

SPECIAL EDUCATION LAW, 1/E

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Chapter 3 Statutory Overview

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CHAPTER

3

Statutory Overview

A. Introduction

In order to promote access to employment, education and public accommodations for citizens with disabilities in both the private and public sectors, the Congress enacted three key federal statutes. This chapter provides an overview of these laws, and each statute is discussed in greater depth in subsequent chapters.

B. IDEA: Meeting the Need for Special Education

In 1975 Congress enacted a statute titled the Education for All Handicapped Children Act. That statute, now known as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, operates as a federal grant program to state educational agencies (SEA), and through the SEA to the local educational agencies (LEA), providing funds for a free appropriate public education (FAPE) for eligible children with disabilities. States and LEAs must locate, identify, and evaluate all children suspected of having a disability who, because of the disability, require special education and related services. An Individualized Education Program (IEP) is developed for each eligible child, with services that address the individual child's educational and functional needs. The IEP team consists of school professionals and the child's parents. Services must be provided in the least restrictive environment (LRE), appropriate to the unique needs of the child. In other words, to the extent appropriate, a child is expected to receive services in the general education classroom and to be integrated with other children with and without disabilities. This is sometimes referred to as inclusion. A child who does not meet the eligibility requirements of the IDEA may still be eligible for services under Section 504 of the RA.

The IDEA first impacted the education of children with mental retardation and mental illness. The Department of Education has noted that, in 1967, "state institutions were homes for almost 200,000 persons with significant disabilities. Many of these restrictive settings provided only minimal food, clothing and shelter." Few children were assessed, educated, and rehabilitated. Many children's disabilities were mislabeled, and education, if any was provided, was ineffective. Some were

improperly incarcerated. Few parents were able to be involved in the planning or placement decisions for their children.

In the 1950s and 1960s, disability associations such as the Association for Retarded Children (ARC) joined with the federal government to develop practices for children with disabilities and their families. These practices in turn formed the templates for programs designed for the early identification and appropriate education of children with disabilities.

Their efforts bore fruit. Improved programs were created by the federal government under the authority of the Spending Clause. These included such landmark legislation as the Training of Professional Personnel Act of 1959 (P.L. 86-158), which helped train leaders to educate children with mental retardation; the Captioned Films Act of 1958 (P.L. 85-905), which sought to make films accessible; and the Teachers of the Deaf Act of 1961 (P.L. 87-276), which provided teacher training for those individuals who worked with the hearing impaired.

Congress branched out to address other disabilities. The Elementary and Secondary Education Act (P.L. 89-10) and the State Schools Act (P.L. 89-313) provided further grant assistance. Finally, the Handicapped Children's Early Education Assistance Act of 1968 (P.L. 90-538) and the Economic Opportunities Amendments of 1972 (P.L. 92-424) authorized support for early childhood programs.

By 1968, the federal government had supported training for more than 30,000 special education teachers and related specialists, provided captioned films for viewing by approximately 3 million persons who were deaf, and established programs for children with disabilities in preschool, elementary, secondary, and state schools throughout the country.

The Department of Education has summarized the legal developments of the early 1970s thus:

Landmark court decisions further advanced increased educational opportunities for children with disabilities. For example, the *Pennsylvania Association of Retarded Citizens v. Commonwealth* (1971) and *Mills v. Board of Education of the District of Columbia* (1972) established the responsibility of states and localities to educate children with disabilities. Thus the right of every child with a disability to be educated is grounded in the equal protection clause of the 14th Amendment to the United States Constitution.

Like Senator Kennedy and Congressman Miller (see Chapter 2), the Department of Education views the IDEA as a civil rights statute. Indeed, to the extent that the IDEA freed children with mental retardation and mental illness from unnecessary incarceration, it achieved much the same result that could have been achieved under the Fourteenth Amendment, even without the IDEA and its predecessors. See *Olmstead v. L.C.*, 527 U.S. 581 (1999) and Chapter 2.

In 1975, the Congress enacted a statute entitled the Education for All Handicapped Children Act. Known for years as Public Law 94-142, now the IDEA, the law included four specific purposes as shown in Figure 3.1.

