



Special Education Law

An Introduction

Key Concepts in This Chapter

- Sources of Law
- Equal Educational Opportunity Movement
- Laws Governing Special Education

A major challenge facing educators today is addressing the educational needs of students with disabilities. Amazingly, though, school officials were not always concerned with the needs of children with special needs.

In fact, unlike today, until well into the 19th century, most public schools in the United States did virtually nothing to meet the educational needs of students with disabilities. Special schools and classes began to emerge for children who were visually and hearing impaired as well as for those with physical disabilities during the latter half of the 19th century; children who were considered to be retarded, or who had emotional problems and/or serious physical disabilities, were still largely ignored.

Even so, an almost 100-year-old opinion from the Supreme Court of Wisconsin is representative of attitudes of the time. In language that is unthinkable today, the court affirmed the exclusion of a student whose paralysis caused him to speak hesitatingly and drool uncontrollably even though he had the academic ability to benefit from school because “his physical condition and ailment produce[d] a depressing and nauseating effect upon the teachers and school children.”¹

During the late 19th and early 20th centuries, educational reformers developed classes for students who were, in the language used at the time, mentally retarded. Even so, these programs were segregated, typically offered little for children with physical disabilities, and were often taught by personnel who were insufficiently prepared for their jobs. Moreover, much of the progress that occurred in the early part of the century came grinding to a halt with the onset of the Great Depression in 1929. Fortunately, during the latter half, or more precisely, the final third, of the 20th century, American educational leaders, lawmakers, and others recognized the need to meet the educational needs of students with disabilities.

In light of the framework of statutes, regulations, and cases protecting the rights of students with disabilities and their parents, the first of the three sections in this chapter presents a brief overview of the American legal system by discussing the sources of law. Even though some might perceive this material as overly legal, this part of the chapter is designed to help readers who may be unfamiliar with the general principles of education law so that they may better understand both the rest of the book and the legal system that shapes special education. The second section briefly examines the history of the movement in pursuit of equal educational opportunities for students with disabilities, highlighting key cases that shaped legal developments in this area. The final part of the chapter offers an overview of major federal legislation safeguarding the educational rights of children with disabilities and their parents; this part of the chapter also acknowledges that the states have adopted similar laws.

Sources of Law

Simply put, the U.S. Constitution is the law of the land. As the primary source of American law, the Constitution provides the framework within which the entire legal system operates. To this end, all actions taken by the federal and state governments, including the creation of and amendments to state constitutions, which are supreme within their states as long as they do not contradict or limit rights protected under their federal counterpart, statutes, regulations, and common law, are subject to the Constitution as interpreted by the Supreme Court.

As important as education is, it is not mentioned in the Constitution. According to the Tenth Amendment, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people.”² Therefore, education is primarily the concern of the states. The federal government can intervene in disputes arising under state law, as in *Brown v. Board of Education (Brown)*,³ where state action deprived individuals of rights protected under the Constitution. More precisely, in *Brown*, the Supreme Court struck down state-sanctioned racial segregation in public schools, because it violated the students’ rights to equal protection under the Fourteenth Amendment by denying them equal educational opportunities. The Court was able to intervene in what was essentially a dispute under state law because once states create, and open, public schools, the Fourteenth Amendment dictates that they be made available to all children on an equal basis.

Along with delineating the rights and responsibilities of Americans, the Constitution establishes the three coequal branches of government that exist on both the federal and state levels. The legislative, executive, and judicial branches of government, in turn, give rise to the three other sources of law.

The legislative branch “makes the law.” In other words, once a bill completes the legislative process, it is signed into law by a chief executive, who has the authority to enforce the new statute. Federal statutes are located in the United States Code (U.S.C.) or the United States Code Annotated (U.S.C.A.), the latter being a version that is particularly useful for attorneys and other individuals who work with the law, because it provides brief summaries of cases that have interpreted these statutes. This book cites the U.S.C. rather than the unofficial U.S.C.A., since the U.S.C. is the official source of federal statutes. The statutes are identical in both locations. State laws are identified by a variety of titles.

Keeping in mind that statutes provide broad directives, the executive branch “enforces” the law by providing details in the form of regulations. For example, a typical compulsory attendance law requires that “except as provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school in the school district in which the child is entitled to attend school.”⁴ Insofar as statutes are typically silent on such matters as curricular content and the length of the school day, these elements are addressed by regulations that are developed by administrative personnel who are well versed in their areas of expertise. Given the extensiveness of regulations, it is safe to say that the professional lives of educators, especially in public schools, are more directly influenced by regulations than by statutes. Federal regulations are located in the Code of Federal Regulations (C.F.R.). State regulations are identified by a variety of titles.

From time to time the U.S. Department of Education, and particularly its Office of Special Education Programs, issues policy letters, typically in response to inquiries from state or local education officials, either to clarify regulations or to interpret what is required by federal law.⁵ These letters are generally published in the Federal Register and are often reproduced by loose-leaf law-reporting services.

The third and final source of law is judge-made or common law. *Common law* refers to judicial interpretations of issues as judges “interpret the law” by examining issues that may have been overlooked in the legislative or regulatory process or that may not have been anticipated when statutes were enacted. In its landmark judgment in *Marbury v. Madison*,⁶ the Supreme Court asserted its authority to review the actions of other branches of American government. While there is an occasional tension between the three branches of government, the legislative and executive branches generally defer to judicial review and interpretations of their actions.

Common law is rooted in the concept of precedent, the proposition that a majority ruling of the highest court in a given jurisdiction, or geographic area over which a court has authority, is binding on all lower courts within its jurisdiction. Put another way, a ruling of the Supreme Court is binding throughout the nation, while a decision of a state’s highest court is binding only in that state. Persuasive precedent, a ruling from another jurisdiction, is actually not precedent. In other words, when a judge in Massachusetts, for instance, seeks to resolve a novel legal issue, the jurist would typically review precedent from other jurisdictions to determine whether it has been addressed elsewhere. However, since a court is not bound to follow precedent from a different jurisdiction, the advice from other jurisdictions remains persuasive in nature.

