

# CHAPTER 1

## WHY THIS BOOK?

Special education law is complicated and confusing. What does the law say about evaluations and reevaluations, test procedures, and eligibility decisions? What does the law say about Individualized Educational Programs (IEPs) and IEP teams? Goals, objectives and benchmarks? Transition plans? Least restrictive environment and inclusion?

What does the law say about discipline? Positive behavioral intervention plans and interim alternative placements? Manifestation Review Hearings?

What does the law say about educational progress? Tuition reimbursement and parent notice? Independent educational evaluations? Mediation?

**Wrightslaw: Special Education Law** will help you find the answers to your questions in the statutes, regulations, and caselaw.

### Who Should Read This Book

If you are the parent of a child with a disability, you represent your child's interests in securing an appropriate special education program. To be an effective advocate for your child, you need to understand your rights and responsibilities under the special education laws.

If you are like most **teachers** and **service providers** to children with disabilities, you have received confusing and conflicting information about the special education laws. This information may be inaccurate or incomplete. If you work in the field of education, you need to know what the laws say.

If you are an **attorney or advocate** who represents children with disabilities, you need the statutes, regulations and landmark Supreme Court cases close at hand. In **Wrightslaw: Special Education Law**, your main legal references are in one volume.

Law evolves and changes, regardless of the statute and regulations. Congress may pass a new bill tomorrow that changes a portion of the law. A judicial interpretation that is accepted today will change tomorrow, next week, or next year after a legal precedent or conflicting statute. **This is the nature of law.**

### Who Are "Special Education" Children?

More than five million children receive special education services under the Individuals with Disabilities Education Act (IDEA). Who are these children?

The largest group - about 2.5 million children - have learning disabilities. Other children have speech/language disorders, communication disorders, autistic spectrum disorders, non-verbal learning disabilities, and attention deficit disorders. Some children have visual impairments, hearing impairments, mobility problems, cerebral palsy, brain injuries and mental retardation.

Millions more handicapped children are protected from discrimination by Section 504 of the Rehabilitation Act.

In 1997, the Individuals with Disabilities Education Act was reauthorized. During the reauthorization process, Congress received research about special education outcomes. Congress found that special education "has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." (See 20 U.S.C. 1400(c)(4))

Congress concluded that special education should be made more effective by "having high expectations for such children and ensuring their access to the general curriculum to the maximum extent possible." Congress strengthened the role of parents and urged school districts to use "prereferral interventions instead of waiting until children fail or are labeled." (See 20 U.S.C. 1400 (c))

### How This Book is Organized

**Wrightslaw: Special Education Law** is organized into five sections. **Section One** focuses on **law and special education law**. In Chapter 1, you learn how this book is organized. Chapter 2 includes a review of law and

explains the process of legal change. Chapter 3 includes a brief history of public education, special education, and early education law from *Brown v. Board of Education* to *Public Law 94-142*.

**Section Two** is about special education and the Individuals with Disabilities Education Act. Chapter 4 contains an overview of the **Individuals with Disabilities Education Act of 1997**. In Chapter 5, you'll find the full text of the **Individuals with Disabilities Education Act of 1997**, a comprehensive analysis of the statute, and suggestions about how to secure appropriate services for the child. Chapter 6 includes the IDEA regulations including the new Appendix A.

**Section Three** is about **civil rights and discrimination** as it relates to handicapped children. Handicapped children are entitled to protection from discrimination under the civil rights statutes. Chapter 7 includes an overview of **Section 504 of the Rehabilitation Act**. In Chapter 8, you'll find pertinent text from Section 504 of the Rehabilitation Act. The implementing regulations for Section 504 are in Chapter 9.

**Section Four** is about **records and confidentiality**. The privacy of educational records is governed by the **Family Educational Records Privacy Act (FERPA)**. Under FERPA, schools must honor parental requests to inspect and review their child's educational records within strict timelines. Chapter 10 contains an overview of FERPA. Chapter 11 includes the text of the FERPA statute. The FERPA regulations are in Chapter 12.

**Section Five** is about **caselaw**. Chapter 13 is an overview of special education decisions by the United States Supreme Court. Chapter 14 is a casebook that includes the landmark Supreme Court decisions in *Rowley* (1982), *Burlington* (1985), *Honig* (1988), *Carter* (1993), and *Cedar Rapids* (1999).

