

*New
Edition*

Navigating Special Education Law and Policy

Dixie Snow Huefner
Cynthia M. Herr

IEP

RESOURCES

IEP
IDEA
FERPA
ADA

Navigating Special Education Law and Policy

New Edition

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Dedication

This book is dedicated to all the educators and parents who help children with disabilities lead meaningful lives and contribute to the society in which we live.

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Just as it takes a village to raise a child, according to the African proverb, so it takes a village or at least a professional family to raise up a book. Special thanks go to colleagues and students, who, over the years, have helped us keep current and accurate. Thanks are also due to our editors at Attainment Company, Inc., for much encouragement and support. Any errors or misunderstandings, of course, are our responsibility, not that of others.

Reflecting on influences that helped to shape this book, Dixie is struck by how many educators and lawyers are on her family tree. She adds: Like my father, however, I chose not to practice law, and I have been happy to combine education and law in the service of special education. My high school vice-principal was the first to tell me that I should consider becoming an educator. Some twenty years later, I took him seriously. My interest in political science, education, law, and individuals with unique and special needs and talents combined to create mid-life career opportunities in special education law. I thank my gene pool, my environmental circumstances, and the values and support of my family for the instincts, incentive, and ability to pursue my interest in special education law over the past three decades.

Cindy is, first of all, honored and grateful to Dixie for the opportunity to collaborate on this third edition. She adds: I have used this book, from the first edition on, as a text in my Law & Special Education class. It has provided many graduate students in special education with a firm understanding of both the spirit and the letter of special education law. I also thank Dr. Barbara Bateman for providing me with my first introduction to special education law many years ago when IDEA was very new. In the years since, Dr. Bateman is the “expert” to whom I have turned whenever I have questions about the law. I am grateful to her for so many years of mentorship, and for her abiding friendship.

Introduction

This book is about special education law and children with disabilities who are of public school age. It is written primarily as a textbook for educators-in-training and is suitable for an undergraduate or a graduate text in colleges and universities. It is also suitable as an introduction to special education law for practitioners: special and general education teachers, principals and superintendents, special education directors, school psychologists, social workers, school board members, board attorneys, parents, and others who have reason to understand special education issues and do not yet have many years of experience dealing with them. Higher education instructors, especially those who teach graduate students, will want to supplement this book with actual court cases, journal articles, case studies, and the statutes and regulations themselves.

The book is designed to provide a framework for understanding why educators are asked to serve children with disabilities in so many specific ways. It also attempts to indicate how special education law has evolved over the years. It is not a primer or a cookbook with quick and easy recipes for particular troubles, although it does suggest strategies to prevent problems. The overall intent is twofold: (a) to provide a conceptual foundation for the expansion over the past 40 years of federal law affecting children with disabilities, and (b) to help educators and parents be informed about their vital roles and the roles of multiple professionals in educating children with disabilities and steering federal and state policies. The law keeps changing, and those who were exposed to the law in earlier years need to understand the developments that have occurred over the past decade.

With this, the third edition, the final IDEA regulations of 2006 have been integrated into the text. Important court cases decided after the second edition have likewise been included, along with updated statistical information on IDEA students. Additional relevant No Child Left Behind Act regulations have also been incorporated, along with the 2008 amendments to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act and the 2008 amendments to FERPA regulations.

Readers will discover that we spend more time on legislation and regulations than on judicial decisions. It is important to understand that, in the special education arena, as in other areas of law, legislation has primacy and establishes the basic legal standards. Regulations follow to help clarify the intent of the legislation and guide its implementation. Court interpretation comes last, after ambiguities in the law create issues that require judicial resolution.

Readers may find that they want to read the book from start to finish. On the other hand, Part I provides an overview for those who simply want a basic understanding of the three major statutes affecting students with disabilities. Part II, the longest part of the book, describes the major issues that have arisen under IDEA. Part III describes the nondiscrimination requirements of Section 504 for those who wonder what Section 504 does that the Individuals With Disabilities Education Act (IDEA) does not.

We hope that, whatever use you make of the book, you will understand more completely the rights of children with disabilities; the complexities of the legal relationships between federal and state governments; the relative contributions being made by legislation, regulations, and court decisions; and the ultimate responsibility that rests with parents and teachers to make appropriate education a reality for children with disabilities.