The federal courts and most state judicial systems have three levels: trial courts, intermediate appellate courts, and courts of last resort. In the federal system, trial courts are known as federal district courts; state trial courts employ a variety of names. Each state has at least one federal trial court, and some densely populated states, such as California and New York, have as many as four. Federal intermediate appellate courts are known as circuit courts of appeal; as discussed below, there are 13 circuit courts; state intermediate appellate courts employ a variety of names. The highest court of the land is the U.S. Supreme Court; while most states refer to their high courts as supreme courts, here, too, a variety of titles is in use.

Trial courts typically involve one judge and a jury. The role of the judge, as trier of law, is to apply the law by resolving such issues as the admissibility of evidence and proper instructions for juries on how to apply the law in the disputes under consideration. All federal judges are appointed for life based on the advice and consent of the U.S. Senate. State courts vary as judges are appointed in some jurisdictions and elected by popular vote in others.

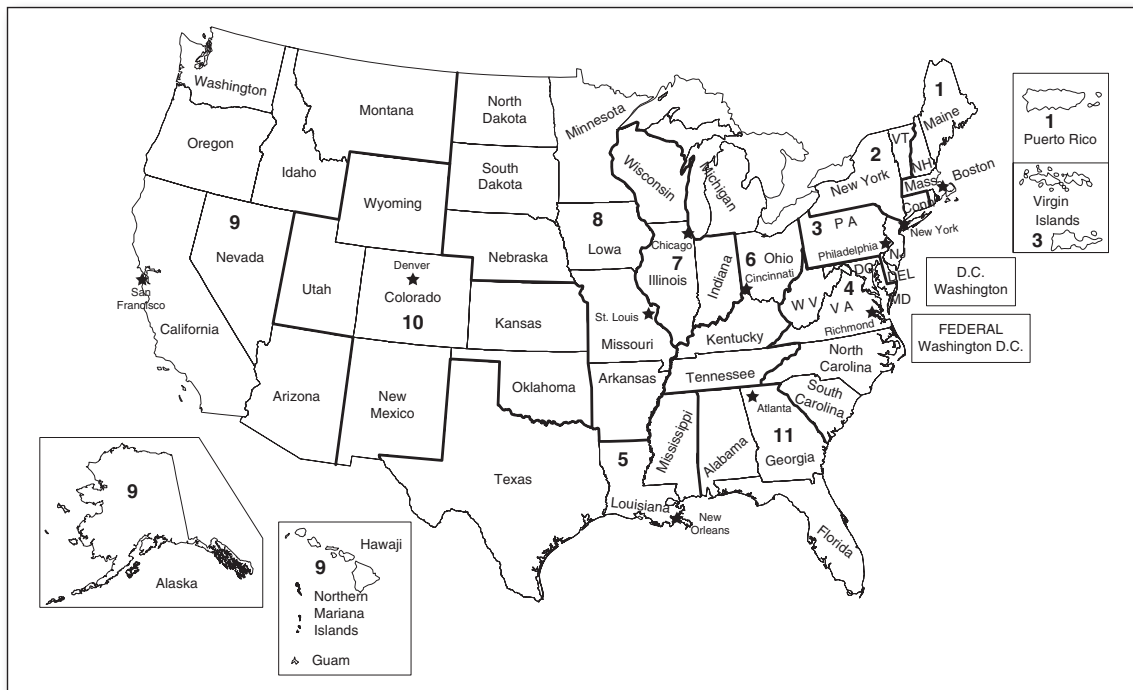
Juries function as triers of fact, meaning that they must weigh the evidence, decide what happened, and render verdicts based on the evidence presented at trial. As triers of fact in special education cases, juries (or, in nonjury trials, judges) review the records of administrative, or due process, hearings and additional evidence, and hear the testimony of witnesses. In a distinction with a significant difference, parties who lose civil suits are

rendered *liable*, while those who are found to be at fault in criminal trials, a matter well beyond the scope of this book, are described as *guilty*.

Other than in a few select areas, such as constitutional issues and special education, which is governed by the Individuals with Disabilities Education Act (IDEA),⁷ few school-related cases are directly under the jurisdiction of the federal courts. Before disputes can proceed to federal courts, cases must generally satisfy one of two broad categories. First, cases must involve diversity of citizenship, namely that the plaintiff and defendant are from two different jurisdictions, and the amount in controversy must be at least \$75,000; this latter requirement is imposed because of the high costs associated with operating the federal court system.⁸ Second, disputes must involve a federal question, meaning that cases must be over the interpretation of the U.S. Constitution, federal statutes, federal regulations, or federal crimes.

The party that is not satisfied with the outcome of a trial court ordinarily has the right to seek discretionary review from an intermediate appellate court. Figure 1.1 illustrates the locations of the 13 federal judicial circuits in the United States. Under this arrangement, which is designed, in part, for administrative ease and convenience in the sense that parties should not have to travel too far when contesting their cases, each circuit is composed of a number of states. By way of illustration, the Sixth Circuit consists of Michigan, Ohio, Kentucky, and Tennessee.

Figure 1.1 Federal Circuit Courts of Appeal



State courts with three-tiered systems most often refer to this intermediate appellate level as a court of appeals. Intermediate appellate courts typically consist of three judges and ordinarily review cases for errors in the record of a trial court. This means that appellate panels usually inquire into such matters as whether a trial court judge properly admitted or excluded evidence from trial. Appellate courts generally prefer to examine issues of law, leaving them undisturbed unless they are clearly erroneous, and ordinarily do not review the facts unless there are strong reasons to do so.

