1 Introduction

Education and the American Legal System

KEY CONCEPTS IN THIS CHAPTER

- Sources of Law
- History of Exclusionary Practices
- Effect of the Civil Rights Movement
- Equal Educational Opportunity Movement
- A New Era for Students With Disabilities
- Right to an Appropriate Education
- Litigation Leads to New Legislation

INTRODUCTION

A major challenge facing educational leaders is how to address the needs of individuals with disabilities in school settings. While the primary focus of school officials seems to be typically on students, through their parents, it is important to keep in mind that federal and state laws increasingly take into account the need to safeguard the rights of employees and visitors to school facilities.

Students with special needs and their families are covered by the Individuals with Disabilities Education Act (IDEA, 2005), the Americans With Disabilities Act (ADA, 1990), various state laws, and Section 504 of the Rehabilitation Act of 1973 (Section 504, 2005). However, the primary focus of this book is on Section 504 and the ADA, which together with state laws also protect school staff and visitors with disabilities.

As discussed later in this chapter, school officials were not always concerned with the educational needs of students with disabilities. The current focus on the needs of students with disabilities stands in stark contrast to much of American history. Until well into the nineteenth century, most schools in the United States did little or nothing to look after the educational needs of children with special needs. Special schools and classes began to emerge for children who were visually and hearing impaired as well as for those with physical disabilities during the latter half of the nineteenth century; children who had cognitive deficits, emotional problems, or serious physical disabilities were still largely ignored at that time. During this same time, virtually nothing was done to address the needs of school employees or visitors who had disabilities.

School officials were not always concerned with the educational needs of students with disabilities.

During the late nineteenth and early twentieth centuries, educational reformers developed classes for students who were mentally retarded. Even so, since these programs were segregated, they typically offered little for children with physical disabilities and frequently were taught by personnel who were insufficiently prepared for their jobs. At the same time, federal laws, most notably an earlier iteration of Section 504, began to protect the rights of workers with disabilities who needed vocational rehabilitation and preparation.

Much of the progress that occurred in the early part of the century came grinding to a halt with the onset of the Great Depression. Fortunately, during the latter half, or more precisely, the final third, of the twentieth century, American educational leaders, lawmakers, and others recognized the need to meet the educational concerns of students with disabilities (Scotch, 2001).

When educators and parents think of children with special needs, their thoughts undoubtedly focus on the IDEA, a far-reaching statute that provides a plethora of substantive and procedural safeguards to eligible students and their parents. However, as indicated briefly above, the IDEA is but one of a variety of laws that are designed to protect the rights of individuals with disabilities. Of the other laws, as noted, Section 504 is perhaps the most significant, because it affects not only students and their parents, but also staff, visitors, and anyone else who may have occasion to visit schools. Based on the impact that Section 504 has had on schooling, this

book focuses on how it has impacted American education. At the same time, insofar as the key provisions in the ADA are identical to those in Section 504, the book uses cases litigated under the ADA in discussing how these two laws operate.

In light of the framework of statutes, regulations, cases, and other sources of law that protect the rights of students with disabilities, the first of the two sections in this chapter presents a brief overview of the American legal system by discussing the sources of law. Even though some might perceive this material as overly legal, this section is designed to help readers who may be unfamiliar with the general principles of education law so that they may better understand both the following chapters and the legal system within which they operate. The second section examines the history of the movement to obtain equal educational opportunity rights for students with disabilities, highlighting key cases that shaped the development of Section 504, since developments with regard to the needs of children ultimately impacted on the rights of adults, whether employees or visitors, in school settings. The chapter rounds out with recommendations for educational leaders and their governing bodies whether in K–12 or higher education.

SOURCES OF LAW

Constitutions

Simply put, the U.S. Constitution is the supreme law of the land. As the primary source of American law, the Constitution provides the framework within which the entire legal system operates. To this end, all actions taken by the federal and state governments, including state constitutions (which are supreme within their states as long as they do not contradict or limit rights protected under their federal counterpart), statutes, regulations, and common law, are subject to the Constitution as interpreted by the U.S. Supreme Court.

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As important as education is, it is not mentioned in the federal Constitution. In fact, the earliest federal enactment mentioning education was Article 3 of the Northwest Ordinance of 1787, which declared that "schools and the means of education shall forever be encouraged" (Baron, 1994, p. 86). Pursuant to the Tenth Amendment, according to which "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," education is primarily the concern of individual states.

