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Students with Disabilities

HISTORY OF THE LAW

LEARNING OUTCOMES

After reading Chapter 2, you should be able to

- Know how students with disabilities were provided education historically
- Know the philosophical changes in the 1970s and how this affected education for students with disabilities
- Describe the basic political framework for these changes
- Describe how the Constitution was applied through litigation to establish a new approach to educating students with disabilities
- Describe how judicial decisions lead to the passage of the Education for All Handicapped Children Act (EAHCA) of 1975
- Identify the basic principles of the EAHCA
- Describe the major amendments to the EAHCA up to the present and its change to the Individuals with Disabilities Education Act
- 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
- 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.

A CONSTITUTIONAL AND POLITICAL FRAMEWORK FOR CHANGE

It was *Brown v. Board of Education*² 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.”³ The Supreme Court has held consistently that there is no federally protected right to education; nonetheless, if the state undertakes to provide education (which all states do), a property interest is thereby created by the state. 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 1970,⁴ 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.⁵ 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.

By 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 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*⁶ and *Mills v. Board of Education*,⁷ 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 an important one, 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,⁸ but education has been recognized as deserving of “special constitutional treatment,” and an intermediate test of heightened scrutiny has been applied.⁹ 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.¹⁰ 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.¹¹ 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. It passed federal grant legislation to

encourage states to adopt appropriate procedures for providing education to students with disabilities, procedures that would be consistent with judicial decisions. The civil rights movement and related activities provided a favorable political atmosphere for the enactment of strong legislation.

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 hearings¹² 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

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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 full-time 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) [NOTE THAT TODAY THE TERM
“RETARDED” WOULD BE “INTELLECTUALLY
DISABLED”]*

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

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same program advantages afforded the so-called “normal” child.

Fourth, perhaps a year-round, twelve-month 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.”¹³ The interim bill was adopted to give Congress a year to study the issue more carefully. The following year, Congress passed the EAHCA of 1975,¹⁴ 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),¹⁵ 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.”¹⁶ 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 1977.¹⁷ The basic underlying principles of the EAHCA (now IDEA) should be noted here, however:

- *All* students with disabilities must be given an education.¹⁸
- It must be provided in the *least restrictive appropriate* placement.¹⁹

- Education is to be *individualized* and *appropriate* to the student's unique needs.²⁰
- It is to be provided *free*.²¹
- *Procedural protections* are required to ensure that the substantive requirements are met.²²

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.²³ 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.²⁴ 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 2015.²⁵

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.”²⁶ 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). It 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.”²⁷ 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.²⁸ 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.²⁹ One example of a connection between the IDEA and NCLB is the integration of the term “scientifically based research,” which came from NCLB.³⁰ Under the 2004 changes to the IDEA, scientifically based research plays an important role in a number of areas, including (1) professional development and training for school personnel; (2) the procedures used to determine whether students have learning disabilities; and (3) the supports and interventions provided to students, including positive behavioral interventions and supports provided to students with behavioral issues. Similarly, the IDEA now requires that the special education and related services and the supplementary aids and services provided to students with disabilities be based on “peer-reviewed research to the extent practicable.”³¹

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.”³² 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.³³ Congress also noted that the education of students with disabilities can be made more effective with the use of assistive technology.³⁴

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.³⁵ 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. Occasionally, conflicts still arise between state and federal mandates over what constitutes appropriate education for students with disabilities.

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.³⁶

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.³⁷

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.³⁸

The Americans with Disabilities Act

In 1990, Congress passed the Americans with Disabilities Act (ADA)³⁹ 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.⁴⁰ 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.

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. 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) 21
 handicap 19
 individualized education program (IEP) 21
 Individuals with Disabilities Education Improvement Act (IDEIA) 22
 intellectually disabled 13

mainstreaming 12
 No Child Left Behind (NCLB) 21
 Public Law 94-142 21
 reasonable accommodation 23
 related services 20
 response to intervention (RTI) 22

WEB RESOURCE

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.

