Chapter 1

The Legal System and How It Works

Learning Objectives

After reading Chapter 1, you should be able to

1.1 Outline the legal system and how the Constitution, statutes, regulations, judicial decisions, and administrative decisions and opinions apply to education for students with disabilities

1.2 Describe the interrelationship of state and federal law as applied to students with disabilities

Introduction

Understanding the legal requirements for providing education to students with disabilities requires an understanding of the basis of law and how various laws relate to each other. This is an area of law that has a very dynamic relationship between constitutionally based requirements, statutory responses, regulations and administrative guidance interpreting statutes, and judicial opinions deciding cases pursuant to these requirements. The relationship between state and federal requirements is also critical in understanding this area of law. This chapter introduces the reader to how the law works so that the remainder of the text can be read and understood with that background.

State and Federal Laws

The United States Constitution and State Constitutions

The primary and basic source of law in the United States is the Constitution. Federal statutes passed by Congress must be based on some provision of the Constitution. State constitutions and statutes may go beyond what is provided in the federal law as long as there is no conflict between them and as long as state laws do not address areas reserved to the federal government, such as providing for the national defense.

The Constitution of the United States, because it is a general framework, does not specifically answer every question of law, and it has been subject to substantial interpretation over the past two centuries. The Constitution provides for the establishment of legislative, executive, and judicial powers of the United States as well as procedures for modifying the Constitution itself. In addition to the articles of the Constitution, there are 26 amendments to the Constitution. Of major importance to special education are the constitutional provisions for spending money to protect the general welfare[1] (which is the basis for the **Individuals with Disabilities Education Act (IDEA)**[2] and **Section 504 of the Rehabilitation Act**[3] as well as the Fourteenth Amendment, providing that no state shall "deprive any person of life, liberty, or property, without due process of law . . . nor deny . . . equal protection of the laws").[4]

It should be noted that there is no constitutional mandate requiring that the federal government provide education. Under the Tenth Amendment to the Constitution, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States."[5] All states have, by virtue of that authority, provided for public education, either by state constitution, or by state statute, or both. States are, therefore, required under the Due Process and Equal Protection clauses of the Fourteenth Amendment to provide education on an equal basis and to provide due process before denying equivalent educational programming to different students. As the following chapters demonstrate, however, it is not always clear what it means to be "equal," and it is not always easy to determine what "process" is due. In addition, the Fourteenth Amendment applies only to states or state agents acting within state authority. When an individual teacher or other educator acts without a specified state policy spelling out whether the particular act is permissible or not, it is not always clear whether the individual is acting within state authority so as to meet the "state action" element of the Fourteenth Amendment. For example, if an administrator refuses to return phone calls of a parent of a student with a **disability**, and, as a result, the appropriate programming for that student is substantially delayed, it is unclear whether the administrator's acts would be deemed to be within the authority of the state.

Statutes

The Constitution provides that Congress shall have the power to "make all Laws . . . necessary and proper for carrying into Execution the foregoing Powers."[6] Pursuant to that authority, Congress has enacted an enormous body of laws that cover everything from civil rights in the workplace to aviation safety laws.

The federal statutes of most relevance to special education are the IDEA, the **Americans with Disabilities Act (ADA)**, and Section 504 of the Rehabilitation Act. These were passed pursuant to the constitutional provisions that authorize the expenditure of money to protect the general welfare. The IDEA authorizes the expenditure of federal funds to subsidize special education provided by the individual states. Section 504 of the Rehabilitation Act requires that programs receiving federal financial assistance not discriminate on the basis of disability. The ADA prohibits public and private schools from discriminating on the basis of disability.

Most statutes of relevance to education generally are state statutes rather than federal statutes. Although education is highly regulated indirectly by federal funding programs, education is for the most part a state function, with some functions delegated to local school districts. All states have as

part of their overall educational program a plan for providing education to students with disabilities within the state. By having a plan that complies with the guidelines set forth in the IDEA, all states qualify for federal funding to assist in providing that education to students with disabilities.

Regulations and Guidelines

Statutes are usually passed as a general framework of policy relating to a particular issue. Congress and state legislatures generally delegate to administrative agencies the task of developing detailed regulations pursuant to federal and state statutes. These regulations must be within the authority of the statute. Federal regulations and some state regulations are generally finalized only after an opportunity for **notice** and public comment. If a regulation is developed within the framework and limitations of the statute, it has the weight of law.

In addition to regulations, administrative agencies often develop guidelines that suggest how the laws administered by the relevant agency should be interpreted. While these do not have the weight of law, they are often given a great deal of deference by both policy makers and courts.

Special education is an area in which elaborate sets of regulations exist at both the federal and state levels. At the federal level, the IDEA regulations spell out in considerable detail the procedures and programming that must be provided to children with disabilities in order for states to receive federal funding.[7] States must submit their state plans to the federal Department of Education to qualify for IDEA funds. States may go beyond what is required in the IDEA regulations as long as their regulations are consistent with the federal requirements. For example, some states have broadened the definition of which children are entitled to special education by including gifted children in their special education programming. States also often regulate areas such as bus transportation, pupil/teacher ratios, and other issues that are more appropriate for state regulation.

Case Law

Case law is the law developed in the courts. Historically, it was a means of establishing law before there was a great deal of written statutory law. Judges would render opinions that incorporated custom. This early law was known as **common law**. Most judicially rendered law today is opinion not about custom but rather interpreting a constitutional provision or statute as it applies to a particular set of facts. Courts are limited to rendering opinions about the specific facts in the cases before them. Pronouncements of a broader nature are not prohibited, but they do not have the force of law. Broader pronouncements are known as *dicta*, and they provide guidance to potential litigants about their chances of success should they decide to seek a remedy in the courts.

In the United States, there is a fairly universal acceptance of the concept of **stare decisis**, which means that courts are bound to render decisions consistent with previous decisions involving similar matters in the same jurisdiction and the higher courts over that jurisdiction. If a court reaches a result different from a previous decision, it must usually justify the decision by explaining why the set of facts before it is different, or why circumstances have changed, or why the previous decision was wrong. So that judicial law can be known to the public, most judicial opinions at the federal level (and a significant portion of opinions within state judicial systems) are published. These published opinions are generally available online. Part of a legal education includes training in how to find relevant court opinions as well as how to research statutes and regulations.