According to the Department of Education, the IDEA "guaranteed a free, appropriate public education to each child with a disability in every state and locality across the country" (*History: Twenty-Five Years of Progress in Educating Children with*

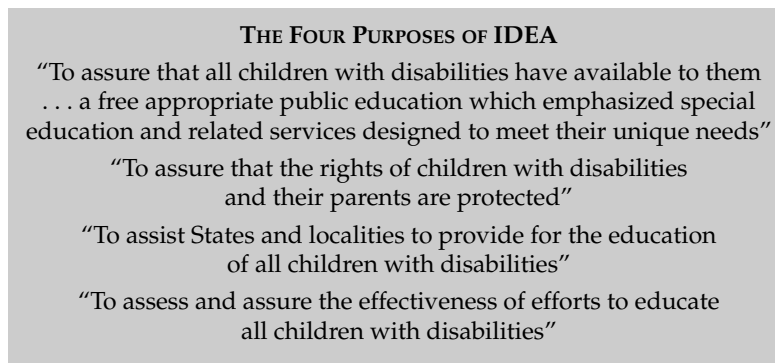


FIGURE 3.1 Four Purposes of IDEA

Disabilities through IDEA [U.S. Department of Education: OSEP]). In the Department’s view, IDEA has accomplished three major objectives as illustrated in Figure 3.2.

The accuracy of some of these statements has been repeatedly challenged by critics of state and local education, in general, and of the IDEA, the RA, and ADA, in particular. Critics have alleged that the public education system relies heavily on social promotions, rather than accomplishment, and that the significant rise in the number of disabled college students has more to do with overdiagnosis to obtain an advantage over other students than it does with accommodating a true disability. One author, for example, has concluded that the “impetus for coining the technical term [learning disability] in 1963 and popularizing it soon thereafter was to lend scientific credibility to what was at its core a political movement.” He points out that, in 1988, only 16.1 percent of disabled college freshmen identified themselves as learning disabled, but that by 2000, 40.1 percent did so. He attributes the increase to a number of potential factors, including a “change in medical definition” which broadened the learning disability category. Then “there are the legal advantages held out to those who secure an LD diagnosis,” which can include “shortened homework assignments, additional and personalized assistance, exemptions from otherwise required classes, and accommodations on exams.” These “preferences can outweigh any social stigma attached to an LD diagnosis.” Lerner,

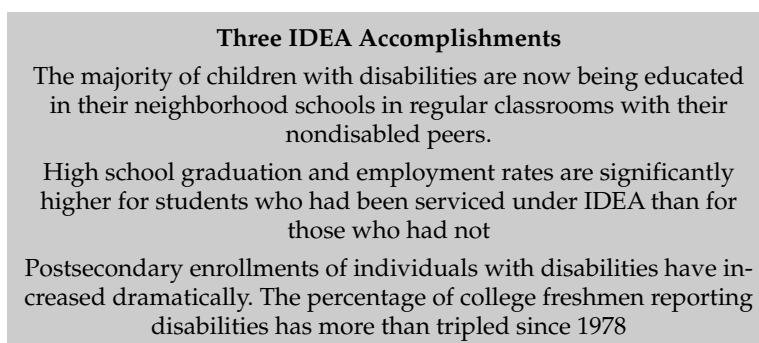


FIGURE 3.2 Three IDEA Accomplishments

Craig S., "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites? 57 Vand. L. Rev. 1043 (Apr. 2004). Despite criticisms, significant anecdotal evidence shows that the IDEA has led to the inclusion in public education of students with significant disabilities and has improved educational opportunities available to those students.

C. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (RA), 29 U.S.C. §701 *et seq.*, made discrimination against individuals with disabilities unlawful in three areas: employment by the executive branch of the federal government, employment by most federal government contractors, and activities that are funded by federal subsidies or grants. All public elementary and secondary schools and most postsecondary institutions receive federal subsidies or grants and therefore must comply with the RA. Section 504 of the RA is the statutory provision that prohibits discrimination in grants, and the RA is most often referred to simply as "Section 504." To qualify for services under Section 504, individuals must have impairments that substantially limit a major life activity, such as learning. Eligible individuals are entitled to academic adjustments and auxiliary aids and services, so that courses, examinations, and services will be accessible to them.

D. The Americans with Disabilities Act of 1990

In 1990, Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* This act extended the concepts of "Section 504" to (1) employers with fifteen or more employees (Title I); (2) all activities of state and local governments, including but not limited to employment and education (Title II); and (3) virtually all places that offer goods and services to the public, known as "places of public accommodation" (Title III). In addition, ADA standards apply to employment by Congress.

