

Chapter 1

SPECIAL EDUCATION LAW

An Introduction

Key Updates

Summary of the Every Student Succeeds Act
Descriptions of the four sources of law

Educators today face major challenges when addressing the educational needs of students with disabilities. Historically, though, school officials were not always concerned with the needs of children with special needs.

In fact, until well into the 19th century, most public schools in the United States did little to meet the educational needs of students with disabilities. During the latter half of the 19th century, states and local school boards established special schools and classes for children who had visual and hearing impairments and those with physical challenges; children who today would be classified as having intellectual disabilities, emotional disturbance, or serious physical challenges were still largely ignored. Even so, a more than 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 to a halt with the onset of the Great Depression in 1929. Fortunately, during the final third of the 20th century, American educational leaders, lawmakers, and policymakers recognized the need to meet the educational needs of students with disabilities.

In light of the complex framework of statutes, regulations, and cases protecting the rights of students with disabilities and their parents, the first sections in this chapter present a brief overview of the American legal system by discussing the sources of law, the federal and state court systems, and how readers can find legal materials. While some might perceive this material as overly legal, this part of the chapter will help readers who are unfamiliar with the general principles of education law so they may

better understand the content of this book and the legal system that shapes special education. The next 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 is 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

There are four main sources of law in the United States at both the federal and state levels: constitutions, statutes, regulations, and common law. Table 1.1 describes each source.

Constitutions

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, statutes, regulations, and common law, are subject to the Constitution as interpreted by the Supreme Court. State Constitutions are supreme within their jurisdictions, as long as they do not contradict or limit rights protected under their federal counterpart.

As important as education is, it is not mentioned in the federal 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 a state concern. The federal government can intervene in disputes arising under state law, as, for example, in *Brown v. Board of Education (Brown)*,³ when state action deprives individuals of constitutionally protected rights. 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 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 at 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.

Table 1.1 • Sources of Law

Four Main Sources of Law	
Constitutions	The fundamental, or primary, source of law that provides the framework within which entire legal systems operate.
Statutes	The codified laws enacted by legislative branches setting forth broad directives, usually mandating or prohibiting specified conduct.
Regulations	Guidelines promulgated by governmental agencies charged with implementing and enforcing statutes. Regulations are more specific than statutes; they outline how laws should be implemented in practice.
Common or case law	The written decisions of courts interpreting constitutions, statutes, and regulations.

Statutes

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 published 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., the official source of federal statutes, rather than the unofficial U.S.C.A. State laws are identified by a variety of titles.

Regulations

Keeping in mind that statutes provide broad directives, the executive branch “enforces” the law by creating executive agencies, or departments, to provide details in the form of regulations. For instance, 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 Because statutes are typically silent on such matters as curricular content and the length of the school day, the regulations, developed by administrative personnel who are well versed in their areas of expertise, address these matters. 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 (OSEP), issues policy letters, typically in response to inquiries from state or local education officials, either to clarify regulations or to interpret what federal law requires.⁵ These letters are ordinarily published in the Federal Register and are often reproduced by loose-leaf law-reporting services. Although policy letters do not have the same force of law as statutes and regulations, courts do grant some deference to OSEP’s interpretation of the Individuals with Disabilities Education Act’s (IDEA) requirements.⁶

Common Law

The fourth and final source of law is judge-made or common law. *Common law* refers to judicial interpretations of laws; 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*,⁷ the Supreme Court asserted its authority to review the actions of other branches of American government. Although an occasional tension develops 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 judges seek to resolve novel legal issues, they typically review court decisions from other jurisdictions to determine whether the issues have been addressed elsewhere. However, because courts are not bound to follow precedent from another jurisdiction, the advice from other jurisdictions is merely persuasive.

