One

OVERVIEW OF THE IDEA 2004

The Buck Stops Here

—Sign on President Truman's desk in his White House office

The buck never stops here.

—McBride, Dumont, and Willis (2004)

The federal laws affecting the rights of children with disabilities have always been, to put it tactfully, ambiguous. For many school systems, getting simple answers to simple questions has been a lengthy and costly process, sometimes analogous to seeing if a gun is loaded by staring down the barrel and pulling the trigger. After publication of the 1999 Final Regulations, (entitled "Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities; Final Regulations," 1999), that situation seemed to intensify. The authors, participants in a number of national listservs related to school psychology and special education, saw an increasing number of questions about the law and the burdens it imposed. Over the years, in attempting to find and share answers to those questions, the authors accumulated a substantial body of information. That body of information provided the basis for this book. We took some of the more frequently asked questions and updated our answers based on the most recent statutory and regulatory revisions (up to 2010) affecting children with disabilities. It is our hope that our readers might find herein answers to some of their questions without incurring the inconvenience or expense of litigation. Recognizing that our unsupported opinions might carry little weight in an adversarial situation, wherever possible, we have, on the accompanying CD, also provided our readers with authoritative resources (statutes, regulations, case law, federal letters, and federal topic briefs) that can be relied on.

Traditionally, when writing a book whose basis is the law, the first thing anyone does is provide a statement ensuring that the buck never stops here—a major theme of this book, as it turns out. Nailing the basics of special education law (henceforth referred to as spedlaw) is like trying to nail pudding to a post. Some wonder if it can be done at all, and anyone who does try ends up becoming exceedingly frustrated as well as running the risk of feeling incredibly stupid. It would be nice if we could say with some assurance, "If you read such and such, and adhere to the rules therein, you will be safe from harm." But it is not true. Anybody can be sued any time for any reason. Understanding the law from a layperson's perspective may help to avoid some litigations or due process procedures, but knowing the law is no guarantee that we will never be sued. A person does not have to be evil, wrong, or mistaken. He or she just has to be in the wrong place at the right time. Ambrose Bierce, writing in *The Devil's Dictionary*, defined litigation as "a machine which you go into as a pig and come out of as a sausage" (Bierce, 1911/1958, p. 78).

Let us try to start out with realistic expectations. When we are trying to comprehend the world of spedlaw, several things actually do carry the force of law: federal and state statutes (because they *are* the law) and federal regulations. Federal law trumps state law, unless it explicitly defers to the states. For example, the 2006 Final Regulations for the Individuals with Disabilities Education Act (IDEA) establish a 60-day timeline from date of testing to an entitlement decision—unless a state has another timeline.

One of the problems readers often encounter is that what the federal special education regulations say in one paragraph they can modify or even take away a page later. The same is also true with federal regulations. Additionally, basic terms in both the IDEA and in Section 504 of the Rehabilitation Act (such as "Free Appropriate Public Education," "adversely affects," or "substantially limits") remain essentially undefined in the statutes. The regulatory agencies (e.g., Office of Special Education Programs [OSEP], Office for Civil Rights [OCR]) may tell us that those terms are meant to be defined on a case-by-case basis by the group (504) or Individualized Education Program (IEP) team (IDEA) after reviewing the results of a comprehensive evaluation. Whatever the intent, these types of guidance are not really very helpful. In order to simplify matters, when we refer

generically to spedlaw (or "the law"), we will be including both the statutes and their implementing federal regulations (which carry the force of law).

Office of Special Education Programs (OSEP) letters (which will be referred to often in the pages to come) help clarify the law but do not carry the force of law; still, they might be persuasive in a court of law.

Circuit court decisions carry the force of law in the states overseen by that circuit, but they are not binding on other circuit courts. (When there is a split in the circuit courts, then the issues become ripe for Supreme Court of the United States review.) See Rapid Reference 1.1 for a list of sources of information with force of law.

Circuit court decisions are binding in the states they serve, but they are also fact specific. Change the facts, and while the standards will remain the same, the outcome may differ. For example, suppose a circuit court says Johnny is only socially maladjusted, not emotionally disabled, and cites in support of that conclusion the fact that all his teachers liked him and he got all As and Bs until he made "bad choices" in high school, falling in with a bad crowd. Then suppose an eligibility group has to make a decision about Jamie, who is just like Johnny—except everybody hates him, he never got a grade above a C (in physical education, once), and who always ran with a bad crowd. Can the group count on the precedent in your circuit's decision to support a find of noneligibility due to social maladjustment? Not with the same degree of assurance, because different facts can lead to different outcomes.