Administrative Agency Guidance Statements and Opinions

Administrative guidance statements and opinions are issued at the federal, state, and local levels by administrative agencies. The federal Department of Education often issues interpretive statements and letters of opinion about the requirements of the IDEA, Section 504, and the ADA. Some state educational agencies do this as well regarding state or federal special education requirements. While these agency statements are important as guides to how an agency is likely to interpret or decide a particular matter, they do not carry the same weight or have the same precedential value as statutes, regulations, and judicial decisions. Because these statements are generally prospective and are not binding on specific parties, they are generally not appealable to state or federal court.

Because of their lesser value, such opinions and decisions are not a substantial basis for the material included in this text. In addition, these statements are not consistently reported publicly in the same way as statutes, regulations, and judicial decisions; therefore, having a current comprehensive set of findings can be difficult.

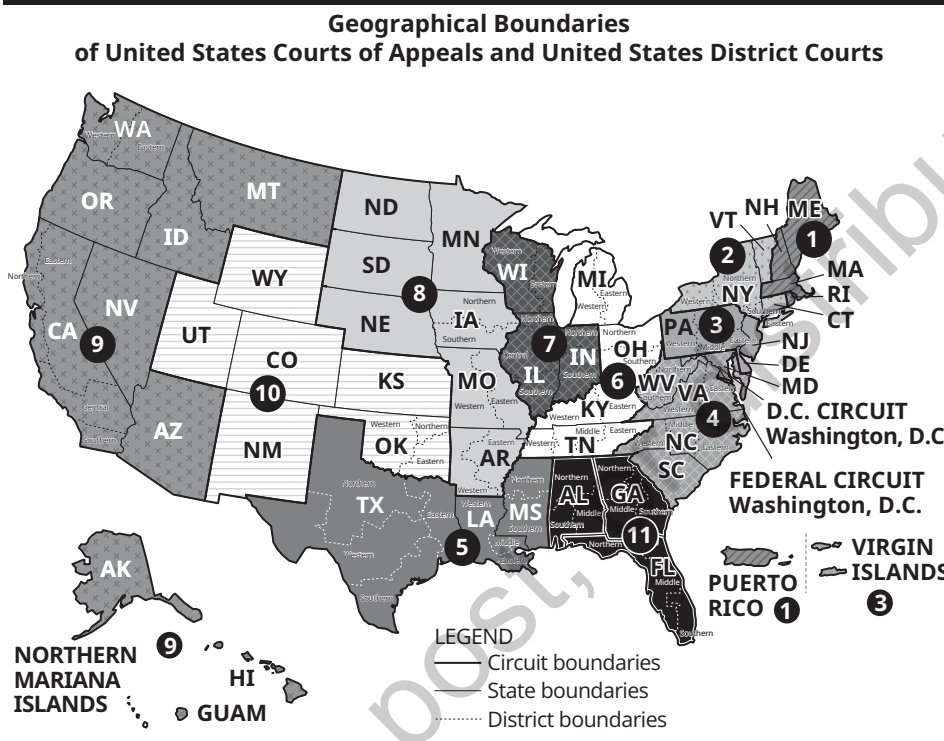
Under the IDEA, state departments of education are also responsible for facilitating administrative due process hearings to resolve special education disputes that arise between a parent/student and a school regarding the IDEA's requirements as they relate to that student.[8] These decisions are discussed in more detail in the following sections. They are different than the general opinion letters and guidance statements as they are based upon an evidentiary hearing, resolve a specific dispute between parties, and are binding on the parties. They may have some binding value within the state that they are issued, and they can be appealed to state or federal court. State agencies often publish these decisions on their websites.

The Judicial System

To understand which court opinions on the relevant subject matter apply to a specific case, it is necessary to understand the court system in the United States. The system includes both federal and state courts and various appellate levels within those systems. As noted earlier, courts are generally bound by precedent from previous cases decided in the same jurisdiction or an appellate jurisdiction in which the lower court exists.

Most cases involving students with disabilities in the education system are brought in federal court jurisdictions. All 50 states, the District of Columbia, the Virgin Islands, Puerto Rico, and Guam are within one of eleven federal circuit court jurisdictions. A case decided in the lower court (trial court) jurisdiction (referred to as the district court) would be appealed by a party to the circuit court that includes that lower court. Larger states may have several districts within a state. The appellate court level is referred to as the "court of appeals" level. Further appeal by parties dissatisfied at that level would go to the United States Supreme Court by a process known as a writ of certiorari. The Supreme Court review is discretionary. Of the approximately 7,000 cases where Supreme Court review is sought, only about 100 to 150 are heard. The Supreme Court's decisions are binding on all federal district and circuit courts. Figure 1.1 is a map that demonstrates how the jurisdictions are divided.

Figure 1.1 ▪ Geographic Boundaries of United States Courts of Appeals and United States District Courts



U.S. Supreme Court; https://www.supremecourt.gov/about/Circuit_Map.pdf

Cases brought in state courts have similar appellate structure, most with the same three levels – trial, appellate, Supreme Court, although New York has four levels and some states only have two levels. State court cases would generally only involve state constitutional or statutory issues. Because education for those with disabilities is so comprehensively covered by federal statutes and regulations, there are few cases brought and limited judicial reported opinions within the state court systems on these issues. Only one decision in this textbook is a state court opinion.

At both the state and federal level, the trial court receives evidence, determines contested facts, and applies the facts to the pertinent law. Some cases are tried before a jury; others are tried before a judge. Intermediate appellate courts hear the appeals from the trial courts when the losing party files an appeal. They do not receive additional evidence or hear witnesses; they decide cases based on the transcripts of the trial and legal arguments of the counsel. The high court (the U.S. Supreme Court in the federal system – and usually the state supreme courts) hear appeals from the intermediate appellate courts. Decisions at this level are based on the record below and the briefs of the parties. In many cases, other interested parties are allowed to submit *amicus briefs* for the court to consider. That is a frequent practice in many of the Supreme Court cases that are included in this textbook.

Agency Hearing and Investigative Decisions

Congress sometimes delegates to an administrative agency the function of deciding disputes or determining whether a statute has been violated. The reason is often one of efficiency and quality of decision making. It is costly and time consuming to litigate disputes in court. A resolution before an administrative hearing officer is often quicker and less expensive, although it is not always so. In addition, in some cases, an administrative decision maker may have a particular area of expertise that could lead to better decisions than might be made by a judge in court.

As noted earlier, special education is one of the areas in which Congress has delegated dispute resolution and other decision-making to administrative process. Where parents or the school dispute the appropriateness of the proposed special education program, the IDEA sets up a detailed framework providing an opportunity for an impartial due process hearing to resolve the dispute, with a right of review by the state educational agency and a subsequent right of review in state or federal court. Parties generally must go through this administrative due process hearing procedure before they can proceed to state or federal court.

