

4th
Edition

SPECIAL EDUCATION LAW

Laura Rothstein
Scott F. Johnson



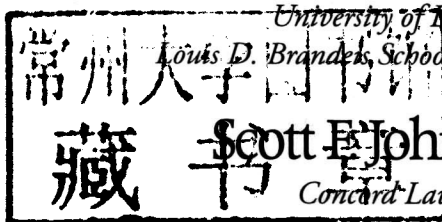
4th
Edition

SPECIAL EDUCATION LAW

Laura Rothstein

University of Louisville

Louis D. Brandeis School of Law



Scott E. Johnson

Concord Law School

 SAGE

Los Angeles | London | New Delhi
Singapore | Washington DC

Copyright © 2010 by SAGE Publications, Inc. Previously published by Pearson Education, Inc.

All rights reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher.

For information:



SAGE Publications, Inc.
2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

SAGE Publications Asia-Pacific Pte. Ltd.
33 Pekin Street #02-01
Far East Square
Singapore 048763

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Rothstein, Laura

Special education law/Laura Rothstein, Scott F. Johnson. —4th ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-4129-6771-6 (pbk.)

1. Special education—Law and legislation—United States. I. Johnson, Scott F. II. Title.

KF4210.R68 2009

344.73'0791—dc22

2008043218

This book is printed on acid-free paper.

10 11 12 13 10 9 8 7 6 5 4 3 2

<i>Acquisitions Editor:</i>	Diane McDaniel
<i>Editorial Assistant:</i>	Ashley Conlon
<i>Production Editor:</i>	Astrid Virding
<i>Copy Editor:</i>	Taryn Bigelow
<i>Typesetter:</i>	C&M Digitals (P) Ltd.
<i>Proofreader:</i>	Scott Oney
<i>Indexer:</i>	Molly Hall
<i>Cover Designer:</i>	Arup Giri
<i>Marketing Manager:</i>	Christy Guilbault

4th
Edition

SPECIAL EDUCATION LAW

*To the memory of my father,
Eric J. Friesen*

LR

To Sara, Morgan, & Macy

SFJ

Cases in Order of Appearance

Chapter 3

Smith v. Robinson, 468 U.S. 992 (1984)

Chapter 5

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)

Plyler v. Doe, 457 U.S. 202 (1982)

Roe v. Commonwealth, 638 F. Supp. 929 (E.D. Pa. 1986)

Evans v. Independent School District 25, 936 F.2d 472 (10th Cir. 1991)

Timothy W. v. Rochester School District, 875 F.2d 954 (1st Cir. 1989)

Chapter 6

Quackenbush v. Johnson City School District, 716 F.2d 141 (2d Cir. 1983)

Larry P. v. Riles, 1992 LEXIS 13677 (N.D. Cal. 1992)

Parents in Action on Special Education (PASE) v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980)

Seals v. Loftis, 614 F. Supp. 302 (E.D. Tenn. 1985)

Chapter 7

Alvin Independent School District v. A.D., 503 F.3d 378 (5th Cir. 2007)

Chapter 8

Cerra v. Pawling School District, 427 F.3d 186 (5th Cir. 2005)

Chapter 9

Board of Education v. Rowley, 458 U.S. 176 (1982)

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986)

Chapter 10

Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984)

Max M. v. Illinois State Board of Education, 629 F. Supp. 1504 (N.D. Ill. 1986)

Irving Independent School District v. Tatro, 468 U.S. 883 (1984)

Cedar Rapids Community School District v. Garret F., 526 U.S. 66 (1999)

Chapter 11

- Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983)
Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989)
Espino v. Besteiro, 520 F. Supp. 905 (S.D. Tex. 1981)
Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989)
Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988)
A.W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987)

Chapter 12

- Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)
Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981)
David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985)

Chapter 13

- Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983)

Chapter 14

- Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986)
Catlin v. Ambach, 644 F. Supp. 161 (N.D.N.Y. 1986)
In re Todd P., 509 A.2d 140 (N.H. 1986)

Chapter 15

- Garcia v. Board of Education of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008)

Chapter 16

- Honig v. Doe*, 484 U.S. 305 (1988)

Chapter 17

- Schaffer v. Weast*, 546 U.S. 49 (2005)
Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007)

