The Role of Law in Special Education*

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Special education in the United States is distinctively characterized by "legalization" (Neal & Kirp, 1985) based on the fundamental role of various sources of law, including litigation. For example, litigation specific to special education is negligible in other countries, even neighboring Canada (e.g., McBride, 2013). Extending the litigation example to the current era within this country shows the centrality of the role of law. More specifically, although amounting to less than one sixth of nation's public school enrollments, special education students have accounted for more federal court decisions for the past four decades than their far more numerous general education peers (Zirkel & Frisch, 2023).

The overall purpose is to provide a comprehensive knowledge base for special education practitioners and professors to assess the distinctive role of law in this field. For example, has the balance of costs and benefits reached the point of over-legalization? Similarly, to what extent is legal literacy essential for special education teachers and related service personnel as compared to special education supervisors and administrators? To facilitate answers to these questions, this article consists of three successive parts. Part I is a description of the meaning of "law" in the context of special education in this country. Part II examines the level and sources of knowledge of special education law among school personnel. Finally, Part III identifies lessons for special education practitioners' consideration.

I. The Contextual Meaning of Law

As described in more practical detail elsewhere (e.g., https://promotingprogress.org/training), the federal system in this country consists of two primary levels—the uniform foundation of federal law and the varying additions of state law.

For public schools, the potential and typical third level of local districts is via delegation from the state law level. As Hawaii illustrates, this extension of the state level is discretionary rather than necessary; all of the islands constitute a single school district.

Sources of Law

With the federal and state levels turned sideways, the successive sources of law form a pyramid-like structure in a bottom-up direction of the Constitution, legislation, and regulations. Each of these initial sources sets the boundaries for the one above it, with the force of law decreasing but the details increasing from the bottom to the top. For the federal side of this pyramid, the Constitution established three branches of government—legislative, executive, and judicial. The legislative and executive branches issue legislation and regulations, respectively. In turn, the judicial branch accounts for the tip of the pyramid, which applies these sources, including any conflicts between them, to specific factual circumstances.

[INSERT FIGURE 1 APPROXIMATELY HERE.]

For P–12 students with disabilities, federal law starts at the legislative level, with the federal Constitution providing only roots, on an underlying but indirect basis, in the due process and equal protection clauses of the Fourteenth Amendment. The primary legislation is the Individuals with Disabilities Education Act (IDEA), which started primarily as a funding statute in 1975 and which Congress has subsequently amended in 1986, 1990, 1997, and 2004 to fine-tune is various requirements. As a secondary matter, a pair of civil rights acts—Section 504 of the Rehabilitation Act (§ 504) and the Americans with Disabilities Act— provide overlapping broader coverage but less detailed student-specific requirements.

Administrative agencies, which are primarily part of the executive branch but which have also been characterized as a fourth branch of government (e.g., Straus, 1984), issue regulations.

For the P–12 context, the U.S. Department of Education has issued the corresponding regulations for the IDEA and § 504, which repeat the statutory requirements but add specifications for clarification and gap-filling. The Department's Office of Special Education Programs (OSEP) issued the latest full set of IDEA regulations in 2006, which consists of 50 pages of small-print requirements, plus an additional 250 pages of appendices and explanatory commentary (U.S. Department of Education, 2006). The Department's Office for Civil Rights (OCR) recently announced its intention to issue new regulations for § 504, which had not previously been changed since the late 1970s. Adding further legalizing complexity, the various policy interpretations of OSEP and OCR are just beyond the margins for the federal regulations, with potentially persuasive although not binding, force in the forums for decisional enforcement (e.g., Zirkel, 2017a; Zirkel, 2017b).

On the state side, the relevant laws for P–12 students with disabilities vary. First, whether they take the form of legislation or regulations, the state special education laws serve as corollaries to the IDEA, with some merely repeating the federal requirements and others adding various supplementary specifications. Second, some state laws ~~that~~ may include not only special education but also general education students. Thus, depending on the state, issues such as bullying, dyslexia, multi-tiered system of supports, or seclusion and restraint may be the subject of either special education or general education laws. For example, the laws in Arkansas and Mississippi not only permit a multi-tiered approach for identification of students with specific learning disability but also require such an approach for all students. Similarly, although the majority of state laws that provide relatively strong protections against restraint and seclusion apply to all students, a notable minority only apply to special education students.