The IDEA also requires state departments of education to establish a complaint system that allows interested parties to file a complaint regarding the IDEA or state special education violations. The state department of education must investigate the allegations, make an independent determination about whether or not a violation occurred, and, if so, order appropriate corrective action.[9] These state agency complaint decisions are generally appealable to state court.

In addition, anyone believing that a school has violated Section 504 of the Rehabilitation Act or the ADA may complain to the federal Department of Education, which may then investigate and possibly hold a hearing to determine whether a violation has occurred. In this forum, the agency determines whether a violation has occurred and whether corrective action, such as withholding future federal financial assistance, is an appropriate remedy. Because the remedies under this administrative investigative decision-making for Section 504 and the ADA do not always resolve the problem for the individual complainant, many individuals choose to go directly to court instead to seek relief. As later chapters indicate, whether doing so is permissible is not entirely clear. Chapter 15 clarifies that even if one can claim a violation of Section 504 or the ADA in court, most claims involving special education must be decided under the IDEA, and the parents must first seek relief through the impartial hearing process mentioned above.

Relationship of Constitutional Law, Statutory Law, Regulatory Law, and Case Law in the Development of Special Education Laws

Laws are not developed by the various governmental entities (Congress, administrators, and judges) in a vacuum. Often, laws are made by one entity as a response to developments in other arenas. State and federal laws are frequently interactive in this process. The development of special education law is an excellent example of this dynamic development of policy.

While many states had laws providing for some education for students with at least some types of disabilities before the 1970s (such as blindness and deafness), the real watershed year for special education law was 1971. In that year, and a year later, two judicial opinions interpreted the Fourteenth Amendment to the United States Constitution as follows: Because the District of Columbia and the Commonwealth of Pennsylvania provided education to children within their jurisdictions, they were denying due process and equal protection to children with disabilities by excluding these children from the educational system.[10] As a result of these federal judicial opinions and the number of similar lawsuits awaiting final decision throughout the United States, Congress responded. To bring consistency to and to assist states in what appeared to be constitutionally mandated education of students with disabilities, Congress created a federal program of subsidization.[11] The program that resulted was set out in the **Education for All Handicapped Children Act (EAHCA)**, passed in 1975. This act made federal funds available to states that developed plans to ensure education for all children with disabilities who were of school age. This education was to be individualized, provided at no cost to the parents, made available in the least restrictive appropriate setting, and provided under required procedural safeguards. In 1990, the name of the act was changed to the IDEA. Two other major amendments to the IDEA (in 1997 and 2004) further developed the requirements of the law but did not substantially change the primary principles and procedures under the original 1975 statute.

The statute itself set the general framework, but a great deal of detail was needed to clarify what was meant by the various provisions relating to procedural safeguards. The Department of Health, Education, and Welfare (now separated into the Department of Education and the Department of Health and Human Services) developed an elaborate set of regulations to spell out these details. These regulations became effective in 1977 after extensive public comment. As of now, all states have elected to seek funding support under the IDEA, and, as a result, they have all developed state statutes and regulations incorporating the requirements of the IDEA and usually providing for additional requirements relating to special education.

Even with detailed statutory and regulatory requirements under EAHCA/IDEA, a number of issues became the subject of debate. These issues included matters such as whether states were required only to provide the same number of school days to students with disabilities that they provided to students without disabilities, whether residential placements must be paid for entirely by the state and under what circumstances, and whether services such as certain medical treatments must be provided at no charge. Several issues reached the level of the Supreme Court, which then provided its interpretation of the law. When Congress disagrees with the Court's interpretation, Congress can rewrite or pass new legislation. One Supreme Court case that prompted Congress to amend the IDEA to clarify its intent was the 1984 case of *Smith v. Robinson*.[12] In that case, the Supreme Court held, among other things, that under the IDEA as it was then written, parents could not recover attorneys' fees. Congress subsequently passed the **Handicapped Children's Protection Act (HCPA)** in 1986 to allow for attorneys' fees in certain circumstances under the IDEA. There has been a substantial amount of litigation concerning situations in which those attorneys' fees can be awarded.[13] Interaction among the various agents in the development of law has continued as the interpretation of the IDEA continues to evolve.

Summary

The basic legal framework applicable to education of students with disabilities is currently found primarily in a federal statute, the IDEA, and in its regulations and the state statutes passed in conjunction with the federal law. These requirements developed as a result of the dynamic workings of our legal system. The United States Constitution (through the Fourteenth Amendment's equal protection and due process requirements) was interpreted by federal courts (in *Pennsylvania Association of Retarded Children [PARC] v. Pennsylvania* and *Mills v. Board of Education*), which set out a general framework for what the Constitution required of states in providing special education. The general framework of the decisions was then the basis for the passage of a federal statute (the IDEA) and the detailed regulations developed pursuant to it.

Although the IDEA and its regulations now are the primary source of law for special education, numerous judicial interpretations of the IDEA are essential additional reference points. The Supreme Court has issued several opinions clarifying certain issues but leaving others unresolved. An enormous body of case law at lower court levels continues to provide additional and sometimes conflicting interpretations of the IDEA. Statutory amendments have been passed in response to judicial decisions and recognized gaps or needs for clarification in the statute.

With this expanding body of statutory, regulatory, and judicial law, it might seem that answers to most questions about what is required of schools in providing special education would by now be found within existing laws. As the following chapters illustrate, however, many questions remain unanswered, and it is likely that the development of law on these issues will continue for some time.

Appendix A provides a more detailed explanation of the American legal system, the way it works, and information on how to stay abreast of legal developments.

Questions for Reflection

1. Why doesn't Congress develop all the details of the IDEA and other statutes rather than leaving that to administrative agencies?
2. Is it good policy to enact a statute that may be intentionally somewhat vague on certain points?
3. Which is the fastest and most efficient way to develop law—through the court system or the legislative process? What are the advantages and disadvantages of each?
4. What are the advantages and disadvantages to establishing an administrative hearing procedure to resolve special education disputes between the parties, as opposed to allowing parties to proceed directly to state or federal court?

