

2016

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Joanna Pawlowska

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Recommended Citation

Joanna Pawlowska, *Continuing Barriers to Equal Educational Opportunities for Students with Disabilities*, 22 Pub. Interest L. Rptr. 20 (2016).

Available at: <https://lawecommons.luc.edu/pilr/vol22/iss1/6>

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Continuing Barriers to Equal Educational Opportunities for Students with Disabilities

Joanna Pawlowska

In late August of 2016, the Obama administration (“the Government”) sued the state of Georgia in a lawsuit that was the first challenge to a state-run school system segregating students with disabilities.¹ The Government’s complaint alleged that Georgia’s Network for Educational and Therapeutic Support (“GNETS”) program unnecessarily segregated students with disabilities in violation of the Americans with Disabilities Act.² The Government’s allegations stemmed from an extensive review of GNETS facilities, which revealed that more than two-thirds of 4,600 students with disabilities enrolled in GNETS were assigned to GNETS centers that had been opened exclusively for students with disabilities³ and were facilities of exceptionally poor quality, some having even historically been used as schools during the Jim Crow Era.⁴ Additionally, the Government’s review revealed that where students with disabilities attended schools with their non-disabled peers, the students were frequently separated into isolated sections of the building, causing them to spend most of their time, including class time and meal time, segregated from their non-disabled peers.⁵ In its complaint, the Government further alleged that thousands of students with disabilities were being denied equal access to libraries, certified teachers, and extracurricular activities, as well as basic amenities in comparison to their non-disabled peers.⁶

This is but one example illustrative of the fact that there are continuing barriers preventing students with disabilities from gaining equal access to educational opportunities. Unfortunately, this problem is present not only in the state of Georgia, but in other states as well. For instance, in 2004, the Texas Education Agency “set a target for special education enrollment,” allowing

¹ *Justice Department Sues Georgia for Unnecessarily Segregating Students with Disabilities*, THE U.S. DEP’T OF JUST. (Aug. 23, 2016), <https://www.justice.gov/opa/pr/justice-department-sues-georgia-unnecessarily-segregating-students-disabilities>.

² *Id.*

³ *Id.*

⁴ Emma Brown, *Justice Department sues Georgia over segregation of students with disabilities*, WASH. POST. (Aug. 23, 2016), <https://www.washingtonpost.com/news/education/wp/2016/08/23/justice-department-sues-georgia-over-segregation-of-students-with-disabilities/>.

⁵ *Id.*

⁶ *Id.*

only 8.5% of students with special needs to receive special education services.⁷ Because this target was lower than the 13% national average, this effectively precluded approximately 250,000 students in the state of Texas from receiving much-needed services, such as special assistance in education, counseling, and therapy.⁸ Why did the state institute what was effectively a cap on how many students could receive special education? A longtime Texan education advocate believed it was “meant to save money.”⁹

According to the Center for Disease Control and Prevention, approximately 15.4% of children, nationally, have some form of mental, behavioral, or developmental disorder¹⁰ that would require special attention in an educational environment. Yet historically, there has been significant fluctuation in the number of students who have received special education services in public schools.¹¹ In the 2013-2014 school year, this number settled at approximately 13%.¹² While this number is by no means small, it nevertheless does not encompass the total number of students in need of special services and leaves thousands without appropriate educational opportunities. This article will examine the continuing barriers preventing all children with disabilities from receiving equal access to educational opportunities and services.

RELEVANT FEDERAL LAWS

There are three main federal laws that aim to protect the rights of all people with disabilities, including students.¹³ These laws are the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act of 1973 (“Section 504”), and the Individuals with Disabilities Education Act (“IDEA”).¹⁴

⁷ Brian B. Rosenthal, *Denied: How Texas keeps tens of thousands of children out of special education*, HOUS. CHRON. (Sept. 11, 2016), <http://www.houstonchronicle.com/denied/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Rebecca H. Bitsko et al., *Health Care, Family, and Community Factors Associated with Mental, Behavioral, and Developmental Disorders in Early Childhood — United States, 2011–2012*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/mmwr/volumes/65/wr/mm6509a1.htm> (last visited Oct. 8, 2016).