## Tips To Help You Use This Book

The statutes and regulations in this book are set in Garamond Book font. Wrightslaw's explanations, analyses, and tips that are in Helvetica font and preceded by a large arrow like this ➡ are **not** part of the statute. We used **bold type** to emphasize certain words and phrases in the statute. Look at the example below. The statute begins with **(A) In General**. The explanation begins with ➡ **IDEA AND FAPE**.

**(A) In General** - The term 'child with a disability' means a child-

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) **who, by reason thereof, needs special education and related services.**

### ➡ IDEA AND FAPE

IDEA confers a right to a free appropriate public education (FAPE). The IDEA child is entitled to an IEP [as described in 20 U.S.C. §1414(d)] and special education that confers educational benefit. All children with disabilities are protected under Section 504. It is important for parents to understand that if their child does not receive services under IDEA, the child does not have IDEA procedural protections.

## References

When references to other works are cited, the full bibliographic citation is at the end of the chapter.

## Contact Us

What did you like about **Wrightslaw: Special Education Law**? What did you dislike about **Wrightslaw: Special Education Law**? How can we improve this book so it meets your needs? Send your ideas, thoughts and comments about how we can improve **Wrightslaw: Special Education Law** to: **Harbor House Law Press**, P. O. Box 480, Hartfield VA 23071. (877) 529-4332 or (877) LAW-IDEA

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# CHAPTER 2

## OVERVIEW OF LAW

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There are four types of law: federal and state constitutions, statutes, administrative rules and regulations, and case law.

### Constitutional Law

The United States Constitution outlines the structure of the federal government. All laws passed must agree with the principles and rights set forth in the Constitution. The first ten amendments to the Constitution are called the Bill of Rights. The Bill of Rights is the source of the most fundamental rights – freedom of speech and religion, right to a jury trial, protection against unreasonable searches and seizures. These Amendments were added to the Constitution to protect citizens against interference from the federal government.

### Federal Statutes

Statutes are laws that are passed by federal, state and local legislatures. Federal statutes are passed by the United States Congress and signed into law by the President. Federal statutes are organized by subject, indexed, and published in the United States Code by Title number. Title 20 is about Education.

References to law are called **citations**. Legal citations are written in a standardized form describing exactly where the statute is located. Citations to federal statutes include the title for the U.S. Code and the section number.

The Individuals with Disabilities Education Act is a federal statute. The statute is in Title 20 of the United States Code, beginning at Section 1400. The legal citation is 20 U.S.C. § 1400, *et. seq.* § is legal shorthand for symbol and is made by two S's superimposed. The term "*et. seq.*" means at Section 1400 and continuing thereafter.

Section 504 of the Rehabilitation Act is a federal statute. Section 504 is in the Rehabilitation Act of 1973 which is codified in Title 29 of the United States Code at Section 794 and is cited as 29 U. S. C. § 794. "Congressional Findings and Purpose" are in Section 701. "Definitions" are in Section 705.

The Family Educational and Privacy Rights Act is a federal statute. The FERPA statute is in Title 20 of the United States Code at Section 1232.

### Federal Regulations

The purpose of regulations is to clarify and explain the statute. Although regulations give force and effect to a statute, they must also be consistent with the statute. Regulations have the same power as the statute. An Appendix to a regulation is a part of a regulation and may or may not have the same force and effect as a regulation, depending on the context. Regulations are published in the Code of Federal Regulations or C.F.R. Before Regulations are published in the Code of Federal Regulations, they are published in the Federal Register (F.R.) which is issued daily.

Title 20 of the U. S. Code requires the U. S. Department of Education to develop and publish the IDEA regulations. The IDEA regulations are in Volume 34, Part 300 of the Code of Federal Regulations. The legal citation for the IDEA regulations is 34 C.F.R. §. The first IDEA regulation is "Purpose" which is at 300.1. The legal citation for "Purpose" is 34 C.F.R. § 300.1.

Appendix A is part of the special education regulations. Appendix A provides additional guidance about IEPs, the involvement of the child's parents, transition, and the child's participation in state and district-wide assessments of achievement in a Question and Answer format. In the former statute, the comparable regulation was Appendix C.

The Section 504 regulations are in Volume 34, Part 104 of the Code of Federal Regulations (C.F.R.). The legal citation for the Section 504 regulations is 34 C.F.R. §. The first Section 504 regulation is "Purpose" which is at 104.1. The legal citation for "Purpose" is 34 C.F.R. § 104.1.

## CHAPTER 3

# A SHORT HISTORY OF SPECIAL EDUCATION LAW

To understand the battles being fought today for children with disabilities, it is important to understand the history and traditions associated with public schools and special education.