A party not satisfied with the ruling of an intermediate appellate court may seek further discretionary review from the high court in the jurisdiction. In order for a case to reach the U.S. Supreme Court, a party must file a petition seeking a writ of *certiorari* (literally, to be informed). In order to be granted a writ of *certiorari*, at least four of the Court's nine Justices must agree to hear an appeal. Insofar as the Court receives in excess of 7,000 petitions per year and takes, on average, fewer than 100 cases, it should be clear that the Supreme Court will accept relatively few disputes. A denial of a writ of *certiorari* is of no precedential value and merely has the effect of leaving a lower court's decision unchanged. It is generally easier for discretionary appeals in state judicial systems to reach their courts of last resort, typically composed of five, seven, or nine members, especially where state law is at issue.

Opinions of the Supreme Court can be located in a variety of sources. The official version of Supreme Court opinions is the United States Reports (abbreviated to U.S. in legal citations). The same text, with additional research aids, is located in the Supreme Court Reporter (S. Ct.) and the Lawyer's Edition, now in its second series (L. Ed. 2d). Federal appellate cases are found in the Federal Reporter, now in its third series (F.3d) while federal trial court rulings are in the Federal Supplement, now in its second series (F. Supp. 2d). Some cases decided by the federal appellate courts are published in the Federal Appendix (F. App'x). However, these cases have not been released by the courts for official publication and so are not considered to be precedent setting. Even so, these opinions can be instructional as persuasive precedent. State cases are published in a variety of publications, most notably in West's National Reporter system, which breaks the country up into seven regions: Atlantic, North Eastern, North Western, Pacific, South Eastern, South Western, and Southern.

Prior to being published in bound volumes, most cases are available in so-called slip opinions, from a variety of loose-leaf services, and from electronic sources. Statutes and regulations are also available in similar readily accessible formats. Legal materials are also available online from a variety of sources, most notably Westlaw and LexisNexis. State laws and regulations are generally available online from each state. (See the list of state websites in Resource B at the end of the book.)

Legal citations are easy to read. The first number in a citation is the volume number where a case, statute, or regulation is located; the abbreviation

refers to the book or series in which the material may be found; the second number indicates the page on which a case begins or the section number of a statute or regulation; the last part of a citation includes the name of the court, for lower court cases, and the year in which the dispute was resolved. For example, the citation for *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the first Supreme Court case involving special education, reveals that it can be found on page 176 of volume 458 of the United States Reports. The earlier case between the parties, *Rowley v. Board of Education of the Hendrick Hudson Central School District*, 632 F.2d 945 (2d Cir. 1980), which was decided by the Second Circuit in 1980, begins on page 945 of volume 632 in the Federal Reporter, second series. Similarly, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (2012) can be found starting in section 1400 of Title 20 of the U.S. Code.

History of the Equal Educational Opportunity Movement

Prior to 1975, no federal statute obligated states to provide comprehensive special education programming for students with disabilities. Previously, some states enacted legislation offering special education services to students with disabilities, but these jurisdictions were in the minority. Before the enactment of these state laws, as discussed at the outset of this chapter, school boards routinely excluded students with disabilities. When such practices were challenged, the courts largely upheld the exclusionary practices but the status quo changed in the early 1970s. Yet, federal involvement in special education came only after a long battle by advocates for individuals with disabilities to gain equal rights and was spurred on as a direct result of the civil rights movement.

The impetus for ensuring equal educational opportunities for all American children can be traced to the Supreme Court's opinion in *Brown*.⁹ Although equal access to education was resolved in the context of school desegregation, in *Brown* a unanimous Court set the tone for later developments, including those leading to protecting the rights of students with disabilities, in asserting that "education is perhaps the most important function of state and local governments."¹⁰ The Court added that "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right that must be made available to all on equal terms."¹¹ The language of *Brown* has often been either quoted directly or paraphrased by innumerable other courts in cases where parties sought equal educational opportunities for students with disabilities.

Education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (*Brown v. Board of Education*, 347 U.S. 483 (1954), p. 493)

Unfortunately, immediately following *Brown* the rights of individuals with disabilities continued to be overlooked. Throughout the 1950s, more than half of the states had laws calling for the sterilization of individuals with disabilities, while other jurisdictions limited their basic rights, such as voting, marrying, and obtaining drivers' licenses. By the 1960s, the percentage of children with disabilities who were served in public schools began to rise; while 12% of the students in public schools in 1948 had disabilities, the number of students with disabilities increased to 21% by 1963 and to 38% by 1968.¹² As of July 1, 1974, the federal Bureau for the Education of the Handicapped reported that about 78.5% of America's 8,150,000 children with disabilities received some form of public education. Of these students, 47.8% received special education and related services, 30.7% received no related services, and the remaining 21.5% received no educational services at all.¹³

A major push for the development of special education came as a result of judicial actions that set the stage for statutory developments. Rather than trace the full history of this litigation, this brief review focuses on arguably the two most significant cases that contributed to developments aimed at protecting the rights of students with disabilities. These disputes, although decided in trial courts, are considered landmark cases because they provided the impetus for Congress to pass sweeping legislation safeguarding the rights of students with disabilities, regardless of the severity or nature of their conditions.

*Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*¹⁴ helped to establish the conceptual bases for what developed into the IDEA. In *PARC*, advocates filed suit in a federal trial court against the Commonwealth of Pennsylvania on behalf of all individuals who were considered mentally retarded and who were between the ages of 6 and 21 and were excluded from the public schools. Commonwealth officials sought to justify the exclusions by relying on four statutes that relieved local school boards of any obligation to educate children whom school psychologists certified as uneducable and untrainable, allowed officials to postpone the admission to children who had not attained a mental age of five years, excused children from compulsory attendance if they were found unable to profit from education, and defined compulsory school age as 8 to 17 (but used these limits to exclude children who were considered mentally retarded but were not between those ages). The plaintiffs challenged the constitutionality of the statutes seeking to enjoin their enforcement.

