

## IV. The Special Education Framework

"If a child cannot learn in the way we teach ... we must teach in a way the child can learn."  
~ Dr. O. Ivar Lovaas

### A Brief History

Historically, children with disabilities in the United States were either excluded from the public educational setting all together and their education was a matter primarily left to families, or they were educated in segregated settings. With the advent of compulsory education, some attention was given to the treatment of individuals with disabilities in education.

After the landmark decision of *Brown v. Board of Education*, 347 U.S. 482 (1954), held that children had a right to an education on equal terms whatever their race, various court cases addressed the implications of this right in the context of educating children with disabilities. In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1972), the parties settled a suit challenging the state's policy of excluding children with intellectual disabilities from public education with a consent decree barring the state from "deny[ing] to any mentally retarded child access to a free public program of education and training." The *PARC* case was followed by a Washington, D.C. case, *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.C. 1972), in which the court held that no child with a disability could be excluded from a regular school unless the child was provided with "adequate alternative educational services suited to the child's needs" and "a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."

Prior to the *PARC* and *Mills* decisions, Congress had made some efforts to expand educational opportunities for children with disabilities by establishing a grant program to assist the states in expanding available programs. See Pub. L. No. 89-750, § 161, 80 Stat. 1204 (1966) (amending the Elementary and Secondary Education Act of 1965 to establish a grant program); Education for the Handicapped Act, Pub. L. No. 91-230, 83 Stat. 175, Part B (same); Pub. L. No. 93-380, 88 Stat. 579 (1974) (increasing funding and requiring states to adopt goal of educating all children with disabilities). In 1975, however, Congress enacted the Education for All Handicapped Children Act (EHA), which was later renamed the Individuals with Disabilities Education Act, better known as IDEA. [20 U.S.C. § 1400 *et seq.*]

In the years since its enactment, the IDEA has been amended and reauthorized, most recently in December of 2004, and has been the subject of countless court decisions over the exact nature of the educational guarantees, the scope of services required, the procedures by which decisions are to be made about necessary services, and the remedies available when students' substantive and procedural rights are violated.

### III. Education Laws

*"Upon the subject of education, not presuming to dictate any plan or system respecting it, I can only say that I view it as the most important subject which we as a people may be engaged in. That everyone may receive at least a moderate education appears to be an objective of vital importance."*

*~ Abraham Lincoln*

The primary law governing special education is the Individuals with Disabilities Education Act (IDEA). However, there are other laws that govern public schools' obligations to educate students with disabilities.

#### **Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 *et seq.*)**

Unlike the IDEA, which is an education law, Section 504 is a civil rights law. Enforced by the United States Department of Education, Office for Civil Rights, Section 504 prohibits discrimination on the basis of disability in programs and activities, public and private that receive federal financial assistance. A person is "disabled" under Section 504 if he or she: (1) has a mental or physical impairment that substantially limits one or more major life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, hearing, seeing, speaking, breathing, learning, or working.

Section 504, like the Americans with Disabilities Act, requires equality of treatment rather than imposing affirmative obligations. An evaluation is necessary before a student can be determined eligible under Section 504 and parents must be involved in the process whenever possible. An appropriate education for students eligible under Section 504 means an education comparable to that provided to students without disabilities and includes educational and related aids and services designed to meet the individual educational needs of the child, at no cost to the parents. There is no federal funding to serve children found eligible under Section 504.

#### **The Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 *et seq.*)**

The ADA is a civil rights act, enacted after the Rehabilitation Act, to broaden the scope of the prohibition on discrimination to the public and private sectors that prohibits discrimination solely on the basis of disability in employment, public services, and accommodations. Title II of the ADA applies to public entities, including public educational institutions. Title III of the ADA applies to private entities that provide public accommodations, including schools, but does not apply to institutions controlled by religious organizations.

Eligibility under the ADA applies to any individual with a disability who: (1) has a mental or physical impairment that substantially limits one or more life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. Under the ADA, schools must provide reasonable accommodations to eligible students with a disability to perform essential functions. Reasonable accommodations may include, but are not limited to, redesigning equipment, assigning aides, providing written communication in alternative formats, altering existing facilities or building new facilities.

### **The Elementary and Secondary Education Act (20 U.S.C. § 6301 *et seq.*)**

The most recent reauthorization of the Elementary and Secondary Education Act (ESEA), originally passed in 1965, is commonly referred to as the No Child Left Behind Act of 2001 (NCLB). Designed to close the gap between disadvantaged, disabled, and minority students, and their peers by ensuring that all children have access to high quality educational opportunities, the Act phases in a system of accountability measures and quality requirements designed to ensure that, by the 2013-14 school year, all students achieve proficiency as measured against state academic achievement standards. The Act stresses stronger accountability for results, increased flexibility and local control, and expanded options for parents. It also pays special attention to teacher quality and requires local education agencies that accept funds under Title I to hire only "highly qualified" teachers.