### Common Schools Teach Common Values

During the last century, waves of poor, non-English speaking, Catholic and Jewish immigrants poured into the United States. Citizens were afraid that these new immigrants would bring class hatreds, religious intolerance, crime, and violence to America. Social and political leaders searched for ways to “reach down into the lower portions of the population and teach children to share the values, ideals and controls help by the rest of society.” (Church, 81)

An educational reformer named Horace Mann proposed a solution to these social problems. He recommended that communities establish common schools funded by tax dollars. He believed that when children from different social, religious and economic backgrounds were educated together, they would learn to accept and respect each other. Common schools taught common values that included self-discipline and tolerance for others. These common schools would socialize children, improve interpersonal relationships, and improve social conditions. (Cremin, 183-194)

### Early Special Education Programs

The first special education programs were delinquency prevention programs for “at risk” children who lived in urban slums. Urban school districts designed manual training classes as a supplement to their general education programs. By 1890, hundreds of thousands of children were learning carpentry, metal work, sewing, cooking and drawing in manual classes. Children were also taught social values in these classes.

Manual training was a way of teaching children industriousness, and clearing up their character problems . . . the appeal of this training was the belief that it would attract children to school, especially poor children, so their morals could be reshaped . . . Manual training would teach children to be industrious and prevent the idleness that accounted for the increasing crime rate . . . it could teach self discipline and will power. (Cremin, 220-222)

Early special education programs also focused on the “moral training” of African-American children. (Cremin, 192-226) When the Individuals with Disabilities Act was reauthorized:

In 1997, Congress found that poor African-American children continue to be over-represented in special education classes:

- (8) (A) Greater efforts are needed to prevent the intensification of problems connected with **mislabeled and high dropout rates among minority children with disabilities.**
- (B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.
- (C) **Poor African-American children** are **2.3** times more likely to be identified by their teacher as having **mental retardation** than their white counterpart. (20 U.S.C. §1400)

### Compulsory Attendance Laws

For public schools to succeed in the mission of socializing children, all children had to attend school. Poor children attended school sporadically, quit early, or didn't enter school at all. Public school authorities lobbied their legislatures for compulsory school attendance laws. Compulsory attendance laws gave school officials the power to prosecute parents legally if they failed to send their children to school. (Sperry, et. al., 139-145; Cremin; *Brown v. Board of Education*, 347 U.S. 483 (1954))

# CHAPTER 4

## OVERVIEW OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT OF 1997

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The Individuals with Disabilities Education Act is in the United States Code (U.S.C.) at Volume 20, beginning at Section 1401. This book is based on the United States Code although it does include references to various Sections within the Act. The Individuals with Disabilities Education Act of 1997 is divided into four parts.

The U. S. Department of Education is responsible for issuing the special education regulations. The IDEA Regulations are published in Volume 34 of the Code of Federal Regulations (C.F.R.), beginning at Section 300. Appendix A to the Regulations includes 40 questions and answers about IEPs and transition services.

The regulations about early intervention programs for very young children is in Volume 34 of the Code of Federal Regulations beginning at Section 303.

Parents, advocates, attorneys, and educators will refer most often to Part A and Part B, Sections 1400, 1401, 1412, 1414, and 1415 and the corresponding regulations that relate to these sections.

### **Part A: General Provisions, Definitions and Other Issues**

Part A is titled “General Provisions, Definitions and Other Issues” and begins with “Congressional Findings and Purpose.” Part A is very important because it discusses the purpose of the special education law. Part A also includes definitions of terms that are used in the statute.

### **Part B: Assistance for Education of All Children with Disabilities**

Part B is titled “Assistance for Education of All Children with Disabilities” and includes funding, state plans, evaluations, eligibility, due process, discipline and other areas relating to direct services. Section 1414 is about evaluations, eligibility, and IEPs. Section 1415 describes the procedural safeguards for children and their parents, including the requirement about “Prior Written Notice,” Mediation, Due Process Procedures, “stay put,” and discipline issues. Section 1419 includes procedural information about grants to states that have pre-school programs for children as young as two years of age.

### **Part C: Infants and Toddlers with Disabilities**

Part C is “Infants and Toddlers with Disabilities” and begins with “Findings and Policy” at Section 1431. The term “at-risk infant or toddler” is defined as an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided. Part C requires a comprehensive child find system and individual family service plans (ISFP) that are similar to IEPs in Part B.