Court cases and administrative rulings interpret these statutes and apply statutory provisions to individual situations. Cases discussed illustrate particular applications of these laws, and, while some of the cases discussed do not involve learning disabilities, they establish principles that are applicable to individuals with learning disabilities.

E. The Relationships among the RA/ADA and the IDEA

1. Two Approaches to One Goal

The ADA and RA are statutes that prohibit discrimination but do not provide specific funds for the activities mandated by them. The IDEA provides funding for an objective beyond civil rights requirements: the provision of a free appropriate public education to students with disabilities whose needs are such that they require special education and related services.

2. The RA/ADA Mandate Access for Individuals with Disabilities

The RA and ADA are traditional civil rights statutes. They prohibit discrimination on the basis of disability, just as other civil rights laws ban race and gender discrimination. Collectively the RA and ADA apply to virtually every educational institution; most state, local, and federal governmental entities (including professional licensing boards, but not the federal judiciary); and all sizable private employers.

In order to accomplish their purpose, the RA and ADA require that public and private schools provide access to education to qualified students with disabilities. This means two things. First, the school is required to review its academic and other requirements to ensure that they properly measure academic accomplishment and do not unnecessarily penalize students for the consequences of their disabilities. Second, these statutes require that students receive reasonable accommodations in the methods by which tests are administered and instruction and materials are delivered. The education provided under these laws must be tailored to the individual recipients, such that discriminatory aspects of the educational process are eliminated. However, educational institutions are not required to make fundamental changes in the nature of their programs.

While the coverage differs, the elements to be proven in any case brought under these statutes are the same. In order to obtain the protections of the ADA/RA, it must be established that (1) the person is an “individual with a disability”; (2) the person is “otherwise qualified”; (3) the person was denied a job, education, or other benefit by reason of the disability; and (4) the ADA or RA applies to the case.

Public Education Students Are Otherwise Qualified

Public education differs from private education under the RA/ADA standards. It is not necessary to prove that the individual in question is “otherwise qualified” to receive public elementary or secondary education. All states require that elementary and secondary education be provided to all children. Everyone, therefore, is qualified to receive public education at these levels. With respect to individuals with disabilities under the RA, the Office for Civil Rights (OCR) of the U.S. Department of Education notes that the Code of Federal Regulations (34 CFR §104.3[k]):

provides that for elementary and secondary schools, such an individual is “qualified” when he or she is of an age during which it is mandatory under state law to provide such services, or an age during which it is mandatory under state law to provide such services to persons with disabilities, or to whom a state is required to provide a free and appropriate public education under the Individuals with Disabilities Education Act. *Letter of Findings issued to Susquehanna Community School District*. Docket No. 03931473, October 18, 1993

Private Education—The Need to Prove That Students Are Otherwise Qualified

The standard for determining who is “otherwise qualified” to receive private education is different. In *Bercovitch v. Baldwin School, Inc.* (1st Cir. 1998), for example, the United States Circuit Court of Appeals held that Jason, a student with ADHD, was

not entitled to “be exempted from the normal operation of the school’s disciplinary code” as a reasonable accommodation under either the ADA or the RA and that Jason was not otherwise qualified for the private school program! The proposed accommodation was that the student “only be suspended after at least three warnings, and then only for the remainder of the day.” This modification would eliminate “the normal progressive discipline built into the school’s code,” and would have prevented the school “from suspending Jason, as it would any other student, for repeated disruptive behavior.”

Comparing the RA/ADA to the IDEA, the Court found:

That a private non-special needs school is covered by the ADA does not, as a matter of law, transform it into a special needs school. The Baldwin School is not equipped to handle special needs students with severe behavioral problems. Despite the district court’s order that Baldwin create an individualized “accommodation plan” for Jason which creates special treatment for Jason, the ADA imposes no requirement on Baldwin to devise an individualized education plan such as the IDEA requires of public schools. The district court order comes perilously close to confusing the obligations Congress has chosen to impose on public schools with those obligations imposed on private schools.

