2011

Perspective on Economic Critiques of Disability Law: The Multifaceted Federal Role in Balancing Equity and Efficiency

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Citation: Elizabeth Burleson "Perspective on Economic Critiques of Disability Law: the Multifaceted Federal Role in Balancing Equity and Efficiency," 8 INDIANA HEALTH LAW REVIEW 335 (2011). [View Document]

ABSTRACT

Given the recent enactment of the ADA Amendments Act, this article analyzes a Rawlsian philosophical framework with which to view society's treatment of people with disabilities. Allocation of resources remains a pervasive concern of economists and attorneys alike. Need, merit, and market compete as means by which to decide who should receive what benefits. This article concludes that while economics can play a powerful role in the initial allocation of limited resources, there remains a multifaceted federal role to confront discrimination and promote equity.

I. INTRODUCTION

The Americans with Disabilities Act ("ADA") Amendments Act ("ADAAA") went into effect in 2009,[1] rekindling the federalism debate regarding education. As an expansion of the Americans with Disabilities Act of 1990,[2] the ADAAA rejects the *Sutton* Trilogy[3] requirement that mitigating measures be factored into a disability analysis.[4] Instead it reinstates the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*.[5]

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[1] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as portions of 42 U.S.C. §§ 12101-12214 and 29 U.S.C. § 705 (2008)).

[2] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2009)).

[3] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); and Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999).

[4] Congress expanded the Rules of Construction Regarding the Definition of Disability to specify in (E)(i) that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." 42 U.S.C. § 12102(4)(E)(i) (2009).

[5] ADA Amendments Act of 2008, § 2(b)(2)-(3); *see also* School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

Eleven percent of students in higher education have disabilities,[6] and ten percent of these students have learning disabilities.[7] A significant level of awareness has been raised concerning the needs of people with disabilities, yet increased visibility and legal protections have been met with strong resistance. While disability advocates speak of fundamental civil rights, opponents speak of economic costs. Law and economics can provide much needed guidance based upon well-reasoned theories and have contributed immeasurably to the sound application of laws and policies. Law and society scholars have provided countervailing analyses that remain mindful of the need for humane laws and policies.

This article begins by offering a philosophical framework with which to view society's treatment of people with disabilities. In doing so, Part II attempts to balance the predominantly economic approach by which disability issues have been assessed. Part III then directly addresses the economic way in which the Individuals with Disabilities Education Act ("IDEA")[8] has affected resource allocation to special education. Next, Part III considers what happens to

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[6] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-33, HIGHER EDUCATION AND DISABILITY: EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ITS ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS 6 (2009); *see also* Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 871 (2010).

[7] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-33, *supra* note 6, at 11. (noting that "the return of veterans with a variety of conditions ranging from mobility impairments to post traumatic stress disorder will present new challenges for colleges and universities. The Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No.110-252, 122 Stat. 2357 (codified at 38 U.S.C. § 3313 (2008)), provides funding for tuition and fees, housing, and other assistance for returning veterans. This is likely to increase the number of individuals on campus returning from active service. Not only might the services they request be challenging, but there may be legal issues about documentation. Individuals returning from active service may not be able to get the traditionally required documentation quickly from the military to justify an accommodation, and institutions will need to determine whether they can adapt their policies to this new population"); Rothstein, *supra* note 6, at 873; *see also* Paul D. Grossman, *Foreword with a Challenge: Leading Our Campus Away from the Perfect Storm*, 22 J. POSTSECONDARY ED. & DISABILITY 4 (2009).

[8] Individuals with Disabilities Education Act ("IDEA"), Pub. L. No. 101-476, 104 Stat. 1142 (codified at 20 U.S.C. §§1400-1482 (2006) (formerly known as the Education for All Handicapped Children Act)).

individuals who fall outside of IDEA protection once they reach the age of twenty-one. Many students in this situation have turned to Section 504 of the Rehabilitation Act.[9] In the post-secondary context, courts have struggled with the level of protection that the Rehabilitation Act provides. Instead of explicitly addressing economic costs of compliance, much of the analysis in this area has revolved around the clarification of who is "otherwise qualified." Part IV addresses the intense debate over legislative language that has continued, despite a Congressional effort to strengthen its mandate to eliminate discrimination against disabilities by enacting the ADA.[10] In the context of higher education and professional entrance examinations, there has been less mention of direct cost benefit analyses. Instead, the debate has revolved around academic standards. Beneath this discussion, however, there is an economic productivity debate. The following analysis focuses on the economic undercurrent that has pervaded the process of establishing and implementing civil rights for people with disabilities. This article concludes that while economics can play a powerful role in the initial allocation of limited resources there remains a multifaceted federal role to confront discrimination and promote equity.

II. A PHILOSOPHICAL FRAMEWORK WITH WHICH TO ASSESS DISABILITY LAW

The American legal philosopher, John Rawls, described a state of nature in which individuals have complete freedom within the following hypothetical societal framework.[11] People are initially identical with regard to physical strength, financial security, religion, race, etc.[12] Moreover, these fungible individuals have no idea what they will become in the future.[13]

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[9] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794 (2011)).

[10] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2009)).

[11] JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

[12] David J. Popiel, *The Debate Over the Americans with Disabilities Act: A Question of Economics or Justice?* 10 ST. JOHN'S J. LEGAL COMMENT. 527, 530 (1995).

[13] *Id.*

Given these two basic tenets, Rawls predicted that the rules people would establish would be fair because no one would be able to skew them to benefit a given individual circumstance.[14] In this way, we can assess our own laws by considering whether a given rule would have been agreed upon in Rawls' state of nature.