The Supreme Court's decisions are binding everywhere in the country, of course, but the same problems can arise. The Supreme Court decides a deaf child who is making all Cs has received a free appropriate public education (FAPE) from her special education. Can an eligibility group infer from that that a regular education child making all Cs is, therefore, not eligible for classification? No, because the court's ruling applied *only* to children who had *already* been classified and served, not to children being considered for services.

So is there an authority school evaluators can rely on? Well . . . if you find something that is precisely "on point" with respect to a particular question in the IDEA 2004, the Final Regulations of 2006, or the Preface to the Final Regulations of 2006, you are probably on safe ground—with no need for further support, assuming of course you have interpreted and applied it appropriately.

Rapid Reference 1.1

Authoritative (though sometimes equivocal) sources of information with force of law include:

- Current federal statutes
- Current federal regulations
- Current state statutes
- Current state board of education codes, procedures, rules, or regulations
- U.S. Supreme Court decisions (to the extent that the particular facts are applicable and the relevant law has not changed since the decision)
- Circuit court decisions (in your circuit and to the extent that the particular facts are applicable and the relevant law has not changed since the decision)

If you find something written by a spedlaw attorney or parent advocate or school psychologist or college professor or educational specialist (or us) that seems "on point," you would be wise to look for at least two other independent sources confirming that interpretation before acting on it. If, for example, you stake out a position based on something we have written in this text without finding at least two other opinions that are authoritative (or something in the regulations or from Office of Special Education and Rehabilitative Services (OSERS), OSEP, or OCR and get clobbered, we explicitly deny responsibility. This is, in part, because if you have done everything suggested in the volume but still have a real problem, then our recommendation would always be to obtain the services of a real lawyer; but mostly it is because "the buck never stops here." That is not quite as cold as it may sound, because we have provided extensive documentation—authoritative documentation—on the CD accompanying this book to support many of the assertions herein so you can validate our opinions for yourself.

DON'T FORGET

Full texts of several important statutes and regulations, excerpts from some court decisions, and other information can be found on the CD accompanying this book. Material on the CD cited in text is annotated "(on CD)."

Most of the issues addressed in this book are taken from actual questions from school professionals in various venues and forums, some private and some public. The advice "The buck never stops here" may seem particularly appropriate for psychologists who test children, write reports, and make recommendations—proposals to be disposed of by others. But it is also applicable to school special education directors who aspire to the title "Teflon™ administrator." In this context especially, being a Teflon™ administrator is a good thing, because in special education, FAPE was defined by the United States Supreme Court (paraphrasing) as receiving educational benefit within the context of due process procedures, with particular reference to the right of parents to participate. What is trivial for one child, according to the Court, might be substantial for another.

> The Act's requirement of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade (*Hendrick Hudson v. Rowley*, U.S. Supreme Court 1982) (on CD).

William Rehnquist (then associate justice) included this statement in his opinion in the same case.

> The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational

benefits conferred upon all children covered by the Act (*Hendrick Hudson v. Rowley*, U.S. Supreme Court 1982) (on CD).

Nowhere does it say that school administrators get to unilaterally make decisions about special education children—except possibly within the context of properly convened IEP team meetings wherein they are serving as local education agency (LEA) representatives. Another maxim of sped-law is, or should be, as Clare Boothe Luce quipped, "No good deed goes unpunished" (Dickson, 1978, p. 109). Special education administrators who go beyond the scope of their authority (e.g., by giving parents a heads-up on the outcome he or she expects from an eligibility or IEP team meeting) outside the context of duly constituted meetings expose themselves and their schools to litigation, however well intentioned their motivations.

Be nice to parents. Always be nice. When the time comes not to be nice, that is why we have board attorneys.

Being nice does not mean rolling over like an old dog to be petted. But neither does it mean ceding the role of advocate to the child's parents and advocates, or "engaging" parents as if we were two locomotives converging at full speed on the same spot on the same track. It does mean ensuring that every child and every parent is made to feel welcome; it means disagreeing, if necessary, without being disagreeable; and it means ensuring that every child and every parent is provided with the rights accorded to them (whether we agree or not) by Congress and our respective state legislatures.