¹¹ *Children and Youth with Disabilities*, NAT’L CTR. FOR EDUC. STAT. (May 2016), http://nces.ed.gov/programs/coe/indicator_cgg.asp.

¹² *Id.*

¹³ The Understood Team, *At A Glance: Which Laws do What*, UNDERSTOOD, FOR LEARNING & ATTENTION ISSUES, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/at-a-glance-which-laws-do-what> (last visited Oct. 8, 2016).

¹⁴ *Id.*

The ADA was enacted in 1990 as a means of providing individuals with disabilities greater civil rights protections and ensuring equal opportunities by prohibiting discrimination on the basis of disability by employers, public accommodations, state and local governments, public and private transportation, and in telecommunications.¹⁵ Title II of the ADA specifically prohibits educational providers from discriminating based on disability and from denying education services, activities, or programs to students with disabilities.¹⁶ In light of this purpose, the ADA's definition of "disability" was amended in 2008 through the Americans with Disabilities Act Amendments Act ("ADAAA"), so as to broaden the scope of coverage to more qualifying individuals.¹⁷

Section 504 serves to further the same purpose as Title II of the ADA. Section 504 specifically states: "No otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁸ Consequently, any program receiving any form of financial assistance from the federal government must adhere to Section 504, including public school districts, private school districts, and institutions of higher education.¹⁹ In addition, Section 504 requires any educational facility receiving federal funds to provide "reasonable accommodations" for the student's disability.²⁰ Under Section 504, any student with an impairment that substantially limits a major life activity is considered to be a student with a disability.²¹ Because Section 504 defines "disability" in these broad terms and does not list eligible disabilities, children who may not qualify as "disabled" under the IDEA may nevertheless qualify under Section 504.²²

The federal law that pertains most directly to individuals with disabilities' education is the IDEA. Under the IDEA, a child with a disability is entitled to

¹⁵ Americans with Disabilities Act, U.S. DEP'T OF EDUC. (Apr. 25, 2006), <http://www2.ed.gov/about/offices/list/ocr/docs/hq9805.html>.

¹⁶ 42 U.S.C. § 12131 (1990).

¹⁷ 42 U.S.C.A. §12102 (2009).

¹⁸ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

¹⁹ *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC. (Oct. 15, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

²⁰ 29 U.S.C. § 701 (2014).

²¹ Kristin Stanberry, *Understanding 504 Plans*, UNDERSTOOD: FOR LEARNING & ATTENTION ISSUES (June 3, 2014), <https://www.understood.org/en/school-learning/special-services/504-plan/understanding-504-plans>.

²² *Id.*

a free appropriate public education (“FAPE”) administered in the least restrictive environment (“LRE”).²³ A FAPE is an education that is “specifically designed to meet the child’s unique needs.”²⁴ The IDEA requires that an Individualized Education Program (“IEP”) be developed for each child with special needs.²⁵ After a child is found to be eligible for an IEP through a referral and assessment process, an IEP team, including the child’s parents and other individuals involved in the child’s education, will develop an education plan that describes the child’s abilities, outlines goals for the child’s education, and specifies services that the child will receive.²⁶ After an IEP is created, the IDEA mandates that students with disabilities be placed in an LRE, which provides appropriate programming for the child with special needs while also allowing them to interact with non-disabled peers.²⁷ However, not every child with a disability is eligible for services under the IDEA. To qualify, a child must be found to have an expressly listed disability.²⁸ In this way, the IDEA is more restrictive than both the ADA and Section 504.²⁹

ONGOING BARRIERS

While the aforementioned federal laws were enacted to provide more civil rights protections and afford all individuals with disabilities equal access to many opportunities, including access to education, children with disabilities all over the nation continue to face challenges when attempting to access an equal opportunity to education as their non-disabled peers, as seen by the telling incidents in Georgia and Texas. Shawn Ullman, Director of The Arc@School’s Center for Special Education Advocacy, states that in attaining access to education for students with disabilities, where the potential to encounter a challenge may exist, it often does.³⁰

²³ Individuals with Disabilities Education Act (IDEA), DISABILITY.GOV, <https://www.disability.gov/individuals-disabilities-education-act-idea/> (last visited Oct. 8, 2016).