Forums for Decisional Enforcement

For the judicial branch, which accounts for the litigation that applies these sources of law to the specific facts of individual cases, the complexity includes consideration of (a) the aforementioned hierarchy that limits legislation to the boundaries of the Constitution and that similarly limits regulations to the scope and authorization of the legislation; (b) the interaction between federal and state law, including preemptive effect of federal law where both apply and state law conflicts with federal law (e.g., Adkins et al., 2023); and (c) the doctrine of judicial precedent, which is binding for higher courts within the same jurisdiction and which may be persuasive for court decisions from other jurisdictions (e.g., Dobbins, 2010).

Moreover, primarily for the IDEA although extending to § 504 at a much lower level, the judicial level has an underlying much wider layer of administrative adjudication. More specifically, in the majority of cases, the filing party—whether it is the parent or the district—must first complete an impartial due process hearing. Although varying from state to state, this administrative level of adjudication is generally more user-friendly in terms of time and cost than the ponderous judicial system (e.g., Connolly et al., 2019). The IDEA provides concurrent jurisdiction for state and federal courts, but most of the cases in recent years that proceed beyond administrative adjudication are decided in federal courts.

Yet, as another step of legalization in special education, the issues in IDEA cases have become increasingly purely adjudicative, such as the limitations period for filing and appeal and the recovery of attorneys' fees for prevailing parties. Indeed, the Supreme Court has led the way by shifting its focus since the turn of the century from key issues in special education, such related services, disciplinary protections, and unilateral private placements, to technical litigation issues under the IDEA, such as the burden of persuasion, the costs of expert witnesses, the parents' right to proceed in federal court without an attorney, and the exhaustion of overlapping

federal claims (e.g., Zirkel, 2020b). Similarly, the hearing officer system under the IDEA has gradually become more "judicialized" (e.g., Zirkel et al., 2007), including the expanded use of state administrative law judges (Connolly et al. 2019). A concomitant development is that the due process hearings have become more time-consuming. To stem the tide of due process hearings, the 2004 IDEA amendments added a 30-day resolution period to precede the 45-day timeline in the IDEA regulations for the hearing officer decision; yet, the national average in recent years has reached 2.5 times that combined 75-day period (Holben & Zirkel, 2021).

Additionally, the IDEA and § 504 provide for an alternative decisional dispute resolution avenue at the administrative level that is investigative rather than adjudicative. More specifically, under the IDEA, this avenue is the state complaint process (e.g., Hansen & Zirkel, 2018). Under § 504, it is OCR's complaint resolution process (U.S. Department of Education, 2022).

Thus, although typically specific to adjudication, "law" in this context amounts to far more than this visible tip of the "iceberg" (Zirkel & Machin, 2012).

[INSERT FIGURE 2 APPROXIMATELY HERE]

As an overall estimate of the width of the successive adjudicative layers for the special education cases during the decade 2010–2019, the approximate totals were as follows: officially published court decisions - 675 (Zirkel & Karanxha, in press), all court decisions – 1,325 (Zirkel & Frisch, 2023), and hearing officer decisions - 16,680 (CADRE, 2022).*

Additionally, as the alternate decisional avenue to adjudication, the corresponding total for IDEA state complaint decisions during this same ten-year period was 33,460 (CADRE,

* The author applied an estimated correction factor for these data reported by the Center for Appropriate Dispute Resolution in Special Education (CADRE) because they do not include due process hearing cases that were decided after the year in which they were filed.

2022). The corresponding data for the overlapping complaint resolution process of OCR approximate 44,000 decisions, but they include disability discrimination issues for higher education, employees, and facilities as well as K–12 students (e.g., U.S. Department of Education, 2009–12, 2019).

Yet, the activity distribution of the adjudicative and investigative forums of the IDEA generally reveals "two worlds" of special education law within this country. For example, approximately five states, including the District of Columbia, account for the vast majority of due process hearings (Zirkel & Gullo, 2020), and approximately ten states account for parallel predominance of the state complaint activity (Fairbanks et al., 2021).

Moreover, consider that, as a national average under the IDEA, only about 5% of the filings for due process hearings (Zirkel & Gullo, 2020) and about 60% of the filings of state complaints (Fairbanks et al., 2021) end in a decision. For the rest, especially but not exclusively in the adjudicative area, the margins of the fluid subsurface level are not clearly separable from formal non-decisional avenues of dispute resolution, including mediation and settlements. After the filtering effects of settlements and withdrawals/abandonments, the decisions tend to favor school districts, although the specific proportions vary according to the jurisdiction (e.g., Zirkel & Karanxha, in press), the decisional avenue (e.g., Zirkel, 2017c) and the outcome measure (e.g., Zirkel & Skidmore, 2014).