Students with disabilities are also impacted by this law, as evidenced by the reauthorization of IDEA in 2004, when it was aligned to be consistent with many requirements of the ESEA. Most notably, ESEA affects students with disabilities through its requirement that schools and districts demonstrate adequate yearly (AYP) progress toward ensuring that every child achieves the proficient level of the state's standards at his or her grade level by the 2013-14 school year. The Act requires that students with disabilities as a subgroup demonstrate AYP toward the state's goals, through the use of assessments. Schools that do not achieve AYP over time may be subject to "improvement," including allowing parents to transfer their children to a better performing school within the district.

### **McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 *et seq.*)**

The McKinney-Vento Homeless Assistance Act is the primary federal law dealing with the education of public school children and youth experiencing homelessness. The Act requires schools to ensure that homeless students have access to education and other services they need to meet the same high academic achievement standards as all students. More specifically, schools must ensure homeless students: (1) educational stability (which includes the right to stay in their school of origin), (2) transportation back to the school of origin, (3) immediate enrollment if the family chooses to enroll in the school in their new community, and (4) other support services, including special education, pre-school and services for teens living on their own.

## IDEA (20 U.S.C. § 1400 *et seq.*)

Congress recognized the special needs of students with disabilities when it passed the Individuals with Disabilities Education Act (IDEA) in 1975, and reauthorized it in 1997 and again in 2004. The purpose of IDEA is to protect the rights of children with disabilities, and to ensure that they receive a *free, appropriate public education (FAPE)* in the *least restrictive environment*. *Free* means at no cost to the parent, and *appropriate* means that the child receives the supports and services that he or she needs to learn, taking into consideration his or her disability. The *least restrictive environment* means that, to the maximum extent appropriate, children with disabilities are educated with their nondisabled peers in the school he or she would attend if nondisabled.

Once a child has been identified as eligible for special education and related services, an individualized education program (IEP) must be developed before services commence. To ensure that each child's needs are addressed, the IEP must be developed at a meeting with the child's IEP team that must include at least one of the child's parents, at least one special education teacher of the child, at least one regular education teacher of the child, a representative of the public education agency, a person to explain the results of any evaluations, the child, when appropriate, and anyone else with special knowledge about the child as determined by the child's parents and the school, respectively. The IEP must specifically identify the educational needs of the individual student and outline a plan for meeting those needs. IDEA regulations outline the specific areas to be addressed in the IEP, including the student's present level of academic achievement and functional performance, measurable annual goals, and special education and related services that the child needs to make progress toward achieving those goals.

In short, the IDEA gives children with disabilities an individual entitlement to a FAPE and their parents certain procedural safeguards to ensure their right to meaningfully participate in decisions about their children's education.

## Child with a Disability

The IDEA defines *child with a disability* as a child who has a qualifying disability and by reason thereof is in need of special education and related services. In other words, under the IDEA it is not enough to simply have a qualifying disability. The disability must cause the child to *need* special education and related services in order to access the general curriculum, which is the same curriculum taught to *all* children.

In Arizona, the categories of disability for children age 3 through 21 are:

- Autism (A)
- Developmental Delay (DD)
- Emotional Disability (ED)
- Hearing Impairment (HI)
- Mild Intellectual Disability (MIID)
- Moderate Intellectual Disability (MOID)
- Multiple Disabilities (MD)
- Multiple Disabilities with Severe Sensory Impairment (MDSSI)
- Orthopedic Impairment (OI)
- Other Health Impairment (OHI)
- Preschool Severe Delay (PSD)
- Severe Intellectual Disability (SID)
- Specific Learning Disability (SLD)
- Speech/Language Impairment (SLI)
- Traumatic Brain Injury (TBI)
- Visual Impairment (VI)

Although the IDEA defines each disability category, the specific qualifications for each category may vary from state to state. In Arizona, several of the categories require additional components other than those described in the IDEA, such as verification of a medical condition for some disabilities.<sup>3</sup>

In Arizona, when a child with a disability is eligible in more than one disability category, state per pupil funding is based on the category that has the highest add-on weight. Arizona does not restrict schools from addressing students' needs that are not specifically linked to their particular disability categories. Instead, individualized education program (IEP) teams *must* ensure that all needs are considered.

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<sup>3</sup>For details on any additional requirements in Arizona, see the Arizona State Board of Education rules at A.A.C. R7-2-401(E).