Key Terms

Americans with Disabilities Act (ADA)
case law
certiorari
common law
disability
Education for All Handicapped Children Act (EAHCA)
Handicapped Children's Protection Act (HCPA)
Individuals with Disabilities Education Act (IDEA)
notice
Section 504 of the Rehabilitation Act
stare decisis

Web Resources

Code of Federal Regulations

https://www.govinfo.gov/app/collection/cfr/2019

This link is to the Code of Federal Regulations homepage. The website allows users to search for all regulations promulgated by the U.S. Department of Education (Title 34), including those regarding the IDEA.

Office for Civil Rights

http://www.ed.gov/about/offices/list/ocr/index.html? src=oc

This homepage for the U.S. Department of Education's Office of Civil Rights describes what the Office's role is in enforcing civil rights laws, including those affecting special education. The site also contains links to various laws pertaining to special education and a "reading room," which posts federal publications regarding special education law.

Chapter 2

Students With Disabilities

History of the Law

Learning Objectives

After reading Chapter 2, you should be able to

2.1 Explain how students with disabilities were provided education historically

2.2 Recall the philosophical changes in the 1970s and how this affected education for students with disabilities

2.3 Describe the basic political framework for these changes

2.4 Describe how the Constitution was applied through litigation to establish a new approach to educating students with disabilities

2.5 Describe how judicial decisions led to the passage of the Education for All Handicapped Children Act (EAHCA) of 1975

2.6 Identify the basic principles of the EAHCA

2.7 Describe the major amendments to the EAHCA up to the present and its change to the Individuals with Disabilities Education Act

2.8 Describe how accountability in education through No Child Left Behind has affected special education and how the change to the Every Student Succeeds Act has evolved that accountability

2.9 Describe the basic provisions of the Rehabilitation Act and the Americans with Disabilities Act and their relationship to special education statutes

Special Education Before the 1970s

The development of educational philosophy toward students with disabilities in schools occurred in several phases.[1] The first phase, in the late 1800s, reflected an intention of relieving stress on the teacher and other students by removing students with disabilities to separate special classes. This segregationist attitude continued in later years, but the underlying basis was to

avoid stress on the individual with a disability. Eventually, some educational programming was provided, first in the form of diluted academic training and later as training for manual jobs. The students were still segregated for the most part, and there was a continued concern to avoid disruption in the classroom. Many students with disabilities were never sent to school.

By the mid-1900s, an important shift had begun—the recognition of the self-worth and dignity of the person that led to the goal of teaching self-reliance. Also at about this time, vocal leaders in education recognized that separation, or segregation, in the educational process was usually inherently negative. The education of students with hearing and visual disabilities had a somewhat different history in terms of the types of training they received. There was a similarity historically, however, in that education was usually provided in a segregated setting. The statements from congressional hearings included later in this chapter provide a firsthand perspective on the state of affairs by the early 1970s. These attitudes are substantially different from today's approach. Advocates for independent living, however, would argue that the status today is still far from where it should be.

Terminology used in this book attempts to reflect the changing philosophy about appropriate language when discussing issues of special education. First, it should be noted that many of the early foundational judicial decisions were written before some of the preferred language changes had occurred. This textbook does not change the courts' terminology but notes here that often terminology such as "retarded" is not deemed appropriate. Congress enacted "Rosa's Law," in 2010 to change references to mental retardation in federal laws to intellectual disability. The United States Department of Education subsequently amended federal regulations to implement the statutory change as well.[2]

Federal statutes use both "disability" and "**handicap**," although most of those relevant to special education now use the term "disability." The most recent editions of *Special Education Law* use "people first" language. Views have changed on this preference, especially with respect to some types of disabilities, but in most instances this textbook will use "people first" language.[3]

A Constitutional and Political Framework for Change

It was *Brown v. Board of Education*[4] that most forcefully stated the philosophy of integration. That decision was based on the federal constitutional principle of the Fourteenth Amendment, which provides that the states may not deprive anyone of "life, liberty, or property, without due process of law" nor deny anyone "equal protection of the laws."[5] Though the Supreme Court has held consistently that there is not a fundamental right to an education in the United States Constitution; the Court has recognized that, if the state undertakes to provide public education (which all states do), it must meet equal protection and due process requirements. The *Brown* decision recognized that if African American students were educated separately, even in facilities "equal" to those of white students, their treatment was inherently unequal because of the stigma attached to being educated separately and the deprivation of interaction with students of other backgrounds.

The concept of educating the student with a disability in the regular classroom as much as possible (known as ***mainstreaming*** or *inclusion*) paralleled the movement away from racial segregation and helped lead to the determination that separating students was detrimental to them.

Congress made preliminary efforts to provide for special education by enacting grant programs in 1966 and 1970,[6] but these were primarily incentive programs with little in the way of specific guidelines and enforcement. Although mainly for personnel development, these programs attempted to address the issue of educating students with disabilities in the regular school system.

By 1975, about three million students with disabilities were not receiving appropriate programming in public schools. In addition, about another one million were excluded totally from public education. So, of the more than eight million students with disabilities in the United States, more than half were receiving either inappropriate or no educational services.[7] Financing was one reason that special education was inadequate; special education is costly and supporting it is burdensome for local school districts. By 1975, state education agencies had taken on a substantial role in special education, both by mandating it and by allocating funds to help subsidize it in local school districts.

In the 1970s, special education could usually be described by a number of common practices. Identification and placement of students with disabilities was haphazard, inconsistent, and generally inappropriate. African American, Hispanic, and some other ethnic groups were often stereotyped and disproportionately placed in special education programs. Parental involvement was not required and generally discouraged. Special education placements were often made with the goal of avoiding disruption in the regular classroom. Special educators and regular educators were competitors for resources, and the two groups did not work in a spirit of cooperation.

The application of the principles set forth in the *Brown* decision to the education of students with disabilities became a legal theory in more than 30 separately filed cases throughout the country. Two of these cases culminated in landmark decisions in 1971 and 1972. In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*[8] and *Mills v. Board of Education*,[9] district courts approved consent decrees that enjoined states from denying education to students who were mentally retarded (now referred to as ***intellectually disabled***) and students with other disabilities without due process. The *Mills* consent decree went so far as to set out an elaborate framework for what that due process would entail. Both of these cases were based on constitutional theories of Equal Protection and Due Process under the Fourteenth Amendment and were the impetus for similar cases in several states.

As previously noted, there is no federal constitutional right to education. It is only when the state undertakes to provide education that the Fourteenth Amendment comes into play. When states provide education, they must do so on equal terms, and they must not deny this state-granted right without due process.

