1 Legal Foundation for Providing a Free and Appropriate Education to Students With Disabilities

The purpose of this chapter is to provide a greater awareness and understanding of why we do what must be done in special education. Court decisions have established the legal framework for how to provide for students with disabilities and other special needs. According to Burrello and Sage (1979), "As part of the social climate of the times, and as a reflection of adversarial relations, the increasing intervention of the courts into determination of specifics of social change constitutes a force of such significance as to warrant consideration in its own right" (p. 36).

The continually debated issue is whether current special education legislation at the state and federal level counts as civil rights legislation or education reform legislation. In the opinion of many practitioners, it is both, with the emphasis on civil rights based on numerous court decisions beginning with *Plessy v. Ferguson* in 1896. This U.S.

Supreme Court decision advanced the controversial "separate but equal" doctrine of racial segregation. Although the majority opinion did not contain the phrase, it gave constitutional sanction to laws designed to achieve racial segregation and served as a controlling judicial precedent until 1954.

That's the year the Supreme Court decided *Brown v. Board of Education of Topeka*, a landmark case in which the justices ruled unanimously that racial segregation in public schools was unconstitutional. *Brown* was one of the cornerstones of the civil rights movement and helped establish the precedent that "separate but equal" education and other services are not, in fact, equal at all.

In this case, which would become famous, Oliver Brown filed a class-action suit against the Board of Education of Topeka, Kansas, in 1951, after his daughter, Linda Brown, was denied entrance to Topeka's all-white elementary schools. The court stated, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on an equal term."

This decision employed the concept of equal rights as derived from the Fourteenth Amendment, which prohibits discrimination against a class of persons for an arbitrary or unjustified reason—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"—and applied it to a particular minority group. What is significant with regard to the Fourteenth Amendment is its focus on ensuring civil rights and services to a group or class of individuals. Although the case had nothing to do with special education, it did set the precedent that separate is *not* equal, and many future courts would use *Brown* as the foundation for their decisions.

Inarguably, special education legislation is about equal access and due process for students with disabilities. Prior to 1940, public school districts across the United States provided little if any special education services. Some states provided institutional programs for certain disability categories but little in the way of comprehensive programming, especially at the local level. Through the 1940s and 1950s, while incremental steps were occurring at the state and local level, no requirements for special education services

were yet in place. Gradually, through the 1960s, states and local school districts began to respond to social pressure as an outgrowth of the civil rights movement, equal opportunity concerns, and education for all as rendered through a sampling of the following court decisions.

1965—PL 89–10, the Elementary and Secondary Education Act (ESEA), provided a comprehensive plan for readdressing the inequality of educational opportunity for economically underprivileged children and became the statutory basis upon which early special education legislation was drafted. ESEA also provided federal funding to improve the education of certain categories of children, including children with disabilities.

1966—Title VI was added to ESEA, funding grants for children with disabilities.

1969—In *Wolf v. State Legislature of Utah*, the Utah Supreme Court ruled that children with intellectual disabilities had the right to attend public school. The court further ruled that admission to public school could not be denied to a student due to the student's intellectual disability. Echoing *Brown*, the court also affirmed that no "child may reasonably be expected to succeed in life if he is denied the opportunity of an education." The Utah court further ruled that "Segregation of the plaintiff children from public school system unusually interpreted as denoting their inferiority, unusualness, uselessness, and incompetency" and that "even though, perhaps well intention, under the apparent sanction of law and state authority has a tendency to retard the educational, emotional and mental development of the children." Interestingly, this particular court case is the basis for much of the research on inclusion that has occurred since the early 1970s.

1971—*Wyatt v. Stickney* saw the Alabama Supreme Court rule that students in state-operated and -funded institutions have a right to treatment, including habilitation, transportation, and education in the Least Restrictive Environment (LRE) with due regard for privacy and other basic attributes of human living. This ruling set detailed standards for treatment with an emphasis on LRE.

1972—In *Mills v. Board of Education of District of Columbia*, the court ruled that the school system "failed to provide a public education for all types of handicapped, disturbed and retarded children," which led to the following orders:

- Services for students identified as having special needs must be offered within 30 days.
- Hearing procedures must be established to guard against the indiscriminate suspension, exclusion, or placement of pupils in special education programs.
- Economic excuses for not implementing special education programs must not be used.