The lack of a direct mention of education in the Constitution notwithstanding, the federal government can intervene in disputes that arise under state law, as in *Brown v. Board of Education* (*Brown,* 1954), if state action denies individuals the rights protected under the Constitution. By way of illustration, in *Brown,* the Supreme Court struck down state-sanctioned racial segregation, because it violated the students' rights to equal protection under the Fourteenth Amendment by denying them equal educational opportunities. In other words, the Justices were able to intervene in what was essentially a dispute under state law, because once states create and open public schools, then the Fourteenth Amendment requires that they be made available to all on an equal basis.

In addition to delineating the rights and responsibilities of Americans, the Constitution creates three coequal branches of government that exist on both the federal and state levels. The legislative, executive, and judicial branches of government, in turn, give rise to the three other sources of law.

Statutes and Regulations

The legislative branch "makes the law." Put another way, once a bill completes the legislative process, it is signed into law by a chief executive, who has the authority to enforce the new statute. Federal statutes are located in the United States Code (U.S.C.) or the United States Code Annotated (U.S.C.A.), a version that is particularly useful for attorneys and other individuals who work with the law, because it provides brief summaries of cases that have interpreted these statutes. State laws are identified by a variety of titles.

Keeping in mind that a statute provides broad directives, the executive branch "enforces" the law by providing details in the form of regulations. For example, a typical compulsory attendance law requires that "except as provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school in the school district in which the child is entitled to attend school" (Ohio Revised Code, § 3321.03 (2001)). Insofar as statutes are typically silent on such matters as curricular content and the length of the school day, these elements are addressed by regulations that are developed by personnel at administrative agencies who are well versed in their areas of expertise. In light of the extent of such regulations, it is safe to say that the professional lives of educators, especially in public schools, are more directly influenced by regulations than by statutes. Federal regulations are located in the Code of Federal Regulations (C.F.R.). State regulations are identified by a variety of titles.

From time to time the U.S. Department of Education, and particularly its Office of Special Education Programs, issues policy letters, typically in

response to inquiries from state or local educational officials, to either clarify a regulation or interpret what is required by federal law (Zirkel, 2003). These letters are generally published in the *Federal Register* and are often reproduced by loose-leaf law-reporting services.

Common Law

The fourth and final source of law is judge-made or common law. Common law refers to judicial interpretations of issues, as judges "interpret the law" by examining issues that may have been overlooked in the legislative or regulatory process or that may not have been anticipated when statutes were enacted. In the landmark case of *Marbury v. Madison* (1803), the Supreme Court asserted its authority to review the actions of other branches of American government. Although there is an occasional tension between the three branches of government; the legislative and executive branches generally defer to judicial interpretations of their actions.

Common law is rooted in the concept of precedent, the proposition that a majority ruling of the highest court in a given jurisdiction, or geographic area over which a court has authority, is binding on all lower courts within its jurisdiction. In other words, a ruling of the U.S. Supreme Court is binding throughout the nation, while a decision of a state supreme court is binding only in a given jurisdiction. Persuasive precedent, a ruling from another jurisdiction, is actually not precedent at all. That is, as a court in Massachusetts seeks to resolve a novel legal issue, the judge would typically review precedent from other jurisdictions to determine whether it has been addressed elsewhere. However, since another court is not bound to follow precedent from a different jurisdiction, it remains only persuasive in nature.

Court Systems

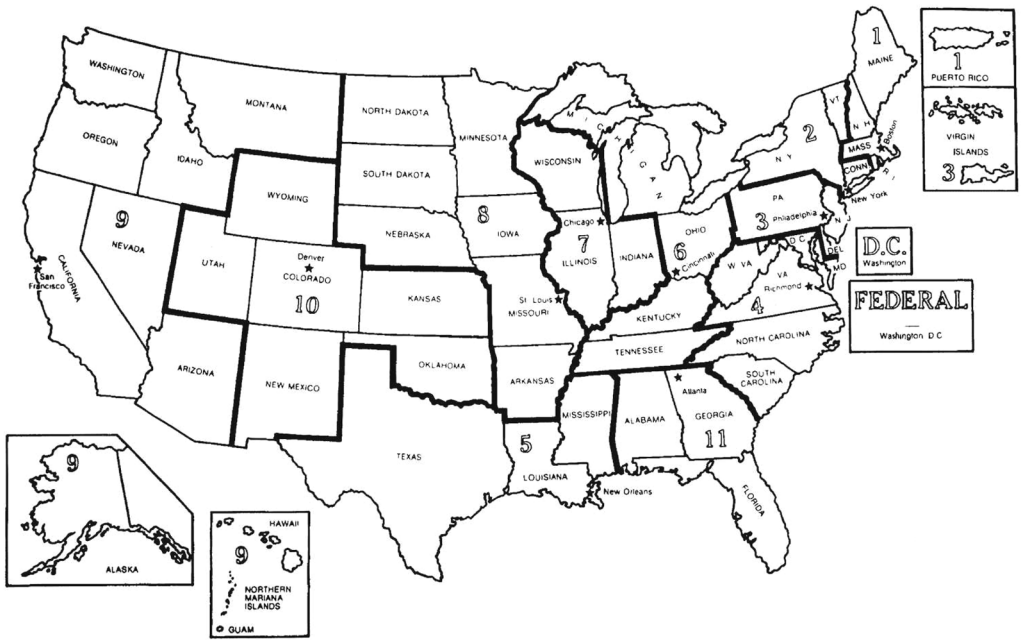
The federal courts and most state judicial systems have three levels: trial courts, intermediate appellate courts, and courts of last resort. In federal court, trial courts are known as federal district courts; state trial courts employ a variety of names. Each state has at least one federal district court, and some densely populated states, such as California and New York, have as many as four. Federal intermediate appellate courts are known as circuit courts of appeal; as discussed below, there are 13 circuit courts. State intermediate appellate courts employ a variety of names. The highest court of the land is the U.S. Supreme Court. While most states refer to their high courts as supreme courts, here, too, a variety of titles are in use.

