FREE APPROPRIATE PUBLIC EDUCATION

The Law and Children with Disabilities

Third Edition

H. Rutherford Turnbull III

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To Jay, for whom these rights have meant so much;
Amy and Kate, who teach and learn from Jay;
Ann, our best teacher; and
Ruth W. Turnbull, gone but everlasting.

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PREFACE

The goal of American education is to value each child as equally an individual and entitled to equal opportunity of development of his own capacities, be they large or small in range. ... Each has needs of his own as significant to him as those of others are to them. The very fact of natural and psychological inequality is all the more reason for establishment by law of equality of opportunity, since otherwise the former becomes a means of oppression of the less gifted.

—Thomas Dewey

Dewey's sentiments have a familiar ring to those of us who have been working to establish the rights of children with disabilities to a free appropriate education. He admonishes us to value all individuals, whomever and whatever they are, recognize their needs and satisfy them, establish equal educational opportunity by law, and change a system that oppresses some because of their inequalities. How surprised Dewey would be to learn that his views have become so widely accepted!

This book tells the story of the initial rejection and ultimate acceptance of those ideas. It also shows how law adopts these ideas and enacts them as the idea of equal educational opportunities for children with disabilities. Its essential teaching is legal. Its essential message is moral: A person who is less able is not less worthy.

In the mid-1980s, the public schools—the governmental system that casts the widest net and exercises the greatest influence over us (next to the tax and revenue departments)—have finally begun to come to terms with educating all these children. How the nation's public schools have dealt with the challenge and opportunity of educating these children in the past, and how they must do so under present law, is this book's initial focus.

The book next analyzes in detail the six principles of special education law: (1) zero reject, or the right of every child to be included in a free appropriate publicly supported educational system; (2) nondiscriminatory classification, or the right to be fairly evaluated so that correct educational programs and placement can be achieved; (3) individu-

alized and appropriate education, so that an education can be meaningful; (4) least restrictive placement, so the child may associate with nondisabled students to the maximum extent appropriate to his or her needs; (5) due process, so the child and child advocates may have an opportunity to challenge any aspect of education; and (6) parent participation, so the child's family may be involved in what happens in school.

Recognizing that these six principles generate widespread resistance, the last part of the book presents the most common objections to these principles. It also attempts to answer those objections on two major grounds: (1) the beliefs that support the principles, and (2) the system of values that undergird the principles.

Now, a word or two about the terminology used in this book. Federal special education laws use the terms *handicapped* and *handicapped children*—for example, the Education for The Handicapped Act and its important amendment, the Education for All Handicapped Children Act. I do not prefer that usage for two reasons. First, it emphasizes the characteristic of the child—namely, the disability—which society turns into a handicap by not accommodating to it, thereby relegating the child to secondary status as a student and person. Second, the collective noun form (the handicapped) implies that all children with disabilities are alike and not individuals.

I prefer "children with disabilities," with a substitution of "students" or "persons/people" for "children" and a substitution of "mental retardation" or "learning disabilities" (or other specific disability) for "disabilities" or "disabled" when the specific is preferable to the general. To resolve the problem of being consistent with federal laws and adhering to my own preferences, I sometimes use the federal term and sometimes my own. Undoubtedly, a change in federal terminology is desirable.

The first version of this book (written in 1978) focused on the new federal laws, the developments that led to them, and the implications of those laws for schools, students and parents, and institutions of higher education. Since then, the literature of special education has been flooded with research and commentary on implementation of the laws. Therefore, it does not seem appropriate to preserve the implementation focus of the first edition in the second version or in this one.

Moreover, since 1978 there have been significant developments in interpretation of the federal law. Literally hundreds of judgments have been entered concerning the meaning of "free appropriate public education." Since the first book emphasized developments leading up to the federal laws and the content of those laws, it seems particularly appropriate for subsequent editions to analyze and comment on the most important judgments and their effects.

For these two reasons only, this book is not co-authored by the original authors but is authored by only one of them, H.R. Turnbull. Ann Turnbull is a special educator whose contributions to the first book were principally with respect to implications of the law. Since that focus is not present in this or the previous edition, she is not shown as a co-author. Nonetheless, she has contributed to the development of this book in important professional and personal ways, and the present author—her colleague and husband—gratefully acknowledges all those contributions.