The ruling from the *Mills* case inspired the filing of litigation in a number of states dealing with related issues:

- Open access to education.
- No rejection regardless of a student's intellectual or physical condition.
- Use of a single test or assessment results (IQ) as the main criteria for placing a student in substantially separate classes.
- Entitling parents and children to be heard regarding the appropriateness of the education assignment.

1972—Following *Mills*, in *Pennsylvania Association of Retarded Citizens v. Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court ruled on two significant issues:

- Every child with intellectual disabilities is capable of deriving benefits from an education.
- In addition to the equal protection concept, the Fourteenth Amendment includes the Due Process Clause, the primary guaranteed basis for the development of procedural rights for the parents of children with intellectual disabilities.

In sum, no child eligible for a publicly supported education could be denied such education without an equal alternative tailored to the child's needs, and the district's practice of excluding children with disabilities from education was deemed unlawful. The judge ordered the district to take the following actions:

- To provide accessible, free, and suitable education for all children of school age regardless of disability or impairment.
- To not suspend a child for more than two days without a hearing.

- To provide all parties in the suit with publicly supported educational programs tailored to their needs.

This trend eventually led to important federal policies such as the Education for All Handicapped Children Act of 1974, which finally made free public education a reality for many children who had previously been denied this right.

1972—Massachusetts passed the first special education law, the Bartley-Daly Act, in 1972. Implemented in 1974, the law became commonly known as Chapter 766, and it was the first to focus specifically on special education students in the United States. Chapter 766 was a noncategorical law, and it is interesting to note that it took 20 years from the *Brown* decision for a law to be written to protect the rights of students with disabilities, with a primary focus on their civil rights.

1974—The U.S. Supreme Court case of *Lau v. Nichols* saw the court rule that refusing to provide English learners with supplemental language courses violated the California Education Code and Section 601 of the Civil Rights Act of 1964. The unanimous decision pushed public schools to develop plans to increase the linguistic skills of students for whom English was a second language.

The same year brought PL 93-380, the Education Amendments of 1974, which established two laws:

- The Education of the Handicapped Act Amendments of 1974, the first mention of an appropriate education for all children with disabilities.
- The Family Educational Rights and Privacy Act (FERPA), giving parents (and students over the age of 18) the right to examine records in a student's personal file.

1975—The federal law PL 94-142, the Education for All Handicapped Children Act, was passed in 1975. This law mandated a free appropriate public education for all children with disabilities, including Individualized Education Plans (IEPs), LRE, and due process rights, and became the basis for federal funding of special education. The law was renamed the Individuals With Disabilities Education Act (IDEA) in 1990.

President Gerald Ford had many thoughts regarding the 1975 law; he viewed certain features of the law as objectionable and thought they should be changed. Some of his comments included the following:

- "Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains."
- "It contains a vast array of detailed, complex, and costly administrative requirements."
- "It establishes complex requirements under which tax dollars would be used to support administrative paperwork and not educational programs."
- "Unfortunately, these requirements will remain in effect even though the Congress appropriates far less than the amounts contemplated in [PL 94-142]."
- "Fortunately, since the provisions of this bill will not become fully effective until fiscal year 1978, there is time to revise the legislation and come up with a program that is effective and realistic."

Many of Ford's concerns continue to ring true today—in particular, costly administrative requirements, time-consuming administrative paperwork, lack of federal appropriation, and ultimately no changes prior to implementation. Paperwork and compliance concern all teachers and administrators, and yet the promise of the law reimbursing school districts 40% of all special education expenditures has never been met, instead varying between 15% and 18%.

1975—*Goss v. Lopez* was another case brought before the U.S. Supreme Court in 1975. In this case, nine students at two high schools and one junior high school in Columbus, Ohio, received 10-day suspensions from school. The school principals did not hold hearings for the affected students before ordering the suspensions, and Ohio law did not require them to do so. The principals' actions were challenged nonetheless, and a federal court found that the students' rights had been violated. The case was then appealed to the Supreme Court. In terms of relevancy for school disciplinary hearings, did the imposition of the suspensions without preliminary hearings violate the students' due process rights as guaranteed

by the Fourteenth Amendment? The court answered that, yes, it did.

