

The Role of Law in Special Education

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Introduction

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, in contrast with other countries, where litigation has a negligible role in the field of special education, students with disabilities, who amount to less than one sixth the nation’s public-school enrollments, have accounted for more federal court decisions during the past four decades than their general education peers.

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Introduction (cont.)

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.

- Has the balance of costs and benefits reached the point of over-legalization?
- To what extent is legal literacy essential for special education teachers and related service personnel as compared to special education supervisors and administrators?

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Introduction (cont.)

To facilitate answers to the foregoing illustrative 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.
- Part III identifies lessons for special education practitioners’ consideration.

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I. The Meaning of “Law” in the Context of Special Education

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I. Contextual Meaning of “Law”

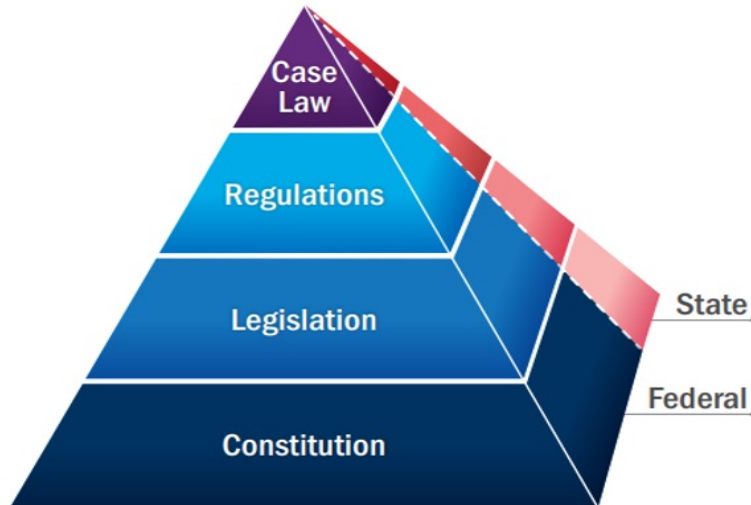
The system in this country consists of two primary levels—the uniform foundation of federal law and the varying additions of state law. For public schools, the potential and typical third level of local districts is via delegation from the state law level.

Turning the federal and state levels turned sideways for illustrative purposes, the successive sources of law form a pyramid-like structure in a bottom-up direction of the Constitution, legislation, and regulations. The judicial tip of the pyramid applies these sources, including any conflicts between them, to specific factual circumstances.

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I. The Meaning of “Law” (cont.)



PROGRESS Center: <https://promotingprogress.org/training/sources-of-special-ed-law>

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I. The Meaning of “Law” (cont.)

The corresponding specific sources of law in special education start with the federal foundation:

- IDEA legislation (1975, 1986, 1990, 1997, 2004) and regulations
- Sec. 504 legislation (1973) and regulations & ADA legislation (1990, 2008) and regulations

The varying additions are in the form of corollary states special education laws (i.e., legislation and regulations).

General education laws also play an interacting role at both levels, which also provide policy interpretations .

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I. The Meaning of “Law” (cont.)

The alternate decisional forums under the IDEA and Sec. 504 are **adjudicative** and **investigative**.

As shown on the next slide, the adjudicative avenue starts at the administrative level with a “due process hearing” (DPH). Since the late 70s, this level has become increasingly **“judicialized,”** with continuing growth of **technical adjudicative issues**, such as exhaustion, burden of proof, and statute of limitations. Attorneys and their fees have become prominent at the expense of special education issues and expertise. As the Supreme Court recognized, the process has become **“ponderous”** in time and other costs.

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I. The Meaning of “Law” (cont.)



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I. The Meaning of “Law” (cont.)

As a top-down example of the referenced “judicialization,” here are the Supreme Court decisions under the IDEA, with the **purely adjudicative issues in bold font**:

Before 2000

- FAPE (*Rowley*, 1982)
- related services (*Tatro*, 1984; *Garrett F.*, 1999)
- reimbursement (*Burlington*, 1985; *Carter*, 2006)
- discipline (*Honig*, 1988)

After 2000

- **burden of proof** (*Schaffer*, 2005)
- **expert witness fees** (*Arlington Central*, 2006)
- **pro se in federal court** (*Winkelman*, 2007)
- reimbursement (*Forest Grove*, 2009)
- FAPE (*Endrew F.*, 2017)
- **exhaustion** (*Fry*, 2017; *Perez*, 2023)

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I. The Meaning of “Law” (cont.)

