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Free Appropriate Public Education: The Unfulfilled Promise of the Individuals with Disabilities Education Act

Madison Flores

When parents drop their children off at school, they leave with a mind full of questions. Will my child be safe today? Is anyone going to say something about my son wearing a dress? Will their teacher and other students keep mispronouncing his name? But the one question parents should not have to ask is, will my child receive an appropriate education that suits their unique needs?

To establish effective policies for children with learning disabilities, government officials, attorneys, and educational leaders must understand the background and needs of these individuals.¹ The National Joint Committee on Learning Disabilities (“NJCLD”) published research addressing the common misperception that “learning disabilities” only refers to a narrow category of students with intellectual and developmental disabilities such as hearing impairments or autism.² Learning disabilities broadly include dyslexia, reading disorders, math disability, dysgraphia, and other disorders of written expression.³ People may assume that these disabilities are mild impairments simply because they cannot be physically seen. But, all students have an array of unique strengths and limitations that affect their ability to learn.⁴ While there is no one size fits all solution for individuals with learning disabilities, continued awareness and research moves the needle forward on providing an equitable education.⁵

WHAT THE LEGISLATION SAYS

The Individuals with Disabilities Education Act (the “Act”) supplements the Education for All Handicapped Children Act of 1975 with greater clarification of the State’s responsibility to people with disabilities.⁶ The Act lists several proven methods for parents, teachers, and students affected by learning

¹ NAT’L. JOINT COMM. ON LEARNING DISABILITIES, LEARNING DISABILITIES: IMPLICATIONS FOR POLICY REGARDING RESEARCH AND PRACTICE 5 (April 29, 2018), <https://njcld.org/wp-content/uploads/2018/04/implications-for-policy-regarding-research-and-practice-njcld-2018.pdf>.

² *Id.* at 4.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *Id.* at 8.

⁶ Individuals with Disabilities Education Act, 20 U.S.C. §1400.

disabilities.⁷ Congress recognized the growing diversity in our country and the need to encourage more minorities to become educators.⁸ Moreover, legislators recognized that students from non-English language backgrounds will have different needs regarding their learning disability and may benefit from diverse teachers and support staff.⁹ By passing this Act, free appropriate public education (“FAPE”) became the standard for educating children with disabilities and designing services that fit their unique needs.¹⁰

Fifteen years later, the Americans with Disabilities Act (“ADA”) was signed into law. It prohibited discrimination and guaranteed that those with disabilities would have the same opportunities to participate in schools, jobs, and the economy.¹¹ An Amendments Act was added in 2009 that included a conforming amendment to Section 504 of the Rehabilitation Act of 1973.¹² Section 504 is a federal law enacted to protect the rights of individuals with disabilities in programs that receive federal funding.¹³ Schools that receive federal funding cannot discriminate based on a student’s disability, no matter how severe the disability.¹⁴ 504 tells schools that a FAPE consists of special aids and services designed to meet a student’s individual needs as adequately as those needs of nondisabled students.¹⁵ Although FAPE is the legal standard, when left to the states to interpret disparities arise in what schools, courts, and parents believe to be “appropriate.”

WHAT THE COURTS SAY

The first monumental Supreme Court case for modern-day special education rights was *Board of Education, Etc. v. Rowley*.¹⁶ The Court held that “free appropriate public education” is satisfied when the State provides sufficient personalized instruction that allows the child to benefit educationally.¹⁷ This decision also provided guidance to the lower court with a two-prong test to determine if the State, through its relationship with the schools, has complied

⁷ *Id.* at 5(A)-(H).

⁸ *Id.*

⁹ *Id.* at (10)-(14).

¹⁰ *Id.* at (d)(1)-(4).

¹¹ Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

¹² Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

¹³ Office of Civil Rights, *Protecting Students with Disabilities*, U.S. Dept. of Educ. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Board of Educ., Etc. v. Rowley*, 102 S.Ct. 3034 (1982).