It is a basic tenet of this book that nobody really wins in a due process lawsuit. Staff is stressed, time that could be spent on other matters is lost, and, most important, the only ones who are guaranteed to profit are the attorneys. Generally, parents have to be awfully angry to go to due process. It costs them a lot of money, and while they are oftimes literally betting the family farm, school administrators are almost always playing with someone else's money. Still, there is always a cost-benefit analysis to be made—whether it would be better to spend a little more money serving a child with a disability than (strictly speaking) would be legally required for him or her to receive FAPE or whether it would be better to spend a lot of money subsidizing the board attorney's condo in Cancun over a trivial issue. For example, the school evaluates the child. The parents want an independent evaluation at district expense. The school can (1) pay for the evaluation or (2) go to due process, fighting the case up to the circuit court. In that kind

Rapid Reference 1.2

Before deciding to pursue a due process hearing, consider all the costs: time, energy, stress on staff, damaged relationships with parents, and attorneys' fees.

of scenario (not an imaginary one by the way), if it goes to court, the district almost certainly spends more than it would have originally cost for the independent educational evaluation (IEE), whatever the judges decide. It is simply a matter of degree. (We discuss IEEs in Chapter 2 and in even more depth in Chapter 3.) See Rapid Reference 1.2.

DON'T FORGET

Acronyms and Abbreviations

As in most specialized disciplines, special education comes complete with its own jargon. While we have made every effort to spell them out at least once in each chapter, a list of common acronyms and abbreviations used in this book and elsewhere is included in Appendix A at the end of this book for the reader's convenience.

Schools, perhaps even more than other organizations, fear "precedents." To some extent, there might be a legitimate concern that acceding to one parent's demand for services beyond FAPE (as interpreted by the school) might open the floodgates of parental demands for the same services for many other children. This fear must be evaluated from two viewpoints:

1. Would the extra services really be all that expensive (compared to the true total costs of due process hearings)?
2. Would there really be a large number of children whose circumstances were identical to this one?

A precedent is a precedent only if the relevant facts are the same.

STATUTES AND REGULATIONS

When Congress writes a statute, it often mandates that the department under which enforcement will fall write regulations that operationalize and enforce that law.

Various agencies within the Department of Education (ED) write and/or enforce regulations for the Individuals with Disabilities Education Act, the Family Educational Rights and Privacy Act (FERPA), the Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act (2008) (ADAAA), Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, and the Protection of Pupil Rights Amendment (PPRA).

More specifically, the IDEA Statute and Regulations are the responsibility of the Office of Special Education and Rehabilitative Services/Office of Special Education Programs (OSERS/OSEP), a division of ED, which among other things is responsible for assisting the states in implementation. Section 504 regulations are administered by the ED's Office for Civil Rights (OCR). The Family Policy Compliance Office (FPCO), also a division of the ED, interprets and enforces regulations and issues advisory information on the Family Educational Rights and Privacy Act (FERPA) as well a less familiar law, the Protection of Pupil Rights Amendment (PPRA).

Office of Special Education and Rehabilitative Services

OSERS is the lead agency in writing the regulations for the IDEA. It also "provides a wide array of supports to parents and individuals, school districts and states in three main areas: special education, vocational rehabilitation and research."

Office of Special Education Programs

A subdivision of OSERS, OSEP "assists states with implementation of the Individuals with Disabilities Education Act (IDEA). As part of its mission, OSEP is charged with developing, communicating and disseminating federal policy on early intervention services to infants and toddlers with disabilities and on the provision of special education and related services for children with disabilities."

OSERS provides a wide array of supports to parents and individuals, school districts and states in three main areas: special education, vocational rehabilitation, and research.

OSEP Letters

OSEP letters do not carry the force of law but continue a long-standing tradition of providing additional nonregulatory interpretations of the implementing regulations for the IDEA. The Pennsylvania Training and Technical Assistance Network (more commonly known as PaTTAN) maintains a searchable database of OSEP letters that can be easily searched by date or by general topic. (OSEP maintains its own database, arranged chronologically and by topic. Using Google's advanced search engine, the OSEP database, like PaTTAN, can be searched for specific phrases.)

Communications from State Departments of Education

Some state special education offices disseminate occasional memos and instructions. Like OSEP letters, these communications do not carry the force of law. They might have more influence in a due process hearing than in court, especially at the federal level, but that would depend on the hearing officers or judges. Oral and written advice from state education department personnel sometimes can be very helpful but are not determinative in a legal proceeding.