PARC was resolved via a consent decree, meaning that the parties essentially reached a settlement on their own that the court later approved. Pursuant to the decree, no children who were classified as mentally retarded, or who were thought to have been mentally retarded, could be assigned to or excluded from special education programs without due process. This meant that placements in regular school classrooms were preferable to ones in more restrictive settings for children with disabilities and that these children could neither be denied admission to public schools nor be subjected to changes in educational placements unless they, through their parents, received procedural due process. The court added not only that all children can learn in school settings but also that officials in Pennsylvania were obligated to provide each student who was considered mentally retarded with a free appropriate public education along with training programs appropriate to their capacities.

Similarly, in *Mills v. Board of Education of the District of Columbia (Mills)*,¹⁵ the parents of seven named exceptional children filed a class action suit in a federal trial court on behalf of perhaps as many as 18,000 students with disabilities who were not receiving programs of specialized education. Most of the children, who were minorities, were classified as having behavior problems or being mentally retarded, emotionally disturbed, and/or hyperactive. The plaintiffs sought a declaration of their rights and an order directing the school board to provide a publicly supported education to all students with disabilities. The court rejected the board's claims that insofar as it lacked the resources for all of its students, it could deny services to children with disabilities.

Unlike *PARC*, which was a consent decree, *Mills* was a decision on the record, meaning that the court reached its judgment after a trial on the merits of the dispute. The court found that the U.S. Constitution, coupled with the District of Columbia Code and its own regulations, required school officials to provide a publicly supported education to all children, including those with disabilities. The court ruled that the school board had to expend its funds equitably so that all students would receive an education consistent with their needs and abilities. If sufficient funds were not available, the court directed officials to distribute existing resources in such a manner that no child would have been entirely excluded and the inadequacies would not have been allowed to bear more heavily on one class of students. In addition, the court ordered the board to provide due process safeguards before any children were excluded from the public schools, were reassigned, or had their special education services terminated.

At the same time, the *Mills* court outlined elaborate due process procedures that helped to form the foundation for the due process safeguards that were included in the IDEA. Since *Mills* originated in Washington, D.C., it was likely among the more significant influences moving federal lawmakers to act to ensure adequate protection for children with disabilities when they adopted Section 504 of the Rehabilitation Act of 1973 and the IDEA.

In light of legal developments following *PARC* and *Mills*, the remainder of this book reviews major developments designed to safeguard the education rights of children with disabilities. In the wake of the literally thousands of suits that have been filed in federal and state courts, the chapters review selected cases under appropriate headings throughout the book rather than as separate entries.

Legislative Mandates

Special education in the United States is governed by four major federal statutes—the IDEA,¹⁶ Section 504 of the Rehabilitation Act (Section 504),¹⁷ the Americans with Disabilities Act (ADA),¹⁸ and the No Child Left Behind Act (NCLB)¹⁹—and numerous state laws. The federal laws are summarized in Table 1.1. After highlighting key features of the IDEA, this chapter provides an overview of Section 504 before taking a brief look at the ADA and NCLB. The remainder of the book, other than Chapter 9, which examines key provisions of Section 504 and the ADA, focuses on the IDEA, paying particular attention to its application by school administrators.

Individuals with Disabilities Education Act

Most of the remainder of this book focuses on the IDEA. Accordingly, this section serves as a brief overview of this comprehensive statute. In 1975 Congress enacted Public Law (P.L.) 94–142, the 142nd piece of legislation introduced during the 94th Congress, formerly known as the Education for All Handicapped Children Act. Following its initial revision in 1986, in 1990 Congress further amended this landmark statute, renaming it the Individuals with Disabilities Education Act (IDEA). The IDEA underwent additional major changes in 1997. Most recently, President George W. Bush signed the Individuals with Disabilities Education Improvement Act of 2004 into law; it became fully effective on July 1, 2005. For the sake of clarity, this book refers to the IDEA by this title throughout.

Section 504 has fairly broad standards, but the IDEA does not; in order to qualify for services under the IDEA, children with disabilities must meet four statutory requirements. First, children must be between the ages of 3 and 21.²⁰ Second, children must have specifically identified disabilities.²¹ Third, children must be in need of special education, and fourth, in need of related services when necessary to benefit from their special education.²² The criterion that children must be in need of special education means that they require specially designed instruction to receive a free appropriate public education (FAPE)²³ in the least restrictive environment (LRE)²⁴ conforming to individualized education programs (IEPs).²⁵ Even

though the IDEA includes related services,²⁶ defined as “developmental, corrective, and other supportive services,”²⁷ as part of its definition of a FAPE, students do not have to need related services to qualify under the statute. Rather, related services are provided in conjunction with special education to assist students in receiving educational benefit from their programs, but not all students covered by the IDEA need or receive related services.²⁸

The IDEA includes an elaborate system of procedural safeguards to protect the rights of children with disabilities and their parents.²⁹ The IDEA requires school officials to provide written notice and obtain parental consent prior to evaluating children,³⁰ making initial placements, or initiating changes in placements.³¹ Moreover, the parents of children with disabilities must be afforded opportunities to participate in the development of the IEPs for and placement of their children.³² Once placed, the status of all children must be reviewed at least annually³³ and reevaluated at least once every three years unless their parents and local school officials agree that reevaluations are unnecessary.³⁴ Further, the IDEA includes provisions, supplemented by the Family Educational Rights and Privacy Act³⁵ and its regulations,³⁶ as well as the IDEA’s own regulations,³⁷ preserving the confidentiality of all information used in the evaluation, placement, and education of students.