### **Part D: National Activities to Improve Education of Children with Disabilities**

Special education methods and techniques are often criticized for not being based on research and best practices. At the beginning of the IDEA statute is this statement from Congress:

However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.” 20 U.S.C. § 1400(c)(4)

Part D focuses on the need to improve special education programs, preparing personnel, disseminating information, supporting research, and applying research findings to education. Part D is called “National Activities to Improve Education of Children with Disabilities” and includes two subparts. Subpart One is “State Program Improvement Grants for Children with Disabilities.” Subpart Two is “Coordinated Research, Personnel Preparation, Technical Assistance, Support, and Dissemination of Information.”

# CHAPTER 5

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# CHAPTER 7

## OVERVIEW OF SECTION 504

Many parents want their children to be classified as Section 504 children, not as “special ed” children under IDEA. They believe that Section 504 of the Rehabilitation Act will provide the child with more benefits and rights. This is clearly wrong.

The child who receives protections under Section 504 of the Rehabilitation Act has fewer rights than the child who receives special education services under IDEA. The child who is eligible for special education under IDEA automatically receives protections under Section 504.

If the child has a disability that adversely affects educational performance, the child is covered under IDEA. If the child has a disability that does not adversely affect educational performance, the child is usually covered under Section 504 but does not receive services under IDEA.

Change the facts to illustrate the differences between these two laws. A handicapped child is in a wheelchair. Under Section 504, this child shall not be discriminated against because of the disability. The child shall be provided with access to an education, to and through the schoolhouse door. However, under Section 504 there is no guarantee that this wheelchair-bound child will receive an education from which the child benefits. The child simply has access to the same education that children without disabilities receive.

Now assume that the child in a wheelchair also has neurological problems that adversely affect the child’s ability to learn. Under IDEA, the child with a disability that adversely affects educational performance is entitled to an education that is individually designed to meet the child’s unique needs and from which the child receives educational benefit.

Many parents believe that if the child has a Section 504 plan, the child will remain in the regular classroom. Some parents and educators believe that under IDEA, children must be placed in special education classes. This is incorrect. For these reasons, parents often assume that IDEA is less desirable.

### Who? Definition of Section 504 Child

Section 504 is a civil rights law. To be eligible for Section 504 protections, the child must have a physical or mental impairment that substantially limits one or more major life activities; have a record of such an impairment; or be regarded as having such an impairment.

The law offers protections to children who meet the criteria for “handicapped:” children who have a physical or mental impairment that substantially limits a major life activity or is regarded as handicapped by others.

“Major life activities” include walking, seeing, hearing, speaking, breathing, **learning**, reading, writing, performing math calculations, working, caring for oneself, and performing manual tasks. The handicapping condition must “substantially limit” at least one major life activity for the child to be eligible.

Section 504 at 29 U.S.C. § 706(7)(B) says “handicapped individual” means “any person 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 impairment, or (iii) is regarded as having such an impairment. For our purposes, the key is whether the child has an “impairment” that “substantially limits . . . one or more . . . major life activities . . .”

Litigation often focuses on the terms “substantially” and “major life activities.” Learning is a “major life activity.” Is learning “substantially limited”? Does the child’s disability adversely affect educational performance?

Educational performance is often assessed by looking at the child’s grades. Yet, according to the National Educational Longitudinal Study, the average grade in American schools is now a “B.” (“What Do Student Grades Mean?” available from ERIC). In some school districts, children receive honor roll grades but cannot read, write, spell, or do arithmetic .

### What? A Section 504 Education

The Code of Federal Regulations at 34 C. F.R. § 104.33(b)(1) defines a free appropriate public education as “the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and . . . are based upon adherence to specified procedures.”

# CHAPTER 8

## THE REHABILITATION ACT OF 1973

### 29 U.S.C. CHAPTER 16

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**Sec. 705 Definitions**

**Sec. 794 Nondiscrimination under Federal grants and programs; promulgation of rules and regulations**

**Sec. 794a Remedies and attorney fees**

**Sec. 701 Congressional findings; purpose; policy**

**(a) Findings**

Congress finds that—

- (1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;
- (2) individuals with disabilities constitute one of the most disadvantaged groups in society;
- (3) disability is a natural part of the human experience and in no way diminishes the right of individuals to—
  - (A) live independently;
  - (B) enjoy self-determination;
  - (C) make choices;
  - (D) contribute to society;
  - (E) pursue meaningful careers; and
  - (F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;
- (4) increased employment of individuals with disabilities can be achieved through the provision of individualized training, independent living services, educational and support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;
- (5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and
- (6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to—
  - (A) make informed choices and decisions; and
  - (B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