Finally, intrinsic to the IDEA, the answers to most legal questions are individualized to the particular factual circumstances, thus often being "it depends" rather than an unqualified "yes" or "no." Thus, the interpretation and application of the legislation, regulations, and case law varies according to not only the usual variables, such as the jurisdiction, but also the IDEA-specific features, such as the adjudicative v. investigative administrative forum and the specific

situation of the individual child.

Legal Literacy of Practitioners

Empirical Research to Date

Although limited in quantity, quality, and currency, the cumulative research generally has found that school personnel tend to have a low level of knowledge of special education law. However, the focus of most of the published studies have been building-level administrators (e.g., Protz, 2005), preservice teacher candidates (e.g., Horner et al., 2020), or teachers (e.g., O'Connor et al., 2016) in general education.

Due to the scant available data on legal literacy of special education leaders and teachers, the information to a large extent must be cautiously imported from the limited empirical sources specific to these partially analogous roles in general education. The only published analyses that went beyond a convenience sample within a limited part of a state, such as one county in a southeastern state (Protz, 2005) or the New York City metropolitan area (O'Connor et al. 2016), were for education law and educators generally, rather being specific to special educators and special education law, during the first decade of this century (Militello et al., 2009; Schimmel & Militello, 2007).

In the first, Schimmel and Militello (2007) conducted a multi-state survey of a large convenience sample of teachers. The authors only reported "contact[ing] principals who were administering the survey" (p. 261), without any information as to the number of principals and states in the survey population or the response rate among the surveyed teachers. The resulting 1,317 respondents were within 17 states, with 86% from only 5 of the states and slightly more than half from Massachusetts. Less than 5% of the respondent teachers were in special education. The "actual knowledge" section of the survey was limited to student and teacher

rights, with none of the 28 items specific to special education. The average score was approximately 40%. Most of the teachers lacked training in education law, with only 24% reporting haven taken a course and 5% have attended an in-service program in education law. The correlation between the level of law training and the correct knowledge score was statistically significant but only .08. The sources that the respondents' reported for their legal knowledge were, in descending order, other teachers (52%), school administrators (45%) inservice/professional development/courses (41%), media (35%) and the teachers' union (25%), but the eight specified choices beyond "other" did not include the professional literature.

In the second multi-state published analysis, Militello et al. (2009) conducted a survey of school principals who were members of the National Association of Secondary School Principals (NASSP). More specifically, they sent the survey invitation to a random sample of 8,000 NAASP members, resulting in 493 completed survey forms, or a response rate of only 6%. The legal knowledge section of the survey form consisted of a total of 34 items concerning student and teacher rights, which was similar but not identical to the 28 items in the Schimmel and Militello (2007) questionnaire. The only item specific to special education concerned teacher responsibility for implementing IEPs. Overall, the average score for the respondent-principals was approximately 60%. Only 5% reported not having any school law training via courses or professional development programs. For sources of legal information of advice, among the five options listed on the survey form ("central office personnel, school/district lawyer, other principals, professional organizations, and print or other electronic resources"), Militello et al. reported that "59% rely on central office personnel … [with] school district lawyer and other principals rank[ing] a close second [and the remaining two choices being lower]" (p. 36).

Application to Special Educational Personnel

Consequently, based on the published research to date, the level and sources of special education legal literacy among the current cadre of special education leaders and teachers is subject to educated guesswork. Based on the available sources of legal information, it is likely that the scope and accuracy of their legal knowledge is inadequate, especially but not exclusively at the teacher level. For example, at the preservice stage, it is unlikely that the crowded curriculum for special education teacher preparation has included more than brief mention of the applicable statutory, regulatory, and case law for students with disabilities under the IDEA and § 504/ADA. The state certification requirements for special education directors are more likely to include more than token preservice preparation via coursework or test preparation, but the such information is often limited to rather basic IDEA issue categories, such as IEP requirements, and within the broader treatment of legal and ethical obligations or education law more generally. Moreover, as Boscardin (2019) pointed out, many special education administrators come from general education backgrounds, thus lacking relevant legal preparation. At the inservice level, if special education teachers and leaders rely on their colleagues or principals, per the limited findings of the aforementioned pair of multi-state surveys of their general education counterparts, their misinformation is likely compounded. Alternatively or additionally, to the limited extent that special education teachers, as compared to special education directors, have access to attorneys, it is typically in the form of staff development sessions in which school lawyers often inflate the level of legal requirements and reinforce the illusion of monetary liability of school personnel under the IDEA and Section 504 for the purposes of promoting compliance and avoiding parental filings.