Disability legislation, such as the ADA, holds up very well if such a Rawlsian comparison is made. In fact, the disability field provides an excellent real-world scenario for Rawls' hypothetical decision-making process since no one knows whether they will have to contend with a disability in the future.[15] Since our ability to determine whether or not we would individually benefit from disability legislation mirrors Rawls' state of nature, it is not surprising that ADA provisions in many ways reflect an undifferentiated decision-making process. Without knowing one's future, individuals would like to be assured that if they acquire a disability in the future, society will provide basic accommodations. Similarly, if they decide to be employers in the future, these same individuals would want to be assured that accommodating disabilities would not be exceedingly expensive.[16] Thus, Rawls provides a rationale for moving beyond a utilitarian discussion of whether the ADA's financial costs outweigh its financial benefits.[17] As Popiel notes,

> The fact based utilitarian balancing act does not define fundamental fairness. If the provisions of the ADA pass Rawls' reason based state of nature test, they are just, and there is a strong argument for retaining them in spite of their cost. Our society glorifies the economic marketplace; but, in thinking about the worth of laws, marketplace analysis has its limits.[18]

Much of the criticism of disability legislation is couched in the argument that the costs outweigh the benefits. Cries that disability provisions such as the ADA are too expensive have

[14] *Id*.
[15] *Id.* at 531.
[16] *Id.*
[17] *Id.*
[18] *Id*. at 531-32.

been countered with assurances that the costs of accommodating disabilities are generally low. Economic arguments have a useful place in society, but they cannot be relied upon as the only indicator of what and how civil rights should be protected. It is important to assess measures that protect people with disabilities in ways that go beyond a narrow framework of economic efficiency. It is not sufficient to measure the quantifiable monetary successes or failures of disability legislation to the exclusion of addressing attitudes and their philosophical underpinnings. As Popiel notes, "[i]t is principles, not what you call 'empirical data,' that will tell you what is right and what is wrong . . . . It is justice that we are after, and justice is not always, or even often, amenable to precise measurement, or even to measurement at all."[19] Popiel goes on to point out that there are other expenditures for which society is willing to pay that can be extremely costly. For instance, in the context of providing fair trials for criminal defendants, looking solely at financial costs rather than the central issue of fairness is likely to lead to a substantial reduction in procedural protections. The fact that we do not perform a pure dollar and cents analysis in ensuring the right to a fair trial indicates that empirical reasoning is not the only grounds upon which we make decisions. Communities allocate resources based upon a combination of need, merit, and market. In the context of recognizing reasonable accommodations for individuals with disabilities, an even playing field can be established by interpreting and implementing federal legislation in a manner that balances efficiency and equity.

III. A Paradigm Shift in Attitudes Towards Disabilities

Societies throughout history have often excluded or ignored people with disabilities. Misconceptions of an inability for people with disabilities to contribute to society have fostered continued discrimination. The piecemeal approach in which disability legislation has been enacted provides a record with which to trace the gradual transition in perspectives.

[19] *Id*. at 529.

The United States has come a long way in its treatment of people with disabilities. Throughout the early 1800s states primarily institutionalized such individuals. Income maintenance programs, such as Workers Compensation in 1911 and Social Security Disability policy in 1935, marked the first attempts to establish a national disability policy. Benefits initially consisted of financial support at a subsistence level, but with little accompanying effort to welcome people with disabilities into mainstream society. World War I marked a turning point in the role that the federal government has played in disability issues when the enormous influx of returning veterans with disabilities prompted the government to establish vocational rehabilitation services.[20] The 1920s ushered in an era of vocational rehabilitation with a "corrective" rational that would return people to the workplace. This economic, marketplace approach sought to mold the individual with a disability into his or her existing surroundings, rather than make an effort to alter the individual's physical surroundings to accommodate his or her needs, or confront the prejudice and ignorance that contributed to his or her exclusion. As a result, individuals with disabilities remained isolated. A philosophical paradigm shift began in the 1960s as people started to recognize that all individuals have a fundamental worth and potential.

A. The Rehabilitation Act of 1973

Prior to 1973, any special education provisions that existed were based upon disability legislation at the state level. Congress took steps to combat disability discrimination on a national level by passing the Rehabilitation Act of 1973.[21] While the Civil Rights Act of 1964

[20] Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 403 (1984).

[21] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794 (West 2011)).

did not provide protection from discrimination on the basis of disability, it did serve as a foundation for the Rehabilitation Act.[22]

The Rehabilitation Act had the goal of "providing equal rights for the nation's twenty-eight to fifty million physically and mentally handicapped."[23] The Act implemented a program to integrate people with disabilities into all areas of society. Section 504 of the Act states that, "No otherwise qualified [handicapped individual] in the United States . . . . shall, solely by reason of his handicap, 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."[24]

While in the original Rehabilitation Act of 1973, the phrase "qualified handicapped individual" only encompassed individuals who could benefit from employment, a 1974 amendment incorporated a broader definition containing the following three components: "(A) a physical or emotional impairment that substantially limits one or more of the major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[25] Under this definition, learning is considered a "major life activity." Therefore, people with learning disabilities are protected in their educational pursuits.

The Rehabilitation Act, and Section 504 in particular, has served as the foundation for broad policies prohibiting discrimination against people with disabilities. The Act contains several serious weaknesses, however. Among the most important criticisms of the Rehabilitation Act are that it is ambiguous in its language and is limited in its scope. Since only recipients of federal financial assistance fell within the Act, much of the private sector could continue to

[22] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C. (2010)).