**(b) Purpose**

The purposes of this chapter are—

- (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through—
  - (A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;
  - (B) independent living centers and services;
  - (C) research;
  - (D) training;
  - (E) demonstration projects; and
  - (F) the guarantee of equal opportunity; and
- (2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

**(c) Policy**

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of—

- (1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;
- (2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;
- (3) inclusion, integration, and full participation of the individuals;

**CHAPTER 9****TABLE OF SECTION 504 REGULATIONS****34 C.F.R. Part 104****Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance**

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# CHAPTER 10

## OVERVIEW OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

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The Family Educational Rights and Privacy Act (FERPA) deals with privacy and confidentiality, parent access to educational records, parent amendment of records, and destruction of records.

The purpose of this statute is to protect the privacy of parents and students. The statute is in the United States Code at 20 U.S.C. 1232. The regulations are in the Code of Federal Regulations at 34 C.F.R Part 99.

FERPA applies to all agencies and institutions that receive federal funds, including elementary and secondary schools, colleges, and universities.

### Educational Records

Educational records include “all instructional materials, including teacher’s manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.”

Test materials, including test protocols and answer sheets are educational records and must be disclosed. The Office for Civil Rights has determined that the test protocols used by a psychologist to prepare a report are educational records and must be produced to the parents. Destruction of records violates the parents rights of access. (Weber, “Records”)

Personal notes and memory aids that are used only by the person who made them are not educational records. However, if the notes are shared with or disclosed to another individual, they become educational records.

The Office for Civil Rights found that the transcript of a hearing is an educational record for purposes of Section 504. Due process decisions are educational records. Tapes of IEP meetings are educational records as are IEPs.

### Right to Inspect and Review Educational Records

Parents have a right to inspect and review all educational records relating to their child. This right to “inspect and review” includes the right to have copies of records and to receive explanations and interpretations from school officials. Agencies must comply with requests to inspect and review records within forty-five days.

Copies of records must be provided to the parent if failure to do so would prevent the parent from exercising the right to view records. Schools may charge reasonable copying fees unless the fee would “effectively prevent” the parent or student from exercising the right to inspect and review the records. Fees may not be charged for searching and retrieving records.

According to the FERPA regulations “If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student’s education records, the educational agency or institution, or SEA or its component, shall (1) Provide the parent or eligible student with a copy of the records requested; or (2) Make other arrangements for the parent or eligible student to inspect and review the requested records.”

If the parent believes that the educational record contains inaccurate or misleading information, the parent may ask the agency to amend the record. The parent may also request a hearing to correct or challenge misleading or inaccurate information.

### Confidentiality and Disclosure of Personally identifiable Information

Personally identifiable information may not be disclosed without written consent of the parent.

“Personally identifiable information” includes, but is not limited to:

- (a) The student’s name;
- (b) The name of the student’s parent or other family member;
- (c) The address of the student or student’s family;

**CHAPTER 11****FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT****20 U.S.C. 1232(g); 20 U.S.C. 1232(h)****Sec. 1232 (g).**

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions.

(1)

(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of post-secondary education the following materials:

- (i) financial records of the parents of the student or any information contained therein;
- (ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;
- (iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—
  - (I) respecting admission to any educational agency or institution,
  - (II) respecting an application for employment, and
  - (III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (c) except that such waiver shall apply to recommendations only if

- (i) the student is, upon request, notified of the names of all persons making confidential recommendations and
- (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

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# CHAPTER 13

## OVERVIEW OF SPECIAL EDUCATION CASELAW

The Individuals with Disabilities Act requires school districts to provide a free appropriate public education (FAPE) to children with disabilities. The child's special education must be at no cost to the child's parent.

After Congress passed Public Law 94-142, courts issued different rulings about the meaning of the term "appropriate." As cases were litigated, some courts decided that "appropriate" meant that handicapped children were entitled to an education that would help the child become **self-sufficient**. Other courts decided that school systems were required "to **maximize** the potential of each handicapped child commensurate with the opportunity provided non-handicapped children." (from *Rowley*)

### **Board of Education v. Rowley, 458 U.S. 176 (1982)**

In 1982, the U. S. Supreme Court issued their first decision in a special education case. In *Board of Education v. Rowley*, the high court defined the terms "special education" and "appropriate" as follows:

Special education . . . means specially designed instruction, at no cost to parents or guardians to meet the unique needs of a handicapped child . . . (At 189) [an appropriate education] provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction . . . and if the child is being educated in the regular classrooms of the public education system, (it) should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Educ. v. Rowley*, 458 U.S. 176, 204, 205 (1982)

After the *Rowley* decision, terms like "maximizing," and "self-sufficiency" were stricken. Parents were not entitled to the "best" education nor were they entitled to an education that would "maximize" their child's potential. The use of these terms is fatal to the parent's case. Parents and school districts continued to disagree about the adequacy (and appropriateness) of special education services.