Chapter 18

- Doe v. Belleville Public School District*, 672 F. Supp. 342 (S.D. Ill. 1987)
School Board of Nassau County v. Arline, 480 U.S. 273 (1987)

Chapter 20

- Board of Education v. Human Rights Commission*, 385 S.E.2d 637 (W.Va. 1989)
Greider v. Shawnee Mission Unified School District, 710 F. Supp. 296 (D. Kan. 1989)

Chapter 21

- Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985)
Board of Education v. Tom F., 2005 U.S. Dist. LEXIS 49 (S.D.N.Y. 2005)
Jefferson County Board of Education v. Breen, 853 F.2d 853 (11th Cir. 1988)

Cases Alphabetized

<i>Alamo Heights Independent School District v. State Board of Education</i> , 790 F.2d 1153 (5th Cir. 1986)	Chapter 9
<i>Alvin Independent School District v. A.D.</i> , 503 F.3d 378 (5th Cir. 2007)	Chapter 7
<i>A.W. v. Northwest R-1 School District</i> , 813 F.2d 158 (8th Cir. 1987)	Chapter 11
<i>Board of Education v. Human Rights Commission</i> , 385 S.E.2d 637 (W.Va. 1989)	Chapter 20
<i>Board of Education v. Rowley</i> , 458 U.S. 176 (1982)	Chapter 9
<i>Board of Education v. Tom F.</i> , 2005 U.S. Dist. LEXIS 49 (S.D.N.Y. 2005)	Chapter 21
<i>Brookhart v. Illinois State Board of Education</i> , 697 F.2d 179 (7th Cir. 1983)	Chapter 13
<i>Burlington School Committee v. Department of Education</i> , 471 U.S. 359 (1985)	Chapter 21
<i>Catlin v. Ambach</i> , 644 F. Supp. 161 (N.D.N.Y. 1986)	Chapter 14
<i>Cedar Rapids Community School District v. Garret F.</i> , 526 U.S. 66 (1999)	Chapter 10
<i>Cerra v. Pawling School District</i> , 427 U.S. 186 (5th Cir. 2005)	Chapter 8
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985)	Chapter 5
<i>Daniel R.R. v. State Board of Education</i> , 874 F.2d 1036 (5th Cir. 1989)	Chapter 11
<i>David D. v. Dartmouth School Committee</i> , 775 F.2d 411 (1st Cir. 1985)	Chapter 12
<i>Doe v. Belleville Public School District</i> , 672 F. Supp. 342 (S.D. Ill. 1987)	Chapter 18
<i>Doe v. Maher</i> , 793 F.2d 1470 (9th Cir. 1986)	Chapter 14
<i>Espino v. Besteiro</i> , 520 F. Supp. 905 (S.D. Tex. 1981)	Chapter 11
<i>Evans v. Independent School District 25</i> , 936 F.2d 472 (10th Cir. 1991)	Chapter 5
<i>Garcia v. Board of Education of Albuquerque Public Schools</i> , 520 F.3d 1116 (10th Cir. 2008)	Chapter 15
<i>Greider v. Shawnee Mission Unified School District</i> , 710 F. Supp. 296 (D. Kan. 1989)	Chapter 20
<i>Hendricks v. Gilhool</i> , 709 F. Supp. 1362 (E.D. Pa. 1989)	Chapter 11