¹⁷ *Id.* at 3036.

with all its obligations.¹⁸ First, a court must determine if the State has complied with the statutory procedures, then they will ask whether the individualized program that uses those procedures is reasonably calculated to enable the child to receive educational benefits.¹⁹ This test is still employed today with the clarifying instructions provided by the 2017 case *Endrew F.*²⁰

In the decades between *Rowley* and *Endrew F.*, courts released various interpretations of the term “reasonably calculated,” which left parents questioning if their child was receiving a FAPE.²¹ The Supreme Court clarified in *Endrew F.* that for schools to meet their substantive obligations under the Individuals with Disabilities Education Act (“IDEA”) they must offer an individualized education program (“IEP”) that is reasonably calculated to enable a child to make appropriate progress.²² The Court further explained that an IEP must aim to enable the child to make progress, with the essential function of an IEP to create a plan for academic advancement.²³ *Endrew F.* argued that the IDEA requires States to provide educational opportunities that are “substantially equal to the opportunities afforded (to) children without disabilities.”²⁴ Because Congress had not changed the statutory definition of FAPE since *Rowley* the Court declined to accept this interpretation.²⁵ These two cases make up the Supreme Court jurisprudence for cases challenging the IDEA.

THE IMPACT ON CHICAGO STUDENTS

The choice for parents is no longer only between public and private schools as charter schools have emerged. Some charter schools have a specialized focus on learning disabilities.²⁶ Charter schools operate as a school of choice.²⁷ Charter schools are publicly accountable, meaning they rely on families who choose to enroll based on specific educational objectives.²⁸ Although charter schools are exempt from certain state and local regulations, they still

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Endrew F. v. Douglas Co. School Dist. Re-1*, 137 S. Ct. 988, 991 (2017).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 992.

²⁴ *Id.*

²⁵ *Id.*

²⁶ National Charter School Resource Center, *What is a Charter School?* 2016, U.S. DEPT. OF EDUC., <https://charterschoolcenter.ed.gov/what-charter-school>.

²⁷ *Id.*

²⁸ *Id.*

fall under the umbrella of public schools.²⁹ Charters may have started with good intentions, but they have been taken over by large corporations, running these schools for profit instead of for specialized education.³⁰

Phoebe Rusch is a Special Education teacher at Austin College and Career Academy on the West side of Chicago, who published an article describing her experience with the charter movement.³¹ A math teacher at her school conducted a study in 2001 of Chicago Public Schools (“CPS”) that had been placed on probation and found that many of them had a high percentage of students with IEPs.³² Meanwhile, a magnet selective enrollment school in the area had only 2 percent of students in need of special education services.³³ Neighborhood public schools, like Austin College and Career Academy, suffer from CPS’s student-based budgeting policy that limits funding to under-enrolled schools.³⁴ These schools tend to be in predominantly Black and Brown neighborhoods with “underperforming” students because charter schools have been “plucking off” students who have greater academic success, including those that do not have learning disabilities.³⁵

Ms. Rusch used to work as a reading clinician for Lindamood Bell, a private company that services students with learning disabilities.³⁶ She saw firsthand the remarkable results of this program but also the enormous costs.³⁷ While there are some partnerships with public schools, few families can access the resources or litigation necessary to advocate for their children.³⁸ She ends her article with the point that “brilliance comes in many forms, but our current system defunds educational access for neurodivergent students of color, to our collective detriment.”³⁹ This is a message that surely resonates with parents fighting for their children’s brilliance to shine through.

²⁹ *Id.*

³⁰ Phoebe Rusch, *Against Sorting: How the charter movement squashes the dreams of students with real and perceived disabilities*, CHI. TEACHERS UNION (Aug. 23, 2022), <https://www.ctulocal1.org/chicago-union-teacher/2022/08/against-sorting/>.

³¹ *Id.*

³² *Id.* at ¶ 5.

³³ *Id.*

³⁴ *Id.* at ¶ 6.

³⁵ *Id.* at ¶ 3.

³⁶ *Id.* at ¶ 13.

³⁷ *Id.* at ¶ 14.

³⁸ *Id.* at ¶ 15.