### **Tuition Reimbursement**

Dissatisfied about their children's lack of progress in public school programs, parents removed their children from public programs and placed the children into private special education programs. Some parents requested that their school districts reimburse them for the costs of their child's special education in these private programs.

If the public school provides an appropriate educational program, parents are not entitled to be reimbursed for a private placement. If the school district defaults on their obligation to provide a child with an appropriate education and the parent places the child into a private special education program where the child does receive an appropriate education, should the parent be reimbursed?

Some Courts decided that reimbursement was retroactive to the date of placement or the date of denial of an appropriate education. Other courts held that parents could not be reimbursed until after the case was litigated and won by the parents, a process that often took several years to complete.

In 1980, the U. S. Court of Appeals for the Fourth Circuit held that parents who had withdrawn their children from public school placements could not receive reimbursement retroactively because the parents violated the "stay put" provisions of the Act. (*Stemple v. Board of Education*, 623 F.2d 893 (4th Cir. 1980)).

The U.S. Court of Appeals for the First Circuit disagreed. In the First Circuit, parents could be reimbursed from the date of placement. This created a split among Circuits on this issue.

### **Burlington School Committee v. Dept. of Education, 471 U.S. 359 (1985)**

To resolve the split, the U.S. Supreme Court agreed to hear the case of Michael Panico in *Burlington School Committee v. Department of Education*, 471 U. S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

In *Burlington*, the legal issue was whether Michael Panico's parents could be reimbursed for his education at a private special education school that was on the state's list of approved schools. The Panico family and the Massachusetts Department of Education brought the suit against the Town of Burlington, Massachusetts.

# THE UNITED STATES SUPREME COURT

458 U.S. 176

**BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL  
SCHOOL DISTRICT, WESTCHESTER COUNTY, et al.,  
Petitioners**

v.

**AMY ROWLEY, by her parents, ROWLEY et. al.  
Respondent**

No. 80-1002

On a Writ of Certiorari to the United States Court of Appeals for The Second Circuit. 632 F. 2d 945, reversed and remanded.

June 28, 1982

Before Burger, C.J., and Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor, JJ.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion, concurring in the judgment.

WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by the Congress upon States which receive federal funds under the Education for All Handicapped Children Act. We agree and reverse the judgment of the Court of Appeals.

## I

The Education for All Handicapped Children Act of 1975 (Act), 20 U.S.C. 1401 et seq., provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a States compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H.R. Rep. No. 94-332. P.2 (1975). The Acts evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case.

Congress first addressed the problem of education the handicapped in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." *Pub. L. No. 89-750*, 161, 80 Stat. 1204 (1966). That program was repealed in 1970 by the *Education for the Handicapped Act*, Pub. L. No. 91-230, 175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.<sup>1</sup>

Dissatisfied with the progress being made under these earlier enactments, and spurred by two district court decisions holding that handicapped children should be given access to a public education, Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt "a goal of providing full educational opportunities to all handicapped children." *Pub. L. 93-380*, 88 Stat. 579, 583 (1974) (the 1974 statute). The 1974 statute was recognized as an interim measure only, adopted "in order to give the Congress an additional year in which to study what if any additional Federal assistance

[was] required to enable the States to meet the needs of handicapped children.” H.R. Rep. No. 94-332, *supra*, p.4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it “has in effect a policy that assures all handicapped children the right to a free appropriate public education.” 20 U.S.C. 1412(1). That policy must be reflected in a state plan submitted to and approved by the Commissioner of Education, 3 1413, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. 1412. 1413. States receiving money under the Act must provide education to the handicapped by priority, first “to handicapped children who are not receiving an education” and second “to handicapped children . . . with the most severe handicaps who are receiving an inadequate education,” 1413(3), and to the maximum extent appropriate” must educate handicapped children “with children who are not handicapped.” 1412(5).<sup>4</sup> The Act broadly defines “handicapped children” to include “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities.” 1401(1).<sup>5</sup>

The “free appropriate public education” required by the Act is tailored to the unique needs of the handicapped child by means of an “individualized educational program” (IEP). 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child’s teacher, the child parents or guardian, and, where appropriate, the child, consists of a written document containing

- (A) a student of the present levels of educational performance of the child,
- (B) a statement of annual goals, including short-term instructional objectives,
- (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
- (D) the projected date for initiation and anticipated duration of such service, and
- (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child’s IEP at least annually. 1404(a)(5). See also 1413(a)(11), 1414(a)(5).