Office for Civil Rights

OCR is responsible for interpreting and enforcing implementation of the ADA/504 and Title VI in the schools. On its web page, it writes:

> An important responsibility is resolving complaints of discrimination. Agency-initiated cases, typically called compliance reviews, permit OCR to target resources on compliance problems that appear particularly acute. OCR also provides technical assistance to help institutions achieve voluntary compliance with the civil rights laws that OCR enforces. An important part of OCR's technical assistance is partnerships designed to develop creative approaches to preventing and addressing discrimination. (www2.ed.gov/about/offices/list/ocr/index.html)

Family Policy Compliance Office

FPCO is responsible for monitoring compliance with FERPA and the PPRA.

Although monitoring compliance with FERPA and addressing noncompliance issues is the responsibility of FPCO, OSERS also asserts its authority to monitor and address compliance issues regarding confidentiality as required by the statute and 2006 Final Regulations (Preface, 2006 Final Regulations, p. 46672).

Links to OSERS, OSEP, OCR, and FPCO are included on the accompanying CD.

Other sources of information and opinions regarding spedlaw include Sattler (2008, Chapter 3) and several books available on Wrightslaw (www.wrightslaw.com). Perry Zirkel (www.lehigh.edu/~ineduc/assets/vitas/zirkel_051209.pdf) has published many articles on special education law.

Typically within this book we reference specific regulations; those regulations carry the force of law and may be referenced in their entirety, for example, 34 CFR 300.8, or just by their section number (300.8). Attorneys, however, often reference the statutes themselves (e.g., USC § 1414(a)(1)(D)(i)(I)), which use an entirely different notation. We will not be referencing the statutes in this text. (If a reader wants to know the statutory justification for an IDEA regulation, all she or he needs to do is look up the section in question in the regulations, identify the statutory referents provided therein, and then look at the statute itself. We have provided both the statute and the implementing regulations on the accompanying CD, but they can also be easily found on the Internet.)

DON'T FORGET

Some important federal spedlaw agencies include:

- Office of Special Education and Rehabilitative Services (OSERS)
- Office of Special Education Programs (OSEP)
- Office for Civil Rights (OCR)
- Family Policy Compliance Office (FPCO)

At certain points throughout this book we will be referring to specific sections and specific wording from IDEA itself.

How can one decipher this legalistic shorthand?

STATUTES

Statutes are laws passed by federal, state, and local legislatures. Congress publishes laws, calling each an "Act," in the Statutes at Large, and then organizes laws by subject in the United States Code (USC or U.S.C.). The United States Code has subject classifications called "Titles," with Title 20 being the one designated for education. Within each title, laws are indexed and assigned section numbers. The symbol § often is used as the abbreviation for "section" (plural §§). Statutes published in the Statutes at Large have sections (section 1, 2, 3, 4, etc.) and the sections themselves may have multiple levels of subsections ((a), (b), (c), (d), etc.). See Rapid Reference 1.3.

So, back to deciphering our original mystery: What does 20 USC § 1414(a)(1)(D)(i)(I) mean? 20 USC tells us that we are dealing with a law (Act) published in the Statutes at Large and then classified as Title 20 (Education). Next, § 1414 tells us that we are referring to Section 1414 of the Title 20 Act. The subsection designations take us to a specific provision within that section. Confusingly, amendments and revisions are assigned the same titles and more or less the same sections as the statutes they replaced, so current and obsolete versions might have the same designation. Statutes are also referred to as Public Laws (PL or P.L.) with a hyphenated number, the first part referring to the Congress that passed the law and the second part a number specific to the statute. For example, the current, 2004, IDEA (20 USC 1400) is also called Public Law 108-446. (Each Congress is in session for two years, beginning in 1789–91, so the latest revision was passed in 2004 by the 108th Congress.) The 1997 version, also 20 USC 1400, was designated Public Law 105-17.

CAUTION

When researching an issue, be sure you are reading the most recent version of statutes and regulations.

REGULATIONS

In addition to the federal statutes, there are also regulations. It is to these that we will most often refer. Regulations provide clarification and explanations for the USC. Because regulations must be consistent with the USC and must be approved by Congress, they carry the same force of law. Each

State must ensure that its statutes and regulations are consistent with the *USC* as well as with the Code of Federal Regulations (CFR). Although the individual state statutes and regulations may provide more rights than federal laws, they cannot provide fewer or weaker rights than guaranteed by federal law. Some states have added more definitions to their special education regulations than are required by the USC. New Jersey, for example, is one of the few states to officially recognize "Social Maladjustment" as an educationally handicapping condition that would make a child eligible for special education services. (See Chapter 5 for additional discussion.) States may provide parents with more rights than the federal act; they may not restrict those rights. Similarly, they can increase the burdens on their LEAs; they cannot decrease them. If a state law or regulation is in conflict with a federal law, the federal law prevails, because of the "Supremacy Clause" of the U.S. Constitution (Article VI, Clause 2).