Table 1.1 The IDEA and Its Amendments

<i>Year</i>	<i>Public Law</i>	<i>Statute</i>	<i>Title</i>
1970	91–230	84 Stat. 175	Education of the Handicapped Act
1974	93–380	88 Stat. 580	Education Amendments of 1974
1975	94–142	89 Stat. 773	Education of All Handicapped Children Act
1986	99–372	100 Stat. 796	Handicapped Children’s Protection Act of 1986
1986	99–457	100 Stat. 1145	Education of the Handicapped Amendments of 1986
1990	101–476	104 Stat. 1103	Individuals with Disabilities Education Act
1997	105–17	111 Stat. 37	Individuals with Disabilities Education Act Amendments of 1997
2004	108–446	118 Stat. 2647	Individuals with Disabilities Education Improvement Act of 2004

Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973, which traces its origins back to 1918, a time when the American government sought to provide rehabilitation services for military veterans of World War I, was the first federal civil rights law protecting the rights of individuals with disabilities.³⁸ Pursuant to Section 504,

No otherwise qualified individual with a disability in the United States . . . 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 [f]ederal financial assistance.³⁹

Section 504, which is predicated on an institution's receipt of "federal financial assistance," applies to virtually all schools, because this term is interpreted so expansively⁴⁰ and offers broad-based protection to individuals under the more amorphous concept of impairment rather than disability. It is important to keep in mind that even though Section 504 covers children, employees, and others who may visit schools, this book focuses on the rights of students. Section 504 defines an individual with a disability as one "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."⁴¹ The regulations define physical or mental impairments as including

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disorders.⁴²

A note accompanying this list indicates that it merely provides examples of the types of impairments that are covered; it is not meant to be exhaustive.

In order to have a record of impairment, individuals must have a history of, or been identified as having, a mental or physical impairment that substantially limits one or more major life activities. As defined in one of Section 504's regulations, individuals who are regarded as having impairment are those who have

(A) a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) none of the impairments . . . but is treated by a recipient as having such an impairment.⁴³

“‘Major life activities’ means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁴⁴ Once students are identified as having impairments, the next step is to evaluate whether they are “otherwise qualified.” In order to be “otherwise qualified” under Section 504, as the term is applied to students, children must be “(i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) [a student] to whom a state is required to provide a free appropriate public education [under the IDEA].”⁴⁵ Students who are “otherwise qualified,” meaning that they are eligible to participate in programs or activities despite the existence of their impairments, must be permitted to take part as long as it is possible to do so by means of “reasonable accommodation[s].”⁴⁶

Once identified, qualified students are entitled to appropriate public educations, regardless of the nature or severity of their impairments. In order to guarantee that school officials make appropriate educations available to all children, Section 504’s regulations include due process requirements for the evaluation and placement of students that are similar to, but not nearly as detailed as, those under the IDEA.⁴⁷

In making modifications for students, educators must provide aid, benefits, and/or services that are comparable to those available to children who do not have impairments. Qualified students must thus receive comparable materials, teacher quality, length of school term, and daily hours of instruction. Moreover, programs for qualified children should not be separate from those available to students who are not impaired unless such segregation is necessary for their educational programming to be effective. While school officials are not prohibited from offering separate programs for students who have impairments, these children cannot be required to attend such classes unless they cannot be served adequately in settings with their peers.⁴⁸ If separate programs are offered, facilities must, of course, be comparable.⁴⁹

Reasonable accommodations may involve minor adjustments such as permitting a child to be accompanied by a service dog,⁵⁰ modifying a behavior policy to accommodate a student with an autoimmune disease who was disruptive,⁵¹ or providing a hearing interpreter.⁵² On the other hand, school officials do not have to grant all requests for accommodations.

For example, in addition to the cases discussed below under the defenses to Section 504, a federal trial court in Missouri ruled that school officials did not have to maintain a “scent-free” environment for a child with severe asthma because she was not otherwise qualified to participate in its educational program.⁵³

Examples of academic modifications include permitting children longer periods of time to complete examinations or assignments, using peer tutors, distributing outlines in advance, permitting children to obtain copies of notes from peers, employing specialized curricular materials, and/or permitting students to use laptop computers to record answers on examinations. In modifying facilities, school officials do not have to make all classrooms and/or areas of buildings accessible; it may be enough to bring services to children, such as offering a keyboard for musical instruction in an accessible classroom rather than revamping an entire music room for a student who wishes to take piano classes.

In a related concern, Section 504’s only regulation directly addressing private schools declares that institutional officials may not exclude students on the basis of their conditions if the children can, with minor adjustments, be provided with appropriate educations.⁵⁴ Additionally, this regulation dictates that private schools “may not charge more for the provision of an appropriate education to handicapped persons than to non-handicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.”⁵⁵ Therefore, private school officials may be able to charge additional costs to parents of children with impairments.

Even if children appear to be “otherwise qualified” school officials can rely on one of three defenses to avoid being charged with noncompliance with Section 504, as described below. This represents a major difference between Section 504 and the IDEA, since no such defenses are applicable under the latter. Another major difference between the laws is that the federal government provides public schools with direct federal financial assistance to help fund programs under the IDEA but offers no financial incentives to aid institutions, public and nonpublic, as they seek to comply with the dictates of Section 504.

The first defense under Section 504 is that school officials can be excused from making accommodations that result in “a fundamental alteration in the nature of [a] program.”⁵⁶ The second defense permits educational officials to avoid compliance if a modification imposes an “undue financial burden”⁵⁷ on institutions or entities as a whole. The third defense is that otherwise qualified students with disabilities can be excluded from programs if their presence creates a substantial risk of injury to themselves or others.⁵⁸ For example, a child with a severe visual impairment could be excluded from using a scalpel in a biology laboratory. However, in order to comply with Section 504, school officials would likely have to offer a reasonable accommodation, such as providing a computer-assisted program to achieve an instructional goal similar to the one that would have been achieved in a laboratory class.