[23] Steven W. Gerse, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 701 (1982).

[24] Rehabilitation Act of 1973, § 794(a).

[25] Rehabilitation Act Amendments of 1974, Pub. L. No. 93-651, §111(a), 89 Stat. 2, 2-3 (1974).

discriminate against people with disabilities. To remedy this flaw, Congress introduced new legislation to strengthen the Rehabilitation Act's protection.[26] This process culminated in the passage of the ADA, which is discussed further in Section IV.

B. Equal Access and Opportunities to Education

The doctrine of "separate but equal" did not reach the Supreme Court until1896 and was not originally established in relation to disability, or to education. Instead, *Plessy v. Ferguson*[27] involved transportation. The case most people associate with the doctrine, however, is *Brown v. Board of Education*,[28] in which African-American elementary school children in Topeka, Kansas were given the right to go to an integrated school. Initially, the three-judge district court, found that segregation in public education had negative effects on African-American children, but denied relief on the ground that the segregated schools had roughly similar buildings, transportation, curricula, and educational qualifications of teachers.[29] Such a finding disregarded the argument that segregation itself inflicted a sense of inferiority, which affected the motivation of a child to learn. The Supreme Court concluded that "separate educational facilities are inherently unequal."[30] This raises the question of how the "separate is unequal" conclusion relates to individuals with disabilities.

Segregation of special needs students dates back at least as far as the 1800s when states began organizing separate schools for the deaf and blind. Kentucky opened the first state school for the deaf in 1823. Similar schools in Ohio, Massachusetts, and New York soon followed. Special Education programs were not integrated into public schools, however, until the 1960s.

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[26] President Reagan created the National Council on Disabilities, which ultimately authored Public Law 101-336, otherwise known as the Americans with Disabilities Act ("ADA").

[27] Plessy v. Ferguson, 163 U.S. 537 (1896).

[28] Brown v. Bd. of Educ., 347 U. S. 483 (1954).

[29] *Id.* at 486.

[30] *Id.* at 495.

Even when physical integration did begin to take place, this development did not have a significant effect on the teaching approach taken with special needs students or on their exposure to peers who did not have disabilities. The contemporary concept of mainstreaming only began in the 1970s in the wake of the following court cases and federal statutes.

In 1971, *Pennsylvania Association for Retarded Children ("PARC") v. Commonwealth of Pennsylvania* challenged a state law that discriminated against children with disabilities based on the assumption that they would be unable to profit from public school.[31] Specifically, *PARC* challenged the constitutionality of a Pennsylvania statute that excluded retarded children from public schools.[32] The Supreme Court struck down the statute and required Pennsylvania to stop "deny[ing] to any mentally retarded child access to a free public program of education and training."[33] This case was followed by *Mills v. Board of Education of the District of Columbia*, in which the court found that schools could not deny services on the basis of cost, but instead had to extend the right to free and appropriate education to special needs children.[34] The court held that a school cannot exclude a child unless it provides, "adequate alternative educational services suited to the child's needs which may include special education or tuition grants . . . . [and] a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."[35]

Mills is most often quoted for its requirement that districts must not exclude special needs students on the basis of a school's lack of resources. The court established this with the strong statement that,

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[31] PARC v. Pennsylvania, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).
[32] *Id*.
[33] *Id*. at 1258.
[34] Mills v. Bd. of Educ., 348 F. Supp. 866 (D.C. Cir. 1972).
[35] *Id.* at 878.

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit there from. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child.[36]

This language in *Mills* and the protection outlined in *PARC* became instrumental in the creation of subsequent federal legislation.

In 1975, Congress passed the Education For All Handicapped Children Act ("EAHCA").[37] Both the House and the Senate reports attribute the impetus for this act to the two federal court judgments previously discussed, *PARC* and *Mills*.[38] Most importantly, the term "appropriate" apparently came from these cases. In the *PARC* case, the district court required that handicapped children be provided with "education and training appropriate to [their] learning capacities"[39] and in *Mills*, the district court referred to the need for "an appropriate educational program."[40] The EAHCA was amended in 1990 and renamed the Individuals with Disabilities Education Act ("IDEA").[41]

C. Individuals with Disabilities Education Act ("IDEA")

Despite the growing realization that children with disabilities could benefit educationally from being in the regular classroom, many states continued to deny educational services on the basis of cost and institutional difficulty. In the early 1970s, it was estimated that one to two

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[36] *Id.* at 876.

[37] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

[38] Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 180 (1982).

[39] PARC v. Pennsylvania, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).

[40] *Mills*, 348 F. Supp. at 879.

[41] 20 U.S.C. § 1400 (2006) (describing the reasons for amending the EAHCA).

million children were excluded from public school services.[42] Congress used the conservative one million figure to argue for the passage of IDEA and incorporated the "Child Find" program into the legislation.[43] This initiative succeeded in locating many previously-excluded children with disabilities. While the Department of Health, Education, and Welfare ("HEW") estimated that 463,000 children remained excluded from school in 1976, by 1980 the figure had dropped to 22,600.[44] Just as excluded students were entering the public school system, the number of newly identified special needs students increased dramatically rising from 2.1 million children in 1966, to 4.2 million in 1982.[45]

1. Conflict between the Traditional Educational System and IDEA

Beyond the misconceptions people have about disabilities, acceptance of IDEA is further hindered by the fact that the legislation is contradictory to the system in which it has been implemented. IDEA introduces a needs-based approach into a merit-based educational system.[46] Under the statute, the role of educational merit and needs are reversed. That is to say, the special needs students who have the lowest performance often receive the most resources.[47]

While IDEA calls for an individualized educational program for a special needs student, school systems are based on a system of standardization in which a set of uniform educational opportunities is provided.[48] In such a system, the ideal goal is to become blind to individual backgrounds. In this respect, educators may see the inclusion movement as a way to bridge this

[42] William H. Clune and Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 L. & CONTEMP. PROBS. 7, 15 (1985).