In a 5-to-4 decision, the court held that because Ohio had chosen to extend the right to an education to its citizens, it could not withdraw that right "on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct ha[d] occurred." The court held that Ohio was constrained to recognize students' entitlement to education as property interests protected by the Due Process Clause that could not be taken away without minimum procedures required by the clause. In addition, the court found that students facing suspension should at a minimum be given notice and afforded some kind of hearing. *Goss* stands for the basic principle that a due process hearing is required for any student facing a long-term suspension (i.e., suspension of 10 days or more) or exclusion.

1982—The question of free and appropriate education was addressed in *Board of Education of the Hendrick Hudson Central School District v. Rowley*. The court clarified that the free and appropriate education must "permit the child educationally to benefit from the instruction" and must be reasonably calculated to allow the student to attain passing grades and annual promotion. In the decision, the court held that "free appropriate is the floor" when determining student progress.

1984—In *Stock v. Massachusetts Hospital School*, the court required the Massachusetts Department of Education to administer special education programs "to assure the maximum possible development of a child with special needs." This case moved Massachusetts to the standard of maximum rather than appropriate and was future elaborated upon a year later in the *David D.* case.

1985—*David D.* reiterated that "free and appropriate is the floor"; however, the court indicated that the federal law stated "the child's education will meet the standard of the state educational agency." The language in Massachusetts Chapter 766 was for a child to be educated to the "maximum feasible benefit."

1985—That same year, *Burlington School Committee v. Massachusetts Department of Education* saw the court reimburse parents for a unilateral placement. This case began at the Bureau of Special Education Appeals (BSEA) where the hearing officer found in favor of the parents. The Burlington Public Schools took the result to the U.S.

Court of Appeals for the First Circuit, which overturned the BSEA decision and ordered parents to reimburse the local education agency (LEA). The parents appealed the decision of the circuit court to the Supreme Court, which found in their favor and remanded the decision back to the circuit court for resolution. This decision had a significant impact on compliance and timelines as the court found the parents' "self-help" unilateral placement justified due to the district not meeting compliance requirements.

1988—*Honig v. Doe* is a U.S. Supreme Court decision that dealt with the issue of expelling a child with disabilities based on actions arising from the child's disability. The court ruled that a school district may not unilaterally exclude or expel a child with disabilities from the classroom for any dangerous or disruptive conduct resulting from the child's disabilities, and created what is now known as the "10-day rule," which allows a school to only suspend a child for up to 10 days without parental consent or court intervention. Finally, the court ruled that students could not be removed from school if the behavior they exhibited was a result of their disability.

1988—In the *Timothy W. v. Rochester, New Hampshire, School District* case, the U.S. District Court for New Hampshire ruled that even children with the most severe disabilities meet the statutory requirements for special education services. This ruling established the "zero reject" policy—that all children, regardless of the severity of their disability, are entitled to an education.

1990—PL 101-476, the Education of the Handicapped Act (another precursor to IDEA), added several new elements; among them, it expanded and reauthorized discretionary programs, mandated transition services, defined assistive technology devices and services, and added autism and traumatic brain injury to the list of disability categories.

1993—A West Virginia circuit court (Civil Action No. 92-C-92) heard the only case, *Doe v. Withers*, of a teacher being held personally responsible for violating the civil rights of a student with special needs. The facts of the case involve a student diagnosed with a learning disability whose IEP allowed for oral testing with a special education teacher in a resource room throughout middle school. When the student entered high school in September, the student's parents met with all teachers, and all but one agreed to the testing in the resource room. That teacher, Mr. Withers, administered nine tests without allowing the student to go to the resource room, and further belittled

the student in class in front of other students. The parents then asked to meet with Mr. Withers again, but he refused, and the student, who failed the class, was not allowed to participate in extracurricular activities. At the midpoint of the school year, Mr. Withers left his position to become a state legislator, and when a substitute teacher replaced him, the student's grades improved dramatically with the opportunity for oral testing. The student's parents filed a civil rights violation requesting compensatory damages against Mr. Withers for $30,000, the principal for $10,000, the superintendent for $10,000, and the school board for $10,000.

The court granted relief to the principal, superintendent, and school board based on efforts made to assist Mr. Withers to comply with the student's IEP. The jury, however, ruled in favor of the student and parents, and ordered Mr. Withers to pay the following:

- $5,000 in compensatory damages.
- $10,000 in punitive damages.
- Interest back to the filing date of the action and all costs related to the action.