²⁴ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 203 (1982).

²⁵ Andrew M.I. Lee, *How IDEA Protects You and Your Child*, UNDERSTOOD, FOR LEARNING & ATTENTION ISSUES (Apr. 11, 2014), <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/how-idea-protects-you-and-your-child>.

²⁶ *A Guide to The Individualized Education Program*, U.S. DEP’T OF EDUC. (Oct. 15, 2016), <http://www2.ed.gov/parents/needs/speced/iepguide/index.html#closer>.

²⁷ *The IEP cycle*, DISABILITY RIGHTS EDUC. & DEF. FUND, <https://dredf.org/special-education/special-education-resources/the-iep-cycle/> (last visited Oct. 8, 2016).

²⁸ Lee, *supra* note 25.

²⁹ *Id.*

³⁰ Telephone Interview with Shawn Ullman, Director, The Arc@School (Oct. 21, 2016).

One reason children with disabilities encounter challenges in attaining equal access to educational opportunities is the standard instituted by the IDEA. The IDEA requires that students with disabilities receive an “appropriate” education.³¹ However, “appropriate” does not mean the best possible education that a child is entitled to, nor does it require that the education “maximize the potential of handicapped children commensurate with the opportunities provided to other children.”³² In *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Supreme Court determined that Congress’ intent in passing the IDEA was merely to ensure that students were provided with “a basic floor of opportunity.”³³ Moreover, the Supreme Court stated that an IEP plan was sufficiently developed if it was “reasonably calculated to give the child some benefit.”³⁴ How is this standard, which calls only for “some benefit,” consistent with the anti-discriminatory intent of the federally enacted laws?

Nevertheless, the Supreme Court has continued to cite *Rowley*’s standard approvingly.³⁵ However, other Circuits have recognized the flaws of this standard, and have adopted a standard requiring a “meaningful educational benefit” be conferred on a child with disabilities while enrolled in the FAPE.³⁶

Another barrier to providing children with disabilities equal access to education arises due to the difficulties in implementing the programs mandated by the IDEA. Ms. Ullman states that the idea behind the IEP as mandated by the IDEA is great, as it allows the people who know the child best, such as parents and teachers who work with a child on a day-to-day basis, to come together in a meeting to discuss what is working well and what isn’t, and then to develop a plan that provides the services and supports that the child needs to learn.³⁷ However, Ms. Ullman explains that in practice, it is extremely difficult to implement.³⁸ While the law requires that the parties come to a consensus, frequently parents and school representatives disagree on whether the child is making sufficient progress and which strategies to implement to help the child

³¹ Individuals with Disabilities Education Act, Pub. L. 94-142, 104 Stat. 1142.

³² *Rowley*, *supra* note 24, at 198.

³³ *Id.* at 200.

³⁴ *Id.* at 203, 218.

³⁵ See generally *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

³⁶ See, e.g., *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808–09 (5th Cir. 2003); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988).

³⁷ Telephone Interview, *supra* note 30.

³⁸ *Id.*

achieve his or her goals.³⁹ This difficulty is exacerbated by a variety of factors. Amanda Klemas, an attorney for the Special Education Clinic of Equip for Equality, finds that while addressing a child's needs is a very individualized practice, schools are generally not set up to provide individualized support.⁴⁰ Schools tend to measure progress as a uniform standard instead of looking at the unique needs and potential of the student.⁴¹ Addressing the child's needs is also restricted by the fact that schools are limited to implementing whatever strategies and resources exist in the particular community, rather than the strategies that would be most effective for the child.⁴² Similarly, it is particularly difficult for parents in low-income families to make recommendations delineating exactly what strategies would be most effective for their special-needs child during an IEP, when they do not have adequate resources to hire psychologists to evaluate the child and make the necessary recommendations.⁴³