[43] *Id*. For information on "Child Find" see US Office for Special Education at http://www.childfindidea.org/overview.htm.

[44] Clune & Van Pelt, *supra* note 42, at 15.

[45] *Id.*

[46] 20 U.S.C. § 1412 (a)(3) (2006).

[47] Katherine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, 48 L. & CONTEMP. PROBS. 7, 24-26 (1985).

[48] *Id*. at 20.

discrepancy between individual and collective approaches. Yet, inclusion sometimes becomes an economic catchall approach for denying services. The placement of *all* children with disabilities in the regular classroom is as great a violation of IDEA as is the placement of *all* children in separate classrooms on the basis of their type of disability. Inclusion is not universally good or evil. Different children require different services. For instance, a Down Syndrome child benefits from socialization opportunities in the regular classroom, while a child with a mild learning disability benefits from separate, remedial academic skill-building. Those seeking socialization can benefit from inclusion but this should not be grounds for insisting that children who are seeking the same educational goals as their non-disabled peers can equally benefit from inclusion. Watering down a concept so that it can be learned within the constraints of the traditional classroom does not help the latter. The basis of inclusion is a modified curriculum, essential for some children with disabilities and inadequate for others.

IDEA brought a compulsory funding requirement into a political system of resource allocation—a system in which negotiations determine how much money goes where.[49] The following political disadvantages facing special needs students at the local level indicate why Congress deemed it necessary to ensure their individual rights. Discomfort and prejudice toward people with disabilities remains widespread. Greater understanding is hindered by the reality that teachers and administrators are overburdened and are already struggling to adjust to funding shortages, while juggling increasingly overcrowded classrooms, high student-teacher ratios, and outdated facilities.[50] Despite the need to protect children with disabilities from systematic discrimination, introducing federal control into a system historically run by state and local

[49] *Id*. at 21.
[50] *Id.* at 23.

decision-makers increased the animosity of schools toward special education.[51] When public education was first created in the United States, decisions were made on a local level by parents and the local government.[52] During the nineteenth century, schools were consolidated and increasingly made accountable to states.[53] In contrast, the uniform federal procedures established under IDEA limit local autonomy. This was a change in the role of the federal government, which had traditionally been concerned with increasing access to education rather than setting standards for the content of educational programming.[54]

2. Funding Special Education and the Complexity of Disability Evaluations

Realizing that IDEA created an expensive compliance burden for states, Congress incorporated a partial funding mechanism into the legislation.[55] This federal aid would not compensate for all the costs of compliance but it was hoped that the money would ease the burden of providing evaluations and new programs and make districts more willing to change organizational routines and attitudes. As a result, schools receive special education funding in proportion to the number of children identified with disabilities.[56] Linking funding to the labeling process, however, does not give schools the additional incentive to make sure services are appropriate.

A common criticism of special education is that labeling drives the services. That is to say, a school's access to funding affects a child's eligibility and placement recommendations. There is a disincentive to provide for new disabilities because each new category dilutes the funding available to existing programs. These circumstances have led many advocates to argue

[51] *Id*. at 26.
[52] *Id*. at 27.
[53] *Id*.
[54] *Id*.
[55] *See generally* 20 U.S.C. § 1411 (2005).
[56] 20 U.S.C. § 1411(a)(2)(B)(i) (2005).

for the separation of funding from the evaluation process. Even if this were to occur, however, other issues remain problematic. For instance, states have had widely divergent standards of whom and what defines a given disability. In 1977, "thirty states had definitions of mental retardation inconsistent with the [IDEA] definition."[57] Even if a district has a broad definition of eligibility, under-referrals may result from a backup in the assessment process, overcrowding of programs, or personality traits.[58] To clarify the latter, if a child is not disrupting the class, a teacher may not realize he or she is having difficulty. One way to mitigate under-referrals is to increase special education training among regular classroom teachers. This may or may not lead to the opposite problem of over-referrals. Referring children too often results when teachers are at their wits' end with disruptive students.

3. Competing Interests

Despite valid criticisms, IDEA did provide funding, moral authority, a standard of free and appropriate education, and the leverage to ask for new organizational procedures.[59] IDEA offers a "demand entitlement" which can be used by those willing to request change.[60] This change, however, depends on the given party's resources to demand it. IDEA gives parents a litigation entitlement, as opposed to a clear entitlement of say $1,000 for a given disability. As a result, parents are limited by the cost of litigation yet not confined by a fixed voucher or categorical grant in a fluctuating economy. This pragmatic approach limits social change to balancing the competing economic and ethical interests of parents and schools.