³⁹ *Id.*

Another issue faced by families in CPS who need specialized education is long commute times.⁴⁰ CPS may have schools that can provide the specialized programs but those schools can be over an hour-long bus ride away.⁴¹ The District CEO, Pedro Martinez, says that recent long commute times were due to bus driver shortages and claims the district now has enough drivers.⁴² CPS can make the determination that they can no longer properly support a student, but they must provide that student with an alternative that the district will pay for, including transportation.⁴³ About 20 percent of children are on the bus for over an hour due to their special education assignment.⁴⁴ One parent says her daughter spends almost four hours on the bus every day.⁴⁵ Many parents do not have the option to take time off work to get their child to the appropriate school.⁴⁶ When children are spending hours on a bus every day it does not seem like a FAPE is being provided as mandated by the IDEA.⁴⁷ Because parents are faced with the choice of continuing public education at a school that cannot support their child or hour long commutes to charter schools, they can feel helpless in their battle against the District. This is where attorneys have the opportunity to be an advocate and utilize the legislation and case law in place to determine what an appropriate education looks like and if these students are receiving it.

WHAT LAWYERS CAN DO

Lara Cleary is a Special Education Attorney who has experience as an advocate, an educator, and a mother.⁴⁸ When speaking of the one thing lawyers need to remember when working on these types of cases, she said: “look to litigation.”⁴⁹ Schools create IEPs for students and the only way to appeal that plan is for parents to request an administrative hearing.⁵⁰ To dispute the type

⁴⁰ Nader Issa, *Some CPS special ed students endure 2-hour bus rides as transportation problems continue to start year*, CHI. SUN TIMES (Aug. 23, 2022), <https://chicago.suntimes.com/education/2022/8/23/23319021/bus-routes-cps-special-education-students-transportation-problems>.

⁴¹ *Id.* at ¶ 8.

⁴² *Id.* at ¶ 6.

⁴³ *Id.* at ¶ 19.

⁴⁴ *Id.* at ¶ 8.

⁴⁵ *Id.* at ¶ 2.

⁴⁶ *Id.* at ¶ 18.

⁴⁷ Individuals with Disabilities Education Act, *supra* note 6.

⁴⁸ Virtual interview with Lara Cleary, Special Education Attorney, Hansen & Cleary (Oct. 17, 2022) (notes on file with the author).

⁴⁹ *Id.*

⁵⁰ *Id.*

of treatment their child is receiving, parents need to provide research from a private provider.⁵¹ If the problem escalates beyond this, it will be headed towards litigation.⁵² This will require expert witnesses who can speak to what an appropriate plan looks like for the individual child.⁵³ Schools will also present experts who likely have years of experience determining what is appropriate.⁵⁴ It is crucial to document all hearings and request copies of documents from the school, these will be used as evidence if a trial occurs.⁵⁵ Remember, schools can never deny services based on resources.⁵⁶ If a school uses that as an excuse, they are in violation of their procedural obligations under the IDEA.⁵⁷ While trial is never the goal, lawyers must prepare for that result and ensure they are being a zealous advocate for the family.

While CPS has a long way to go in ensuring every child with a learning disability is receiving an equitable education, it is important that the people at the top see this as a mission of the district. CPS's CEO says he has a "blueprint to reimagine learning" that includes better services for students with disabilities.⁵⁸ Martinez hopes to reinvest in neighborhood schools, a change that could hopefully prevent the long bus rides and flight to charter schools with better resources.⁵⁹ Having people in charge that are "optimistic" and "ambitious" about the district's future is a good first step on the long road ahead.⁶⁰ Unfortunately, educators with the best intentions can fall short on providing a FAPE because of their own lack of resources. This is where attorneys come in to ensure parents know their rights when they are up against a school district. Document the entire process diligently and make sure the research is on your side if you do decide to challenge the IEP. Advocates must remember that the unresolved issues regarding learning disabilities should not impede the development or implementation of policies that protect the rights of students and

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Mila Koumpilova, *As Chicago gears up for a new school year, CEO previews plan to 'reimagine' learning*, CHALKBEAT CHI. (Aug 17, 2022, 4:19pm CDT), <https://chicago.chalkbeat.org/2022/8/17/23310465/chicago-public-schools-pedro-martinez-three-year-blueprint-pandemic-recovery>.

⁵⁹ *Id.*

⁶⁰ *Id.*

ensure their access to appropriate services.⁶¹ The promise of a free and appropriate public education does not have to go unfulfilled.

⁶¹ NAT'L. JOINT COMM. ON LEARNING DISABILITIES, *supra* note 1, at 8.