## The FAPE Mandate

Under the IDEA, all children with disabilities ages three through 21 are entitled to a *free appropriate public education* that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. In Arizona, children with disabilities are entitled to receive a FAPE through the school in which they turn 22.

As used in this part, the term free appropriate public education or *FAPE* means special education and related services that:

- 1) are provided at public expense, under public supervision and direction, and without charge;
- 2) meet the standards of the SEA (State Educational Agency);
- 3) include preschool, elementary school, or secondary school education in the State; and
- 4) are provided in conformity with an individualized education program (IEP).

## **The Role of the Parent**

The parents of children with disabilities must be given the opportunity to meaningfully participate in the special education process. They can provide valuable information about the child's strengths and needs, likes and dislikes, how the child learns, and his or her interests.

As part of their procedural safeguards, schools must afford the parents of a child with a disability the opportunity to participate in meetings that concern the identification, evaluation, educational placement of their children, or the provision of a FAPE. This requirement does not include the requirement for parents to participate in informal conversations among school personnel, preparatory activities among school personnel to plan for the above mentioned meetings, or pre-referral intervention meetings internal to school personnel. The law requires schools to take steps to ensure that one or both of the child's parents are present at each IEP team meeting and to take whatever action is necessary to ensure that the parents understand what is taking place, including arranging for interpreters for parents with deafness or whose native language is other than English.

According to IDEA a parent means:

- a biological or adoptive parent
- a foster parent
- a legal guardian
- an individual acting in the place of a biological or adoptive parent (including a relative with whom the child lives or an individual who is legally responsible for the child's welfare)
- a surrogate parent

If more than one person is qualified to act as the parent, schools should presume that the biological or adoptive parent is the parent under Part B of the IDEA when that individual is attempting to act as the parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

A surrogate parent for special education is an individual appointed by the Arizona Department of Education or a court of competent jurisdiction to ensure that a child's rights are protected when the child's parents are unable to do so. Schools are required to ensure the appointment of a surrogate parent for a child with a disability if any of the following are true:

- No parent can be identified
- After having made reasonable attempts, the school cannot determine the parents' whereabouts
- The child is a ward of the state and a parent cannot be identified or a school cannot determine the location of a parent after having made reasonable attempts<sup>4</sup>
- The child is an unaccompanied homeless youth as defined in the McKinney-Vento Homeless Assistance Act

In order to be eligible to serve as a surrogate parent, the person must: (1) possess adequate knowledge and skills to represent the child, (2) may not be an employee of a state agency involved in the education or care of the child, (3) may not have an interest that would conflict with the child's best interest, and (4) must have a valid fingerprint clearance card issued by the Arizona Department of Public Safety.

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<sup>4</sup>The term "ward of the state" does not include a foster child.



## V. Child Find

The IDEA obligates schools to identify, locate, and evaluate all children with disabilities, and guarantees eligible children with disabilities a FAPE, based on the child's unique needs, in the child's least restrictive environment.

### Identification

The IDEA requires states to identify, locate, and evaluate all children with disabilities residing in the state, aged birth to 21, who are in need of early intervention or special education services. This "child find" requirement applies to all children residing in the state, regardless of the severity of the disability, including children attending private schools<sup>5</sup> and "highly mobile" children, which are those children who move frequently, such as military connected children; migrant children; homeless children; and children who are in the foster care system. The child find regulations also apply to children suspected of having a disability even though they are advancing from grade to grade. In addition, states must enact procedures to determine whether children identified as disabled are, in fact, receiving needed special education and related services. In other words, schools must ensure that those children who have already been "found" are receiving the necessary services.

### Screening

Schools may not rely solely on parents to request special education services for their children, but must have a system in place to locate students in need of services. In Arizona, schools must screen all children for disabilities within 45 calendar days: (1) after the child enters a preschool program or kindergarten, (2) after a child enrolls in a new school without appropriate records of screening, evaluation and progress in school, or (3) upon notification of concern by the parent. In Arizona, screening procedures must include hearing and vision status and consideration of cognitive, academic, communication, motor, social, behavioral, and adaptive development. Screening does not include a comprehensive evaluation and parental consent is not required prior to screening.

### Interventions

If the screening process or review of records indicates a concern, the school must take some action, including but not limited to the following possible pre-referral intervention strategies: vision or hearing acuity screening, social or emotional interventions, academic interventions, such as remediation or programmatic adaptations, referral to a pre-referral intervention team, etc. If the school suspects the child may be a child with a disability in need of special education and related services the child should be referred for a full and individual evaluation.

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<sup>5</sup>School districts are required, under IDEA, to conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located within the school district's boundaries. In Arizona this includes homeschooled children within the district's boundaries.