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Special Education Law

Third Edition

Thomas F. Guernsey

PRESIDENT AND DEAN
ALBANY LAW SCHOOL

Kathe Klare

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*For our parents Ruth and Richard Guernsey and
William and Anita Klare
whose wonderful support and interest encouraged us to become lawyers
in order to make a difference in other children's lives.*

For Alison and Adam who unselfishly shared their parents with other children.

For our many special education clients who have enriched our lives.

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Preface

More than 7.1 million children from birth through 21 years of age are receiving special education and related services from more than 46,000 teachers in the United States. That means that 7.1 million Individualized Education Programs (IEPs) are developed each year involving millions of parents, thousands of teachers, and thousands of other professionals. Most of these IEPs are developed, and the students receive the educational services, with little conflict. The Individuals with Disabilities Education Act (IDEA) in effect provides a roadmap that both the parents and the school follow toward the same destination. A fair number of parents and local educators, however, do not reach agreement about the provision of special education and related services and formal disputes result.

This book assists in reading that map as well as in resolving those disputes. The book is designed to take the lawyers, educators, and other professionals without prior experience through the process leading to an agreement. If agreement, however, is not reached between the school and the public agency responsible for educating the child, the book is designed to help the participants through the process of resolving that disagreement.

In this third edition we continue to provide a comprehensive overview of the federal statutes, regulations, and case law that affect the education of children with disabilities from birth to age 22. The book provides a solid background in special education law and is fully up-to-date with the recent recodification of IDEA, the new Department of Education regulations, and the recent case law, including the most recent United States Supreme Court decisions.

The text is written so that lawyers, educators and parents all can understand the intricacies of special education law. One of the overriding themes of special education is that a child's educational programming should be individualized. As such, many of the cases in this area are fact specific. For the lawyer, therefore, comprehensive citations to statutes, regulations, and case law provide the information necessary to conduct detailed legal research. In addition, numerous checklists and forms provide assistance with the practical application of the legal requirements.

The book, by its very nature, is primarily limited to federal law in general and IDEA and Section 504 of the Rehabilitation Act of 1973 (§504) in particular. One of the difficulties dealing with special education law is the interplay of several federal statutes, primarily IDEA and §504, and to a lesser extent the Americans with Disabilities Act, (ADA), and 42 U.S.C. §1983, as well as supporting federal regulations. Further there are often statutes and regulations affecting general education that affect special education. For example, the Education Department General Administrative Regulations (EDGAR)

and the Family Educational Rights and Privacy Act (FERPA or the Buckley Amendments) each may play a significant role. Chapter 1 provides a general overview of IDEA and its interrelationship with § 504, § 1983, EDGAR and FERPA. In each of the succeeding chapters, the primary focus is on IDEA, however, full attention is also given to the impact § 504 has on the subject, as well as any additional federal statute affecting the particular area.

State law should always be checked. Each state has its own statutes and regulations implementing the IDEA. While these state statutes and regulations usually mirror the federal statutes and regulations, this is not always the case. For example, federal statutes and regulations are silent on some points, and Congress has allowed states to develop independent standards in some areas. Further, while the state may not provide fewer rights, some states actually provide more substantive and procedural rights than required under IDEA. The addresses where copies of state regulations can be obtained, often at no cost, are listed in the Appendix.

Even the lawyer reading the footnotes may find some authorities with which he or she is not familiar. There are of course citations to court decisions, federal statutes and regulations. In addition, however, there are numerous citations to opinions written by the staff of two offices of the Department of Education: The Office of Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and its Office of Special Education Programs (OSEP). OSEP is responsible for monitoring compliance with IDEA while OCR is responsible for monitoring compliance with § 504. Each office, therefore, has occasion to interpret the regulations of the respective statutes. OCR and OSEP opinions, being the interpretation of the agency having written the regulation, are afforded considerable deference by courts. In areas where there are no court decisions, they may be particularly significant.

For the nonlawyer, a brief explanation of the primary authorities used is contained in the Appendix.

The Individuals with Disabilities Education Act has been amended several times and its name has changed over the years. We refer to the statute as IDEA or the Act, except where quotations require reference to a previously used acronym such as EHA or EAHCA. We have also tried to inform the reader where significant changes have been made by the various amendments to the statutes and regulations over the years since their original enactment

Portions of this work have appeared, often in significantly different form, in the following law journals. The authors thank the journals for their permission to use the material in this book: Guernsey and Sweeney, *The Church, The State, And the EHA: Educating the Handicapped in Light of The Establishment Clause*, 73 *Marquette Law Review* 101 (1990); Guernsey, *The Education For All Handicapped Children Act*, 42 *U.S.C. Section 1983 and Section 504 of the Rehabilitation Act of 1973: Statutory Interaction Following the Handicapped Children's Protection Act of 1986*, 68 *Nebraska Law Review* 564 (1989); Guernsey, *The School Pays the Piper, But How Much? Attorneys' Fees in Special Education Cases After the Handicapped Children's Protection Act of 1986*, 23 *Wake Forest Law Review* 237 (1988); Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 *Cleveland State Law Review* 67 (1987–1988).

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Note on Abbreviations

Special education law is replete with abbreviations beginning with the title of the Act. The abbreviations are explained throughout the text. We have, however, as a matter of convenience listed below the more common abbreviations.

AIDS	Acquired Immune Deficiency Syndrome
DOE	Department of Education
EAHCA	Education for all Handicapped Children Act
EDGAR	Education Department General Administrative Regulations
EHA	Education for the Handicapped Act
ESY	Extended School Year
FAPE	Free Appropriate Public Education
FERPA	Family Educational Rights and Privacy Act (Buckley Amendment)
HCPA	Handicapped Children's Protection Act of 1986
HIV	Human Immuno-deficiency Virus
IDEA	Individuals with Disabilities Education Act
IEE	Independent Educational Evaluation
IEP	Individualized Education Program
IFSP	Individualized Family Service Plan
ITDA	Infants and Toddlers with Disabilities Act
LEA	Local Education Authority
LRE	Least Restrictive Environment
MDR	Manifestation Determination Review
OCR	Office of Civil Rights (U.S. Department of Education)
OSEP	Office of Special Education Programs (U.S. Department of Education)
OSERS	Office of Special Education and Rehabilitative Services (U.S. Department of Education)
SEA	State Education Authority