Court Systems

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 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 later, there are thirteen 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 procedural issues as the admissibility of evidence and proper instructions for juries on how to apply the law in the disputes under consideration. Federal judges are appointed for life based on the advice and consent of the U.S. Senate. State courts vary from one jurisdiction to the next; some judges are appointed while others are elected by popular vote.

Juries function as triers of fact, meaning 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 and other cases, juries—or, in nonjury trials, judges—review the records of administrative, or due process, hearings; hear additional evidence that judges allow to be admitted, if warranted; 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*.

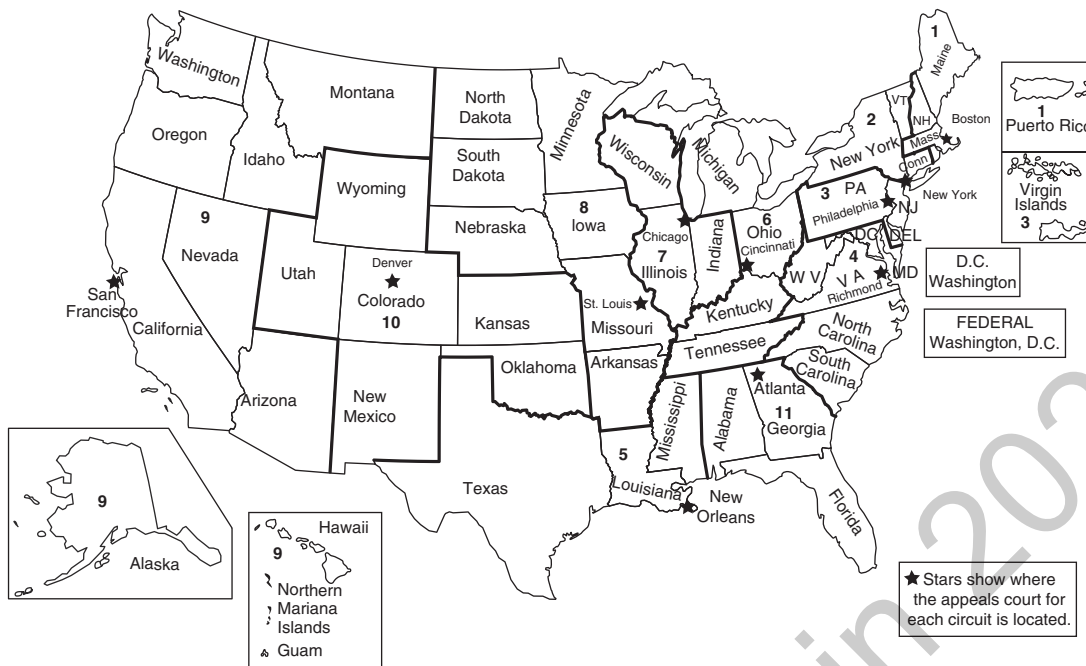
Other than in a few select areas, such as constitutional issues and special education, which is governed by the IDEA,⁸ few school-related cases are directly under the jurisdiction of the federal courts. Before disputes can proceed to federal courts, cases must generally satisfy one of two broad categories. 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; Congress imposed this latter requirement due to the high costs associated with operating the federal court system.⁹ Second, disputes must involve federal questions, meaning they must be over the interpretation of the U.S. Constitution, federal statutes, federal regulations, and/or federal crimes.

Parties who are dissatisfied with the outcome of trials ordinarily have the right to seek discretionary review by intermediate appellate courts. Figure 1.1 illustrates the locations of the thirteen 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.

State courts with three-tiered systems most often refer to their intermediate appellate courts as courts of appeal. Intermediate appellate courts typically consist of three judges and ordinarily review cases for errors in the record of trial courts by examining whether trial judges properly admitted or excluded evidence. Appellate courts generally examine issues of law, leaving the original judgments undisturbed unless they are clearly erroneous and ordinarily not reviewing the facts absent strong reasons to do so.