Trial courts typically involve one judge and a jury. The role of the judge, as trier of law, is to apply the law by resolving such issues as the admissibility of evidence and proper instructions for juries on how to apply the law in the disputes under consideration. Federal judges, at all levels, are appointed for life based on the advice and consent of the U.S. Senate. State courts vary, as judges are appointed in some jurisdictions and elected by popular vote in others. Juries function as triers of fact, meaning that they must weigh the versions of events, decide what happened, and enter verdicts based on the evidence presented at trial. As the trier of fact in a special education suit, a jury (or, in a nonjury trial, the judge) reviews the record of administrative, or due process, hearings and additional evidence and hears the testimony of witnesses. In a distinction with a significant difference, parties who lose civil suits are *liable,* while those who are found to be at fault in criminal trials, a matter well beyond the scope of this book, are *guilty*.

Parenthetically, the vast majority of cases involving education are civil litigation. Civil litigation differs from criminal actions in three basic ways. Civil litigation involves private individuals who file claims either against one another or the state on civil matters such as the right to an education; the measure of damages is usually either legal (meaning monetary, to put individuals in the position that they would have been in) or equitable (hoping to have public officials "do the right things" such as making accommodations for a student with a disability under Section 504). The burden of proof is based on a preponderance of the evidence, meaning that a plaintiff must only provide a little more evidence than a defendant, such that the plaintiff would prevail in a civil trial by a jury vote of four-to-two but would lose if it were deadlocked at three. Conversely, in a criminal case, the state must initiate proceedings to punish wrongdoers who have committed an act that violated criminal statutes, the usual punishment is a fine or imprisonment with capital punishment serving as the exception, and the state must prove defendants' guilt by the much higher standard of beyond a reasonable doubt.

Other than a few select areas such as constitutional issues and special education, which is governed by the IDEA, few school-related cases are directly under the jurisdiction of the federal courts. Before disputes can proceed to federal courts, they must generally satisfy one of two broad categories. First, cases must involve diversity of citizenship, namely that the plaintiff and defendant are from two different jurisdictions, and the amount in controversy must be at least $75,000; this latter requirement is imposed because of the high costs associated with operating the federal court system. Second, disputes must involve a federal question, meaning that it must be over the interpretation of the U.S. Constitution, a federal statute, regulation, or crime.

Figure 1.1 Federal Circuit Courts of Appeal



The party that is not satisfied with the decision of a trial court ordinarily has the right to seek discretionary review from an intermediate appellate court. Figure 1.1 illustrates the locations of the 13 federal judicial circuits in the United States. Under this arrangement, which is designed, in part, for administrative ease and convenience, each circuit is composed of several states. By way of illustration, the Sixth Circuit consists of Michigan, Ohio, Kentucky, and Tennessee. State courts with three-tiered systems most often refer to this intermediate appellate level as a court of appeals. Intermediate appellate courts typically consist of three judges and ordinarily review cases for errors in the record of a trial court. This means that appellate panels usually inquire into such matters as whether a trial court judge properly admitted or excluded evidence from trial, not overturning earlier judgments unless such judgments, rather than the facts, are clearly erroneous.