Differences between IDEA and the RA/ADA—The Courts

In *Sellers v. School Board of Manassas* (4th Cir. 1998), the Fourth Circuit examined the difference between the IDEA and the RA/ADA. Kristopher Sellers was diagnosed as learning disabled and emotionally disturbed for the first time at the age of eighteen. The Sellers sued for compensatory and punitive damages under the IDEA and RA because of the school district’s failure to test and evaluate Kristopher for disabilities. The district court granted the school district’s motion to dismiss, and the Sellers appealed. The U.S. Court of Appeals for the Fourth Circuit held that the Sellers’ claims were properly dismissed because the IDEA does not provide for compensatory or punitive damages, and the RA does not require outreach and identification of children with disabilities. The Court of Appeals noted that “IDEA and the Rehabilitation Act are different statutes. Whereas IDEA affirmatively requires participating States to assure disabled children a free appropriate public education . . . section 504 of the Rehabilitation Act instead prohibits discrimination against disabled individuals.” The court then said:

We have held that to establish a violation of section 504, plaintiffs must prove that they have been discriminated against—that they were “excluded from the employment or benefit due to discrimination solely on the basis of the disability.” . . .

To prove discrimination in the education context, “something more than a mere failure to provide the ‘free appropriate education’ required by [IDEA] must be shown. . . . We agree with those courts that hold “that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children.” (Citations omitted)

The Supreme Court declined to review the Fourth Circuit’s decision. The Sixth Circuit agrees. *N.L. v. Knox County Schools* (6th Cir. 2003)

In order to establish a violation under section 504, a disabled individual must establish that he was subjected to prohibited discrimination, which means he was denied the opportunity to participate in or benefit from the aid, benefit, or service because of a disability. . . . To prove discrimination in the education context, courts have held that something more than a simple failure to provide a free appropriate public education must be shown. See *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982); see also *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1580 (D.C. Cir. 1984).

The Federal Circuit Courts of Appeal, therefore, view the RA/ADA as imposing only a general duty of nondiscrimination on private and public schools subject to their requirements, duties which are vastly different from those created by the IDEA for public schools. Their language and reasoning tracks that of the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), discussed in Chapter 2.

Differences between the IDEA and RA/ADA—The Department of Education

On the other hand, the Department of Education perceives a higher duty under the RA that is closer to the duty under the IDEA. The department has repeatedly held that the state and local educational agencies have a duty to identify children with disabilities who may be eligible to receive special education and related services under either the IDEA or the RA. On April 29, 1993, the Office for Civil Rights modified the September 16, 1991, Memorandum on Policy and issued a revised Questions and Answers Handout on ADD which established that point. (“OCR Facts: Section 504 Coverage of Children with ADD,” Memorandum to Regional Civil Rights Directors Regions 1-X, From Jeanette J. Lim Acting Assistant Secretary for Civil Rights, dated April 29, 1993)

3. The IDEA: Access through Funded Special Education

The IDEA requires more than nondiscrimination. It requires access for those who need special education and related services and provides part of the funding to pay for those services. Under the IDEA, each school district is required to provide a “free appropriate public education” (FAPE), which means “special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge,” that “meet the standards of the State educational agency,” and that include an appropriate preschool, elementary, or secondary school education in the state involved and “are provided in conformity with the individualized education program required under” the IDEA.

The IDEA provides money for education of children with disabilities. It applies to each “child with a disability,” which the law defines as follows:

(3) CHILD WITH A DISABILITY—

(A) IN GENERAL—The term “child with a disability” means a child—

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as “emotional disturbance”), orthopedic

impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C. §1401(3)

To be eligible for services, a child both must have a listed disability *and* “by reason thereof need special education and related services.”

The funding formula was described in the Senate Report which accompanied the bill that became the reauthorized IDEA, S. Rep. No. 17, 105th Cong., 1st Sess. 13 (1997), entitled the Individuals with Disabilities Education Act Amendments of 1997, dated May 9, 1997. The funding formula was described thus:

Current law permanently authorizes such sums as may be necessary for this program and contains a formula for determining how much states would get if the program is fully funded—the number of children with a disability times 40 percent of the average per pupil expenditure.

Essentially the same formula is used in the 2004 IDEA Reauthorization. 20 U.S.C. §1411. Note that, for funding to occur there must be both *authorization*, which the amended and reauthorized IDEA provides, and *appropriation* of funds, which occurs annually through the congressional appropriations (funding) process.