The Department of Education was responsible for developing and then publishing the federal special education regulations. Before the ED published those regulations, it published the proposed regulations in the Federal Register (FR) and solicited comments from citizens about the proposed regulations. The final special education regulations were published in Volume 34, Part 300 of the CFR, making the legal citation for the IDEA regulations 34 CFR § 300. Regulations in the CFR follow very similar notations to those of the USC, with sections (§§) and subsections. So, 34 CFR § 300.300(a)(1)(i) would refer to IDEA Federal Regulations (34 CFR § 300) subsection "300 (Parental consent) (a) Parental consent for initial evaluation (1)(i). The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after providing notice consistent with §§ 300.503 and 300.504, obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation." While written consent is required on the occasions noted earlier, it is *not* necessary to obtain a parent signature on every occasion when their participation is required. For example, a parent may agree to sign consent for placement but refuse to sign an IEP. As long as the school documents parental participation in the IEP process (e.g., by recording that the parent was in attendance but declined to sign), it has met its legal obligation. (Assuming, of course, that the parent does not pursue his or her other avenues of appeal!)

Rapid Reference 1.3

USC = United States Code (federal statute)
CFR = Code of Federal Regulations
§ = section (plural §§)
(a)(1)(A)(i)(I) = successive subsections

Unless noted otherwise, all references with the section symbol, §, refer to the federal regulations for IDEA 2004, 34 CFR Parts 300 and 301, Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; Final Rule, published in the Federal Register, Vol. 71, No. 156, August 14, 2006, pp. 46540–46845. The actual regulations begin on p. 46753. The commentary in the preface to the IDEA Regulations is referenced herein as "Preface, 2006 Final Regulations." Similarly, the 1999 Regulations for the 1997 law are cited as "1999 Final Regulations."

See how easy it is!

A COMMENT ON SPEDLAW

For all their complexity, omissions, and apparent arbitrariness, IDEA and state laws and regulations were written in a sincere attempt to rectify a terrible injustice. In the 1960s, when one of the authors (J.O.W.) was volunteering at a private special education school, the local superintendent of schools told a group of people that there were no handicapped children in the public schools because there were none in the town. It was probably rude to retort loudly "Then I sure [expletive deleted] away my time building a wheelchair ramp this weekend!" Until Public Law 94-142 was passed in 1975, loud, rude rejoinders and relentless, dedicated activism by parents, advocates, and teachers were about all that could be done to assert rights for children with disabilities. School districts and states were free to offer as much or as little education as they wished to children with disabilities. Many offered little or nothing. The law can indeed make our lives more difficult and can be cynically misused, but those of us who were involved in special education before the advent of spedlaw would never want to go back to the bad old days.

A VERY BRIEF HISTORY OF IDEA

Less than 40 years ago, schools in the United States educated only about one in five children with disabilities. Also at that time, many states had laws excluding from its schools students who were deaf or blind or who had emotional disturbance or intellectual disabilities. In 1975, the United States Congress enacted Public Law 94-142, the Education for All Handicapped Children Act (EAHCA or, more simply, EHA) to protect the rights of infants, toddlers, children, and youth with disabilities and to assure the right to a free appropriate public education (FAPE) for all children with disabilities. In return for federal funding, each state had to ensure, among other things, that the students with disabilities received nondiscriminatory testing, evaluation, and placement; the right to due process; and education in the least restrictive environment (LRE). Under EAHCA, students with identified disabilities were to receive an Individualized Education Program (IEP) that would clearly spell out the child's "unique" educational needs and how the school would address those needs. The IEP would contain relevant instructional goals and objectives, a statement about the determination of the most appropriate educational placement, and descriptions of criteria to be used in evaluation and measurement.

As mentioned previously, in 1982, the U.S. Supreme Court, in the *Board of Education of the Hendrick Hudson Central School District v. Rowley* case, provided some clarification regarding the level of services to be afforded to students with special needs and ruled that special education services need only provide some "educational benefit" to students—public schools were not required to maximize the educational progress of students with disabilities. Hence the now-old cliché that schools need only provide the Ford, not the Cadillac. (That still does not mean a 20-year-old Ford would suffice.)