In its evaluation of what is meant by equal terms, the Supreme Court has traditionally applied different degrees of scrutiny to the practices of governmental entities. If the individual affected by the practice is a member of a suspect class (such as a racial minority) or if the right at issue is a fundamental right (such as privacy), the practice will be strictly scrutinized (evaluated very carefully). Where the classification is not a specially protected class or if the right is not fundamental, the practice will usually be upheld if there is any rational basis for it. Individuals with disabilities have not been held to be members of a suspect class,[10] but education has been recognized as deserving of "special constitutional treatment," and an intermediate test of heightened scrutiny has been applied in some situations.[11] It is important to note that in assessing whether students with disabilities are receiving equal protection in their educational programming, one

should not use equal expenditures of money as the measure, although it is often difficult to determine exactly what constitutes equality.[12]

The due process clause of the Fourteenth Amendment requires procedures to be appropriate to the protected interest at stake. Obviously, in a criminal proceeding, states must be extremely careful that the individual has received appropriate due process because incarceration is a serious deprivation of liberty. Education is recognized as an important property interest by states, because without it, a person may not succeed in life. Education is important for helping individuals with disabilities to live independently or semi-independently. For that reason, the court in the *Mills* decision mandated that due process include procedures relating to the labeling, placement, and exclusionary stages of decision making. The procedures should include a right to a hearing (with representation, a record, and an impartial hearing officer), a right to appeal, a right to have access to records, and written notice at all stages of the process.[13] The basic framework set out in *Mills* was incorporated into the EAHCA (now known as the Individuals with Disabilities Education Act or IDEA).

Because of potential confusion that might result from varying decisions in other jurisdictions and pressure from administrators at the state level concerned about the cost of providing special education, Congress intervened. The civil rights movement and related activities provided a favorable political atmosphere for the enactment of strong legislation. Congress passed federal grant legislation to encourage states to adopt appropriate procedures for providing education to students with disabilities. This is described in the following section.

Statutory Responses

The Individuals With Disabilities Education Act

While the constitutional principles theoretically would mandate equal protection and due process for students with disabilities in the public school setting without any statutory requirement at the federal level, Congress recognized that states would have difficulty implementing the constitutional requirement to provide education to these children. And although most states already had statutes in place requiring the education of students with disabilities, there was a great deal of inconsistency in what states required, and many states did not have very strong programs of special education when *PARC* and *Mills* were decided.

During the 1973–1974 congressional hearings on educational services for children with disabilities, a number of problems with the status of special education were revealed through testimony and statements. These statements indicated that, to a large extent, states that were acting in good faith and attempting to provide special education had serious problems of administration and financing. In other instances, parents had been successful in getting the school administration to implement a local program benefiting one or a few individuals but at a cost of substantial effort and energy on the part of the parents. And, perhaps most troubling, in some areas, significant numbers of students were still being excluded.

The following statements from those hearings[14] illustrate more graphically some of these problems. The first statement indicates the most severe situation—the child who is simply institutionalized and not given an education.

Statement of Dr. Oliver L. Hurley, Associate Professor of Special Education, University of Georgia, Athens (p. 657)

Some years ago, during the course of a visit to the State Institution for the mentally retarded, I encountered a little girl who was lying in a crib. Wondering why she was so confined while the other children were not, I began to play with her. I found that even though I could make eye contact with her, she was unable to follow me with her eyes for more than about 12 inches. I began to try to teach her. In about 15 minutes she could follow me about a quarter of the way around the bed. I was convinced then, and still am, that with a little work the child could have been taught some useful behavior and could have been gotten out of the crib. It seems safe to say that no one with any authority was concerned about the education of that little girl.

For me, this child, who showed some ability to learn, typified our reactions to these difficult cases—hide them away, exclude them, forget them. Such a prejudicial attitude toward those who are different must be changed. The "Education for All Handicapped Children Act" will help in this regard. Someone must assume responsibility for the education of such children. To me, the State education agencies are a logical choice. It seems antithetical to American philosophy, as I see it, that whether or not a handicapped child gets proper care and proper educational treatment depends on the fatness of that child's father's wallet.

The problem of different levels of services from state to state was raised by a parent of a child with a hearing impairment. It also highlights the benefit of early education.

Statement of Mrs. Gordon Wuddleston, Orangeburg, SC, Parent of a Severely Hard-of-Hearing Child (pp. 796–799)

My husband and I are particularly interested in this bill because we have experienced education in four States for our hearing-impaired son, and in these four States we have found a vast difference in what is provided for him. Perhaps by telling my story, I can best illustrate to you some of these differences that we have experienced.

In 1950, our son David was born with a severe hearing impairment. We discovered this when David was 2 years of age. We were living in Parkersburg, W.Va., at the time, and because of limited medical facilities we were referred to Dr. Helmer Michelbust, at the Institute of Language Disorders at Northwestern University, in Evanston, Ill. Dr. Michelbust and his staff told us that David had a severe hearing impairment and was delayed in language, but with proper early education he could develop speech and lip reading ability, to function in society, and the emphasis was on early education. We were told that early ideology and language training was a must.

West Virginia did not have any facilities, but we were fortunate that we lived in an area where we could get to the speech and language clinic at Ohio University. So for 2 years David and I drove 100 miles a day for speech therapy. When David was 4, the educators at Ohio University told us that he was ready for academic training and should be placed in a school for hearing-impaired children, that because of the potential that he had shown during his period of work there they recommended that we definitely seek an oral deaf school placement for our son. There was such a school as part of the public school program in Columbus, Ohio, so at that time our family moved to Columbus, and at age 4 David entered the Alexander Graham Bell Oral School for Hearing-Impaired Children, as part of the public school program in Columbus.

He worked in a classroom with a trained teacher of the deaf, in a public school setting, with a maximum of eight students per class. After 2¾ years in this setting, we were told that David could integrate into the regular classroom in his own district: with supportive help, resource teachers, he could probably function very well. His teacher made use of audiovisual aids, and resource teachers were available to him. He was promoted to the second grade with a B-plus average.

At this time we were transferred to Wilmington, Del., with the Du Pont Co., and moved David there. There were facilities; there were resource teachers; there was also an oral school for hearing-impaired children at Newark, Del. David received from these resource teachers, in a regular classroom setting in Wilmington, one-to-one help in math, reading, and language. At the end of second grade, David was evaluated by the school psychologist and by a staff from the Margaret Struck School for Hearing-Impaired Children, in Newark, Del. It was determined at that time that David was functioning very well in a normal classroom and it would be in his best interest to continue in a regular classroom setting. This is where he could reach his potential, with supportive help. He completed third grade, had a B average, and we were told that he was on his way, and with supportive help he should be able to continue in a normal classroom setting with normal children.