<i>Honig v. Doe</i> , 484 U.S. 305 (1988)	Chapter 16
<i>Hurry v. Jones</i> , 734 F.2d 879 (1st Cir. 1984)	Chapter 10
<i>Irving Independent School District v. Tatro</i> , 468 U.S. 883 (1984)	Chapter 10
<i>Jefferson County Board of Education v. Breen</i> , 853 F.2d 853 (11th Cir. 1988)	Chapter 21
<i>Kruelle v. New Castle County School District</i> , 642 F.2d 687 (3d Cir. 1981)	Chapter 12
<i>Lachman v. Illinois State Board of Education</i> , 852 F.2d 290 (7th Cir. 1988)	Chapter 11
<i>Larry P. v. Riles</i> , 1992 LEXIS 13677 (N.D. Cal. 1992)	Chapter 6
<i>Max M. v. Illinois State Board of Education</i> , 629 F. Supp. 1504 (N.D. Ill. 1986)	Chapter 10
<i>Parents in Action on Special Education (PASE) v. Hannon</i> , 506 F. Supp. 831 (N.D. Ill. 1980)	Chapter 6
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	Chapter 5
<i>Quackenbush v. Johnson City School District</i> , 716 F.2d 141 (2d Cir. 1983)	Chapter 6
<i>Roe v. Commonwealth</i> , 638 F. Supp. 929 (E.D. Pa. 1986)	Chapter 5
<i>Roncker v. Walter</i> , 700 F.2d 1058 (6th Cir. 1983)	Chapter 11
<i>Schaffer v. Weast</i> , 546 U.S. 49 (2005)	Chapter 17
<i>School Board of Nassau County v. Arline</i> , 480 U.S. 273 (1987)	Chapter 18
<i>Seals v. Loftis</i> , 614 F. Supp. 302 (E.D. Tenn. 1985)	Chapter 6
<i>Smith v. Robinson</i> , 468 U.S. 992 (1984)	Chapter 3
<i>Timothy W. v. Rochester School District</i> , 875 F.2d 954 (1st Cir. 1989)	Chapter 5
<i>In re Todd P.</i> , 509 A.2d 140 (N.H. 1986)	Chapter 14
<i>Winkelman v. Parma City School District</i> , 127 S. Ct. 1994 (2007)	Chapter 17
<i>Zobrest v. Catalina Foothills School District</i> , 509 U.S. 1 (1993)	Chapter 12

Preface

In 1975, Congress passed major legislation to facilitate the education of all children with disabilities in the United States. The legislation resulted from constitutionally based challenges to the exclusion of these children from public education. The Education for All Handicapped Children Act (1975), amended as the Individuals with Disabilities Education Act (IDEA) (1990) and amended again in 1997 and 2004; Section 504 of the Rehabilitation Act (1973); the Americans with Disabilities Act (1990); and other laws have established a framework for a highly specific set of legal requirements for the provision of special education in the United States.

Most of these laws have been in existence for many years, and an extensive body of judicial law that interprets the requirements of the statutes affecting children with disabilities in education is available. It is important to note, however, that although recent years have brought a substantial degree of clarification about many of the special education requirements that may have seemed ambiguous in 1975 when the laws were first passed, many issues remain unresolved. In those areas where case law does not provide clarification or where sufficient case law does not yet exist, various viewpoints are presented, and where appropriate, commentary and analysis are added.

The underlying philosophy of this book is prevention. The goal is to offer information from which policies can be developed and decisions made that comply with current legal requirements, so that appropriate services can be provided. Formal dispute resolution is costly; it is not the best use of scarce education dollars. It also has a high emotional cost for all concerned. Of course, not all such disputes can be avoided, and this book also provides information about the procedures required should informal resolution or advance policy making prove inadequate to address a problem. The hope, however, is that knowledge of the law may prevent many disputes.

Who Needs This Book?

Special Education Law, Fourth Edition, is intended for use by graduate students in education and other fields as well as law students in courses in special education law, school law, and special education. It could also be of value in the study of psychology, sociology, social work, and anthropology. Specifically, the text is designed to make such students familiar with the requirements of educating individuals with disabilities. The information it contains should prove invaluable to administrators and other school professionals, both current and future, as well as to classroom teachers in both regular and special education.

School administrators and school attorneys deal with special education issues on a regular basis. Local superintendents, principals, special education professionals, and psychologists, as well as regional and state administrators, must be familiar with the legal requirements of educating students with disabilities. Attorneys who represent schools and those who represent parents of students with disabilities also need an in-depth understanding of the details of special education law. Finally, it is important that classroom teachers, in both regular and special education classrooms, be aware of the laws that affect them.

The cost of providing special education is high, but the cost of not providing such education may be even higher. For the educational agency, potential federal funding to state and local systems may be lost. Additional financial liability may result when a school fails to comply with state and federal requirements. Educators and administrators need to know what their responsibilities are—and what the liabilities may be should those responsibilities not be fulfilled. The cost to the child and the child's family, of course, is that the abilities and potential of the child may be seriously adversely affected.