NOTES

1. These phases are described in more detail in Max L. Hutt and Robert G. Gibby, *The Mentally Retarded Child* (Boston, MA: Allyn and Bacon 1958), 386–391.
2. 347 U.S. 483 (1954).
3. *U.S. Const.* amend. XIV.
4. Pub. L. No. 89–750, § 161, 80 Stat. 1204; Pub. L. No. 91–230, 84 Stat. 175, Part B.
5. Pub. L. No. 94–142.
6. 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).
7. 348 F. Supp. 866 (D.D.C. 1972).
8. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).
9. *Plyler v. Doe*, 457 U.S. 202 (1982).
10. For a more in-depth discussion of these issues, see Laura Rothstein and Julia Irzyk, *Disabilities and the Law* (Toronto, Canada: Thomson Reuters, 2012), §§ 2:34–2:43 and cumulative editions. See also Katharine T. Bartlett, “The Role of Cost in Educational Decisionmaking for the Handicapped Child,” *Law & Contemporary Problems* 48 (1985): 7.
11. 348 F. Supp. at 878–883. See also *Disabilities and the Law*, §§ 2:34–2:48.
12. To Provide Financial Assistance to the States for Improved Educational Services for Handicapped Children: Hearings on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. (May 14, 1973, Oct. 19, 1973, and March 18, 1974) (hereinafter referred to by witness and page number).
13. Pub. L. No. 93–380, 88 Stat. 579, 583 (1974). The first major effort to provide special education at the federal level had occurred in 1966 when Title VI of the Elementary and Secondary Education Act, Pub. L. No. 98–750 (1966), was passed. Title VI provided a single administrative body to coordinate efforts, namely the Bureau of Education for the Handicapped (BEH). Title VI was replaced in 1970 by a separate act, the Education of the Handicapped Act (EHA), Pub. L. No. 91–230 (1970). Part B of the EHA authorized grants to states to assist in providing special education.
14. Pub. L. No. 94–142, enacted November 29, 1975, 20 U.S.C. §§ 1400 *et seq.*
15. Pub. L. No. 91–230 (1970).
16. 20 U.S.C. § 1400(c) (1975); section numbers have been changed.
17. See Chapter 5.
18. See Chapter 5.
19. See Chapter 9.
20. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).
21. See Chapter 7.
22. See Chapter 12.
23. 20 U.S.C. § 1401(b)(4)(1).
24. 20 U.S.C. § 1414(b)(5).
25. 20 U.S.C. § 6301.
26. 20 U.S.C. § 1400(c)(5).
27. 20 U.S.C. § 1400(d)(1)(A). For articles discussing the reauthorization, see Rutherford H. Turnbull, “Individuals with Disabilities

- Education Act Reauthorization: Accountability and Personal Responsibility,” *Remedial & Special Education*, 26, no.6 (Nov.–Dec. 2005): 320–326; Charles J. Russo, Allan G. Osborne, and Elizabeth Borreca, “The 2004 Re-Authorization of the Individuals with Disabilities Education Act,” *Education and the Law* 17, no. 3 (September 2005): 111–117; Susan Etscheidt and Christina Curran “Reauthorization of the Individuals with Disabilities Education Improvement Act [IDEA 2004]: The Peer-Reviewed Research Requirement,” *Journal of Disability Policy Studies* 21, no. 1 (February 23, 2010): 26-39; Rutherford Turnbull, Nancy Huerta, and Matt Stowe, “The Individuals with Disabilities Education Act as Amended in 2004,” *Beach Center on Disability at the University of Kansas* (2006).
28. NCLB and ESSA are explained in more detail in Chapter 3.
29. For provisions on assessments, see 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a); and Chapter 8 of this book. For school personnel qualifications see 20 U.S.C. § 1402(10)(B); 20 U.S.C. § 1412 (a)(14)(C); 34 C.F.R. § 300.18; and Chapter 4.
30. The term was defined in the regulations at 34 C.F.R. § 300.35. The definition was removed when NCLB was amended to become ESSA, but the term remains in various parts of the law including 20 U.S.C. §§ 1411, 1413, 1454, 1462. The ESSA term changed to “evidence based interventions” in 2015. 20 U.S.C. § 7801(21).
31. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).
32. 20 U.S.C. § 1400(c)(5)(F).
33. 34 C.F.R. § 300.226(a).
34. 20 U.S.C. § 1400(c)(5)(H).
35. See Chapter 6 for more information about response to intervention.
36. 29 U.S.C. § 794.
37. C.F.R. Part 104, Subpart D.
38. See Chapter 7.
39. 42 U.S.C. §§ 12101 *et seq.*
40. See Chapter 7.