The U.S. Supreme Court has made it clear that the IDEA’s predominant concern is with providing funds to ensure that all children covered by its terms have *access* to the educational process. Of lesser importance for funding purposes is the *quality* of the education accessed. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), for example, the Supreme Court said that the “intent” of the IDEA “was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” More recently, in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999), the Supreme Court held that a school district was financially obligated under the IDEA to provide the services of a personal attendant to Garret F., a student whose spinal column was severed in a motorcycle accident when he was four years old and who was, therefore, “ventilator dependent,” a condition requiring a “responsible individual nearby to attend to certain physical needs while he is in school.” The court held that the school district was obligated to provide the service, rejecting the argument that the cost was prohibitive and therefore an undue burden. In so ruling, the court said, “This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained.”

The court noted that its ruling would “create some tension with the purposes of the IDEA.” While recognizing that the IDEA “may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children,” Congress did intend “to open the door of public education” to all qualified children and “require[d] participating States to educate handicapped children with nonhandicapped children whenever possible.” [Citations omitted]

The IDEA provides a far broader reach than either the RA or ADA. First, the definition of disability is more comprehensive and specific. Second, special education and related services can include fundamental teaching and program alterations

far beyond what would be required as accommodations under the RA/ADA. At the same time, certain accommodations may be obtained by students under the RA, even though those students are not covered by the IDEA. The relationship between the two statutes might be viewed this way:

The fact that a school district has found a student to need special education and related services under IDEA because of a listed condition creates a strong, although rebuttable, presumption that the condition, with any mitigating measures used, is an impairment that substantially limits a major life activity such as learning or reading.

[Internal Memorandum to OCR Staff, from Norma V. Cantu, Assistant Secretary for Civil Rights, Subject Internal Guidance Document Entitled "Sutton Investigative Guidance: Consideration of 'Mitigating Measures' in OCR Disability Cases" dated September 29, 2000.]

F. State Law

The focus of this text is federal law, because federal law has been most influential in assisting individuals with disabilities. However, state constitutional and statutory laws have evolved following federal leadership and, in some cases, have surpassed the federal models on which they were based. See generally *Roland M. v. Concord School Comm.*, 910 F.2d 983 (1st Cir. 1990), for an excellent discussion of this topic. The case contains a concise discussion of the IDEA, as does the Supreme Court's opinion in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). In addition, state law may supplement or fill in the gaps where federal law is silent. The question of whether state law has been "preempted" by federal law is a complex question, which must be considered on a case-by-case basis and is beyond the scope of this book.

State law may contain a definition of disability which is more inclusive than the federal one. In *Kammueler v. Loomis, Fargo & Co.* (8th Cir. 2004), for example, the court held that, under the Minnesota Human Rights law, polycystic kidney disease is a condition that *materially limits* a major life activity and is therefore a covered disability. The Minnesota law only required proof that an impairment materially limits a major life condition. In contrast, the ADA/RA require proof of a substantial limitation, a more stringent test.

State law may provide remedies that are not available under federal law. In *Montoy v. Kansas* (Sup. Ct. Kan. 2005), the Supreme Court of Kansas held that the Kansas legislature had failed to provide adequate funds for the public school system. The court ruled that this failure violated the Kansas Constitution which requires that the legislature "make suitable provision for finance" of the public schools.

Kansas does not stand alone. To date twenty-five states have been sued successfully by plaintiffs seeking additional funds, eighteen have been sued unsuccessfully, and seven have not been sued at all. Farney, Davis, "States Resist Court-Ordered School Funds: Advocates for Poor Students Fare Well with Judges, Not with Kansas' Antitax Legislators," *Wall Street Journal*, March 9, 2005.

All states except South Carolina have constitutions that promise universal education in sweeping terms. The New York State Constitution, for example, requires that “the legislature shall provide for maintenance and support of a system of free common schools, wherein all the children of this state may be educated” (Art. XI, §1). Whether the legislature has met its obligations then becomes a question of state constitutional law.

The rationale for ordering increased spending is roughly the same. State constitutions and statutes require the provision of a first-class education, usually measured by a combination of student testing and accreditation reviews. Coupled with these elevated standards is a requirement that the legislature finance the public school system. It is, therefore, no large stretch to say that if the legislature is required to fund a superlative educational system, the funding must be adequate to the purpose. Whether this means increased taxes is unclear. Some states have responded by cutting other services in order to resist a tax increase.

G. Summary

The RA and ADA are statutes that prohibit discrimination against qualified individuals with disabilities. These laws generally apply to elementary and secondary education, postsecondary education, and employment. The IDEA provides funds to state and local educational agencies in order to provide each child with a disability a free appropriate public education, which includes special education and related services.