How This Book Is Organized

This text begins with a general overview of the legal system in the United States and moves from there to a more specific exploration of special education law. Chapter 1, "The Legal System and How It Works," provides a brief look at the various levels of legislation and regulation, and the responsibilities of the judiciary. This chapter refers to Appendix A in which there is a guide to how the legal system interacts with education, as well as to the basics of legal research and the resources available to the reader. Chapters 2 and 3, "History of Special Education Law" and "Statutory Provisions: A General Overview," explore the legal foundations of special education. Chapter 2 includes a timeline describing the major developments in special education legislation and case law, while Chapter 3 takes a general look at the major legislation that governs special education in this country. Chapter 4, "The People," defines the various groups that feel the impact of special education legislation, including students, parents, administrators, teachers, and advocates.

In the remainder of the text, Chapters 5 through 22, special education case law is presented and analyzed within specific contexts: defining appropriate education, and so on. In these chapters, the format is similar to texts used in law schools, with some modifications. Major judicial decisions, statutes, and regulations are presented as primary source material; these cases are listed both alphabetically and in their order of appearance on pages xiii through xvi. This treatment allows for easy cross-referencing when cases are mentioned elsewhere in the text. Other decisions and related commentary are also included as expansions on the major cases and legislative materials. The analysis surrounding this primary material is designed to help the reader understand the relevance of case law to actual educational situations and behaviors. The judicial decisions are often substantially edited for ease of use.

Several learning aids are included as part of this text. Each chapter ends with a *Summary*, which is followed by *Questions for Reflection*. These questions highlight

underlying policy concerns and allow the consideration of both unresolved issues and the practical and tactical matters involved in addressing a particular situation. The goal is to encourage reflection not only on whether current law is sound policy but also on specific problems likely to be encountered on a regular basis in our schools and the practical issues needed to address these problems.

New to This Edition

The primary purpose of this fourth edition of *Special Education Law* is to provide updated, current information on special education statutes, regulations, and case law. New legislation has been passed (in particular the IDEA amendments of 2004), and substantial changes in interpretation have occurred since the third edition of this text was published. The fourth edition includes new cases that reflect these changes, including cases dealing with several procedural and remedial issues (burden of proof, expert witness costs, parental representation) and a revisit to the issue of reimbursement for expenses for a parental placement. Disciplinary removal, transition planning, response to intervention, school choice, and other difficult issues have been added. It also includes a discussion of the relationship of the No Child Left Behind (2002) legislation to special education. Greater clarification of the application of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act is added as a separate chapter.

In addition to the updating and content revisions, *key terms* and *acronyms* are defined in Appendix B.

Ancillary Material

Companion Web site

www.sagepub.com/rothstein4study

The companion Web site provides a variety of resources to enhance students' understanding of the book's content. The site includes discussion questions and topics, as well as annotated Web resources. The site also includes teaching tips for the instructor.

Acknowledgments

We thank those who assisted in writing this book.

To Scott Johnson, my coauthor for this edition of the book, who brings great practical experience as a valuable perspective. To Terry Seligmann, who suggested Scott to be the coauthor for this edition. To Leslie Friesen and Robert Klein, who provided formatting assistance. To Kurt Metzmeier and Scott Campbell, faculty research professors at the University of Louisville Louis D. Brandeis School of Law, who assisted in providing research materials. To Rebecca Wenning and Marilyn Peters, who provided clerical support. To our editor at Sage, Steve Wainwright, and to Virginia Lanigan, Pearson Publications, who assisted with the transfer of the publication to Sage. To Ilene Shane, who gave me my first special education case. To John Burkoff, who arranged for that to happen. To Jan Sheldon Sherman for teaching me so much about individuals with disabilities. To Gail Sorenson for suggesting the need for a text on the topic when I wrote the first edition. To my parents, Dorothy Friesen and the late Eric Friesen (who read and commented on the first edition of the book). To my daughters, Lisa Rothstein (who found references to social science journal articles) and Julia Rothstein (coauthor on *Disabilities and the Law*, a text referenced throughout). Special thanks to my husband, Mark, for his continuing support. And to Bailey, who provides support by being there.