Unfortunately, litigation entitlements have a number of disadvantages. First, legal goals do not consider the existing competition between priorities. Second, legal remedies do little to

[57] Clune & Van Pelt, *supra* note 42, at 18.
[58] *Id.* at 22-23.
[59] *See generally* 20 U.S.C. § 1411 (2005).
[60] Clune & Van Pelt, *supra* note 42, at 39.

address bureaucratic red tape or genuine technical ignorance. Special education cannot have an unlimited budget, despite the current views of parents seeking to recover very large sums of money for private placements. Schools will either attempt to balance special education provisions with those allocated to non-disabled children or they will resist accommodating special needs students because there is no pressure to do so or because the legal provisions are impossible to comply with, given budgetary constraints. Third, legal objectives generally do not address the expense of compliance. As a result, districts opt for surface compliance. In assessing the merits of such compliance, however, it is important to realize the validity of the competing interests. The educational rights of non-disabled students, normal working hours, a teacher's ability to teach effectively, and efficient use of taxpayers' money are not discriminatory objectives. Assessing them, however, does not necessarily mean giving them a higher priority than the needs of children with disabilities.[61]

4. An Economic Model for Allocating Special Education Services

Maximizing efficiency between two populations of children, those with disabilities and those without disabilities, is a function of schools and parents. In identifying a source of market failure in this context, this Article focuses on maximizing the efficiency of education for all children. Schools and parents become primary decision-makers, each of whom must maximize their objectives subject to their respective budgets. As rational decision-makers, parents seek to maximize their utility. They do this by maximizing educational opportunity for their child(ren) given their budget constraints. Similarly, as rational decision-makers, schools seek to maximize educational benefit across the two populations of children: those with regular educational needs and those with special needs.

[61] *Id.* at 41.

To what extent do parents have the right to shift their budget lines outward by requiring schools to finance services for their special needs child(ren)? IDEA mandates a free and appropriate education for all handicapped children, but what is appropriate? The analysis is complicated by the fact that some parties are seeking greater access for special needs students in regular classrooms while others are seeking a greater number of out-of-class services. In conducting a cost-benefit analysis for special education, parents must weigh the needs of their child(ren) against personal budget constraints and the opportunity cost of other personal needs. Conversely, schools must analyze their opportunity cost of providing educational services to non-disabled children, given the externality of future cost to society of individuals with disabilities.

What incentives do schools have to spend more money on special education now to save costs for other sectors of the society later? Are funding patterns toward education efficient, given the crucial role human capital plays in our economy? Should each student be competitive in getting a good job or simply able to obtain economic survival? Is it the school's responsibility to prepare all its students for higher education or should vocational training be the objective? Must reading and spelling be mastered perfectly before pursuing abstract ideas? The answers to these kinds of questions greatly effect what are the perceived needs of a child. Furthermore, perspectives on a child's needs will vary depending on whether the school takes a short-term perspective of a school year or a long-term perspective of the life span of the special needs person. Do the opposing goals of schools and parents create a paradox of compensation or can special education law create efficient incentives for both schools and parents? Investing in education can reduce support cost later on. A given school, however, does not directly benefit from the costs that are saved in the individual's adult years. Therefore, there is a lack of local

incentive to pay the price of benefits to other sectors of society in the future. As funding for education continues to decrease in relation to the demand for services, the controversy over resource allocation mounts.[62]

5. The Rowley Case

Hendrick Hudson District Board of Education v. Rowley[63] provides a landmark judicial interpretation of the level of services that IDEA requires. The Supreme Court restrictively interpreted IDEA to require schools to provide merely "adequate" educational benefit.[64] Mr. and Mrs. Rowley sought a sign-language aide for their daughter, Amy.[65] She had minimal residual hearing but was an excellent lipreader.[66] As plaintiffs on Amy's behalf, her parents argued that refusing to provide Amy with a sign language interpreter when she entered first grade was a denial of a "free appropriate public education" under IDEA.[67] The court found that Amy performed better than average in the class and was advancing easily from grade to grade, despite understanding less than half of what went on in the classroom.[68] There was a clear disparity between Amy's actual achievement and potential. On these grounds, the district court decided that Amy was not being provided a "free appropriate public education."[69] The court defined the latter as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[70] The Supreme Court, however, disagreed with the lower court's

[62] Charles McCormick & Patricia F. First, *The Cost of Inclusion: Educating Students with Special Needs*, 60 SCH. BUS. AFF. 30, 30 (1994).
[63] Hendrick Hudson District Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
[64] *Id.* at 210.
[65] *Id.* at 184.
[66] *Id.* at 184.
[67] *Id.* at 185.
[68] *Id.*
[69] *Id.* at 185-86.
[70] *Id.* at 186 (quoting Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (1980)).

ruling that Amy should be provided with a sign language interpreter.[71] Instead the Court found that since she was receiving an "adequate" education, was performing above average work, and was receiving some personalized instruction and services the lower court should not have found that IDEA required anything further.[72]

In his dissent, Justice White disagreed with the Court's conclusion that IDEA only mandated "adequate" educational benefit.[73] He pointed out that Congress did not intend courts to end all inquiry if a child is performing on grade level. In fact, Congress repeatedly used the term "full" rather than anything that could be interpreted to mean "adequate." As Justice White explains,

> [t]he Act itself announces it will provide a "*full* educational opportunity to all handicapped children" 20 U.S.C. § 1412(2)(A) (emphasis added). This goal is repeated throughout the legislative history, in statements too frequent to be 'passing references and isolated phrases' . . . . Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered.[74]

Justice White goes on to criticize the majority opinion's use of the *PARC* and *Mills* cases.[75] He contends that, the fact that "these decisions served as an impetus for the Act does not, however, establish them as the limits of the Act."[76]