A party not satisfied with the ruling of an intermediate appellate court may seek review from the high court in a jurisdiction. In order for a case to reach the Supreme Court, a party must file a petition seeking a writ of *certiorari* (literally, to be informed). In order to be granted a writ of *certiorari,* at least four of the Court's nine Justices must agree to hear an appeal. Insofar as the Court receives in excess of 7,000 petitions per year and takes, on average, less than 100 cases, it should be clear that few disputes will

make their way to the Supreme Court. The denial of a writ of *certiorari* is of no precedential value and merely has the effect of leaving the lower court's decision unchanged. It is generally easier for discretionary appeals in state courts to reach the court of last resort, typically composed of five, seven, or nine members, especially where state law is at issue.

Finding Legal Materials

The opinions of the Justices in Supreme Court cases can be located in a variety of sources. The official version of Supreme Court cases can be found in the *United States Reports* (abbreviated "U.S." in case reference listings). The same text, with additional research aids, are located in the Supreme Court Reporter (S. Ct.) and the Lawyer's Edition, now in its second series (L. Ed.2d). Federal appellate cases are found in the Federal Reporter, now in its third series (F.3d); cases that are not chosen for inclusion in F.3d appear in the Federal Appendix (Fed. Appx). Federal trial court rulings are in the Federal Supplement, now in its second series (F. Supp.2d). State cases are published in a variety of publications, most notably in West's National Reporter system, which breaks the country up into seven regions: Atlantic, North Eastern, North Western, Pacific, South Eastern, South Western, and Southern.

The official versions of federal statutes can be found in the United States Code (U.S.C.) or the unofficial, annotated version published by West, the United States Code Annotated (U.S.C.A.). The final version of federal regulations appears in the Code of Federal Regulations (C.F.R.). As with cases, state statutes and regulations are published in a variety of sources.

Prior to being published in bound volumes, most cases are available in so-called slip opinions from a variety of loose-leaf services and from electronic sources. Statutes and regulations are also available in similar readily accessible formats. Legal materials are also available online from a variety of sources, most notably WestLaw. State laws and regulations are generally available online from each state.

Legal citations are easy to read. The first number indicates the volume number where a case, statute, or regulation is located; the abbreviation refers to the book or series in which the material may be found; the second number indicates the page on which a case begins or the section number of a statute or regulation; the last part of a citation includes the name of the court, for lower court cases, and the year in which the dispute was resolved. For example, the citation for *School Board of Nassau County, Florida v. Arline,* 480 U.S. 273 (1987), the first Supreme Court case applying Section 504 in an educational dispute, affirming that officials violated the rights of a teacher that they had dismissed due to the recurrence of her tuberculosis, indicates

that it is located starting on page 273 of volume 480 of the United States Reports. The earlier reported case between the parties, *Arline v. School Board of Nassau County*, 772 F.2d 759 (11th Cir. 1985), which the Eleventh Circuit decided in 1985, begins on page 759 of volume 772 in the Federal Reporter, second series. Following the Supreme Court's ruling, the case was returned to a federal trial court in Florida, *Arline v. School Board of Nassau County*, 692 F. Supp. 1286 (M.D. Fla. 1988), which began on page 1286 of volume 692 of the Federal Supplement; in this opinion, the court held that since the teacher was an otherwise qualified person when she was dismissed, she was entitled to reinstatement and back pay. Similarly, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (2005) appears at Section 794(a) of Title 29 of the United States Code. Further, Section 504's regulations are published at 34 C.F.R. §§ 104.1 *et seq*. (2000), meaning that they start at part 104.1 of Title 28 of the Code of Federal Regulations.

HISTORY

Exclusionary Practices

In the early years of public education, school programs were usually unavailable to students with disabilities. In fact, the courts frequently sanctioned the exclusion of students with disabilities. For example, in 1893 the Supreme Judicial Court of Massachusetts supported a school committee's exclusion of a student who was mentally retarded (*Watson v. City of Cambridge,* 1893). The student was excluded because he was too "weak minded" to profit from instruction. School records indicated that the student was "troublesome" and was unable to care for himself physically. The court wrote that since the school committee (as school boards in Massachusetts are known) had general charge of the schools, it would not interfere with its judgment. The court explained that if acts of disorder interfered with the operation of the schools, whether committed voluntarily or because of what it described in its own words as imbecility, the school committee should have been able to exclude the offender without being overruled by a jury that lacked expertise in educational matters.

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In another dispute, the Supreme Court of Wisconsin upheld the exclusion of a student with a form of paralysis (*State ex rel. Beattie v. Board of Education of Antigo*, 1919). The student had normal intelligence, but his condition caused him to drool and make facial contortions. The student attended public schools through grade five but was excluded thereafter, since school officials claimed that his physical appearance nauseated

teachers and other students, his disability required an undue amount of his teacher's time, and he had a negative impact on the discipline and progress of the school. School officials suggested that the student attend a day school for students with hearing impairments and defective speech, but he refused and was supported by his parents. When the board refused to reinstate the student, the court affirmed its decision, maintaining that his right to attend the public schools was not absolute when his presence there was harmful to the best interests of others. The court went so far as to suggest that inasmuch as the student's presence was not in the best interests of the school, the board had an obligation to exclude the student.