The gradual result has been judicialization of the DPH, which Congress originally intended as a user-friendly, special-educationally expert, and speedy adjudicative mechanism. The characteristics include the primacy of attorneys as both the hearing officers and the party representatives. Concurrently, **central panels** of administrative law judges (ALJs) have become more common, with motions practice under state administrative procedures acts (APA). Overall, DPHs have become more formal, costly, and time-consuming, with the issues increasingly adjudicative and the skew increasingly for **deference** to school district expertise.

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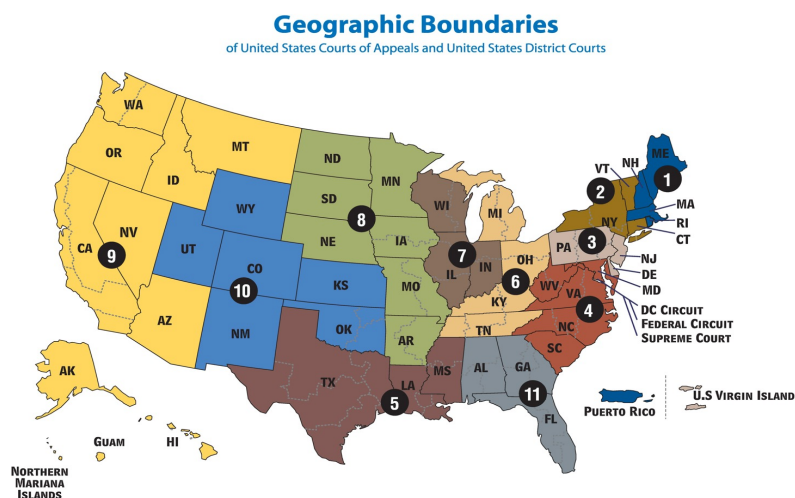
I. The Meaning of “Law” (cont.)

Moreover, based on the dual system of state and federal adjudication and the intersecting doctrine of “precedent,” establishing clearly settled interpretations of the IDEA legislation, regulations, and corollary state laws is complex and never-ending. The variation in the adjudicative avenue includes differences among not only state courts but also—and more importantly in light of the primary traffic under the IDEA—the federal courts. The next slide shows the jurisdictional boundaries of both the federal district courts (dotted boundaries within each state) and the federal courts of appeal (boundaries in color across states of each numbered circuit).

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I. The Meaning of “Law” (cont.)



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I. The Meaning of “Law” (cont.)

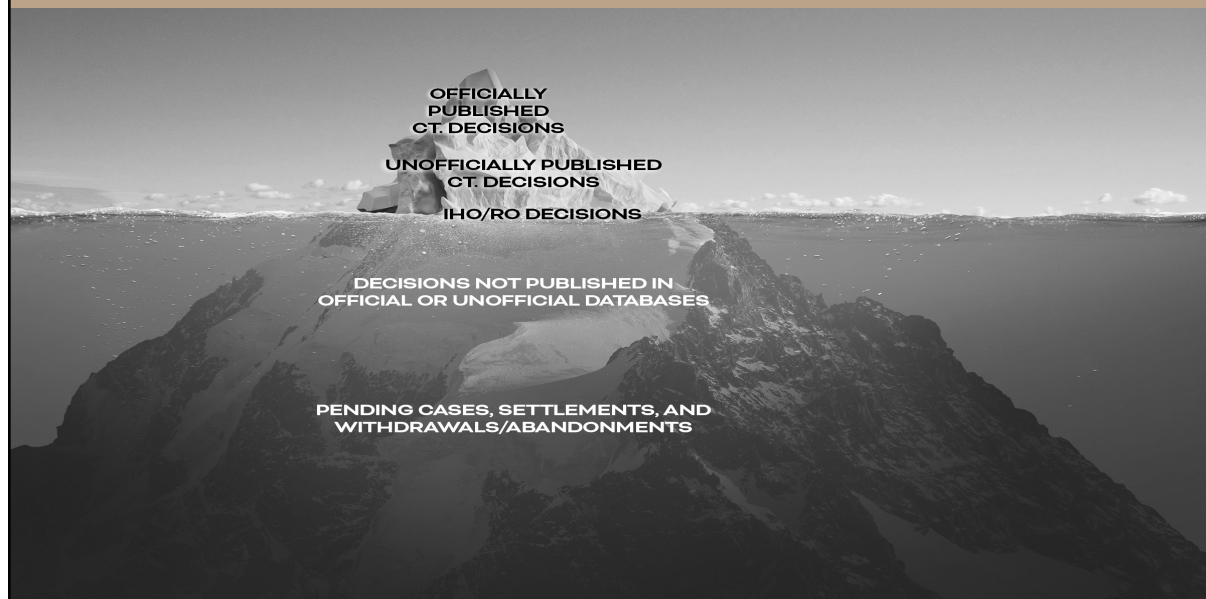
Finally, the judicial doctrine of “precedent” and the congestion of the courts has led to a fluid multi-layered set of case dispositions akin to the **proverbial litigation iceberg**.