Allocating resources for special education appears to create a paradox of compensation. If the law requires that a child be afforded the maximum development possible then schools have an efficient incentive to identify and serve children with disabilities. Parents, on the other hand, do not have efficient incentives. They do not have anything obligating them to make sure the cost of a service is offset by the benefit to their child. On the other hand, if the law only requires

[71] *Id.* at 210.
[72] *Id.*
[73] *Id.* at 215-20.
[74] *Id.* at 213.
[75] *Id.* at 215-20.
[76] *Id.* at 214.

that "adequate" educational services which offer merely "some" educational benefit be afforded to a special needs child, then parents are the ones who have efficient incentives to find out what services are essential. Schools, on the other hand, do not have efficient incentives to provide services beyond the first increment of educational benefit. The incentive on the part of schools to provide as little as possible, is what concerned Justice White in the *Rowley* case and has led several states to establish standards above the *Rowley* precedent of "adequate" educational benefit.[77] The following section seeks to strike a balance between educationally beneficial services and those ensuring maximum possible development.

6. Proportional Quality

IDEA requires that every child has a right to a free and appropriate education in the least restrictive setting possible.[78] Yet, interpreting these provisions can be confusing. For example, does a child have access to special education if there is a testable disparity between achievement and potential, or merely if that disparity is below grade level (i.e., the underlying issue in the *Rowley* case)? A general misunderstanding of disabilities aggravates such complexities. Disabling conditions do not preclude students from performing above grade level. In fact, it has been estimated that one sixth of the population of gifted children have disabilities.[79]

Currently, enormous but inadequate amounts of money are being invested in special education. These funds undoubtedly help a large number of children. It is important, however,

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[77] *See id.*

[78] "Each public agency must ensure that—(i) to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §300.114(a)(2).

[79] LINDA KREGER SILVERMAN, *Gifted and Talented Students,* in SPECIAL EDUCATION & STUDENT DISABILITY, AN INTRODUCTION: TRADITIONAL, EMERGING, AND ALTERNATIVE PERSPECTIVES 377, 408 (Edward L. Meyen & Thomas M. Skrtic eds., 1995).

to make sure the value of a service to a given child is greater than the cost of the service. This is not synonymous with determining that the value to the child is greater than the value of an alternative resource to non-disabled children. For example, if an aide for a special needs child can only be afforded at the expense of a classroom chalkboard, it makes sense to ensure that the benefit of an aide to the child with a disability justifies the cost of the aid. While administrative biases and discrepancies in defining value (i.e., economic productivity verses individual dignity) can make the benefit hard to calculate, it is clear that the service should be worthwhile to its recipient. In contrast, determining whether the special needs child can use the aide more productively than the other students can use the chalkboard legitimizes replacing the rights of less highly valued individuals with the rights of more highly valued individuals. To give up something in the present in order to receive something greater in the future may be efficient. To require one group of children to sacrifice something so that another group can have something, even if the gain is greater than the loss, is not efficient. *Pareto Efficiency* requires that the party not being made better off is at least not made worse off.[80] Unlike a strict cost-benefit analysis, proportional quality programming does not compare services on the basis of goals but rather sees each group of children as having entitlements to the same degree of respect and a right to learn.

While it is unrealistic not to consider costs in determining special education services within a system that is forced to weigh the costs and benefits of every other aspect of its program, the issue of cost should be confronted directly, not disguised under the educational term "least restrictive environment." Cost considerations must be made on a quality basis. If schools only compare costs, they will continue to systematically deny special education

[80] *Pareto Efficiency* or *Pareto Optimality* "occurs when resources are so allocated that it is not possible to make anyone better off without making someone else worse off." See OECD, *Glossary of Statistical Terms*, http://stats.oecd.org/glossary/detail.asp?ID=3275 (last visited 05/31/11).

programs on the basis of higher cost. If sacrifices must be made, they should be made across the board instead of always being made by a single group of students. Therefore, before costs are used to legitimize not providing an educationally beneficial special service, schools have to offer special needs students a program that is comparable in quality to the program available to non-disabled students.[81]

A proportional quality approach can narrow the discrepancy between the nondiscriminatory mandate of Section 504 and the affirmative requirements imposed by IDEA. A child with a disability must be able to benefit from the instruction under IDEA. Section 504, on the other hand, merely requires that a handicapped child be offered the same educational access as a non-disabled child. Additionally, Section 504's protection does not bring money with it. Federal funding determines whether Section 504 is applicable but the money does not have to be disability funding. Section 504 is a civil rights law rather than a funding law. While IDEA provides more detailed provisions for those who qualify, Section 504 extends to a range of individuals with disabilities who are not protected under IDEA. Many college students, for example, find that the accommodations that they received throughout elementary and secondary school are no longer protected in post-secondary pursuits since IDEA only covers individuals with disabilities up to the age of twenty-one. [82] The following discussion focuses on the struggle that post-secondary students have experienced.

D. An "Otherwise Qualified Individual" Under Section 504

One of the greatest obstacles that post-secondary students have faced pursuant to Section 504 of the Rehabilitation Act, has been to successfully argue that they are an "otherwise

[81] Bartlett, *supra* note 47, at 9.