In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon State receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in “the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child,” and must be permitted to bring a complaint about “any matter relating to” such evaluation and education. 1415(b)(1)(D) and (E).<sup>6</sup> Complaints brought by parents or guardians must be resolved at “an impartial due process hearing,” and appeal to the State educational agency must be provided if the initial hearing is held at the local or regional level. 1415(B)(2) and (c)<sup>7</sup> Thereafter, “any party aggrieved by the findings and decisions” of the state administrative hearing has “the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.” 1415(e)(2).

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, 1414(b)(A), 1416, and by the provision for judicial review. At present, all States except New Mexico receive federal funds under the portions of the Act at issue today. Brief for the United States as Amicus Curiae 2, n. 2.

## II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York. Amy has minimal residual hearing and is an excellent lip reader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place in a regular kindergarten class in

# FERPA REGULATIONS

## 34 C.F.R., Part 99

Subpart A—General

Subpart B—What are the Rights of Inspection and Review of Education Records?

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Subpart E—What are the Enforcement Procedures?

### SUBPART A—GENERAL

#### Sec. 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in Sec. 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary of Education if -

- (1) The educational institution provides educational services or instruction, or both, to student; or
- (2) The educational agency provides administrative control or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution if funds under one or more of the programs referenced in paragraph (a) of this section

- (1) are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or
- (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

#### Sec. 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended. (Note: 34 C.F.R. 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under IDEA.)

#### Sec. 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

“**Act**” means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as Sec. 438 of the General Education Provisions Act.

“**Attendance**” includes, but is not limited to:

- (a) Attendance in person or by correspondence; and
- (b) The period during which a person is working under a work-study program.

“**Directory information**” means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

“**Disciplinary action or proceeding**” means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

“**Disclosure**” means to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means.

“**Educational agency or institution**” means any public or private agency or institution to which this part applies under Sec. 99.1(a).

“**Education records**”

- (a) The term means those records that are:

# NONDISCRIMINATION ON THE BASIS ON HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

## 34 C.F.R. PART 104

- Subpart A—General Provisions
- Subpart B—Employment Practices
- Subpart C—Program Accessibility
- Subpart D—Preschool, Elementary, and Secondary Education
- Subpart E—Postsecondary Education
- Subpart F—Health, Welfare, and Social Services
- Subpart G—Procedures

### SUBPART A—GENERAL PROVISIONS

#### Sec. 104.1 Purpose.

The purpose of this part is to effectuate Sec. 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

#### Sec. 104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to each program or activity that receives or benefits from such assistance.

#### Sec. 104.3 Definitions

As used in this part, the term:

- (a) “**The Act**” means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.
- (b) “**Sec. 504**” means Sec. 504 of the Act.
- (c) “**Education of the Handicapped Act**” means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.
- (d) “**Department**” means the Department of Education.
- (e) “**Assistant Secretary**” means the Assistant Secretary for Civil Rights of the Department of Education.
- (f) “**Recipient**” means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.
- (g) “**Applicant for assistance**” means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.
- (h) “**Federal financial assistance**” means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
  - (1) Funds;
  - (2) Services of Federal personnel; or
  - (3) Real and personal property or any interest in or use of such property, including:
    - (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
    - (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.
- (i) “**Facility**” means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.
- (j) “**Handicapped person.**”
  - (1) “**Handicapped persons**” means any person who
    - (i) has a physical or mental impairment which substantially limits one or more major life activities,
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    - (iii) is regarded as having such an impairment.

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## Handicapped Children Excluded

Until 1975, handicapped children were often excluded from school. When allowed to attend, children with many different disabilities were often lumped together in generic special education classes. Because schools segregated children with disabilities from “normal” children, special education classes were often held in undesirable, out-of-the-way places like trailers and school basements.