Finally, Section 504, which is enforced by the Office of Civil Rights, requires recipients of federal financial aid to file annual assurances of compliance; provide notice to students and their parents that their programs are nondiscriminatory; engage in remedial actions where violations are proven; take voluntary steps to overcome the effects of conditions that resulted in limiting the participation of students with disabilities in their programs; conduct self-evaluations; designate staff members, typically at the central office level, as compliance coordinators; and adopt grievance procedures.⁵⁹

Admissions Evaluations

Some public (and many nonpublic) schools may require students with disabilities to take admissions examinations and/or be interviewed prior to acceptance or placement in order to evaluate whether these applicants are otherwise qualified; provisions in Section 504 address this situation. The regulations cover four areas: preplacement evaluations, evaluations, placements, and reevaluations.⁶⁰

As to preplacement evaluations, the regulations require school officials to evaluate all children who, because of their conditions, need or are believed to need special education or related services. Educators must complete these evaluations before taking any actions with respect to the initial placements of children in regular or special education as well as before any subsequent significant changes in placements.

The evaluation provisions in Section 504's regulations require school officials to follow procedures similar to those under the IDEA. More specifically, officials must validate tests and other evaluation materials for the specific purposes for which they are to be used, and the tests must be administered by trained personnel in conformance with the instructions provided by their publishers. Officials must tailor these materials to assess specific areas of educational need and cannot use materials designed to provide a single general intelligence quotient. Also, officials must select and administer these materials in ways to best ensure that when tests are administered to students with impaired sensory, manual, or speaking skills, the results accurately reflect the students' aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting their impaired sensory, manual, or speaking skills, except where those skills are the factors that the tests purport to measure.

When educators apply placement procedures to students under Section 504, their interpretations of data must consider information from a variety of sources, including the students' aptitude and achievement test scores, teacher recommendations, physical conditions, social and cultural backgrounds, and adaptive behaviors that have been documented and carefully considered. In addition, not only must any such decisions be made by groups of persons, including individuals who are knowledgeable, but all children must be periodically reevaluated in a manner consistent with the dictates of the IDEA.

Under Section 504, officials in schools with policies relying on examinations or interviews may be required to provide reasonable accommodations to applicants who are impaired. While school officials are not required to alter the content of examinations or interviews, they may have to make accommodations in how tests are administered or interviews are conducted. In other words, officials would not be required to make examinations easier so that students who simply lacked the requisite knowledge could pass them, but would have to alter the conditions under which the tests were administered, or interviews were conducted, so that students with impairments with the requisite knowledge and skills to pass or express themselves fully could do so despite their conditions.

The accommodations that educators provide for examinations may be as simple as providing quiet rooms without distractions, essentially private rooms away from others, for students who suffer from attention deficit hyperactivity disorder, or procuring the services of readers or Braille versions of examinations for applicants who are blind. Moreover, students with physical impairments may require special seating arrangements, scribes to record answers to questions, and/or computers to record answers on examinations.

In like manner, whether as part of examinations or admissions interviews, students who are hearing impaired might be entitled to the services of sign language interpreters to communicate directions that are normally given orally. At the same time, school officials may be required to provide students with learning disabilities with extra time to complete examinations or make computers available to children who are more comfortable with computers than with traditional paper-and-pencil tests.

Prior to receiving accommodations, students must prove that they have needs for accommodations, such as learning disabilities⁶¹ that necessitate their taking additional time to complete examinations. The purpose of providing the extra time is to allow students who might have difficulty processing information sufficient opportunity to show that they are capable of answering the questions.

Unlike the IDEA, which imposes an affirmative obligation on school officials to identify, assess, and serve children with disabilities, under Section 504, students, and/or their parents, are responsible for making school officials aware of their impairments and need for accommodations for such activities as testing or interviewing. Accordingly, administrators can request proof that students have impairments in need of accommodations in order for the students to demonstrate knowledge and skills on examinations. In such situations, students, through their parents, should suggest which accommodations would be most appropriate. In considering whether students are entitled to accommodations, officials must make individualized inquiries. School officials would violate Section 504 if they refused to make testing accommodations or made modifications only for students with certain specified disabilities.

Section 504 Service Plans

As noted, students who qualify under Section 504 are entitled to reasonable accommodations allowing them to access school programs. Making accommodations may involve alterations to physical plants, such as building wheelchair ramps or removing architectural barriers, so that students may physically enter and get around school buildings. School officials may be required, under some circumstances, to provide accommodations such as allowing students to bring service animals into classrooms,⁶² but officials are not required to provide accommodations going beyond what can be considered to be reasonable. To this end, school officials are not required to make accommodations that are excessively expensive, that expose staff members to excessive risk, or that require them to make substantial modifications to the missions or purposes of their programs.

In another departure from the IDEA, neither Section 504 nor its regulations mandate the creation of written agreements with regard to student accommodations or specify the content of such documents. Even so, school officials in many districts meet with parents to formalize the accommodations and services that they provide to eligible students. These written agreements are euphemistically referred to as Section 504 service plans. In practical terms, school officials should be sure to include the following components in each written Section 504 service plan:

- **Demographic Data**—the student's name, date of birth, school identification number, grade, schools attended, teacher, names of parents or guardians, addresses, telephone numbers, and the like
- **Team Members**—a listing of all team members who contributed to the development of the service plan and their respective roles
- **Impairment**—a detailed description of the student's impairment and its severity, along with an explanation of how it impedes the student's educational progress
- **Accommodations and Services**—a detailed description of the accommodations and services to be offered under the plan, including the frequency of services, where they are to be provided, and by whom they are to be provided

In addition, officials should attach the evaluative reports or assessments that helped to determine the nature of the student's impairment and the need for accommodations and services.

Americans with Disabilities Act

Patterned largely after Section 504 of the Rehabilitation Act, the Americans with Disabilities Act,⁶³ enacted in 1990, protects individuals with disabilities by imposing far-reaching obligations on private sector

employers, public services and accommodations, and transportation. As indicated in its preamble, the purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁶⁴ This clarifies that the ADA intends to extend the protections afforded by Section 504 to private programs and activities that are not covered by Section 504 because they do not receive federal funds.

