CHAPTER 3

History of Special Education Law

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.[1]

To understand the battles being fought today for children with disabilities, it is important to understand the history and traditions associated with public schools and special education. In this chapter, you will learn about the evolution of public education and special education, the impact of several landmark discrimination cases, and the circumstances that led Congress to enact Public Law 94-142 in 1975.

Common Schools Teach Common Values

Waves of poor, non-English speaking, Catholic and Jewish immigrants poured into the United States during the 19th and early 20th centuries. Citizens were afraid that these new immigrants would bring class hatreds, religious intolerance, crime, and violence to America. Social and political leaders searched for ways to "reach down into the lower portions of the population and teach children to share the values, ideals and controls held by the rest of society."[2]

An educational reformer named Horace Mann proposed a solution to these social problems. He recommended that communities establish common schools funded by tax dollars. He believed that when children from different social, religious and economic backgrounds were educated together, they would learn to accept and respect each other. Common schools taught common values that included self-discipline and tolerance for others. These common schools would socialize children, improve interpersonal relationships, and improve social conditions.[3]

For public schools to succeed in the mission of socializing children, all children had to attend school. Poor children attended school sporadically, quit early, or didn't enter school at all. Public school authorities lobbied their legislatures for compulsory school attendance laws. Compulsory attendance laws gave school officials the power to prosecute parents legally if they failed to send their children to school.[4]

Early Special Education Programs

The first special education programs were delinquency prevention programs for "at risk" children who lived in urban slums. Urban school districts designed manual training classes as a supplement to their general education programs. By 1890, hundreds of thousands of children were learning carpentry, metal work, sewing, cooking and drawing in manual classes. Children were also taught social values in these classes. Early special education programs also focused on the "moral training" of African-American children.[5]

Special schools and special classes for children with disabilities, especially deafness, blindness, and mental retardation did exist in 19th century America and gradually increased during the 20th century.[6] Programs for

1 *Brown v. Board of Education*, 347 U.S. 483 (1954)

2 Church, Robert L. (1976) *Education in the United States,* page 81 (New York: The Free Press)

3 Cremin, Lawrence A. (1967) *The Transformation of the School: Progressivism in American Education, 1876-1957*, pages 183-194 (New York: Knopf)

4 Sperry, David, Philip T. K. Daniel, Dixie Snow Huefner, E. Gordon Gee. (1998) *Education Law and the Public Schools: A Compendium,* pages 139-145 (Norwood, MA: Christopher-Gordon Publishers, Inc.); Cremin, pages 182-226

5 Cremin, pages 182-226

6 See, for example, *History of the Vineland Training School* at www.vineland.org/history/training school/history/history.html for children with mental retardation, *Perkins School for the Blind* at www.massmoments.org/index.cfm?mid=68, and *The American School for the Deaf* at www.asd-1817.org/about/index.html. (Retrieved on October 11, 2006)

children with specific learning disabilities (called "brain injury," "minimal brain dysfunction," and other terms) became more common in the 1940's.[7]

However, many early special education programs were private and/or residential. The quality and availability of programs varied between and within states. Good special education programs were rare and difficult to access. For most children with disabilities, special education programs were simply not available. [8]

Brown v. Board of Education (1954)

In 1954, the U. S. Supreme Court issued a landmark civil rights decision in *Brown v. Board of Education*.[9] In *Brown*, school children from four states argued that segregated public schools were inherently unequal and deprived them of equal protection of the laws. The Supreme Court found that African-American children had the right to equal educational opportunities and that segregated schools "have no place in the field of public education." The Court wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.[10]
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[11]

In *Brown*, the Supreme Court described the emotional impact that segregation has on children, especially when segregation "has the sanction of the law:"

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court that nevertheless felt compelled to rule against the Negro plaintiffs:
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> > Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.[12]

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7 Hallahan, Daniel P. and Cecil D. Mercer (2001) Learning Disabilities: Historical Perspectives. *Learning Disabilities Summit: Building a Foundation for the Future* at www.nrcld.org/html/information/articles/ldsummit/hallahan.html (Retrieved on October 11, 2006)

8 See *History of Crotched Mountain School for the Deaf* at www.crotchedmountain.org/crotchedmountain/html/deafschool.htm (Retrieved on October 11, 2006)

9 *Brown v. Board of Education*, 347 U.S. 483 (1954) www.wrightslaw.com/law/caselaw/ussupct.brown.bd.ed.htm

10 *Id.,* at page 493

11 *Id.*, at page 493

12 *Id.*, at page 494

After the decision in *Brown*, parents of children with disabilities began to bring lawsuits against their school districts for excluding and segregating children with disabilities. The parents argued that, by excluding these children, schools were discriminating against the children because of their disabilities.

