

Fifth
Edition

FREE APPROPRIATE PUBLIC EDUCATION

THE
LAW
AND
CHILDREN
WITH
DISABILITIES

H. Rutherford Turnbull III
Ann P. Turnbull

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H. Rutherford Turnbull III
Ann P. Turnbull
University of Kansas

with Amy Buchele-Ash and Kate Rainbolt
University of Kansas



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Dedication

To our family—J.T., Amy, Kate, and H.F.P.—who daily make
advocacy on behalf of students with disabilities a joyful battle.
And to Paul Marchand and Bobby Silverstein,
advocates, colleagues, and friends.

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Preface

We wrote the first edition of this book during the Christmas season of 1977. At that time we both were on the faculty at the University of North Carolina at Chapel Hill. Our dining room table was awash with cut-and-pasted sections of what then was referred to as PL 94-142, the Education for All Handicapped Students Act.

At that very same time our son, J. T., was in his second year of education under that law—an education he would not have had but for the federal law and its impact on North Carolina law. He not only was a young boy with disabilities (mental retardation and autism) but also was one of the first “class” of students to benefit from IDEA.

As we were writing that first edition, we kept J. T.’s collection of education rights firmly in mind and tried to understand the law as it would apply to him. That guide-post proved valuable, for it helped us analyze the law according to the ways in which schools were required to deal with J. T.: enroll him (the zero reject principle), determine what he needs (the nondiscriminatory evaluation principle), provide it to him (the individualized appropriate education principle), do so in the most typical setting (the least restrictive environment principle), hold schools accountable for what they do (the procedural due process principle), and let us have a say in what happens to him in school (the parent participation principle).

Throughout that Christmas we had a sense that J. T. was our best teacher, and that insight has been confirmed many times since then. Even so, we sometimes wish our “lessons” were not so hard. Of course, it is not just J. T.’s disabilities that create hard lessons. The world in which he has to live—the world of schools and other service-delivery agencies—teaches its own lessons, lessons about discrimination, inadequacy of the quality of services, and segregation into a “disabled only” world.

Hence, two other principles reflected in this book and in the 1997 amendments to IDEA reflect J. T.’s life. One is the principle of dual accommodations, and the other is the principle of “capacity building.” J. T. has to learn how to fit into the world. To that end his capacities have to be developed and he has to be educated. At the same time the world (and its schools) have to learn how to accommodate to his disabilities. Their capacities to teach, use knowledge, implement rights, and collaborate across professions and with parents must be developed.

Time has passed between the writing of that first edition and the writing of this, the fifth. Now it is mid-summer of 1997, and Congress has just reauthorized IDEA. It is

closer to the truth to say that Congress has just created a nearly new and substantially different world in which students with disabilities will be educated. What J. T. experienced in school is now a far cry from what students with disabilities first entering early intervention just after their birth, or first entering schools at age 3 or perhaps as late as age 6, will experience if IDEA is implemented as it should be.

What is the difference between J. T.'s experience and the one that today's students will experience? How is IDEA so different?

As this edition shows, IDEA is not nearly as concerned about whether students have access to schools. That was the big problem when J. T. started school. In 1997, IDEA is concerned about providing them with an education that leads to their full participation in society. Now it is an outcome-oriented, result-focused law, and the outcomes and results are those that nondisabled citizens have taken for granted: independence and chosen interdependence, productivity at a workplace and contribution outside of it, and integration into a setting and inclusion in the hearts and minds of fellow citizens.

In part through his schools, but mainly through his network of informal support from family and friends (including friends who are professionals in the disability field), J. T. now works in a regular job for a regular wage and with nondisabled people. He is buying his own house, where he lives with young men and women who do not have disabilities.

That kind of outcome, that kind of result, is what the 1997 amendments to IDEA seek. They want full citizenship, full participation, for students with disabilities, in an inclusive society.

That vision, that result, would not have been achieved for many people like J. T., and that kind of law would not have been crafted for them without the fierce advocacy of many people whom we have been privileged to know and work with over the past 20 years. In the early mornings and late evenings of our work, we tender silent and sometimes not so silent gratitude to them. They may be nameless here, but they know, directly, how much they have meant to J. T. and us. They are creative, dogged, principled, and reliable allies.

None of what IDEA now expects and requires would have been possible without the research, demonstration, model programs, and personnel preparation activities of so many of our colleagues in institutions of higher education.

- Those who demonstrated that even individuals who have the most severe limitations can learn nevertheless are responsible for IDEA's zero reject rule.
- Those who understood that a full picture of a student cannot be obtained only in clinical settings are responsible for IDEA's nondiscriminatory evaluation rule.
- Those who demonstrated how to individualize and make effective teaching techniques are to be applauded for helping put teeth into the appropriate education principle.
- Those who have poked into the corners of human behavior assiduously and sought more humane ways to respond to its challenges are responsible for IDEA's emphasis on functional assessment and positive behavioral supports.