The ADA provides a comprehensive federal mandate to eliminate discrimination against people with disabilities and to provide “clear, strong, consistent and enforceable standards”⁶⁵ to help accomplish this goal. The ADA’s broad definition of a disability is comparable with the one in Section 504: “(a) a physical or mental impairment that substantially limits one or more of the major life activities; (b) a record of such an impairment; or (c) being regarded as having such an impairment.”⁶⁶ As with Section 504, “major life activities” include caring for oneself, hearing, walking, speaking, seeing, breathing, and learning. The ADA, like Section 504, does not require individuals to have certificates from doctors or psychologists in order to be covered by its provisions.

The ADA specifically excludes a variety of individuals, of whom few are likely to be students but some may be school employees, most notably those who use illegal drugs.⁶⁷ The ADA specifically excludes transvestites;⁶⁸ homosexuals and bisexuals;⁶⁹ transsexuals, pedophiles, exhibitionists, voyeurs, and those with sexual behavior disorders;⁷⁰ and those with conditions such as psychoactive substance use disorders stemming from current illegal use of drugs.⁷¹ Further, the ADA modifies Section 504 since it covers individuals who are no longer engaged in illegal drug use, including those who have successfully completed drug treatment or have otherwise been rehabilitated and those who have been “erroneously” regarded as being drug users.⁷² The ADA permits drug testing by employers to ensure that workers are complying with the Drug-Free Workplace Act of 1988.⁷³ Although it permits employers to prohibit the use of illegal drugs or alcohol in the workplace, the ADA is less clear over the status of alcoholics, as it appears that the protections afforded rehabilitated drug users extend to recovering alcoholics.

There are five major Titles in the ADA. Title I, which addresses employment in the private sector, is directly applicable to private schools. Like Section 504, this Title requires school officials to make reasonable accommodations for otherwise qualified individuals once administrators are aware of individuals’ conditions; this means that in order to be covered by the ADA, students and staff need to inform education officials of their conditions and provide specific suggestions on how their needs can be met.

Title II of the ADA covers public services of state and local governments for both employers and providers of public services, including transportation, and most notably education, as part of the law applies to public schools. Since the reasonable accommodations specifications in

these provisions imply academic program accommodations, they can be applied to permit qualified students with disabilities to participate in school activities.

Title III of the ADA, which expands the scope of Section 504, deals with public accommodations, covering both the private and public sectors. This Title includes private businesses and a wide array of community services, including buildings, transportation systems, parks, recreational facilities, hotels, and theaters.

Title IV of the ADA deals with telecommunications, specifically voice and nonvoice systems. Title V, the ADA's miscellaneous provisions, stipulates not only that the law cannot be construed as applying a lesser standard than that under Section 504 and its regulations but also that qualified individuals are not required to accept services that do not meet their needs. In addition, the ADA employs defenses that parallel those in Section 504.

The ADA's impact on schools is most significant in the areas of reasonable accommodations for employees and academic programs for students. Since schools are subject to many ADA-like regulations through the rules enacted pursuant to Section 504, officials can avoid difficulties with the ADA by keeping proactive policies and procedures in place to ensure reasonable accommodations. School boards should designate ADA compliance officers who keep up-to-date on current ADA regulations and policies in the areas of employment and academic inclusion. In sum, if board officials have faithfully implemented Section 504 and its regulations, in most instances they should not have difficulties with the ADA.

No Child Left Behind Act

Perhaps the most controversial federal education law in recent memory is the No Child Left Behind Act (NCLB),⁷⁴ enacted in 2002. The NCLB, which is actually an extension of the original Elementary and Secondary Education Act of 1965, has had an impact on the delivery of special education services.

The key elements in the NCLB are to improve the academic achievement of students who are economically disadvantaged; assist in preparing, training, and recruiting highly qualified teachers (and principals); provide improved language instruction for children of limited English proficiency; make school systems accountable for student achievement, particularly by imposing standards for annual yearly progress for students and districts; require school systems to rely on teaching methods that are research-based and that have been proven effective; and afford parents better choices while creating innovative educational programs, especially where local school systems are unresponsive to parents' needs.⁷⁵ As part of the process of complying with the IDEA and the NCLB, school officials must "take measurable steps to recruit, hire, train, and retain highly qualified school personnel to provide special education and related services"⁷⁶ for students with disabilities.

The IDEA and the NCLB are both similar and dissimilar. The laws are alike to the extent that both address the needs of students with disabilities, albeit in varying degrees, through state agencies and local school systems; focus on student achievement and outcomes; emphasize parental participation; and require the regular evaluation or assessment of students and staffs. On the other hand, the laws have some significant differences. The most important difference between the two statutes is that IDEA focuses on the performance of individual students in an array of areas, while the NCLB is more interested in systemwide outcomes.

One of the IDEA's most controversial additions, its definition of "highly qualified" teachers,⁷⁷ which also applies to related services personnel and paraprofessionals,⁷⁸ parallels the language of the NCLB. In order to be classified as "highly qualified," a standard based on state rather than federal law, subject area teachers in public schools must not only be certified fully in special education or pass state-designed special education licensure examinations, but must also possess bachelor's degrees and demonstrate knowledge of each subject for which they are the primary instructors.⁷⁹

New special education teachers have up to two years after they are hired to become approved as "highly qualified" in different subjects as long as they are fully certificated in at least one. The IDEA adds that while teachers who meet its definition of highly qualified also qualify for this title under the NCLB,⁸⁰ the law does not create a private right of action permitting judicial enforcement to ensure that children are taught by such teachers.⁸¹ Put another way, parents cannot file suits to ensure that their children are taught by teachers who meet the "highly qualified" standards under the IDEA and the NCLB. The IDEA's regulations specify that the requirements concerning how to be categorized as highly qualified are inapplicable to teachers in private schools.⁸²

State Statutes

Insofar as education is a state function, special education is governed by state statutes as well as the federal laws discussed above. While each state's special education laws must be consistent with federal laws, differences do exist. Most jurisdictions have laws that are similar in scope, and even language, to the IDEA. However, some states have provisions in their legislation that go beyond the IDEA's substantive and procedural requirements, setting higher standards of what constitutes appropriate education for students with disabilities. Further, most states have established procedures for implementing programs associated with special education that either are not explicitly covered by federal law or that have been left to the states' discretion, such as defining the qualifications and preparation of hearing officers. If, or when, conflicts develop between provisions of federal law and state laws, federal law is supreme.