Elementary and Secondary Education Act of 1965 (ESEA)

Congress enacted the Elementary and Secondary Education Act (ESEA) in 1965 to address the inequality of educational opportunity for underprivileged children. This landmark legislation provided resources to help ensure that disadvantaged students had access to quality education. [13]

In 1966, Congress amended the ESEA to establish a grant program to help states in the "initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children."[14] In 1970, Congress enacted the Education of the Handicapped Act (P.L. 91-230) in an effort to encourage states to develop educational programs for individuals with disabilities. According to the National Council on Disability:

> Congress first addressed the education of students with disabilities in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program to assist states in the "initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." In 1970, that program was replaced by the Education of the Handicapped Act (P.L. 91-230) that, like its predecessor, established a grant program aimed at stimulating the States to develop educational programs and resources for individuals with disabilities. Neither program included any specific mandates on the use of the funds provided by the grants; nor could either program be shown to have significantly improved the education of children with disabilities.[15]

PARC and *Mills*

During the early 1970s, two cases were catalysts for change: *Pennsylvania Assn. for Retarded Children v. Commonwealth of Pennsylvania (PARC),*[16] and *Mills v. Board of Education of District of Columbia*.[17]

PARC dealt with the exclusion of children with mental retardation from public schools. In the subsequent settlement, it was agreed that educational placement decisions must include a process of parental participation and a means to resolve disputes.[18]

Mills involved the practice of suspending, expelling and excluding children with disabilities from the District of Columbia public schools. The school district's primary defense in *Mills*[19] was the high cost of educating children with disabilities.[20]

> The genesis of this case is found (1) in the failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other "exceptional" children, members of their class,

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13 See ***Wrightslaw: No Child Left Behind***, page 9.

14 *Back to School on Civil Rights*, published by the National Council on Disability (2000). URL: www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm (Retrieved on October 11, 2006)

15 *Id.*

16 334 F. Supp. 1257 (E. D. Pa, 1971) and 343 F. Supp. 279 (E. D. Pa. 1972)

17 348 F. Supp. 866 (D. DC 1972)

18 *PARC* at page 303

19 Financial cost is often the primary defense in special education cases before the U.S. Supreme Court.

20 In 2005, the National Council on Disabilities commissioned this author to write a comprehensive Position Statement about the Burden of Proof issues that were pending before the U.S. Supreme Court in *Schaffer v. Weast*. This Statement was filed with the Court. See *IDEA Burden of Proof: On Parents or Schools?* www.ncd.gov/newsroom/publications/2005/burdenofproof.htm (Retrieved on October 11, 2006) The history of the *Mills* case and the unique rulings by the District Court Judge Waddy were discussed in depth in the Position Statement. Many procedural safeguards in Section 1415 were taken almost verbatim from his Orders.

and (2) the excluding, suspending, expelling, reassigning and transferring of "exceptional" children from regular public school classes without affording them due process of law.[21]

Congressional Investigation (1972)

After *PARC* and *Mills*, Congress launched an investigation into the status of children with disabilities and found that millions of children were not receiving an appropriate education:

> Yet, the most recent statistics provided by the Bureau of Education for the Handicapped estimated that of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.[22]

The investigation so moved members of Congress that they wrote:

> The long-range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.[23]
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> There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person's family.[24]
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> Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions . . .[25]
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> Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives . . . . It should not . . . be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy . . . .[26]

In 1972, legislation was introduced in Congress after several "landmark court cases establishing in law the right to education for all handicapped children."[27]

Public Law 94–142: The Education for All Handicapped Children Act of 1975

On November 19, 1975, Congress enacted Public Law 94-142, also known as The Education for All Handicapped Children Act of 1975. Congress intended that all children with disabilities would "have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children."[28]

Initially, the law focused on ensuring that children with disabilities had access to an education and due process of law. Congress included an elaborate system of legal checks and balances called "procedural safeguards" that are designed to protect the rights of children and their parents.