In addition, the author is extraordinarily appreciative of Dorothy Johanning and Judith A. Roesler, a law student who has been most helpful on technical matters. Both are exceptionally talented members of the staff of The University of Kansas. Through their professional skills and buoyant personalities, they have immensely aided in the production of this book. Finally, the many students at The University of Kansas who read and responded to the earlier book and helped sharpen it are entitled to—and hereby receive—my special thanks.

In the end, however, the greatest appreciation is owed to those pioneering parents and advocates who initiated the civil rights movement in education by challenging racial segregation; to the equally pioneering and risk-taking parents and professionals who started the revolution that we now call the right-to-education movement; to the members of Congress who brought the federal government into the lives of children with disabilities and their parents; and to the children who are disabled and who, through their disabilities, character, and sheer pluck, contribute so positively to the lives of their teachers, families, and friends.

H.R.T. III

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SECTION I
Introduction to the Law

1
Introduction to the American Legal System

FEDERALISM

The law serves many purposes, among them ordering the public affairs of individuals and their governments and resolving disputes between them. These seemingly simple purposes are accomplished through an intricate network. To explain the workings of that network, we will use some familiar images.

Public law can be thought of in terms of three parallel ladders—descending rungs of parallel authority affecting the relationships between individuals and their governments and between various levels of government. At the top of the federal ladder is the United States Constitution; in the middle are laws enacted by Congress pursuant to constitutional authority; and on the bottom are regulations issued by federal agencies pursuant to congressional authority. Next to this ladder stands one representing the state governments, and it has similar rungs of parallel authority: state constitutions, state statutes, and state agency regulations. Finally, next to the state ladder is the local ladder with its three rungs: the charters of local governments, local ordinances, and local regulations.

The whole picture shows that the highest source of law in each "ladder" is the fundamental governing document: the federal Constitution, the state constitution, and the local charter. Federal, state, and local statutes are next in line, followed by federal, state, and local agency regulations:

Federal	*State*	*Local*
Constitution	Constitution	Charter
Statutes	Statutes	Ordinances
Regulations	Regulations	Regulations

This system of parallel governments (federal, state, and local) is known as the *federal system;* as a form of government, it is known as *federalism.*

Two major principles are involved in the form of government known as federalism. First, there is the sharing of responsibility and power between the federal, state, and local governments. As pointed out later in this chapter, the responsibility for and power over the education of children with disabilities is shared between those governments. Traditionally, local and state school boards (or other governing bodies) had the greatest responsiblity and power. Recently, however, responsibility and power have been allocated in greater part to the federal government. This shift is the result of the court cases that began with the desegregation cases in 1954, and it gathered force with two cases decided in 1972 (as pointed out later in this chapter and in chapter 2.) It also is the result of legislation—the Education of the Handicapped Act, which is reviewed in detail later in this book.

Second, there is the supremacy of federal constitutional and statutory law. Early in the history of this country, the Supreme Court, in *Marbury v. Madison,* made it clear that the Constitution of the United States and laws passed by Congress to implement the Constitution are the supreme law of the land. This means that state and local school boards must comply with federal law if, among other things, they receive federal funds (as they do when they educate children who have disabilities with money allocated to them under the Education of the Handicapped Act) or if their laws are in conflict with federal constitutional law or federal statutes. Clearly, the supremacy doctrine has permitted the federal role in the education of children with disabilities.

LAWMAKERS: WHO MAKES THE LAW?

For each source of law there is a lawmaker—a group of persons who make the law. For the federal Constitution and its amendments the initial lawmakers were the delegates to the constitutional convention and subsequently the legislatures of the various states that acted to ratify constitutional amendments (other than the first 10, the Bill of Rights, which was drafted by delegates themselves). The delegates were representatives of the franchised citizens of the states. Thus, the source of the federal Constitution was the citizenry of the United States. This is generally true, too, with respect to the constitutions of states and charters of local governments.