In 1990, Congress updated Public Law 94-142 and changed its name to the Individuals with Disabilities Education Act (IDEA; Public Law 101-476). The updates to the law included the addition of new classification categories for students with autism and traumatic brain injury and required transition plans within IEPs for students age 14 or older. In 1997, the IDEA was reauthorized and amended (Public Law 105-17; referred to as IDEA '97). IDEA '97 required, among other things, the inclusion of students with disabilities in statewide and district-wide assessments,

measurable IEP goals and objectives, and functional behavioral assessment and behavior intervention plans for students with emotional or behavioral needs. In 2004, the IDEA was again reauthorized by the Individuals with Disabilities Education Improvement Act (IDEIA) (Public Law 108-446). See Rapid Reference 1.4 for a quick reference list of special education statutes.

Part C

"Part B" refers to those regulations affecting school-age children with a disability who, as a result of their disability, need special education, and those children are for the most part the subject of this book. "Part C" refers to those statutes and regulations regarding children with a disability from birth through age 3 who, as a result, need special education. This book does not address Part C responsibilities in any detail. Part C was revised in 2004 as a part of the revisions made to the IDEA. Draft regulations for Part C were issued in 2007, but they were withdrawn by OSERS in January 2009. At the time this book was written, no final regulations for Part C had been issued based on the 2004 revisions. Pending the issuance of final regulations, OSEP has posted no current Topic Briefs on the subject. Therefore, the 1999 Final Regulations for Part C continue to carry the force of law (except insofar as they conflict with the IDEIA passed in 2004). For reference purposes only, some select Part C references (the 1999 Final Part C regulations, a listing of changes in the IDEIA 2004 affecting Part C, and a few OSEP Part C letters), are included on the CD.

The most significant changes, from our perspective, were the addition of mediation as another dispute resolution mechanism under Part C and the changes in their requirements for an Individualized Family Services Plan (IFSP)—specifically, the requirements that the IFSP include "[a] statement of specific early intervention services based on peer-reviewed research, to the extent practicable . . . and a statement of the measurable results or outcomes." Those changes should not in and of themselves significantly impact how evaluators conduct their business, but the requirement that to the extent practicable interventions be based on scientifically based research could affect how evaluators frame some of their recommendations (OSERS, n.d.b).

Rapid Reference 1.4

Federal special education statutes include:

1975: Public Law 94-142, the Education for all Handicapped Children Act (EAHCA or EHA)

1990: Public Law 101-476, Individuals with Disabilities Education Act (IDEA)

1997: Public Law 105-17, Individuals with Disabilities Education Act (IDEA '97)

2004: Public Law 108-446, Individuals with Disabilities Education Act or Individuals with Disabilities Education Improvement Act of 2004 (IDEA or IDEA 2004 or IDEIA)

SOME GENERAL GUIDANCE

Like most things, spedlaw changes. Even some of the bedrock standards we discuss here may change with revisions in the IDEA, ADA, or Section 504. They change with circuit court decisions. They may, when there has been a split in the circuit, be overruled by a Supreme Court decision. The IDEA 2004 was itself amended in 2008 giving parents the right to unilaterally withdraw their child from special education. The ADA was also amended in 2008, broadening the definition of a disability by providing more examples of potentially entitling disabilities and by forbidding the consideration of mitigating measures (except for eyeglasses) in determining eligibility, thereby substantially reversing a decision by the United States Supreme Court in *Sutton v. United Airlines* in 1999. (See the regulatory amendments to the 2006 Final Regulations, effective December 31, 2008, on the accompanying CD. Also see the ADAAA amendments from December 2008 on the accompanying CD.)

Sometimes changes occur not in the law but in our understanding of the law. How does anyone keep up?

We recommend downloading key documents for easy reference. We have included among other documents searchable copies of the IDEA 2004, the 2006 Final Regulations for the 2004 IDEA, and 2008 Final Regulations for the 2004 IDEA, along with a searchable copy of the most recently posted copy of federal regulations for Section 504. An understanding of procedural requirements will never be complete without reference to state regulations, procedures, code, or policies governing a state's programs for exceptional

children. We recommend anyone with a serious interest in spedlaw download an electronic, searchable copy of their state regulations onto their computer. Many of the issues addressed in this book arising out of questions posed in various forums could be (and ofttimes were) answered just by searching that database using key words in the search engine.