A party not satisfied with the ruling of an intermediate appellate court may seek 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. The Court receives in excess of 7,000 petitions per year and takes, on average, fewer than 100 cases; clearly, the Supreme Court accepts relatively few disputes. Because a denial of a writ of certiorari is of no precedential value, it merely has the effect of leaving a lower court’s decision in place. 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 if state law is at issue.

Figure 1.1 • Federal Circuit Courts of Appeal



Finding Legal Material

Supreme Court opinions are published 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). As this book heads to press, federal appellate cases are in the Federal Reporter, now in its third series (F.3d), soon to be its fourth (F.4th), while federal trial court rulings are in the Federal Supplement, now in its third series (F. Supp. 3d). Some cases that the federal appellate courts decide are published in the Federal Appendix (F. App’x); however, because these cases have not been released for official publication by the courts they are not considered 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 their 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 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.

Legal citations are easy to read. The first number in a citation is the volume number in which 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 is published 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 IDEA, 20 U.S.C. §§ 1400–1482 (2018) appears 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, a minority of states enacted legislation offering special education services to students with disabilities. Before the enactment of these state laws, as discussed at the outset of this chapter, school boards routinely excluded students with disabilities. When parties challenged such practices, the courts largely upheld the exclusionary practices, a situation that 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.

Effect 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*.¹⁰ 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.”¹¹ 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.”¹² The language of *Brown* was often either quoted directly or paraphrased by innumerable lower 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, as many as thirty states had laws calling for the sterilization of individuals with disabilities,¹³ while other jurisdictions limited their basic rights, such as voting, marrying, and obtaining drivers' licenses.¹⁴ By the 1960s, the percentage of children with disabilities who were served in public schools began to rise; while 12 percent of the children with disabilities in 1948 attended public schools, the figure increased to 21 percent by 1963 and to 38 percent by 1968.¹⁵ As of July 1, 1974, the federal Bureau for the Education of the Handicapped reported that about 78.5 percent of America's 8,150,000 children with disabilities received some form of public education; of these students, 47.8 percent received special education and related services and 30.7 percent received no related services. The remaining 21.5 percent received no educational services at all.¹⁶

Judicial actions prompted a major push by advocates for the development of special education, setting 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 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

*Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*¹⁷ 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, in the terminology used at the time, were considered mentally retarded and who were between the ages of six and twenty-one and were excluded from the public schools.

In *PARC*, commonwealth officials sought to justify the exclusions by relying on four statutes that relieved local school boards of their obligations to educate children whom school psychologists certified as uneducable and untrainable—again, in the terminology used at that time. The laws also allowed officials to postpone the admission of children who had not attained a mental age of five and excused others from compulsory attendance if they were determined to be unable to profit from education. In defining compulsory school age as eight to seventeen, officials used these limits to exclude children who were, again using the terminology of the day, considered mentally retarded but were not between those ages. The plaintiffs challenged the constitutionality of the statutes, seeking to enjoin their enforcement.

As provided in the decree, no children classified as, or who were thought to have been, mentally retarded, could be assigned to or excluded from special education programs without receiving due process.

PARC was resolved via a consent decree, meaning that the parties reached a settlement on their own that the court later approved. As provided in the decree, no children classified as, or who were thought to have been, mentally retarded could be assigned to or excluded from special education programs without receiving 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.

Mills v. Board of Education of the District of Columbia

Similarly, in *Mills v. Board of Education of the District of Columbia (Mills)*,¹⁸ the parents of seven named 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 according to criteria used at the time 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 publicly supported educations to all students with disabilities. Ruling in favor of the parents, 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.

The court found that the U.S. Constitution, coupled with the District of Columbia Code and its own regulations, required school officials to provide publicly supported educations to all children, including those 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 decided that the U.S. Constitution, coupled with the District of Columbia Code and its own regulations, required school officials to provide publicly supported educations to all children, including those with disabilities. The court reasoned 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 unavailable, the court directed officials to distribute existing resources in such a manner that no child would be entirely excluded and the inadequacies would not 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 included in the IDEA. Because *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 1975.