[The testimony then describes the decision to transfer employment to South Carolina.]

Services Not Available in South Carolina

We moved, and we started the school year, and David entered Sheridan Elementary School in Orangeburg, in the fourth grade. We were dismayed to find that he was not able to have a reading teacher help him. He was placed for one-half hour a week in a group session speech therapy with children who did not have a similar defect to his. There were no resource teachers. We sought counseling from the school psychologist: he was very sympathetic. But they explained to us that because of their caseload they just were not able to take him into therapy; consequently, we would have to go it on our own.

Being concerned, I volunteered as a parent to work at school 4 days a week in David's science and math classes to help him come through the year. He did come through. He was in an individual math program. We came through the year, and at the end of the year we tested out 4.9. He had made progress in this area. However, his language and reading teacher was not able to give him the benefit from extra help, and David started downhill. He became frustrated. He started falling behind. His behavior became disruptive. And I might add that he had two teachers, and when he was working in the area of math and areas where he could still compete, his behavior was fine. When he entered the reading and the language area, his behavior became a problem.

The Child Should Adapt

Our son has been evaluated at the Institute for Language Disorders at Northwestern University; Ohio State University; Mid-American Hearing Association, headed by Dr. George Shambaugh, in Chicago; and Margaret Sturk School for Hearing-Impaired Children. All have felt that David had potential and emphasized that he would be able to take his place in a hearing society, and with proper resource teachers in education would not be a burden to society, in that someday, if he were allowed to reach his potential, he could take his place and function in society and would not have to have residential placement or wind up in a correctional institution. He could be a self-supporting member of this society.

The problems of funding in states with limited resources, the need for funding to support construction of physical facilities, and a program to support training of qualified personnel were also noted.

Perhaps of unique interest were statements from a variety of individuals from Pennsylvania, a state under a consent decree to implement the *PARC* decision. *PARC* was the judicial settlement that mandated serving children who were intellectually disabled in the public schools. Many of the comments illustrate the frustration of wanting to carry out the intent and spirit of the order but needing supportive funding to do so. The following is one of many comments from Pennsylvania that indicate the gaps left by the consent agreement.

Statement of Dan Delon, Executive Director, South Dakota Association for Retarded Children (p. 1296)

We have been fortunate in South Dakota to have successfully passed mandatory special education legislation, which requires the provision of appropriate educational opportunities to all exceptional children from birth to 21 years. Since the passage of that bill in 1972, rapid progress has been made in the development of public school programs for handicapped children, but still it has not been enough. DHEW [Department of Health, Education, and Welfare] estimates indicate that only 24.8% of our handicapped children are receiving appropriate educational services. We feel that the estimate may be too high and that the actual figure is closer to 20%. Leading special education experts in our state estimate that more than 5,000 handicapped children will exit from our school systems during the next four years almost totally lacking in skills which will allow them to move into competitive employment areas or successful adjustment to community living.

As an advocate group, we are in the business of making ideals become realities. We recognize that it is ideal that all handicapped children receive a free public education, and in our efforts to make that a reality, we have had to face some very harsh realities about education in a rural state with large impoverished areas.

Statement of Edward Kirsch, Parent of a Child [With an Intellectual Disability] (p. 1550)

[T]he ratio as I understand it in speech therapy is approximately three fulltime or two full-time speech therapists and one part-time speech therapist for the needs of 737 children, and this is rather a ridiculous ratio. These people are really only involved with trainable children so it's hardly likely the children will get much speech therapy. Then again there are the facilities the speech therapists have to share. In one instance there is a speech therapy room sharing space with a piano tuner and a music class. It's hard to imagine anybody can accomplish anything in a situation like that.

One of our biggest concerns is the lack of funds to provide facilities for these children because presently a plan the school board has in mind is to move these children, all 562 of them, to an 88-year-old building on the north side of Pittsburgh in the Manchester area. It's certainly not adequate for the needs of these children in view of the fact that some of them are multiply handicapped and blind and have many other physical handicaps. To put these children in a four-story building seems ridiculous, but there doesn't seem to be any place else for them to go because there are no funds available for new construction.

Many of the parents complain that the children that are teenagers and don't have many more years to spend in the system, and that they are very much concerned because their children have received very minimal vocational and occupational training and shortly they will be out of the system. Where will they go to from there? Many of them were 15 years old when the consent agreement came down so they maybe only have three more years left and agewise they will have to be removed from the system and put into supportive programs outside of the right to education program.

Statement of William W. Wolfinger, Director Special Education Services, Hamburg State School, Pennsylvania (pp. 1538–1539)

We are now at a point of having had over a year and a half of time go by with certainly many accomplishments, but also much remaining to be done.

First, this act, in my opinion, will be a stimulus for our state legislature to look at the total problem of education for all handicapped children since the consent agreement was limited to only the mentally retarded.

Second, it soon became apparent in our implementation of programs for the mentally retarded that much more money was needed for staff, equipment, and physical facilities.

Third, perhaps from such a review by our legislature will emerge the potential for providing a better balance of programs for the handicapped, one that will provide these children with the same program advantages afforded the so-called "normal" child.

> Fourth, perhaps a year-round, twelvemonth school can also emerge since this is so important for handicapped children; 220 days of school instead of the customary 180. . . .
>
> Much remains to be done and without adequate financing most of our needs at each of the state schools will remain unanswered.
>
> Most pressing is the need for adequate physical facilities in which to conduct the educational programs and the related services that are so critical in order to reach the total needs of the child. Buildings are desperately needed that are equipped for the handling of the physically handicapped, since most of the severely and profoundly retarded children found in institutions are also inflicted with severe multiple handicaps. Handicapped children should not be compelled to attend classes or individual sessions in crowded or substandard facilities.

In response to these concerns, as an initial stopgap measure, Congress passed an interim funding bill in 1974 that required states, as a condition of receiving federal funds, to adopt "goal/s/ of providing full educational opportunities to all handicapped children."[15] The interim bill was adopted to give Congress a year to study the issue more carefully. The following year, Congress passed the EAHCA of 1975,[16] which became effective in 1977. There was significant congressional concern about the cost of the legislation. The result of that concern is that the EAHCA is not intended to fund all of the costs of special education fully but is meant to subsidize state and local educational agencies.

The EAHCA was an amendment to the 1970 Education of the Handicapped Act (EHA),[17] which had provided for grants to states to provide special education. The EAHCA amended Part B of the EHA and was significant because it provided the important elements of procedural safeguards, integration, and nondiscriminatory testing and evaluation materials and procedures.