- Those who have helped others understand that behavior is a form of communication contributed to the IDEA rule against cessation of services for students suspended or expelled from school.
- Those who have insisted that ideology will and must guide practice have made it a rule of law that inclusion is the presumptively correct environment.
- Those who railed against schools' inflexibility and showed how schools can become effective can take a bow as system-change seeks its way into IDEA and the education-culture.

Because of the advocates and the researchers, we can say that IDEA is the fruitful product of ideology, vision, power, and knowledge. We are grateful to all who improved it so much in the reauthorization years of 1995 through 1997.

J. T.'s sisters, Amy Turnbull and Kate Turnbull, and J. T.'s beloved grandfather, H. F. Patterson, themselves have been instrumental in our lives and in J. T.'s, beyond the ability of words to describe. Their individual and collective compassion, courage, commitment, and competence on behalf of so many people who are disadvantaged in so many ways have sustained and comforted us on innumerable occasions. A perfectly fine result of the reauthorized IDEA will be if some students and educators in the mainstream of schools and community life will learn, as our family members have, that people with disabilities have many positive contributions to make to the world, and then act on that knowledge.

Acknowledgments

No book ever is written or produced, published, and marketed without significant contributions from our close-at-hand colleagues. That is especially so in this edition.

Amy Buchele-Ash and Kate Rainbolt, both graduates of the University of Kansas undergraduate and law school programs, were most helpful in analyzing cases and the 1997 reauthorized law; they drafted some parts of some chapters, helped in the seemingly endless task of rewriting and polishing, tracked down a large number of references, and did all that with good cheer.

Lois Weldon was so swift and accurate in preparing the manuscript that each chapter's production seemed flawless once the text was in her hands. Her willingness to keep at the job of producing the manuscript so it would not just meet but beat deadlines is remarkable. Yes, she learned it from a great teacher, her mother and our colleague, Opal Folks, but she demonstrated it to an extent we have seen rarely in others before.

Ben Furnish is more than a scholar of Hebrew theatre; he is an editor whose eye for detail and sense of style and order are invaluable in our writing of this and other books.

Stan and Tom Love at Love Publishing Company continue to be unflappable, flexible, convivial, and—in their quiet ways—brilliant and insightful publishers and distributors. The book's market success—indeed even the fact that it was the first special education law book ever published—is attributable to Stan.

When all is said and done, IDEA/1997—the invigorated, outcome/result-focused law—owes so much to so many. So does this edition of our book.

At the bedrock of our gratitude, and indeed as the icon for IDEA/1997, is a young man who has survived and prevailed in spite of his disabilities and because of his innate goodness: J. T. Would that every parent of a student with a disability be able to say that when the child is 30 years old! And would that every teacher in every school in the United States be able to point to a host of students who, though they may have a disability, are full citizens because of their own attributes and because of how their schools, the law, and their fellow citizens have responded to the perfectly natural human condition of disability!

Rud and Ann Turnbull
Lawrence, Kansas
July 1997

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**Part
One**

**Introduction
to the
Law**

1

Introduction to the American Legal System

FEDERALISM

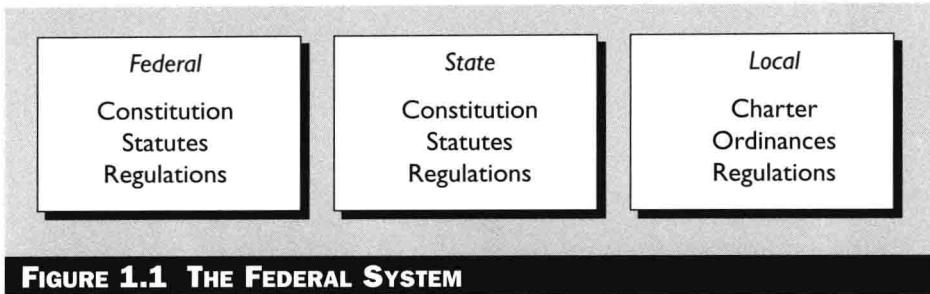
The law serves many purposes. Among them are ordering the public affairs of individuals and their governments and resolving disputes between them. These seemingly simple purposes are accomplished through an intricate network. To explain the workings of that network, we will use some familiar images.

Parallel Governments

Public law can be represented by three parallel ladders. Each has descending rungs of 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. On the bottom are regulations federal agencies issue pursuant to congressional authority. Next to this ladder stands one representing the state governments. 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 image of three parallel governments depicts the sharing of power and responsibility between these governments. It also depicts that the highest source of law in each “ladder” is a fundamental 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. Figure 1.1 depicts this concept.

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*.



Principles of Federalism

Two major principles are involved in the form of government known as federalism.

1. The federal, state, and local governments share responsibility and power. As pointed out later in this chapter, those governments share the responsibility for and power over the education of children with disabilities. Traditionally, local and state school boards (or other similar governing bodies) had the greatest responsibility and power. Recently, however, responsibility and power have shifted to the federal government. (Chapters 2 and 3 discuss the shifting of responsibility and power.)
2. Federal constitutional and statutory law have supremacy. Early in the history of this country, the Supreme Court, in *Marbury v. Madison* (1803), 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) 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?