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. Selected cases from among the thousands litigated on behalf of students with disabilities are grouped under subject headings throughout the chapters.

Legislative Mandates

Special education in the United States is governed by numerous state laws and four major federal statutes: the IDEA,¹⁹ Section 504 of the Rehabilitation Act (Section 504),²⁰ the Americans with Disabilities Act (ADA),²¹ and the Every Student Succeeds Act (ESSA).²² Table 1.2 provides descriptions of these statutes. After reviewing key features of the IDEA, this chapter provides an overview of Section 504 before taking a brief look at the ADA and the ESSA. 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.

Table 1.2 • Federal Laws Affecting Special Education

Federal Law	Description
Individuals with Disabilities Education Act	Requires states to make available a free appropriate public education to eligible children with disabilities by providing them with needed special education and related services
Section 504 of the Rehabilitation Act	Prohibits recipients of federal funds from discriminating against individuals with disabilities on the basis of their disabilities
Americans with Disabilities Act	Extended the protections of Section 504 to the private sector by prohibiting discrimination against individuals with disabilities in employment, transportation, government services, and telecommunications
Every Student Succeeds Act	Governs federal policy in K–12 education by setting standards to ensure that all children have access to a quality education; establishes requirements for state assessments of students with disabilities

Individuals with Disabilities Education Act

Most of the remainder of this book covers the IDEA. Accordingly, this section serves as a brief overview of this comprehensive statute. In 1975 Congress enacted Public Law 94–142 (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 again amended this landmark statute, renaming it the Individuals with Disabilities Education Act. 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 its current title throughout. Even though the IDEA is overdue for reauthorization, as of this writing Congress does not appear to have any intent to amend the statute in the near future. The IDEA and its amendments are listed in Table 1.3.

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 three and twenty-one;²³ students are considered twenty-one until the end of the school year in which they turn twenty-two. Second, children must have specifically identified disabilities.²⁴ Third, children must need special education, and fourth, they must require related services when necessary to benefit from their special education.²⁵

The criterion that children need special education means that they require specially designed instruction to receive a free appropriate public education (FAPE)²⁶ in the least restrictive environment (LRE)²⁷ conforming to individualized education programs (IEPs).²⁸ Even though the IDEA includes related services,²⁹ defined as “developmental, corrective, and other supportive services,”³⁰ 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.³¹

Congress included an elaborate system of procedural safeguards in the IDEA to protect the rights of children with disabilities and their parents.³² The IDEA requires school officials to provide written notice and obtain parental consent prior to evaluating children,³³ making initial placements, or initiating changes in placements.³⁴ Moreover, school officials must afford parents of children with disabilities opportunities to participate in the development of the IEPs for and placement of their children.³⁵

Once placed, IEP teams must review the status of all children at least annually³⁶ and reevaluate them at least once every three years unless their parents and local school officials agree that reevaluations are unnecessary.³⁷ The IDEA includes provisions, supplemented by the Family Educational Rights and Privacy Act³⁸ and its regulations³⁹ as well as the IDEA’s own regulations,⁴⁰ preserving the confidentiality of all information used in the evaluation, placement, and education of students.

Table 1.3 • The IDEA and Its Amendments

Year	Public Law	Statute	Title
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.⁴¹ 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 federal financial assistance.⁴²

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 expansively,⁴³ offering broad-based protection to individuals under the more amorphous concept of impairment rather than disability. Even though Section 504 covers children, employees, and others who may visit schools, this book focuses on the rights of students and how Section 504 applies to their rights to education. The Rehabilitation Act, as amended, defines a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁴⁴ 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, genitourinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁴⁵

This list 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 regarded as having impairments 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.⁴⁶