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21 *Mills* at page 868
22 U. S. C. C. A. N. 1975 at page 1433
23 *Id.*, at page 1433
24 *Id.*, at page 1433
25 *Id.,* at page 1433
26 *Id.,* at page 1433
27 *United States Code Congressional and Administrative News 1975* (U. S. C. C. A. N. 1975) at page 1430
28 *Id.,* at page 1427

Individuals with Disabilities Education Improvement Act of 2004

Congress has amended and renamed the special education law several times since 1975. On December 3, 2004, the Individuals with Disabilities Education Act was amended again. The reauthorized statute is the Individuals with Disabilities Education Improvement Act of 2004 and is known as IDEA 2004. The statute is in Volume 20 of the United States Code (U. S. C.), beginning at Section 1400. The special education regulations are published in Volume 34 of the Code of Federal Regulations (CFR) beginning at Section 300.

In reauthorizing the IDEA, Congress increased the focus on accountability and improved outcomes by emphasizing reading, early intervention, and research-based instruction by requiring that special education teachers be highly qualified.

Purposes

The Individuals with Disabilities Education Act of 2004 has two primary purposes. The first purpose is to provide an education that meets a child's unique needs and prepares the child for further education, employment, and independent living. The second purpose is to protect the rights of both children with disabilities and their parents. [29]

Overrepresentation of Minority Children

In 1975, Congress found that poor African-American children were over-represented in special education. These problems have persisted. In the Findings of IDEA 2004, Congress described ongoing problems with the over-identification of minority children, including mislabeling and high dropout rates:

> (A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.
>
> (B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.
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> (C) African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.
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> (D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.
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> (E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education. [30]

Aligning IDEA and NCLB

The IDEA 2004 reauthorization emphasized the need to align IDEA with other school improvement efforts, specifically "improvement efforts under the Elementary and Secondary Education Act of 1965."[31] Congress found 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 meet developmental goals and . . . the challenging expectations that have been established for all children . . . .[32]

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29 20 U. S. C. §1400(d)(1)
30 20 U. S. C. §1400(c)(12)
31 20 U. S. C. §1400(c)(5)(C)
32 20 U. S. C. §1400(c)(5)(A)

The purpose of the No Child Left Behind Act of 2001 is "to ensure that **all children have a fair, equal, and significant opportunity** to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[33]

IDEA requires states to establish goals for the performance of children with disabilities that are consistent with the goals and standards for nondisabled children. States are also required to improve graduation rates and dropout rates, and to report the progress of children with disabilities on state and district assessments.[34]

In Findings, Congress described a critical need for adequately trained personnel and that "high quality, comprehensive professional development programs are essential to ensure that the persons responsible for the education or transition of children with disabilities possess the knowledge and skills necessary to address the educational and related needs of those children."[35] Special education teachers who teach core academic subjects must meet the highly qualified teacher requirements in NCLB and must demonstrate competence in the subjects they teach.[36] These requirements for highly qualified special education teachers bring IDEA into conformity with the No Child Left Behind Act.

In Summation

In this chapter, you learned how public education and special education evolved, the impact of landmark cases about racial and disability discrimination, the circumstances that led Congress to enact Public Law 94-142 in 1975, and how the law has evolved over the past thirty years.

In Section Two, you will learn about the Individuals with Disabilities Education Act of 2004. Chapter 4 provides an overview of IDEA 2004, how the law is organized, and new requirements in the law. Chapter 5 begins with a Table of Statutes, followed by the full text of the Individuals with Disabilities Education Act with commentary, cross-references and resources. Chapter 6 is the full text of the federal special education regulations.

33 20 U. S. C. § 6301
34 20 U. S. C. § 1412(a)(15)
35 20 U. S. C. § 1450(6)
36 The definition of a "highly qualified teacher" is in Title IX of No Child Left Behind at Section 7801(23) and is also referenced in Section 6319 of NCLB. In IDEA, the definition of "highly qualified" is in Section 1401(10).