DON'T FORGET

Downloading copies of federal and state regulations to your laptop allows you to search quickly for relevant information before or during a meeting.

Thus far, we have only touched on the legislative and quasi-legislative side of spedlaw. Because the IDEA is so vague with respect to defining key terms and phrases (such key words and phrases as "free appropriate public education" [FAPE], "specially designed instruction," "adversely affects educational performance," "least restrictive environment," "determinant factor," and . . . the list goes on [see Chapter 2]), people spend incredible sums of money to get answers from hearing officers and judges to seemingly simple questions. Staying current with spedlaw in the courts is easy . . . if you have deep pockets and can afford to attend national conferences on the topic. LRP probably puts on the best conferences on spedlaw; information on its currently scheduled conferences can be obtained from www.lrpconferences.com/. LRP provides another source of free information regarding developments in spedlaw: *Special Ed e-news:* Go to www.specialedconnection.com/ and click on "Free e-news." It provides updates on important letters from OCR and OSEP as well as significant court decisions.

The best free information on the influence of the courts on a variety of issues can, in our opinion, be obtained from Peter and Pam Wright at Wrightslaw.com (www.wrightslaw.com). Their Web site is supported by their advertisements and sale of various products.

The Wrights maintain a searchable database running the gamut of special educational issues. Two caveats. First, because it is a free public service, it is not always up to date. Second, the opinion pieces, even when written by attorneys (even those who, like Peter Wright, have won U.S. Supreme Court cases), do not provide information that is necessarily determinative in deciding matters of law. That is up to courts and Congress.

A number of other agencies such as the Council for Exceptional Children, NICHCY at www.nichcy.org and www.Edweek.org offer free emailed newsletters that are dedicated to the service of special education

children and which also occasionally offer updates on matters of interest to special educators. However, spedlaw is not their primary focus. See Rapid Reference 1.5 for a list of sources of information about spedlaw.

If you want to thoroughly research a question for your school system that is not answered in the chapters that follow (or if you want to find confirmation of opinions you have found here or elsewhere), we recommend that you take these steps:

1. Do a word search on the Final Federal Regulations (2006).
2. Do a word search on your state code/regulations/procedure/policies. Federal regulations supersede state policies and regulations except where the federal statute explicitly defers to state law or state special education regulations. As another example, the IDEA regulations defer to the state with respect to using foster parents as parents (Section 300.30(a), p. 46760 of the 2006 Regulations). Also, while states cannot limit the federal rights given to parents, they can expand on them. For example, a state may make transition planning mandatory from age 14, not 16, as the 2004 IDEIA amendment requires, require functional behavioral assessments in a wider range of situations than mandated by the 2006 federal regulations, or require written parental consent when federal law does not.
3. After that, we recommend checking out OSEP's letters on the topic (paying particular attention to the dates; some OSEP letters before 2006 are no longer authoritative.)
4. OCR has always held that if an LEA meets the IDEA requirements, it has also met the Section 504 requirements regarding the same issue. However, if a child is identified as Section 504 eligible only, then we recommend doing a search for answers to your questions in the federal regulations for Section

DON'T FORGET

State laws and regulations may offer more and broader rights and services than federal laws and regulations. They must not offer fewer or narrower ones. If state laws or regulations afford parents and their children a lesser right than the federal law or standard, then the federal laws and regulations prevail.

504, articles in the OCR Reading Room, and the OCR Frequently Asked Questions for 504. All are included on the CD.

5. If the issues you are researching involve an adversarial relationship with parents, doing a preliminary search on Wrightslaw for key cases (followed by a search for the cases themselves) on the point(s) in question is recommended. Pay particular attention to decisions made by the circuit court for your state. Supreme Court decisions supersede both federal and state court decisions. Again, our warning about making sure that the decision still reflects current law still applies. In some cases, Congress has overturned landmark case decisions in its various amendments to the IDEA and ADA.

CAUTION

Court opinions and policy guidance letters from federal and state agencies may not always be applicable if the law or regulations have changed since they were published or if a federal court decision has altered the interpretation of a law.

Summary: "The buck never stops here." "Always be nice to parents." "In spedlaw, no good deed goes unpunished."