An appellate court in Ohio, even in affirming the authority of the state to exclude certain students, recognized the dilemma that was created by exclusionary practices, as they conflicted with compulsory education statutes (*Board of Education of Cleveland Heights v. State ex rel. Goldman*, 1934). At issue was the state's compulsory attendance law, which called for children between the ages of 6 and 18 to attend school. Further, the court decided that the Department of Education had the authority to consider whether certain students were incapable of profiting from instruction. The controversy arose when the board in one community adopted a rule excluding any child with an IQ score below 50, subsequently excluding a student with IQ scores ranging from 45 to 61. In rendering its judgment, the court conceded that the Department of Education could exclude some students. Even so, the court ordered the student's reinstatement, because it was a local board, not the state, that had excluded the child. The court noted that education was so essential that it was compulsory between certain ages.

Civil Rights Movement

The greatest advancements in special education have come since World War II. These advancements have not come easily but resulted from improved professional knowledge, social advancements, and legal mandates initiated by concerned parents, educators, and citizens. The civil rights movement in the United States provided the initial impetus for the efforts to secure educational rights for students with disabilities.

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important function of government. Warren, pointing out that education was necessary for citizens to exercise their most basic civic responsibilities, explained as follows:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right that must be made available to all on equal terms. (*Brown*, 1954, p. 493)

Other courts, dealing with later cases seeking equal educational opportunities for students with disabilities, either directly quoted or paraphrased Warren's comment. As a result, students with disabilities became known as the other minority, as they, largely through their parents and advocacy groups, demanded that they be accorded the same rights to an equal educational opportunity that had been gained by racial and ethnic minorities.

Unfortunately, in the immediate aftermath of *Brown*, the rights of the disabled continued to be overlooked. Throughout the 1950s, more than half of the states had laws calling for the sterilization of individuals with disabilities, while other states limited these individuals' basic rights, such as voting, marrying, and obtaining a driver's license. By the 1960s, the percentage of children with disabilities who were served in public schools began to rise; while 12% of all students with disabilities were in public schools in 1948, the percentage had increased to 21% by 1963 and to 38% by 1968 (Zettel & Ballard, 1982). As of July 1, 1974, the federal Bureau for the Education of the Handicapped reported that about 78.5% of America's 8,150,000 children with disabilities received some form of public education. Of these students, 47.8% received special education and related services, 30.7% received no related services, and the remaining 21.5% received no educational services at all (House Report, 1975).

Equal Educational Opportunity Movement

The movement to procure equal educational opportunities for students with disabilities gained momentum in the late 1960s and early 1970s when parent activists filed suits seeking educational equality for the poor, language minorities, and racial minorities. Although not all of these cases were successful, as with *Brown*, much of the language that emerged from the judicial opinions had direct implications for the cause of students with disabilities.

A New Era for Students With Disabilities

State and federal court cases addressing equal educational opportunities for the poor, language minorities, and racial minorities served as persuasive, rather than binding, precedent in later disputes over access to public school programs for students with disabilities. The legal principles remain the same regardless of why a particular group of students may be classified as a minority. Advocates for students with disabilities successfully used the cases dealing with equal educational opportunities discussed above to lobby for the passage of laws mandating equal treatment for these students.

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The successes that advocates for students with disabilities enjoyed in mostly lower court cases are considered landmark opinions despite their limited precedential value, since they provided the impetus for Congress to pass sweeping legislation mandating a free appropriate public education for students with disabilities, regardless of the severity or nature of their disabilities. These cases, which are listed by their conceptually related holdings, rather than chronologically, all occurred within a decade of each other and are important because they helped establish many of the legal principles that shaped the far-reaching federal statutes such as Section 504 and the IDEA.

The Right to an Appropriate Education Delineated

One of the first cases that shifted the tide in favor of students with disabilities, *Wolf v. State of Utah* (1969), was filed in a state court on behalf of two children with mental retardation who were denied admission to public schools. As a result, the parents of these children enrolled them in a private day care center at their own expense. As background to the dispute, the parents, through their lawyer, pointed out that according to Utah's state constitution, the public school system should have been open to all children, a provision that the state supreme court interpreted broadly; other state statutes stipulated that all children between the ages of 6 and 21 who had not completed high school were entitled to public education at taxpayers' expense. In light of these provisions, the *Wolf* court, in language that was remarkably similar to portions of *Brown*, declared that children who were mentally retarded were entitled to a free appropriate public education under the state constitution.