A comprehensive discussion of the laws of each of the 50 states, the District of Columbia, and U.S. possessions and territories is beyond the scope of this book. Indeed, entire books could be written on the special education laws of each state. The purpose of this book is to provide information on the federal mandate, the law encompassing the entire nation. Educators are cautioned that they cannot have a complete understanding of special education law if they are not familiar with state law and so should seek out sources of information on pertinent state laws as supplements to this book.

FREQUENTLY ASKED QUESTIONS

Q: Why was the IDEA passed in the first place?

A: When the IDEA was initially passed in 1975, many states lacked statutes addressing the educational rights of students with disabilities. Congress found that many students with disabilities were excluded from public schools and that those who did attend did not always receive appropriate educations. Prior to the enactment of the IDEA, advocates for students with disabilities had won some significant judicial victories against states and school boards. The IDEA was passed, in part, in response to early litigation designed to provide services for students with disabilities while also providing them with equal educational opportunities.

Q: What is the difference between federal and state laws governing special education?

A: State statutes must, of course, be consistent with federal laws but can provide students with disabilities with additional rights and protections. If conflicts arise between state and federal laws, the latter govern under the supremacy clause of the U.S. Constitution. Therefore, it is important for school officials to be familiar with both federal and state laws designed to protect the educational rights of students with disabilities.

Q: Why are some students with disabilities covered only by Section 504 and not the IDEA?

A: According to the IDEA, in order to be eligible, students with disabilities must have specifically identifiable disabilities, be between the ages of 3 and 21, and need special education and related services as a result of their disabilities. Thus, if students have disabilities not requiring special education, they lack entitlements to the rights and protections of the IDEA. Even so, students who are otherwise qualified may be eligible for protections against

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discrimination under Section 504 if their impairments impact their ability to be educated and their needs can be met through reasonable accommodations.

Q: What is the purpose of the IDEA's regulations?

A: The IDEA provides general guidelines explaining the services that state and local school boards must provide. The regulations, which are written by the U.S. Department of Education and subject to public comment, are more specific, reflecting the statute, and in many cases are identical to it in actual wording. Even so, the regulations typically provide more detailed step-by-step guidance on how the dictates of the IDEA, in a manner consistent with other statutes, are to be implemented.

Q: Why is it important to be familiar with the outcome of judicial opinions?

A: As comprehensive as the IDEA and its regulations are, their authors recognized that they could not possibly have anticipated every conceivable situation that could have arisen. Thus, insofar as many of the IDEA's provisions are open to interpretation when applied to specific sets of facts, its creators provided for judicial review. Courts interpret how the IDEA is to be applied in unique factual settings. Studying judicial opinions affords school officials and attorneys better understandings of how the courts have interpreted the law and so make them better prepared to implement the IDEA's mandates in their board policies and practices.

Recommendations

Even though educators wisely rely largely on their attorneys when dealing with technical aspects of disputes involving special education, they should acquaint themselves with both the federal and state legal systems. By familiarizing themselves with their legal systems, educators can assist their attorneys and school boards because such a working knowledge can help to cut to the heart of issues and help to avoid unnecessary delays. Still, school officials need to do the following:

- Provide regular professional development sessions for professional staff and board members to help them to have a better understanding of how their legal systems operate. Doing so can help staff and board members to recognize the significant differences and interplay between and among Section 504 and the IDEA, as well as other federal and state disability-related laws, so as to better serve the needs of children with disabilities and their parents.

- Offer similar informational sessions for parents and qualified students to help ensure that they are aware of their rights.
- Develop written handout materials explaining how federal and state disability laws operate, including detailed information on eligibility criteria under such key statutes as the IDEA and Section 504.
- Make sure that board policies and procedures relating to the delivery of special education and related services are up-to-date. Among the policies that boards adopt are those dealing with parental involvement and notification as well as mechanisms designed to provide parents with information on regular bases such as progress reports and report cards.
- Prepare checklists to help ensure that staff members are responding to parental requests in a timely and appropriate manner.
- Consider whether students with disabilities who do not qualify for services under the IDEA require reasonable accommodations under Section 504 and/or the ADA.
- Take steps to ensure that students with disabilities are not subjected to differential treatment because of their disabilities or because of their need for accommodations.
- Ensure that compliance officers regularly monitor or audit educational programming to make sure that it meets the dictates of the IDEA, Section 504, the ADA, and the NCLB, as well as other applicable federal and state laws.
- Recognize that in light of the complexity of disability law, it is important to rely on the advice of attorneys who specialize in education law, especially special education. If school officials are unable to find attorneys on their own, they should contact their state school boards and administrator associations, bar associations, or professional groups such as the Education Law Association or National School Boards Association.

Endnotes

1. *State v. Board of Education of City of Antigo*, 172 N.W. 153 (Wis. 1919). Earlier, in perhaps the first reported case involving a student with a disability, *Watson v. City of Cambridge*, 32 N.E. 864 (Mass. 1893), the Supreme Judicial Court of Massachusetts upheld a school committee's right to exclude a student for being too "weak-minded" to attend school.
2. U.S. Constitution, Amendment X.
3. 347 U.S. 483 (1954).
4. Ohio Rev. Code § 3321.03 (2001).
5. Zirkel, P. A. (2003). Do OSEP policy letters have legal weight? *Education Law Reporter*, 171, 391–396.
6. 5 U.S. 137 (1803).