Dixie Snow Huefner and Cynthia M. Herr
Spring 2011

About the Authors



Dixie Snow Huefner

Dixie Snow Huefner is professor emerita in the Department of Special Education at the University of Utah. One of the few professors of special education with a law degree, her training and perspective have given her an unusual advantage in teaching and writing about special education law. With an undergraduate degree in political science from Wellesley College and graduate degrees in special education and law from the University of Utah, she has been a close observer and sometime-participant in politics and public policy in Massachusetts, Utah, and Washington, DC. After completing law school and being admitted to the Utah State Bar, she served a prestigious clerkship with the Honorable Stephen H. Anderson, U.S. Court of Appeals for the Tenth Circuit, before joining the Special Education Department as a full-time faculty member.

Professor Huefner's teaching and writing have focused on areas of special education law; home, school, and community partnerships; and disability law and policy. Her articles have appeared in leading education and law journals. In addition to earlier editions of *Navigating Special Education Law and Policy* (formerly titled *Getting Comfortable With Special Education Law*), she co-authored *Education Law and the Public Schools: A Compendium*, published by Christopher-Gordon Publishers. While a full time faculty member, she was a frequent presenter at national and regional conferences and training institutes and a member of the Board of Directors of what is now known as the Education Law Association. During 2004–2005, she was the chair of the board of directors of the Utah Parent Center. She continues her interest and involvement in public policy at all levels of government.



Cynthia M. Herr

Cynthia M. Herr is an assistant professor/research associate in Special Education at the University of Oregon. She has directed and taught in personnel preparation programs in special education for over 25 years. She currently directs a grant-funded personnel preparation program in autism. Dr. Herr has taught children and adults with a wide variety of disabilities in elementary school, community college, and the UO during her 37 years in special education.

Dr. Herr is a nationally recognized author and expert in special education law. She has consulted with school districts and has also served as an advocate for parents of children with disabilities. She has conducted workshops on IEP development as well as social skills training for community agencies. Dr. Herr has published in the areas of special education law, autism, and secondary transition.

In her free time Dr. Herr enjoys reading mysteries and relaxing with her Bernese Mountain Dog, Hershey, and her African Grey Parrot, Akilah.

Common Acronyms Used in Special Education Law

[Acronyms are pronounced as independent alphabet letters unless other wise indicated.]

| | |
|----------------|---|
| ADA | Americans with Disabilities Act |
| ADD / ADHD | Attention Deficit Disorder / Attention Deficit Hyperactivity Disorder (sometimes used synonymously) |
| APSE (ăp-sē) | Average per student expenditure |
| BIP (bip) | Behavioral intervention plan |
| C.F.R. | Code of Federal Regulations |
| EAHCA | Education for All Handicapped Children Act (also known as Public Law 94-142), enacted in 1975 as Part B of the Education of the Handicapped Act (since renamed the Individuals With Disabilities Education Act) |
| ED (ěd) | U.S. Department of Education |
| EHA | Education of the Handicapped Act, the precursor to IDEA |
| ESEA | Elementary and Secondary Education Act |
| ESY | Extended school year |
| FAPE (fāpe) | Free appropriate public education |
| FERPA (fer-pa) | Family Educational Rights and Privacy Act |
| FBA (fooba) | Functional behavioral assessment |
| HCPA | Handicapped Children's Protection Act (part of IDEA) |
| HOUSSE (house) | High, objective, uniform state standard of evaluation |
| IAES | Interim alternative educational setting |
| IDEA | Individuals With Disabilities Education Act |
| IDELR | Individuals With Disabilities Education Law Report |
| IEE | Independent educational evaluation |
| IEP | Individualized education program |
| LEA | Local educational agency (includes a school district, an intermediate educational unit, a public charter school) |
| LEP | Limited English proficiency |
| LoF | Letter of Findings issued by the Office for Civil Rights (OCR) |
| LRE | Least restrictive environment |

| | |
|----------------|--|
| M-D | Manifestation Determination |
| NCLB | No Child Left Behind Act |
| OCR | Office for Civil Rights in the U.S. Department of Education |
| OSEP (o-sěp) | Office of Special Education Programs in the U.S. Department of Education |
| OSERS (o-surs) | Office of Special Education and Rehabilitative Services in the U.S. Department of Education (OSEP is a subdivision of OSERS) |
| PBS | Positive behavioral supports |
| SEA | State educational agency |
| Section 504 | A brief paragraph in the Rehabilitation Act of 1973 prohibiting discrimination against otherwise qualified persons with disabilities in programs or activities receiving federal money |
| U.S.C. | United States Code |

Table A.