Otherwise Qualified

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.⁴⁷ Once school personnel identify students as having impairments they must 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 nonhandicapped 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]."⁴⁸ Students who are "otherwise qualified," meaning 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].”⁴⁹

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 their evaluations and placements that are similar to, but not nearly as detailed as, those under the IDEA.⁵⁰

In making modifications for students, educators must provide aid, benefits, and/or services comparable to those available to children not having impairments. Qualified students must thus receive materials, teacher quality, length of school term, and daily hours of instruction comparable to those provided to their peers. 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. Although Section 504 does not prohibit school officials from offering separate programs for students who have impairments, they cannot require these children to attend such classes unless they cannot be served adequately in settings with their peers.⁵¹ If separate programs are offered, facilities must, of course, be comparable.⁵²

Reasonable Accommodations

Reasonable accommodations may involve minor adjustments such as permitting a child to be accompanied by a service dog,⁵³ modifying a behavior policy to accommodate a student with an autoimmune disease who was disruptive,⁵⁴ or providing a hearing interpreter.⁵⁵ On the other hand, school officials do not have to grant all requests for accommodations. For example, in addition to the cases discussed later 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.⁵⁶

Examples of academic modifications include permitting children longer periods of time to complete examinations or assignments, using peer tutors, distributing outlines in advance, allowing children to obtain copies of notes from peers, employing specialized curricular materials, and/or affording students opportunities 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 they can provide these children with appropriate educations by making minor adjustments to the programming they receive.⁵⁷ Additionally, this regulation dictates that private schools “may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.”⁵⁸ Therefore, private school officials may be able to charge additional costs to parents of children with impairments.

Defenses for Noncompliance

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. This represents a major difference between Section 504 and the IDEA because no such defenses are available 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 are not required to make accommodations resulting in “a fundamental alteration in the nature of [a] program.”⁵⁹ The second defense permits educational officials to avoid compliance if modifications impose an “undue financial burden”⁶⁰ on institutions or entities as a whole. The third defense is that officials can exclude otherwise qualified students with disabilities from their programs if their presence creates a substantial risk of injury to themselves or others.⁶¹ For example, officials could prevent a child with a severe visual impairment 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 the student would have achieved in a laboratory class.

Required Assurances

Finally, Section 504, which is enforced by the Office of Civil Rights, obliges recipients of federal financial aid to file annual assurances of compliance and provide notice to students and their parents that their programs are nondiscriminatory. Recipients must take remedial actions where violations are proven; act voluntarily 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.⁶²

Americans with Disabilities Act

Patterned largely after Section 504, 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 stated 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 identical to the one in Section 504⁶⁶ as is its definition of major life activities.⁶⁷ The ADA, like Section 504, does not require individuals to have certificates from doctors or psychologists in order to be covered by its provisions.

In its provisions, the ADA specifically excludes a variety of individuals, most notably those who use illegal drugs.⁶⁸ The ADA specifically excludes transvestites;⁶⁹ homosexuals and bisexuals;⁷⁰ transsexuals, pedophiles, exhibitionists, voyeurs, and those with sexual behavior disorders;⁷¹ and those with conditions such as psychoactive substance use disorders stemming from current illegal use of drugs.⁷²

The ADA modifies Section 504 by covering individuals who are no longer engaged in illegal drug use, including those who successfully completed drug treatment or are otherwise rehabilitated and those “erroneously” regarded as being drug users.⁷³ The ADA permits employers to administer drug tests to ensure that workers are complying with the Drug-Free Workplace Act of 1988.⁷⁴ 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, but it appears that the protections afforded rehabilitated drug users extend to recovering alcoholics.

ADA's Five Titles

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 persons 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 it applies to public schools. Insofar as 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 expands the scope of Section 504 by dealing 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.

Impact on Schools

The ADA's impact on schools is most significant in the areas of reasonable accommodations for employees and academic programs for students. Given that 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 on 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.