If you have a question that is not addressed in any of the letters found at OSEP or PaTTAN (e.g., is my state violating the regulations by not

Rapid Reference 1.5

Other sources of information about spedlaw include:

- OSEP Letters
- Advisory memos from your state department of education
- U.S. Department of Education Web sites
- State departments of education Web sites
- Pennsylvania Training and Technical Assistance Network (PaTTAN)
- Wrightslaw.com
- Googling the IDELR identifier (e.g., 17 IDELR 950) listed with a court decision in the references to this book. You will get law articles and citations in other cases

allowing parents and schools to extend testing timelines for an SLD evaluation?), you can write to OSEP and OSERS directly at:

Office of Special Education Programs
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202-7100
Telephone: (202) 245-7459

Don't hold your breath waiting for a response. We have known turnover time to take from six months to up to a year.

You can also call the office at the number listed. The thing is, nobody is going to take your word that OSEP said such and such, and sometimes you do not get the same information via telephone that the office sends you in writing. G. M. M. was once told in no uncertain terms over the telephone that retention was a change of placement under the IDEA; but the written response said just as unequivocally that it was not!

How to Obtain Copies of Older Letters from OSEP Not in Their Online Data Bank under the Freedom of Information Act without Paying

Beg.

Anyone can contact the office at the address listed.

Actually, at the time this book was written, OSEP policy was to charge educational institutions, representatives of the news media, and noncommercial scientific institution requesters for duplication only, and even then (if a person requesting that information meets one of those qualifications) he or she would not be charged for the first 100 pages. However, we suggest you ask what the current fee policy is or specify a maximum amount you are willing to pay if there is a charge before submitting a request that could generate thousands of pages of documentation.

THE 46753 TRICK: COMMENTARY VERSUS REGULATIONS

If you do download a version of IDEA 2006 Final Regulations (on CD) in PDF format (this trick does not work if you have it in Word format), finding what you want may be time consuming if you are not exactly sure

where it is located within the regulations. The PDF version of the law is actually a copy of the Federal Register starting with a page numbered 46540. The total document is 307 pages long. Of that, over 200 pages consist of commentary that provides wonderful discussions of issues and questions raised by concerned parties during the reauthorization process. Some commentators raised substantive issues that resulted in equally substantive changes to the final law. These 200 pages are chock full of interesting examples that in many cases demonstrate the government's rationale for its decision making. That being said, if you want to go directly to the actual law, skipping over all the commentary, you must go to page 46753 of the Federal Register. The 2008 amendments to the IDEA began on page 73006 of the Federal Register. The 1999 Final Regulations for the IDEA 1997 are referred as "1999 Final Regulations."

Unless noted otherwise, all of the text references that use the section symbol, §, refer to the federal regulations.

Conferences or Workshops on Spedlaw

School attorneys would never let their clients go into expensive litigation if they knew they were going to lose. (Not ethical ones, anyway.) But lose schools do, more than 40% of the time. You can help improve the odds for your school system by learning to be proactive, but nobody offers a foolproof away to protect a school system against all possible lawsuits.

Local law firms, local parent advocacy groups, and national parent advocates, such as Wrightslaw (www.wrightslaw.com/) offer less expensive workshops. Workshops by local firms and groups will vary in quality, and law firms and advocacy groups may have strong points of view biasing their interpretation of the law.

FINAL THOUGHTS

Throughout the chapters to come, we attempt to address, in layperson's terms but supported by citation and references to the law, common concerns raised by those who are responsible for following the special education laws and regulations. What follow are questions that have been asked over and over again by inexperienced and experienced professionals in

the special education field. Each one seems on its face to be relatively simple to answer, but you may be surprised by what the "correct, legal" answer is.

TEST YOURSELF

1. **When determining special education eligibility, academic achievement must be measured by test scores.**
   True or False
2. **When it comes to learning disability classification under the IDEA, children are required to demonstrate at least average intelligence.**
   True or False
3. **When using ability/achievement discrepancies for the determination of eligibility for Specific Learning Disability, the IDEA says that the IQ score is equal to the expected achievement score.**
   True or False
4. **Ability/achievement discrepancy is important when determining disabilities other than Specific Learning Disability.**
   True or False
5. **If the school decides to utilize an ability/achievement discrepancy, the discrepancy must be determined by a numerical formula.**
   True or False
6. **A Full Scale IQ score must be used if the school decides to utilize an ability/achievement discrepancy calculation.**
   True or False
7. **Once testing is completed and eligibility determinations are made, record forms (protocols) should be destroyed.**
   True or False
8. **Students without disabilities may not have individual tutoring.**
   True or False
9. **Special education services are permitted only in area(s) of the child's identified disabilities.**
   True or False

Note: All of the answers to this short quiz are False.