Comparison of IDEA, Section 504, and ADA in Education Settings

| | IDEA | SECTION 504 | ADA |
|---------------------------------|---|---|--|
| Nature of Statute | Funding grant and civil rights statute | Civil rights statute | Civil rights statute |
| Statutory Reach | States and school districts accepting money under the statute | Public and private schools (preschool through grade 12) and higher education institutions accepting federal money | Public sector and parts of private sector (e.g., secular private schools and day-care centers) |
| Protected Groups | Students with IDEA disabilities | Students, parents, and employees with Section 504 disabilities | Service recipients (e.g., students, parents) and employees with ADA disabilities |
| Definition of Disability | 13 specific disabilities, if the disability adversely affects the child's education to the extent that special education and related services are needed (developmental delay allowed for younger children) | Functional definition (mental or physical impairment that substantially limits a major life activity, record of such, or regarded as having such an impairment) | Functional definition (essentially the same as Section 504) |
| Age Ranges | Part B: 3 through 21 Part C: Birth through 2 | (Birth to death, depending on program or activity) | Same as Section 504 |
| Program Requirements | Free appropriate public education (FAPE) in the Least Restrictive Environment (LRE) with an Individualized Education Program (IEP) | Nondiscrimination (FAPE) for school-age children Reasonable modifications (programs and services) Reasonable accommodations (employment) Accessible facilities | Same as Section 504 ADA Accessibility Guidelines |
| Enforcement | Administrative complaint mechanisms Private right of action in court | Administrative complaint mechanisms Inferred private right of action in court | Administrative complaint mechanisms Private right of action in court |
| Implementing Agencies | OSEP within ED | OCR within ED Equal Employment Opportunity Commission (EEOC) | OCR EEOC Department of Justice (for Title III) |

Part I

An Overview of Federal Special Education Law

Chapter

The Multiple Sources of Special Education Law

Chapter Outline

Background

**Multiple Sources of Law: Constitutions, Statutes, Regulations,
and Court Cases**

An Introduction to Our Federal Court System

Special Education Acronyms

The Three Parts of This Book

Footnotes and Paragraph Insets

Citations to Federal Court Cases

Citations to Federal Statutes and Regulations

Citations to Administrative Rulings and Documents

Conclusion

Review

References

Selected Supplementary Resources

Background

Before the 1970s there was no such thing as a body of special education law. In fact, prior to 1954 and the U.S. Supreme Court's *Brown v. Board of Education* (1954, hereafter *Brown*) school desegregation decision, there was not much of a body of general school law, either. Education is not mentioned in the U.S. Constitution, and in colonial times education was largely the responsibility of individual families and communities. During the nineteenth century, with the advent of mass compulsory education, it became largely the responsibility of the states. State constitutions created state education systems, and state legislatures delegated authority to state and local boards of education to run those systems with minimal interference. The few existing court decisions came primarily from state courts; these concerned curriculum content and the process by which schools could discipline and exclude students.

Two important interpretations of the U.S. Constitution by the U.S. Supreme Court in the early 1920s resulted in the recognition of parental and private school rights that states had sought to curtail. One case prohibited the states from requiring parents to place their children in public school, recognizing that parents had the right to select a private school education for their children (*Pierce v. Society of Sisters*, 1925)). The other case recognized the right of a private school teacher to instruct elementary school students in a foreign language (*Meyer v. Nebraska*, 1923).

These early cases implicated the constitutional boundaries of public control over private education but not student and teacher rights in the public schools. Rights that we now take for granted were not litigated until after the *Brown* decision. For instance, until the last half of the twentieth century, there were no cases addressing the right of students to be free from unreasonable searches and seizures by school officials. No cases interpreted the free speech rights of students or teachers, or the right to be protected against discrimination based on race, gender, or disability. In most matters, school employees and students were subject to all school district rules, as long as those rules were not considered arbitrary or irrational.

In the aftermath of the desegregation decision in *Brown*, successful cases were brought in which the individual rights guaranteed under the Bill of Rights and the Fourteenth Amendment to the U.S. Constitution were held to apply to students and teachers in school situations. These rights were embedded in the equal protection and the due process clauses, both of which will be discussed in detail in the chapters that follow. As a result of the expansion of these rights to new populations, the number of discrimination claims against school districts grew. Disability rights issues emerged in the wake of expanded federal court involvement in education issues, the larger civil rights movement, and the philosophical “deinstitutionalization” movement within the disability community. The rights of students with disabilities not to be discriminated against, and to receive an appropriate education, were largely the result of accelerated political lobbying and lawsuits in the 1960s and early 1970s. This book addresses these rights and the concomitant responsibilities of general education teachers, special education teachers, school administrators, school psychologists, social workers, other auxiliary personnel, and parents to work together for the benefit of children with special needs.

Many educators and parents have not had the opportunity to understand the legal sources of the rights of children with disabilities or the limits of those rights. Often they read too much into legal decisions, thinking that the decisions are more independent of the facts than they are, or that they reduce the sound discretion of school officials more than is actually the case. One intent of this book