The EAHCA is basically a grant statute that creates individual rights. A state can receive federal funding to support payment for students with disabilities ages 3 through 21 based on a formula of average per-pupil expenditures (which has been adjusted under subsequent amendments). To receive the funding, the state must develop a plan to provide for *all* students with disabilities in the state a "free, appropriate public education which emphasizes special education and related services designed to meet their unique needs."[18] The act specifies the general parameters of the procedural safeguards required of the recipients, and the details of these requirements were eventually developed in the regulations finalized in 1977.[19] The basic underlying principles of the EAHCA (now IDEA) should be noted here, however:

- *All* students with disabilities must be given an education.[20]
- It must be provided in the *least restrictive appropriate* placement.[21]
- Education is to be *individualized* and *appropriate* to the student's unique needs.[22]

- It is to be provided *free.*[23]
- *Procedural protections* are required to ensure that the substantive requirements are met.[24]

In 1990, the EAHCA was amended, and the title was changed to the IDEA. The language of the act changed also, with *handicap* replaced by *disability* throughout. Controversy over what the IDEA requires has resulted in a multitude of cases, and there are now hundreds of reported judicial decisions relating to these issues. Before 1990, the IDEA was often referred to as **Public Law 94–142**, or as the EHA or the EAHCA. Although any of these designations is acceptable, in this book, the *EAHCA* is used in older judicial decision excerpts, and the *IDEA* is most often used in the textual material.

In 1997, the IDEA went through another major amendment. Although the major underlying substantive and procedural principles of the statute remained, they were extended in a number of ways. Prior versions of the law were concerned with ensuring that students were not excluded from school or excluded from free and appropriate services at school. In 1997, Congress went beyond that purpose and started addressing the quality of services provided to students with disabilities by including provisions regarding the expectations and outcomes for students with disabilities.

Congress noted that the implementation of the IDEA had been impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for students with disabilities.[25] To address this, Congress enacted provisions to the IDEA in 1997 that required high expectations for students with disabilities along with access to the "general curriculum." Congress required schools to provide services that would allow students with disabilities "to progress" in the general curriculum.[26] The rationale behind the requirement was that the general curriculum would provide for high educational standards and expectations for students. This was because of a variety of other state and federal laws about education standards that governed the development of the general curriculum by local school districts. These state and federal laws include Title I of the Elementary and Secondary Education Act of 1965, which would become part of **No Child Left Behind (NCLB)** in 2002. NCLB was revised to become the **Every Student Succeeds Act (ESSA)** in 2015.[27]

There were other changes to the law as well, including changes in the areas of discipline, attorneys' fees, provision of special education services to students in private schools, statewide assessment (testing) requirements, **individualized education program (IEP)** requirements, transition requirements, and the funding formula. The statute also received its first renumbering since its initial passage in 1975. This renumbering makes it difficult to cross-reference current provisions with pre-1997 provisions, although the case excerpts throughout this book attempt to provide appropriate cross-referencing by bracketing the current citation to the statute.

Congress amended the statute again in 2004 and continued on the path of high expectations and outcomes for students with disabilities, stating that "the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum

extent possible, in order to—(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible."[28] Along these lines, Congress made a change to the name of the law. It is now called the **Individuals with Disabilities Education Improvement Act (IDEIA)**. However, Congress also stated that it could still be referred to under its previous title, the Individuals with Disabilities Education Act (IDEA), so the previous title is often used in publications (including this book).Congress also expressly addressed the overall goal of the law in terms of outcomes for students with disabilities by noting that a purpose of the law was to prepare students with disabilities "for further education, employment, and independent living."[29] The 2004 changes contained a number of express connections between the IDEA and the 2002 requirements in NCLB. Some of these requirements were changed when NCLB was revised to become the ESSA in 2015, but the core concepts noted here still apply.[30] These connections include the quality of services provided to students with disabilities, more express provisions regarding students with disabilities taking statewide assessment tests, and the qualifications for school personnel and others who provide services to students with disabilities.[31] The IDEA requires that the special education and **related services**[32] and the supplementary aids and services provided to students with disabilities be based on "peer-reviewed research to the extent practicable."[33]

The findings and purpose of the IDEA in 2004 also focus on prevention and technology. Congress emphasized the importance of providing "scientifically based early reading programs, positive behavioral interventions and supports, and early intervention services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children."[34] Early intervention services are for students who are not currently identified as needing special education services but need additional academic and behavioral support to succeed in a general education environment.[35] Congress also noted that the education of students with disabilities can be made more effective with the use of assistive technology.[36]

One example of following a preventive approach is in the area of identifying students with learning disabilities as eligible for services under the law. The IDEA 2004 allows and encourages states to use **response to intervention (RTI)** or similar approaches that are premised on concepts of early intervention and student achievement and progress in grade-level content.[37] Other changes made in 2004 include changes to IEP requirements, IEP development, and IEP team meeting requirements, reevaluation requirements, parental rights, discipline, dispute resolution, attorneys' fees, and paperwork requirements. These changes are discussed in detail in the appropriate sections of this book.

State Statutes

Initially, every state except New Mexico elected to receive federal grant support under the EAHCA (hereinafter referenced as *IDEA*). The *PARC* and *Mills* decisions and similar actions in other states had arguably made it necessary for the states to implement much of what was being required under the IDEA, even states not electing to apply for the federal support. In addition, statutory authority in Section 504 of the Rehabilitation Act of 1973 required states to provide

education in a nondiscriminatory manner to students with disabilities. Perhaps because of all these pressures, New Mexico eventually also elected to apply for IDEA funding.

The IDEA and its regulations set out minimum requirements that states had to meet to be eligible for funding. Those states with statutes and regulations already in place before enactment of the IDEA sometimes had difficulty adjusting to the new law, and those with no policy in place had the task of developing one. As the IDEA's requirements changed and evolved over the years, states made changes to their state laws to remain in compliance with federal requirements. Occasionally, conflicts still arise between state and federal mandates over what constitutes appropriate education for students with disabilities or whether state requirements comply with federal requirements.