1994—In *Sacramento City Unified School District v. Rachel H.*, the district court found that defendant Rachel Holland received substantial benefits in regular education and that all her IEP goals could be implemented in a regular classroom with some modification to the curriculum and the assistance of a part-time aide. While the school district had consistently taken the view that a child with Rachel's IQ (41) had too severe of intellectual disabilities to benefit from full-time placement in a regular classroom, the Hollands maintained that Rachel learned both social and academic skills in a regular classroom and would not benefit from placement in special education. The school district appealed this determination to the district court.

Also in 1994, the Ninth Circuit Court of Appeals reiterated two earlier circuit court decisions by applying four factors to determine whether a placement meets the LRE requirements of IDEA:

- The student's educational benefit from full-time placement in a regular education classroom.
- The nonacademic benefits of a regular classroom placement.
- Effect of the child with a disability on the rest of the class.

- The cost of a regular education placement with proper supplemental aids and service.

Three other federal district courts have affirmed these standards, which apply to 18 states. This case has long been referenced as the precursor to full inclusion, although the court did not indicate how to define or interpret the four determining factors.

1999—The U.S. Supreme Court decision in *Cedar Rapids Community School District v. Garret F.* adopted the bright-line, physician/nonphysician approach to health services that school districts must provide intensive, one-on-one nursing services. The court held to *Tatro*'s bright-line decision to determine if a service is medical or related. (*Irving Independent School District v. Tatro* is a 1984 case in which the court affirmed granting the parents of a child with disabilities the right to medical procedures as part of her IEP.)

2002—The Massachusetts legislature voted to adopt the federal standard of free and appropriate education. As noted earlier, the Massachusetts standard had been established in *David D.* as maximum feasible benefit. Massachusetts further required all teachers to be "highly qualified" and began utilizing the federal categories. The Massachusetts laws had been noncategorical since the implementation 18 years earlier of Chapter 766.

2004—PL 108-446, the Individuals With Disabilities Education Act of 2004 (IDEA), did all of the following:

- Attempted to align with No Child Left Behind (NCLB).
- Defined highly qualified special education teacher.
- Expanded dispute resolution options.
- Provided access to instructional materials.
- Allowed IDEA funds to be used for early intervening services to serve students not IDEA eligible.
- Ensured services for unhoused students and students attending private schools along with highly mobile students.

2017—In *Endrew F. v. Douglas County School District*, the U.S. Supreme Court's decision addressed the substantive standard for the central obligation under IDEA of a Free and Appropriate Public Education (FAPE).

The court had not revisited this issue for 35 years, having originally addressed it in the landmark IDEA case *Board of Education of Hendrick Hudson Central School District v. Rowley*, and issued its decision with a refinement of the *Rowley* standard. Starting with the *Rowley* language, the court added a more individualized predicate: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

CHAPTER SUMMARY

The cases described in this chapter have shaped the framework for special education across the United States. Among the numerous cases brought to clarify aspects of both state and federal laws, including Irving Independent School District v. Amber Tatro, 468 U.S. 883 (1984) (where the court affirmed granting the parents of a child with disabilities the right to medical procedures as part of her IEP), and *Cedar Rapids v. Garret F., 526 U.S. 66 (1999)* (where the court affirmed providing continuous one-on-one nursing services for the respondent student), these decisions established the guidance for individual state legislatures and eventually the federal legislature to put into law the right to a free and appropriate education in the LRE, which can be a regular education classroom if the student can receive a satisfactory education in that setting. When appropriate, education should be provided at the local level and must always be based on the learning needs of the individual student. These educational services must be provided within a reasonable time regardless of cost. The system developed for identifying students must not discriminate, and while a full range of programming must be available to provide the required services to the identified student, these services must be reviewed and reevaluated periodically, which requires parental permission and due process, through a third party.

After 58 years from *Plessy* to *Brown*, 18 years from *Brown* to the implementation of Chapter 766, and 2 years from Chapter 766 to PL 94-142, more court cases are likely to shape the future direction of the provision of services for students who require a special education. It is important to remember that we are still in the infancy stages of these laws, and, clearly, more changes in medical diagnoses, assessment protocols, educational initiatives, and

evidenced-based practices are to come. We will also see more challenges to the law and various regulations that continue to shift how we currently view our role.

The administrator of special education is responsibile for presenting these facts, representing a course of action to ensure a free and appropriate education in the LRE for students identified with special needs within their school districts.