Each source of law has 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 ten, the Bill of Rights, which were 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. This form of direct democracy—delegates enact a constitution—still holds true: Congress may propose an amendment to the federal constitution, but the states, through their legislatures, have to ratify the amendment before it becomes effective.

Legislation

In the case of statutory law, the lawmakers are elected representatives serving in Congress or in state legislatures. Consistent with the concepts of federalism and the supremacy of the federal constitution, Congress and the legislatures may not enact laws that violate the federal Constitution, nor may state legislatures enact laws that violate the state Constitution. All federal and state laws are subject to *testing* to determine if they are *constitutional* under the federal Constitution and the applicable state constitution.

Also, the fundamental law of each state is its constitution, and no state law or state agency regulation has the effect of law unless authority for it can be found in the state constitution.

There are, then, lawmakers for each of government's laws, fundamental laws that have greater authority than any other. And each of the three governments has its hierarchies.

Regulations to Implement Legislation

As a rule, any law enacted by Congress or a state legislature will be general in its terms. No legislature can anticipate precisely all of the situations to which its statutes apply. At the most, statutes give general direction. General direction, however, is not always sufficient to inform the individuals or governments affected by the statutes about exactly how the statutes apply to them. Accordingly, executive agencies issue regulations to implement the statutes. Thus, though statutes are enacted by legislatures whose members are elected by the franchised citizens, regulations are made by regulatory agencies whose staffs are not elected but, rather, are appointed or approved by the legislatures or by the chief of that government's executive branch. Agency regulations must be based on authority the legislatures give to them. The regulators act simultaneously as executives, persons who execute or carry out the legislature's statutes, and legislators—in the limited sense that they write regulations designed to carry out legislation.

This complex system for enacting and carrying out laws exists in the area of education for children with disabilities. The system can be outlined as follows:

1. Constitutional law
 - Federal Constitution (especially Fifth and Fourteenth Amendments)
 - State constitution (especially provisions about education)
 - Local charter (especially provisions creating schools or school boards)
2. Legislature (legislative body)
 - Congress (e.g., the Individuals with Disabilities Education Act)
 - State (e.g., equal educational opportunities legislation)
 - Local (e.g., school board policies establishing programs for children)
3. Regulations (executive agency)
 - Federal (Special Education Programs, Office of Special Education and Rehabilitative Services)
 - State (e.g., Kansas State Board of Education)
 - Local (e.g., director of pupil services or coordinator of special education).

CASE LAW AND THE COURTS

One important type of law and lawmaker have not yet been identified: case law (judicial decisions) and the courts. When the delegates to federal and state constitutional conventions wrote those constitutions, they created three branches of government: legislative, executive, and judicial. Whereas the function of the legislature is to make law and the function of the executive is to carry it out, the function of the judiciary is to resolve disputes between citizens or between a citizen and his or her government. Courts do this by applying law to a given set of facts and interpreting the meaning of the law in that factual context. Courts' unique function is to say what the Constitution or a federal statute or regulation means in a given case, to issue a decision setting forth the facts that underlie their interpretation, and to enter an order commanding the parties in the case (or other courts, if the case is on appeal) to take certain action.

How are the courts organized? For cases involving federal law, the United States courts are organized in a hierarchy: trial courts, courts of appeals, and the Supreme Court (the court of last resort). State systems also consist of trial courts, courts of appeal, and a court of last resort. Why a case may be tried in one court, appealed or reviewed by another, and finally disposed of by yet another is a matter of great complexity. We do not need to enter that thicket. A brief discussion of court jurisdictions will serve our purpose.

The terms used to describe trial and appellate courts vary from state to state and sometimes differ from the terms that describe the U.S. courts. This creates difficulty from time to time in understanding precisely which court is deciding a case. For example, trial courts in the United States are called *district courts*, but trial courts in the state system are called *circuit courts*, *district courts*, or even *supreme courts*. Likewise, the U.S. appellate courts are called *circuit courts* or *circuit courts of appeals*, with the country divided into eleven circuits (regions) over which the appeals courts have jurisdiction. In some states the appeals courts consist of intermediate courts of appeals, together with courts of final appeals. And states use different terms to describe the intermediate courts and courts of final appeals.

The U.S. Supreme Court is the court of last resort for all cases, whether from the state court system or from the federal courts, and its decisions are binding throughout the United States. The U.S. circuit courts of appeals have appellate power over cases decided in the trial courts in their circuits. Their decisions are binding throughout the circuit but may be only persuasive, not binding, in other circuits and in all district courts. The U.S. district courts are the trial courts in their respective districts; their decisions are generally binding in the district only (not throughout the appellate circuit in which they are located) and may be only persuasive, but not binding, on circuit courts and other district courts.

The state court systems parallel the U.S. court system. Each state has a court of final appeals or last resort, whose decisions are binding throughout the state. The diagram in Figure 1.2 illustrates the relationships between the courts in a federal system.

Note that decisions may be appealed to the U.S. Supreme Court from the U.S. circuit courts of appeals and from the courts of final appeals (or last resort) of the states. Again, as to when a case may be taken to the U.S. Supreme Court is a matter of great