Landmark Litigation

Two federal class action suits combined to have a profound impact on the education of students with disabilities. The first case, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (*PARC*, 1971, 1972) was initiated on behalf of a class of all mentally retarded individuals between the ages of 6 and 21 who were excluded from public schools. Commonwealth officials justified the exclusions on the basis of four statutes that relieved them of any obligation to educate children who were certified, in the terminology used at that time, as uneducable and untrainable by school psychologists, allowed officials to postpone school admission to any children who had not attained the mental age of 5 years, excused children who were found unable to profit from education from compulsory attendance, and defined compulsory school age as 8 to 17 while excluding children who were mentally not between those ages. The plaintiff class sought a declaration that the statutes were unconstitutional while also seeking preliminary and permanent injunctions against their enforcement.

PARC was resolved by means of a consent agreement between the parties that was endorsed by a federal trial court. In language that presaged the IDEA, the stipulations maintained that no mentally retarded child, or child thought to be mentally retarded, could be assigned to a special education program or be excluded from the public schools without due process. The consent agreement added that school systems in Pennsylvania had the obligation to provide all mentally retarded children with a free appropriate public education and training programs appropriate to their capacities. Even though *PARC* was a consent decree, thereby arguably limiting its precedential value to the parties, there can be no doubt that it helped to usher in significant positive change with regard to protecting the educational rights of students. *PARC* helped to establish that students who were mentally retarded were entitled to receive a free appropriate public education.

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The second case, *Mills v. Board of Education of the District of Columbia* (*Mills,* 1972), extended the same right to other classes of students with disabilities, establishing the principle that a lack of funds was an insufficient basis for denying these children services. Moreover, *Mills* provided much of the due process language that was later incorporated into the IDEA and other federal legislation.

Mills, like *PARC*, was a class action suit brought on behalf of children who were excluded from the public schools in the District of Columbia

after they were classified as being behavior problems, mentally retarded, emotionally disturbed, or hyperactive. In fact, in an egregious oversight, the plaintiffs estimated that approximately 18,000 out of 22,000 students with disabilities in the district were not receiving special education services. The plaintiff class sought a declaration of rights and an order directing the school board to provide a publicly supported education to all students with disabilities either within its system of public schools or at alternative programs at public expense. School officials responded that while the board had the responsibility to provide a publicly supported education to meet the needs of all children within its boundaries and that it had failed to do so, it was impossible to afford the plaintiff class the relief it sought due to a lack of funds. Additionally, school personnel admitted that they had not provided the plaintiffs with due process procedures prior to their exclusion.

Entering a judgment on the merits in favor of the plaintiffs, meaning that it went beyond the consent decree in *PARC*, the federal trial court pointed out that the U.S. Constitution, the District of Columbia Code, and its own regulations required the board to provide a publicly supported education to all children, including those with disabilities. The court explained that the board had to expend its available funds equitably so that all students would have received a publicly funded education consistent with their needs and abilities. If sufficient funds were not available, the court asserted that existing funds would have to be distributed in such a manner that no child was entirely excluded and the inadequacies could not be allowed to bear more heavily on one class of students. In so ruling, the court directed the board to provide due process safeguards before any children were excluded from the public schools, reassigned, or had their special education services terminated. At the same time, as part of its opinion, the court outlined elaborate due process procedures that it expected the school board to follow. These procedures later formed the foundation for the due process safeguards that were mandated in the federal special education statute.

Other Significant Cases

Subsequent litigation, although not as high profile as *PARC* and *Mills*, nonetheless helped to establish many of the legal principles that were later incorporated into the federal special education law. In one such case, *In re G. H.* (1974), the Supreme Court of North Dakota maintained that a student with disabilities had a right to an education under the state's constitution. The child's parents moved out of state, leaving her behind at the residential school she had been attending. The school board that had been

paying the child's tuition and the welfare department disputed which party was responsible for her educational expenses. The court concluded that the board was liable after acknowledging that the child had the right to have her tuition paid, because special education students were entitled to no less than other pupils under the state constitution. The court suggested that students with disabilities constituted a suspect class, because their disabilities were characteristics that were established solely by the accident of birth. The court reasoned that the deprivation of an equal educational opportunity to a student with disabilities was a denial of equal protection similar to those that had been held to be unconstitutional in racial discrimination cases.

