



“Is there a constitutional right to special education?”

The law is not clear on whether school districts must provide “some” service to every child with a disability in order to comply with the Fourteenth Amendment. If a child with a disability is denied access to any public education, the “rational basis” test applies. Depending on the facts, the court may or may not find a rational basis.

On the other hand, it seems fairly clear that the constitution does not guarantee children with disabilities “special” or “appropriate” education. There is only one possible exception. If the constitution indeed requires “some” education, then a school district which excludes a child with a disability from regular education must provide special education.

Certainly the constitution does not require the most expensive and controversial services mandated by the IDEA or its implementing regulations, such as room and board, extended school year programming, or assistive technology, if the school district does not offer such services to nonhandicapped students.

It is also clear that, before a school district may remove a child with a disability from school, the constitution requires due process, including notice and an opportunity to be heard. However, the constitution may not require due process in other situations, such as an initial application for special education or a minor change in the child’s program. Furthermore, the degree of due process required by the IDEA exceeds what the constitution demands.

Even, when applying the statutes, the constitutional law is important, for it tells us how the statutes must be interpreted. The IDEA and Section 504 are based upon Congress’ Spending Power. The *Penhurst* rule of clear statement consequently applies. If these statutes are based upon Section 5 of the Fourteenth Amendment, they raise additional questions, such as whether Congress may prohibit what the Equal Protection Clause allows.

The same constitutional principles, and others, apply to the U.S. Department of Education’s implementing regulations. Obviously, this agency has no more lawmaking power than Congress. It has less. Yet, the Department of Education’s administrative regulations expand school district responsibilities beyond what the statutes mandate.

The issues presented by the IDEA and Section 504 go far beyond special education. Born from constitutional theories, these laws now threaten to turn upon the constitution itself. They test the basic tenets of our system: federalism and lawmaking by the legislative branch.