Laura Rothstein

To Laura Rothstein for bringing me into this project and for being such a pleasure to work with on this book. To everyone at Sage for their assistance with this book. To Dean Barry Currier and Dean of Faculty Greg Brandes at Concord Law School of Kaplan University for their support of my work. To Andru Volinsky and Ellen Shemitz for starting me on the path of special education law some years ago. To my family for their love and support.

Scott F. Johnson

We gratefully acknowledge the contributions of the following reviewers.

Steven C. Camron, Eastern Michigan University

Thienhuong Hoang, California State Polytechnic University, Pomona

Lawrence Ingalls, University of Texas at El Paso

Gabriel A. (Tony) Martin, Lamar University

Patricia Taylor, University of LaVerne

Tandra L. Tyler-Wood, University of North Texas

Brief Contents

Cases in Order of Appearance	xv
Cases Alphabetized	xvii
Preface	xix
Chapter 1 The Legal System and How It Works	I
Chapter 2 History of Special Education Law	9
Chapter 3 Statutory Provisions: A General Overview	31
Chapter 4 The People	49
Chapter 5 Who Is Protected	65
Chapter 6 Identification and Evaluation	85
Chapter 7 Eligibility	105
Chapter 8 Individualized Education Program	117
Chapter 9 Free Appropriate Public Education	131
Chapter 10 Related Services	147
Chapter 11 Placement and Least Restrictive Environment	171
Chapter 12 Private School Placements, Residential Placements, and Public School Choice Programs	199
Chapter 13 Special Issues With Secondary Students	219
Chapter 14 Cost Issues	231
Chapter 15 Procedural Safeguards: An Overview	247

Chapter 16	Discipline	257
Chapter 17	Dispute Resolution	269
Chapter 18	Americans with Disabilities Act and Section 504 of the Rehabilitation Act	287
Chapter 19	Education Records	301
Chapter 20	Special Education Malpractice	307
Chapter 21	Remedies	327
Chapter 22	The Status and Future of Special Education Law	349
Appendix A Education and the American Legal System		353
Appendix B Frequently Used Acronyms and Terms		359
Index		363
About the Authors		377

Detailed Contents

Cases in Order of Appearance	xv
Cases Alphabetized	xvii
Preface	xix
 Chapter I The Legal System and How It Works	 I
State and Federal Laws 1	
The United States Constitution and State Constitutions 1	
Statutes 2	
Regulations and Guidelines 2	
Case Law 3	
Administrative Decisions and Opinions 3	
The Judicial System 4	
Regulatory Decision Making 5	
Relationship of Constitutional Law, Statutory Law, Regulatory Law, and Case Law in the Development of Special Education Laws 6	
Summary 7	
Questions for Reflection 8	
 Chapter 2 History of Special Education Law	 9
Special Education Before the 1970s 9	
A Constitutional and Political Framework for Change 9	
Statutory Responses 11	
The Individuals with Disabilities Education Act 11	
State Statutes 21	
Section 504 of the Rehabilitation Act 22	
The Americans with Disabilities Act 22	
Sequential Listing of Major Special Education Law Developments 23	
Summary 27	
Questions for Reflection 27	

Chapter 3 Statutory Provisions: A General Overview

31

Section 504 of the Rehabilitation Act	31
Who Is Protected Under Section 504?	32
What Programs Are Covered?	32
Enforcement	33
Remedies	33
Defenses	36
The Americans with Disabilities Act	36
The Individuals with Disabilities Education Act	38
The Funding Mechanism	38
The Substance of Special Education	39
Procedural Safeguards Under the IDEA	41
No Child Left Behind	42
State Education Statutes	43
Other Relevant Laws	44
Student Education Records Laws	44
Student Health Record Laws	44
Tort and Contract Law	45
Summary	45
Questions for Reflection	46

Chapter 4 The People

49

Students	49
Categorization	49
Gaps in Coverage	50
Parents	53
Who Are Parents?	53
The Role of Parents	54
Educators	54
Teachers	54
Administrators	57
Other Personnel	58
Related Service Providers	58
Advocates	59
Decision Makers	60
Summary	61
Questions for Reflection	62

Chapter 5 Who Is Protected

65

Constitutionally Based Cases	65
Classification of Individuals With Disabilities	65
Heightened Scrutiny for Education	69