A year after the second judgment in *PARC* and *Mills*, an order of the Family Court of New York City helped establish the principle that special education programs had to be free of all costs to parents. *In re Downey* (1973) was filed on behalf of a student with disabilities who attended an out-of-state school because the city did not have an adequate public facility that could meet his instructional needs. As a result, the child's parents challenged their having to pay the difference between the actual tuition costs and the state aid that they received. The court found that requiring the parents to contribute to the costs of their child's education violated the equal protection clauses of both the federal and state constitutions. In ordering reimbursement for the parents' out-of-pocket expenses, the court was of the view that since children, not their parents, had the right to receive an education, their right should not be limited by their parents' financial situation.

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In *Fialkowski v. Shapp* (*Shapp*, 1975), another case from Pennsylvania, a federal trial court helped to define what constituted an adequate program for a student with disabilities. Here the parents of two students with severe disabilities claimed that their children were not getting an appropriate education, because they were being taught academic subjects instead of self-help skills. School officials, relying on the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* (*Rodriguez*, 1973), argued that the claim should have been dismissed, because the children did not have a fundamental right to an education. In *Rodriguez*, the Court held that "education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected" (p. 35). Yet, the court responded that *Rodriguez* was not controlling and that the students had not received adequate educations, because their programs were not giving them the tools they would need in

life. At the same time, although agreeing with the parents that their children who were mentally retarded could have constituted a suspect class, the court did not find it necessary to consider this question, because it was satisfied that the parents had presented a claim that warranted greater judicial scrutiny than was necessary by the claim of unequal financial expenditures among school systems.

A year after *Shapp*, the same federal trial court in Pennsylvania heard a class action suit filed on behalf of students with specific learning disabilities who allegedly were deprived of an education appropriate to their specialized needs. The complaint in *Frederick L. v. Thomas* (1976, 1977, 1978) charged that students with specific learning disabilities who were not receiving instruction suited to their needs were being discriminated against, while children who did not have disabilities were receiving a free public education appropriate to their needs, mentally retarded children were being provided with a free public education suited to their needs, and some children with specific learning disabilities were receiving special instruction. Therefore, the plaintiffs claimed, students with specific learning disabilities who were not receiving an education designed to overcome their conditions were being denied equal educational opportunities. In refusing to dismiss the claim, the court was convinced that the students did not receive appropriate educational services, in violation of state special education statutes and regulations as well as Section 504 of the Rehabilitation Act of 1973. The Third Circuit agreed that while the trial court's remedial order requiring the local school board to submit a plan identifying all students who were learning disabled was an injunctive order that was subject to further judicial review, the court neither abused its discretion in refusing to abstain nor erred in mandating the identification of all children in the district who had learning disabilities.

A federal trial court in West Virginia, in *Hairston v. Drosick* (1976), established that basic due process safeguards needed to be put in place before a student could be excluded from general education classes. The court held that a local school board violated federal law when officials excluded a minimally disabled student from its public schools without a legitimate educational reason. The student, who had spina bifida, was excluded from general classes even though she was mentally competent to attend school. Further, officials excluded the student even though they did not give her parents any prior written notice or other due process safeguards. The court concluded that the school officials violated the due process clause of the Fourteenth Amendment in excluding the student from general education, placing her in special education without prior written notice, denying her the opportunity to be heard, and failing to meet the requirements of other basic procedural safeguards.

The final groundbreaking lower court case arose in Wisconsin. In *Panitch v. State of Wisconsin* (1977), the federal trial court observed that not providing an appropriate education at public expense to students who were mentally retarded violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. Although the state enacted legislation in 1973 that should have provided the relief the plaintiffs sought, by the time the court issued its order four years later, public officials had yet to carry out the law's dictates. Believing that the delay was a sufficient indication of intentional discrimination in violation of the equal protection clause, the court ordered the state to provide the students with appropriate educations at public expense.

Legislative Response to *PARC* and *Mills*

With *PARC* and *Mills* as a backdrop, in 1973 Congress reauthorized a statute that traced its origins to the early twentieth century, when the American economy was beginning its major push to industrialization. Section 504 of the Rehabilitation Act, which is located in the United States Code as a labor law, rather than a statute dealing with education, is part of a lengthy line of legislation that focused on providing vocational rehabilitation for veterans of World War I who were disabled due to their injuries. Following the lead of the federal government, by the early 1920s most states also had vocational rehabilitation services available. Moreover, by 1935 all states offered such services (Scotch, 2001), such that the notion that individuals with disabilities in the workforce were entitled to rehabilitation in order to become productive members of society had deep roots in the American legal system.

The enactment of Section 504 set the stage for even more dramatic changes for the disabled with regard to employment, education, and general access to public places.