Finally, overlapping with the preservice and inservice stages, the professional literature in special education and related areas, such as school psychology, is markedly limited in both the

quantity (e.g., Zaheer & Zirkel, 2014) and quality (e.g., Zirkel, 2014a, Zirkel, 2014b) of its legal information. Part of the quality problem is the lack of formal legal training among the small cluster of professors who serve as the predominant authors and reviewers of the law-based articles in the refereed journals, and the silo-like compartmentalization of the special education and education law fields. Another more subtle but just as significant source of legal inaccuracy, which extends beyond academic publications to Internet sources and professional development programs (e.g., Zirkel & Hetrick, 2017), is the lack of transparency in differentiating (a) legal advocacy from impartiality and (b) professional norms from legal requirements (Zirkel, 2020a). My critiques provide various examples of this transparency problem in the professional literature with regard to the IDEA's provisions for child find (Zirkel, 2015), peer-reviewed research (Zirkel, 2022b), progress monitoring (Zirkel, 2022a), and response to intervention (Zirkel, 2018) as well as the Supreme Court's IDEA decisions in *Forest Grove* (Zirkel, 2013) and *Endrew F.* (Zirkel, 2019).

Yet, the focus for special education personnel should remain on efficient and essential knowledge of legal requirements specific to their professional practice, not those specific to the practice of law. As a matter of resources, the primacy needs to remain on effective pedagogical methods and materials so that the tail does not wag the dog. Take, for example, the IDEA's exhaustion provision, which requires completion of the IDEA impartial hearing process before going to court for claims under an alternative federal law, such as Section 504. Subject to evolving exceptions, this issue is a technical adjudicative issue. Yet, after a nuanced analysis of this provision in the wake of a recent Supreme Court decision, Russo and Osborne (2023) seemed to suggest that special education practitioners focus on a deeper understanding of such legal issues, which are not at all essential or efficient for improving their services, as compared

to the needs for the attorneys who represent their districts. Why should a special educator get professionally exhausted trying to plumb the depths of legal exhaustion?

Lessons for Effective Practice

The special education director may be the key for maintaining the focus on relevant and accurate legal information. The limitations include (a) the relatively high attrition and pressing workload of these leaders, especially in light of the current teacher shortage in special education, and (b) the difficulties of coordination with the predominant and often silo-like general education side of the school district, whose personnel may well not only lack the requisite legal knowledge but also have different priorities and perceptions. Within these limitations, the challenge for special education directors is to have (a) basic and up-to-date legal literacy about special education, (b) effective access to specialized legal counsel, and (c) high ability both to differentiate legal requirements (i.e., the "shall") from professional norms (i.e., the "should") and to make prudent decisions within this range.

Limits of Law

One of the key considerations is to understand the limits of law both generally and in the special education context. At the general level, these limits include (a) the societal context; (b) prevailing attitudes, morals, and practices; (c) emergency situations; (d) administration and enforcement difficulties; (e) internal affairs of families and private groups; and (f) changes in scientific knowledge (Mermin, 1982). For our particular society, Manning (1977) provided a diagnosis of "hyperlexis," which is a bloating proliferation of law, as "our national disease" (p. 767). Although Manning's characterization, which arose from his focus on the federal tax code, is subject to challenge as applied to litigation generally (e.g., Galanter, 1986), it does serve as a reminder of the limits of law.

The overlapping limits in the special education context are also significant. For example, the transaction costs of the dispute resolution process in special education are considerable for the parents, the district, and, in particular, the child in at least three ways. First, the IDEA primary decisional avenue for dispute resolution and case law precedents, which is adjudication, is time-consuming. In addition to the usual multiple-month period from filing for a due process hearing to a final hearing decision, the subsequent judicial process is clearly "ponderous" (*Honig v. Doe*, 1988, p. 322). The usual IDEA case takes approximately another two years for a decision at the federal district court level (e.g., Zirkel, 2011), and the federal appellate level may well add another one-to-three years for a decision. Even if the ultimate decision is in favor of the child, for most issues, such as eligibility or free appropriate public education (FAPE), it is often too late to be effective.

Second, overlapping with time, the financial costs during this period mount up quickly, with attorneys' fees often approaching or even exceeding the price of the requested relief. Third, the social-emotional costs escalate in direct relation to its duration. Adversariness replaces trust as litigation eclipses education.