[82] IDEA, Pub. L. No. 101-476, 104 Stat. 1142 (codified at 20 U.S.C. §§1400-1482 (2006)).

qualified individual with a disability." *Southeastern Community College v. Davis*[83] was the first case to interpret the meaning of this phrase under the Rehabilitation Act. In *Davis*, a woman with a hearing impairment brought suit under Section 504 after being denied admission to a clinical nurse-training program.[84] The district court entered a judgment for the university, concluding that Davis's handicap would prevent her from safely participating in the training program.[85] The Court of Appeals for the Fourth Circuit reversed, based on the finding that Southeastern had to evaluate the plaintiff's credentials without considering any limitation that would result from her handicap.[86] The Supreme Court rejected the Court of Appeal's reasoning and held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements *in spite of* his handicap."[87] Furthermore the Court concluded that,

> [the] respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or effect substantial modifications of standards to accommodate a handicapped person.[88]

Davis allowed educational institutions to merely demonstrate a rational basis for denying admission on the basis of disability. A university was not required to make any "reasonable accommodations" to permit a student with a disability to participate.

The Supreme Court did not establish the "reasonable accommodations" standard until 1985. *Alexander v. Choate*[89] called for the Supreme Court to review its earlier holding in *Davis*. In *Alexander v. Choate*, the Court concluded that, "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be

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[83] Southeastern Cmty. College v. Davis, 442 U.S. 397 (1979).
[84] *Id.* at 400.
[85] *Id.* at 402-03.
[86] *Id.* at 404.
[87] *Id.* at 406 (emphasis added).
[88] *Id.* at 413.
[89] Alexander v. Choate, 469 U.S. 287 (1985).

required to make 'reasonable' ones"[90] The Court also altered its previous holding in *Davis* with regard to the term "otherwise qualified."[91] In *Davis*, an individual was not "otherwise qualified" unless he or she was able to meet all of a program's requirements *in spite of* a disability.[92] In *Alexander v. Choate*, on the other hand, an individual could still be "otherwise qualified" even if he or she required "reasonable accommodations" to meet all of a program's requirements.[93] While *Alexander v. Choate* concerned a medical policy rather than a post-secondary context, it did substantially affect the analysis regarding students seeking accommodations for disabilities.[94]

Reasonable accommodations can be difficult to determine. Hidden disabilities, such as dyslexia, have proven to be particularly controversial. The Court of Appeals for the First Circuit sought to provide a clearer interpretation of the *Alexander v. Choate* reasonable accommodation requirement in *Wynne v. Tufts University School of Medicine*[95] by establishing the following standard:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.[96]

Wynne argued that he failed several first year medical classes as a result of having dyslexia and that, therefore, the university discriminated against him in not modifying the standard multiple-

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[90] *Id.* at 300 (finding Tennessee's medical policy, which limited the number of covered hospital days, did not violate Section 504 since a policy that has a disparate impact on individuals with disabilities does not necessarily create a prima facie case of discrimination under the Rehabilitation Act).

[91] *Id.* at 301.

[92] *Davis*, 442 U.S. at 406 (emphasis added).

[93] *Alexander*, 469 U.S. at 301.

[94] Robert W. Edwards, *The Rights of Students with Learning Disabilities and the Responsibilities of Institutions of Higher Education Under the Americans With Disabilities Act*, 2 J.L. & POL'Y 213, 227 (1994).

[95] Wynne v. Tufts Unv. Sch. of Med., 976 F.2d 791 (1st Cir. 1992).

[96] *Id.* at 793 (quoting Wynne v. Tufts Unv. Sch. of Med., 932 F.2d 19 (1st Cir. 1991)).

choice exams to accommodate his learning disability.[97] The court deferred to the University's academic judgment that modifying multiple-choice examinations did not constitute a reasonable accommodation.[98] While the court ultimately decided in favor of the University, the case did clarify the notion that a university must fully defend its grounds for revoking admission of a student with a disability. The Interpretive Guidelines for the ADA, drafted by the Department of Justice ("DOJ") and Equal Employment Opportunity Commission ("EEOC") point out that, given the similarities between Section 504 and the ADA, many of the statutory interpretations of Section 504 can be used in evaluating the ADA.[99] Therefore, the decisions made in *Davis*, *Alexander*, and *Wynne* may apply to the ADA as well.

IV. THE AMERICANS WITH DISABILITIES ACT OF 1990

The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[100] Perhaps the greatest achievement of the ADA is its extension of disability rights to the private sector. This corrected a fundamental flaw in the government's efforts to bring people with disabilities into mainstream society—a goal that Section 504's limited scope was inherently unable to achieve. As John J. Sarno points out,

> The primary intent of the ADA is to eradicate day-to-day discrimination against persons with disabilities. The ADA represents an attempt to legislate comprehensive social policy by barring attitudinal as well as environmental barriers. Such an effort demonstrates a society working to transform itself by striking a balance between the morality of the marketplace and the imperative of equal opportunity.[101]

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[97] *Id.* at 792.
[98] *Id.* at 795.
[99] H.R. Rep. No. 101-485, pt. 2, at 53-55 (1990).
[100] 42 U.S.C. § 12101(b)(1) (2010).
[101] John J. Sarno, *The Americans with Disabilities Act: Federal Mandate to Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401, 405 (1993).