Every Student Succeeds Act

Congress enacted the Every Student Succeeds Act (ESSA)⁷⁵ in 2015 to replace the No Child Left Behind Act (NCLB). The ESSA, like the NCLB, is an extension of the original Elementary and Secondary Education Act of 1965. Many provisions of these laws impact the delivery of special education services.

Although the ESSA provides state educational officials greater flexibility than the NCLB, its primary goal is to ensure the success of students and schools. In this respect, the ESSA promotes equity by retaining protections for disadvantaged and high-needs students. Accordingly, the ESSA maintains accountability standards and anticipates that the lowest performing schools will improve. At the same time, the ESSA allows states to set goals to close the gaps in achievement and graduation rates.

The IDEA and the ESSA are 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 ESSA is more interested in system-wide outcomes.

The ESSA requires states to adopt challenging academic standards for all students. Under the ESSA, as in the NCLB, states must test students in reading and math and break out data for subgroups of students, such as students with disabilities. Students with significant cognitive disabilities can be tested using alternative measures, although the Act limits the number of alternative assessments to 1 percent of all students or approximately 10 percent of students with disabilities.

The ESSA obliges states to support local school boards in improving school conditions for student learning. This includes reducing the incidence of bullying and harassment, the overuse of disciplinary practices that remove students from classrooms, and the use of aversive behavioral interventions that could compromise student health and safety. The category of aversive behavioral interventions includes seclusion and restraint. Although not explicitly stated, such measures would encourage the use of positive behavioral techniques.

State Statutes

Because education is a state function, special education is governed by state statutes as well as the federal laws just discussed. While each state's special education laws must be consistent with federal laws, differences do exist. Most state laws are similar in scope, and even language, to the IDEA. However, some states have adopted laws that exceed the IDEA's substantive and procedural requirements, setting higher standards for appropriate education for students with disabilities. Most states have established procedures for implementing programs associated with special education that are either not explicitly covered by federal law or are left to their 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 fifty states, the District of Columbia, and U.S. possessions and territories is beyond the scope of this book. Indeed, entire books can 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, so they 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 Congress passed the IDEA 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 won some significant judicial victories against states and school boards. Congress adopted the IDEA partly 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 three and twenty-one, and need special education and related services due to 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 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, promulgated by the U.S. Department of Education and subject to public comment, are more specific, reflecting the IDEA and, in many cases, identical to it in actual wording. Still, 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 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 arise. Consequently, insofar as many of the IDEA's provisions are open to interpretation when applied to specific sets of facts, the law allows for judicial review whereby courts interpret how it applies in unique factual settings. Studying judicial opinions affords school officials and attorneys better understanding of how the courts have interpreted the law and so makes 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 the procedural aspects of disputes on 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 a working knowledge can help to cut to the heart of issues and prevent unnecessary delays. Still, school officials need to do the following:

- Provide regular professional development sessions for staff and board members to keep them up to date so they can develop better understandings of how their legal systems operate. Doing so can help staff and board members recognize the significant differences and interplay among Section 504, the ADA, 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, Section 504, and the ADA.

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- Take other steps to disseminate board policies and other materials, such as placing them on district websites as well as in teacher, student, and parent handbooks.
- Make sure that board policies and procedures about the delivery of special education and related services are up to date. Among the policies that boards adopt are those addressing parental involvement and notification as well as mechanisms designed to provide parents with information, such as regular 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 may be eligible for 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 ESSA, as well as other applicable federal and state laws.
- Considering the complexity of disability law, recognize that 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.

Questions for Discussion

1. What factors and events led to the passage of the original version of the IDEA in 1975? Why did these events influence Congress?
2. Education is a state function, so why did Congress find it necessary to mandate that states provide educational services for students with disabilities? Why did Congress not leave this issue to the states?
3. The ESSA, and the NCLB before it, required states to set high academic standards for all students, including those with disabilities. Address how this has improved educational opportunities for students with disabilities.