Despite compulsory attendance laws, most states allowed school authorities to exclude children if they believed that the child would not benefit from education or if the child’s presence would be disruptive to others, i.e., to non-disabled children and teachers. In 1958, the Illinois Supreme Court held that compulsory education laws did not apply to children with mental impairments. Until 1969, it was a crime in North Carolina for a parent to try to enroll a handicapped child in public school after the child had been excluded. (Weber, “Statutory Background”)

## Brown v. Board of Education, 347 U.S. 483 (1954)

In 1954, the U.S. Supreme Court issued a landmark civil rights decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, school children from four states argued that segregated public schools were inherently unequal and deprived them of equal protection of the laws. The Supreme Court found that African-American children had the right to equal educational opportunities and that segregated schools “have no place in the field of public education.” The court wrote that:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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 which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Brown*, the Supreme Court described the emotional impact that segregation has on children, especially when segregation “has the sanction of the law:”

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

After the decision in *Brown*, parents of children with disabilities began to bring lawsuits against their school districts for excluding or segregating children with disabilities. The parents argued that by excluding these children, schools were discriminating against the children because of their disabilities.

The FERPA regulations are in Volume 34, Part 99 of the Code of Federal Regulations (C.F.R.). The legal citation for the FERPA regulations is 34 C.F.R. §. The first FERPA regulation is “To Which educational agencies or institutions do these regulations apply?” The legal citation for this regulation is 34 C.F.R. § 99.1.

## State Law and Regulations

State constitutions establish the structure of state government. States must develop special education statutes and regulations that are consistent with the United States Code (U.S.C.) and the Code of Federal Regulations (C.F.R.). State statutes and regulations may provide more special education rights than the corresponding federal law but states may not take away rights that are provided by federal law.

## Legislative Intent

Statutory and regulatory law are based on legislative intent. In many cases, the legal interpretation of a law, the meaning of a specific section, or the meaning of a particular word will be influenced by the use of “may” instead of “shall,” or even the location of a semicolon.

Sometimes, one word in a statute will lead to extensive litigation. In the area of special education law, the word “appropriate” has been litigated extensively. After more than twenty years of case law, “appropriate” has many interpretations that vary considerably from one set of facts to another.

Sometimes, members of Congress are unable to agree on the wording of a proposed statute. To keep a bill from dying in committee, the legislators will often agree to vague compromise wording. Because Courts must interpret the meaning of a word or phrase in the context of the statute, it is not surprising that courts often arrive at different conclusions.

When you read decisions by the U. S. Supreme Court, you will see that the Justices often include a discussion of legislative intent and legislative history in their decisions. Through this process, vague, ambiguous words and terms receive more precise legal definitions.

The legislative history of the Individuals with Disabilities Education Act is in the *United States Code Congressional and Administrative News 1975* beginning at page 1425 (U.S.C.C.A.N. 1975, p. 1425).

To learn about the purpose of Section 504, read “Congressional Findings and Purpose” in Section 701 (included in this book).

## Judicial Interpretations

It is not unusual for one court to interpret a word, phrase, or code section differently from another court, even when facts are similar. This process leads to more interpretations and more litigation. Over time, a “majority rule” usually develops as courts agree on the same interpretation. A “minority rule” also develops.

If a clear majority rule does not develop, the legal issue will become more confusing and diverse. A U. S. Court of Appeals may issue a ruling in a case that controls the lower courts.

Sometimes, two or more U. S. Courts of Appeal issue rulings that are in direct conflict with each other. This is called a “split among circuits.” When a split occurs, Congress may amend the law or the U. S. Supreme Court may issue a decision that clarifies the issue. Legal issues that result in a “split among circuits” have the highest probability of being accepted for review by the U. S. Supreme Court.

## Caselaw

Caselaw is the body of law that evolves in state and federal courts. Hearing decisions in special education cases can be appealed to state or federal court. Decisions issued by state court judges can be appealed to higher state courts. In most states, the highest state court is the state’s Supreme Court.

For example, a New York trial judge’s interpretation of the special education statute will be governed by earlier rulings by the Supreme Court of New York. However, New York state court judges are not bound by opinions issued by state court judges from other states.

Decisions by U. S. District Court judges can be appealed to the U. S. Court of Appeals for that geographical area. District Court judges are bound by interpretations and rulings from their Courts of Appeals. New York is in the Second Circuit. U. S. District Court judges in New York must follow rulings from the Second Circuit Court of Appeals. California is in the Ninth Circuit. U. S. District judges in California must follow rulings from the Ninth Circuit.

Interpretations of the federal statute by U. S. District Courts are binding on state court trial judges. However, decisions from a U. S. District Court in New York are not binding on state court or Federal court