On the other hand, the pressures increase on both parties for settlement, which—like the law-making process of legislation—is characterized by negotiations and compromise. Conversely, because such negotiations ultimately depend on the balance of power, which generally favors school districts in the special education context, the other non-decisional option is withdrawal/abandonment. Although the specific proportions of settlements and withdrawal/abandonment are not readily available in, and likely vary among, most states, an example appeared in a currently pending class action lawsuit against the state of Virginia. The plaintiffs' complaint summarized data obtained via FOIA requests from the official decisions log

of the agency's IDEA hearings system, reporting that for the 847 filings in Virginia for the period 2010–2021, 14% were settled and 51% were withdrawn (*D.C. v. Fairfax County School Board*, 2022, p. 16).

Another overlapping limit of the IDEA is its structural emphasis on procedures. In its landmark decision in *Board of Education v. Rowley* (1982), the Supreme Court concluded that the extensive and elaborate procedural provisions of the Act "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (p. 206). This emphasis not only dovetails with "the arid formality of legalism" (Neal & Kirp, 1985, p. 83) and "proceduralization" (Kirp et al., 1974, pp. 116, 154) but also conflicts with the two-step, harmless error approach to procedural violations of FAPE that the lower courts developed post-*Rowley* and that Congress codified in the 2004 Amendments of the IDEA for the adjudicative forum (e.g., Zirkel & Hetrick, 2017). The problem, as Yudof (1981) pointed out in his early and thoughtful balanced approach, is overlegalization to the extent that "procedure is deified at the expense of education" (p. 917), although his assessment of the *Goss v. Lopez* (1975) constitutional requirement for short term suspensions in general education and the pre-IDEA proposals of Kirp et al. (1974) for due process hearings are a far cry from the current extent of proceduralism in special education law.

Finally, for the legislative and regulatory sources of law in our highly legalized society, more laws increase the resulting problems of enforcement and compliance for effective outcomes. Although advocates in K–12 education often see the solution in a state law for dyslexia, MTSS/RTI, or anti-bullying, such laws have two major downsides. First, unlike the IDEA and Section 504/ADA, these state laws typically lack a right to sue, which leaves

enforcement to the overburden state administrative agency. Second, as the decades of experience under the IDEA has shown, procedural compliance does not equate to substantive outcomes. For example, research has shown that the dramatic movement toward more and stronger dyslexia laws has not significantly increased the identification rates of students with SLD or, in two of the states with the strongest laws, students with dyslexia (Barber Philips & Odegard, 2017). At the next level, the effect on reading scores is yet to be analyzed but is clearly questionable.

Opportunity for Special Education Leaders

Another example of the limitations of law in special education, which overlaps with the individualized nature of special education and the interplay of the sources, levels, and forums for lawmaking in our country, is the inevitable discretion of school personnel as "street-level bureaucrats" (Weatherly & Lipsky, 1977). Special education leaders may turn this obstacle into an opportunity first by developing well-informed legal literacy that is carefully differentiated from not only one-sided misinformation but also professional norms. Serving as an example of the due and dramatic differentiation between legal requirements and professional norms, Zirkel and Yell (2023) systematically compared the rulings of the post-*Endrew F.* courts and the recommendations of the professional literature for the applicable indicators, or measures, of progress in determining whether school districts have provided FAPE under the IDEA. Staying legally current via efficient use of practically accessible and legally accurate sources, special education leaders can select and share the limited legal information that their direct-service colleagues need to know, otherwise keeping the focus on proactive efficacy rather than legal intricacy.

Thus, using their discretion to put the "Janus-faced nature of legalization" (Neal & Kirp,

1985, p. 82) to work in a balanced way, special education leaders can foster equitable and effective outcomes that are based on professional best practices above and beyond the fuzzy minimums of legal requirements, with due consideration to local resources and values. Making the most of their ultimate skill set, which is collaboration rather than litigation, special education leaders can foster teamwork among special and general education teachers that extends effectively not only to parents (Turnbull et al., 2015) and lawyers (Huebert, 1997) but also to physicians, professors, and private psychologists within the bounds of their respective expertise. Through this collaborative and creative use of the "adhocractic" nature of the IDEA (Skrtic, 1991, p. 172), special education leaders can engage in problem-solving that effectively fulfills the spirit of the law.

Defeating the misconception that what the IDEA and Section 504 do not require is prohibited, special educators could and should use their expertise in this "nonlegal" area (Heubert, 1997, p. 559) to extend their proactive individualized approach to not only students with but also without disabilities. For example, if a child who does not qualify for the IDEA or Section 504 but who needs preferential seating, a functional behavioral assessment, or instructional "chunking," it is discretionary rather than illegal for schools to provide such accommodations or strategies, whether via individual health plans, MTSS interventions, school problem-solving teams, or just informal teacher practices. Treating all children as "special" ultimately is more than legal, thus putting the priority on education rather than litigation.

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