Two years after reauthorizing Section 504, Congress passed the most far-reaching special education legislation to date, the Education for All Handicapped Children Act, now known as the IDEA. The IDEA provided funding and a federal mandate for states, and by delegation school systems, to provide all students with disabilities with a free appropriate public education. The IDEA incorporated many of the due process protections for students and their parents first enunciated in the *Mills* decision.

Approximately 15 years later, Congress added the third major piece of legislation to provide specific rights to individuals with disabilities, the ADA. The ADA extended many of Section 504's protections to the private sector and, at the same time, codified case law that had developed under the latter statute and closed some loopholes. The goal of the ADA, as

stated in its preamble, is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. § 12101). Even though the ADA is aimed at the private sector, it is still applicable to public entities.

RECOMMENDATIONS

Even though educators wisely rely largely on their attorneys when dealing with technical aspects of disputes involving special education, they should acquaint themselves with both the federal and state legal systems. (Figure 1.2 provides some answers to frequently asked questions about these systems.) By familiarizing themselves with the legal systems of their home states, educators can greatly assist their attorneys and school boards, because such a working knowledge can help to cut right to the heart of issues and help to avoid unnecessary delays. Moreover, educational leaders and their governing bodies in K–12 schools and institutions of higher learning should

- provide regular professional development sessions for all professional staff and board members to help them to have a better understanding of how their legal systems operate and, more specifically, to recognize the significant differences and interplay between and among Section 504, the ADA, the IDEA, and other federal and state disability-related laws so as to better serve the needs of children with disabilities and their parents.
- offer similar informational sessions for parents and qualified students to help ensure that they are aware of their rights.
- develop appropriate handout materials explaining in writing how various federal and state disability laws operate, including detailed information on eligibility criteria under such key statutes as the IDEA, Section 504, and the ADA.
- make sure that all board policies and procedures relating to the delivery of special education and related services are up to date; among the policies that school systems should have in place are those dealing with what materials parents should receive on a regular basis, such as progress reports and report cards for students, notice provisions, and policies calling for parental involvement.
- prepare checklists to help ensure that staff members are responding to parental requests in a timely and appropriate manner.
- determine whether students with disabilities who do not qualify for services under the IDEA require reasonable accommodations under Section 504 and/or the ADA.
- take steps to ensure that students with disabilities are not subjected to differential treatment because of their disabilities or because of their need for accommodations.

- ensure that compliance officers regularly monitor or audit educational programming to make sure that it complies with the dictates of Section 504, the IDEA, and other applicable federal and state laws.
- recognize that in light of the complexity of disability law, it is important to rely on the advice of attorneys who specialize in education law; if school officials are unable to find such attorneys on their own, they should contact their state school board associations, bar associations, or professional groups such as the Education Law Association or National School Boards Association.

Figure 1.2 Frequently Asked Questions

Q. What are the major sources of law that govern public education?

A. There are three major sources of law at both the federal and state levels. The first source is the U.S. Constitution and individual state constitutions. The second source is the statutes enacted by Congress or state legislatures and their implementing regulations (promulgated by the designated federal or state agency). The final source of law is case or common law. This is the body of judicial decisions interpreting the constitutions and statutory provisions as applied to specific situations.

Q. What are the various levels of the court systems?

A. The federal court system has three levels. Most, but not all, state court systems follow this pattern. The lowest level is a trial court. The second level is an intermediate appellate court. Finally, at the top level is the "court of last resort" or a court of final appeals. At the federal level these courts are known respectively as a District Court, a Circuit Court of Appeals, and the United State Supreme Court. As noted, most state court systems have a similar setup, although the names of the courts may be different.

Q. How can I find a statute or a court decision?

A. Federal statutes can be found in the United States Code and federal regulations can be found in the Code of Federal Regulations. State laws and regulations are also found in similar compilations. In the same way, written court opinions can be found in bound volumes such as those in West's National Reporter system. All of these volumes can be located in a law school library or the law library at a courthouse. An excellent source for court decisions in education is *West's Education Law Reporter*, which can be found in the libraries of many colleges that have graduate schools of education. However, most statutes, regulations, and even court opinions can be located on the Internet. Consult the appendix to this book for resources.

Q. Why is it necessary to have laws to protect the rights of individuals with disabilities?

A. The rights of individuals with disabilities have not always been recognized, just as the rights of racial and ethnic minorities have not always been recognized. Unfortunately, the United States has a history of discrimination against and exclusionary practices with regard to individuals with disabilities that required the enactment of civil rights laws to ensure that they were given equal opportunities in areas such as education and employment.

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