Section 504 of the Rehabilitation Act

Even before passage of the IDEA, Congress passed the Rehabilitation Act of 1973, which includes Section 504. That section requires that

> [n]o otherwise qualified individual with a disability . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[38]

In addition to federal financial assistance provided under the IDEA to states specifically for "the purpose of providing special education," states receive a great deal of funding from the federal government to support other educational programs. Although Section 504 did not grant funds to the states to provide education for students with disabilities, the law prohibited any program receiving federal funding from discriminating on the basis of disability. Model regulations under Section 504 provide a general guideline on what programs receiving federal funding must do to ensure nondiscrimination on education programs.[39]

The IDEA might appear to be unnecessary because Section 504 already provides protection. It is important, however, to recognize several factors that make the IDEA essential to the provision of special education. First, Section 504 refers only to nondiscrimination, and the IDEA contemplates that a substantial amount of subsidization will take place to ensure that students with disabilities not only receive educational services but also benefit from this education. While Section 504 case law has indicated that some **reasonable accommodation** must be provided to meet the nondiscrimination standard, the level of accommodation being provided in public education under the IDEA goes beyond what is required in other contexts. Second, while Section 504 was passed in 1973, before the 1975 IDEA, the regulations under Section 504 were not finalized until 1978, and there was no detailed framework for the schools to follow. Finally, because the Section 504 regulations were finalized after the IDEA regulations, they are much less detailed, and in fact, incorporate by reference the IDEA regulations. Should the IDEA be repealed or deregulated (as was attempted in the early 1980s), Section 504 would provide much less protection in terms of both substantive requirements and procedural safeguards. The fact that Section 504 is not a funding statute provides an additional problem with it as a source of ensuring educational services.[40]

The Americans With Disabilities Act

In 1990, Congress passed the Americans With Disabilities Act (ADA)[41] prohibiting discrimination on the basis of disability. The reason for its passage was to expand the protection found in the Rehabilitation Act to the private sector. While education was not its primary focus, the ADA does apply to both public and private schools. Most of the ADA requirements for schools already exist through Section 504 of the Rehabilitation Act, and it is likely the IDEA will preempt the ADA to the same extent it preempts Section 504. There will remain, however, at least some situations where the ADA will apply.[42] A sequential listing of the major legal developments for students with disabilities, which incorporates the most important cases leading up to and interpreting the statutes, is found in Appendix B.

Regulatory Responses

As noted in Chapter 1, federal and state statutes provide administrative agencies the task of developing regulations that provide details to help implement statutory requirements. These regulations have evolved and changed over the years when the federal and state statutes were changed. While Congress has not amended the substance of the IDEA since 2004, the United States Department of Education has enacted regulations on several occasions since that time to address a number of issues including parental consent, non-attorney representation in due process hearings, state monitoring requirements, alternate assessments, fiscal requirements, and promoting equity un the IDEA.[43]

Summary

The right to education for students with disabilities did not become a comprehensive program until 1975, with passage of the EAHCA. Before 1975, some states provided some educational programming to some students with certain disabilities. Federal law before 1975 provided incentive funding to those states that provided special education.

The 1975 amendment to the federal incentive programs was the real guarantee of a comprehensive and consistent program for providing education to students with disabilities. The 1975 EAHCA included the important requirements that appropriate education must be provided to all students with disabilities in the least restrictive appropriate setting at no cost to parents and that procedural safeguards for parents must be in place to enforce these rights.

Although the EAHCA (now IDEA) does not mandate that states comply with its requirements unless they seek funding under the IDEA, states need the additional federal funding. They also recognize that public educational agencies are subject to the 1973 Rehabilitation Act and the 1990 Americans with Disabilities Act prohibiting discrimination on the basis of disability as well as constitutional equal protection and due process requirements. For these reasons, all states have elected to accept funding under the IDEA.

The requirements of the IDEA have developed and evolved over the years, but the concepts of providing students with disabilities with a free and appropriate public education and including parents in the process remain central components of the law. Newer provisions of the law include requirements aimed at increasing and improving the expectations and outcomes for students with disabilities.

Courts have issued many decisions interpreting federal statutes. These include a number of Supreme Court opinions. In some situations, Congress has responded to a Supreme Court decision by amending the statute. This continuing dynamic relationship among Congress, the courts, and regulatory agencies is likely to continue.

Questions for Reflection

1. Why has the IDEA evolved over the years to include requirements regarding high expectations for students with disabilities? What effect have these provisions had on the services provided to students with disabilities? Do these requirements have any effect on students without disabilities? Why, or why not?

2. One of the requirements in the IDEA since 1997 is that students with disabilities progress in the general curriculum. This requirement, along with the least restrictive environment requirement mentioned in this chapter (see Chapter 9 for more information about this topic), encourages schools to educate students with disabilities in the regular classroom along with students without disabilities to the maximum extent appropriate. The United States Department of Education reports that in 2022-2023 "more than 66% of children with disabilities were in general education classrooms 80% or more of their school day."[44] At the same time, the law requires schools to provide students with disabilities with individualized instruction that meets each student's unique needs. Is there a conflict between these provisions? Are there ways that schools can differentiate instruction for students within the same class to meet everyone's needs?

3. Consider the following scenario:

   Jeff is a second-grade student with a learning disability in reading. His IEP includes direct individualized instruction in basic reading concepts and phonics for 30 minutes per day. The instruction is different from the instruction his fellow students receive in class and needs to be provided by a special education teacher, as opposed to the regular classroom teacher.

   How should the services be provided? Would it be stigmatizing to remove Jeff from the regular classroom for 30 minutes per day and place him in a group of other students with similar needs for reading services? If so, should that stigmatization factor into the decision on where or how he receives services?

Key Terms

Every Student Succeeds Act (ESSA)
handicap
individualized education program (IEP)
Individuals with Disabilities Education Improvement Act (IDEIA)
intellectually disabled
mainstreaming
No Child Left Behind (NCLB)
Public Law
reasonable accommodation
related services
response to intervention (RTI)

Web Resources

IDEA's Impact

https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf

The U.S. Department of Education describes the improvements IDEA has brought to special education over 35 years.

A History of the Individuals with Disabilities Education Act, https://sites.ed.gov/idea/IDEA-History

The U.S. Department of Education provides a history of the Individuals with Disabilities Education Act and describes the improvements to special education resulting from IDEA's passage more than 45 years ago.

47 Years Later, Are We Delivering on the Promise of IDEA? https://sites.ed.gov/osers/2022/11/47-years-later-are-we-delivering-on-the-promise-of-idea/

On the 47th anniversary of the passing of IDEA, Valerie C. Williams, Director of the Office of Special Education Programs, reflects on the progress made under IDEA, but ultimately calls for further action to provide equitable opportunities in general education so children with disabilities can reach their full potential.