The next slide illustrates this largely subsurface outcomes activity, which is often neglected in terms of training and research.

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I. The Meaning of “Law” (cont.)



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I. The Meaning of “Law” (cont.)

The investigative avenue is the state complaint process under the IDEA and OCR’s corresponding process under Sec. 504. Although varying from state to state, the overall trend has been a higher outcomes ratio in favor of parents but relief that is often shallower and wider. Moreover, this avenue tends to be quicker, non-attorney-dependent, and final (i.e., not subject to appeal in most jurisdictions).

Both the adjudicative and, to a less pronounced extent, investigative avenues have (a) relatively high filings-to-decisions ratios and (b) a predominance of activity in relatively few jurisdictions, such as NY, CA, PA, and NJ.

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II. Legal Literacy of School Personnel

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Educators' Legal Literacy

Most of the published studies have surveyed building-level administrators, preservice teacher candidates, or teachers in **general education**, revealing low legal knowledge.

In the leading multi-state convenience sample of teachers, Schimmel and Militello (2007) found an average score of 40% on student and teacher rights in general education. The primary sources of their legal knowledge were other teachers and administrators.

In a corresponding national survey of principals, Militello et al. (2009) found an average score of 60%, with their primary source being central office administrators.

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Educators' Legal Literacy (cont.)

The reasons for the inadequate levels include:

- crowded preservice and inservice curricula
- limited state certification requirements, relaxed by acute shortage of teachers and administrators in special ed
- preservice: special education faculty university members—rarely with legal training and commonly with **distorting effect of professional norms**
- inservice: distorting effect of school administrators' and attorneys' focus on avoiding litigation
- sources: compounded misinformation from colleagues
- lack of transparency and accuracy including the professional literature and the Internet (see next slide)

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Educators' Legal Literacy (cont.)

Zirkel (2020) "Legal Information in Special Education":

	A. Pro-Parent	B. Impartial	C. Pro-District
3. Professional Norm	3-A	3-B	3-C
2. Legal Requirement	2-A	2-B	2-C
1. Violative Statement	1-A	2-B	3-C

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III. Lessons for Practitioners

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Lessons for Practitioners

Maintain focus on relevant and accurate legal information in a two-tiered level of emphasis:

1. Special education leaders:
 - basic and up-to-date legal literacy
 - access to legal counsel
 - proficient differentiation of legal requirements (“shall”) from professional norms (“should”)
2. Special education teachers and other service providers:
 - primacy of educational effectiveness beyond and above legal compliance

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Lessons for Practitioners (cont.)

Recognize the limits of law:

- societal context: “hyperlexis”
- transaction costs: time (e.g., 6 months for average due process hearing decision), money (e.g., attorneys’ fees), and relationship (e.g., adversariality > trust)
- hidden settlement/abandonment processes
- proceduralization: IDEA structure, decisional application, and increasing prominence of adjudicative issues rather than educational outcomes
- enforcement problems, including distributive injustice

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Lessons for Practitioners (cont.)

Seize the opportunity for collaboration and creativity:

- wide discretion of “street-level bureaucrats” (Weatherly & Lipsky, 1977)
- similar flexibility in the “adhocratic nature of the IDEA” (Skrtic, 1991)
- re-balancing the “Janus-faced nature of legalization” (Neal & Kirp, 1985) to avoid proceduralization at the expense of education (Yudof, 1981)
- maintaining focus on the spirit, not just the letter, of law
- treating all students as “special” individuals

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References

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- For other pertinent publications and useful sources, see perryzirkel.com

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