While inclusion of students with special needs in general classrooms has significantly improved since the LRE was mandated by the IDEA, there is still a high incidence of students with special needs being placed outside of the classroom.⁴⁴ Ms. Klemas explains that there are numerous reasons for this. First, there is frequently a lack of resources in the school environment which may prevent adequate early intervention practices.⁴⁵ What results is a "failed up-model" in which students with special needs must first do poorly in order to receive recognition and have their needs addressed.⁴⁶ Additionally, students with disabilities often have significant behavioral problems, which may result in disruptive behaviors when their needs are not being adequately addressed. These behavioral problems frequently result in the students' exclusion, or more significantly, suspension or expulsion.⁴⁷ Ms. Klemas states that a tremendous amount of work needs to be done to ensure that peers, parents, and educators are coming from a place of understanding when considering a disabled child's

³⁹ *Id.*

⁴⁰ Telephone interview with Amanda Klemas, Staff Attorney, Equip for Equality (Oct. 20, 2016).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Telephone interview with Amanda Klemas, Staff Attorney, Equip for Equality (Oct. 20, 2016).

⁴⁷ *Id.*

individual needs and limitations, so as to avoid imposing drastic measures which will only adversely affect the child.⁴⁸

Finally, another challenge preventing equal educational opportunities to students with disabilities is a lack of sufficient funding.⁴⁹ Beginning with the initial enactment of the IDEA in 1975, federal law included an obligation on behalf of the government to pay 40% of the education cost for each special needs student.⁵⁰ According to the National Education Association, the current average cost of education for a non-disabled student is \$7,552 per year, while the average cost for a disabled student in a special education program is \$16,921, which is an additional \$9,369 per student per year.⁵¹ However, according to the most recent statistics for the 2014 fiscal year, the IDEA's federal funding only covered 16% of the cost associated with educating children with disabilities.⁵² The shortfall is assumed by states and local school districts who frequently do not have additional funds to assume these costs, thus leaving many students without equal access to opportunities.⁵³

THE FUTURE FOR STUDENTS WITH DISABILITIES

In order to combat the many barriers that children with disabilities face in their battle for equal educational opportunities, the conversation regarding this issue must gain more momentum and recognition in the legislative, administrative, and social spheres. The *Rowley* standard must be reevaluated so as to ensure that students with disabilities receive more than just a "basic floor of opportunity." The Supreme Court will have an opportunity to do so in the upcoming term, as it has recently granted certiorari in *Andrew F. v. Douglas County School District*, in which the sole issue is what level of educational benefit a school district must confer on children with disabilities to provide them with a FAPE as guaranteed by the IDEA.⁵⁴ Additionally, the federal government must deliver on its promise to provide adequate funding under the IDEA

⁴⁸ *Id.*

⁴⁹ Background of Special Education and the Individuals with Disabilities Education Act (IDEA), NAT'L EDUC. ASS'N, <http://www.nea.org/home/19029.htm> (last visited Oct. 8, 2016).

⁵⁰ IDEA Funding, NEW AMERICA EDCENTRAL, <http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/> (last visited Oct. 8, 2016).

⁵¹ NAT'L EDUCATION ASS'N, *supra* note 49.

⁵² NEW AMERICA EDCENTRAL, *supra* note 50.

⁵³ NAT'L EDUCATION ASS'N, *supra* note 49.

⁵⁴ John Aguilar, *U.S. Supreme Court will hear Douglas County student with disabilities case*, DENVER POST (Sept. 29, 2016), <http://www.denverpost.com/2016/09/29/supreme-court-douglas-county-student-disabilities-case/>.

to ensure that state and local educational agencies have enough resources to provide children with disabilities with adequate support. While an environment of inclusion and acceptance for students with disabilities has grown throughout the decades, an alternative to the “least restrictive environment” should be established so that full-scale inclusion is mandated nationally.

Alexa Posny, Assistant Secretary for Special Education and Rehabilitative Services, writes for *Homeroom*, the official blog of the U.S. Department of Education: “I truly believe that we are all in this together and that we must collaborate to create a system that can meet the needs of each of our nation’s 50 million students, including the six million students with disabilities attending our schools.”⁵⁵ Hopefully, with the attention drawn to this issue, her goal may come true, and the six million students with disabilities will all be able to receive equal access to education to their non-disabled peers.

⁵⁵ Alexa Posny, *Inclusive Schools*, HOMEROOM, THE OFFICIAL BLOG OF THE U.S. DEP’T OF EDUC. (March 17, 2011), <http://blog.ed.gov/2011/03/inclusive-schools/>.