In contrast, critics of the ADA see it as an effort on the part of Congress simply to privatize the expense of accommodating people with disabilities.[102]

A. Administrative and Judicial Enforcement

It is important to ensure not only a strong, well-funded, and capable infrastructure to enforce the ADA, but also a staff knowledgeable and supportive of its statutory goal of eliminating discrimination against individuals with disabilities. Ultimately, neither Congress nor the judiciary is capable of legislating a change in attitudes towards people with disabilities. Laura Rothstein notes that institutions of "[h]igher education had evolved practices, policies, and procedures before other sectors affected by the ADA (with the exception of K-12 education)."[103] Society-wide, integration is at best a precursor to acceptance. It is not acceptance itself. Carrie Basas notes that, "the daily struggle of managing other people's reactions to and stereotypes about disability can become a job in itself."[104] She goes on to point out that,

> When "reasonable accommodation" is bandied about, minds ultimately turn to a list of tangible tools, equipment, and changes in the physical environment such as large-screen monitors, curb cuts, automatic doors . . . . without considering the combined effects of impairments, the cultural weight of disability, and the long-term impact of societal inaccessibility.[105]

Enforcement of established civil rights and clear guidelines as to what those rights entail are essential to eliminate discrimination. The legislature must adequately fund and staff enforcement entities. This legislative approach, however, is not always sufficient in confronting the problem of clarifying the language of the ADA. Courts must play the important role of

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[102] *Id.* at 412.

[103] Rothstein, *supra* note 6, at 863 (noting that, "Colleges and universities also followed the admonition in *Southeastern Community College v. Davis* that: 'Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.'").

[104] Carrie Griffin Basas, *The New Boys: Women with Disabilities and the Legal Profession,* 25 BERKELEY J. GENDER L. & JUST. 32, 57 (2010).

[105] *Id.* at 60-61.

making statutory interpretations that are consistent with the legislative intent of eradicating discrimination. Assessing the ADA depends, in part, on what one interprets its mandate to be. Thus far, however, a great deal of the ADA analysis has remained at the initial level of determining whether the individual can even qualify as having a "disability." One area in which this has been difficult has been for post-secondary students with learning disabilities. As Wendy Hensel notes,

> [t]he problem for most students in higher education, particularly those in graduate or professional school, is that they have attained a level of educational achievement which surpasses the majority of Americans. Some large cities have nearly 50% of their students drop out of high school with no diploma, and nationally less than one-third of all adults attain college degrees. There is abundant evidence that the average person cannot read at a high school level, let alone at a collegiate one.[106]

The following case exemplifies the ongoing struggle that law students continue to face with regard to seeking reasonable accommodations on bar examinations.

B. The Bartlett Case

In *Bartlett v. New York State Board of Law Examiners*,[107] despite being given extra time throughout law school, on the Multistate Professional Responsibility Examination and on the Pennsylvania Bar Examination, the New York State Board of Law Examiners repeatedly denied Dr. Bartlett's applications for accommodations based upon a learning disability.[108]

Individuals with learning disabilities often have a difficult time conveying their skills on standardized tests that are timed, yet, New York Bar Board member Laura Taylor Swain testified that the bar examination is not intended to measure the ability to work under time constraints.[109] Rather, the Board assumes that there is sufficient time for the average person to answer the

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[106] Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 672 (2009).

[107] Bartlett v. N.Y. State Bd. of Law Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997).

[108] *Id.* at 1101-04.

[109] *Id.* at 1130.

questions.[110] In fact, the Board has never attempted to determine what reading speed is needed under standard conditions.[111] Instead they assume that there is enough time for most people.[112]

The United States District Court for the Southern District of New York found that a reading disorder cannot be assessed solely by the Woodcock Reading Mastery Test ("WRMT"), a standardized test of reading mastery, since it does not make distinctions between rates of automaticity, nor does it measure the ability to recognize and read a word with fluency.[113] Furthermore, the WRMT was created to test children and does not have a sufficient number of difficult questions for the average adult.[114] Most importantly, since the WRMT is not a timed test, it is incapable of measuring how slowly someone reads, which is a significant component of diagnosing an adult with dyslexia.[115]

The court of appeals agreed with the district court that Dr. Bartlett does have a disability pursuant to the ADA and the Rehabilitation Act.[116] Yet, the court of appeals held that the district

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[110] *Id.* at 1130-31.

[111] *Id.* at 1131.

[112] *Id.* at 1130-31. In 1992 the New York Court of Appeals commissioned a study called, *An Evaluation of the New York State Bar Examination*. Otherwise known and the *Millman Report*, this study was released in May of 1993. It found that the Bar Exam tested only legal knowledge, legal reasoning, and legal ability. The *Millman Report* did not assess the impact of time pressure. Instead the panel of experts who measured content validity found that speed should not be a major component of the examination. JASON MILLMAN ET AL., AN EVALUATION OF THE NEW YORK STATE BAR EXAMINATION (1993). This supports the district court's rejection of the Board's claim that the bar examination was intended to be a reading test in the *Bartlett* case. The district court found that "speed in reading is not tested by the Bar Examination, nor is speed in reading one of the essential functions of lawyering." *Bartlett*, 970 F.Supp. at 1128. The court held that the Board was "estopped from arguing that the Bar Examination is intended to test either reading or the ability to perform tasks under time constraints." *Id.* In reaching this conclusion, the court pointed out that "numerous accommodations, including time extensions are granted every year to persons whose physical impairments make it difficult visually to read, including persons who are blind." *Id.* at 1130. The simple fact that there are blind members of the Bar indicates that the bar examination does not require a visual ability to read.

[113] *Id.* at 1114.

[114] *Id.*

[115] *Id.* at 1112.

[116] Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998).

court erred in going as so far as to find whether Dr. Bartlett had a disability with regard to her ability to "work" since the district court could have concluded that she has a disability that substantially limits her major life activities of "reading" and "learning."[117] Given her reading and learning disability, the court of appeals held that the district court's ultimate conclusion, that Dr. Bartlett requires reasonable accommodations, was correct.[118]

A person has a disability under the ADA and Section 504 of the Rehabilitation Act if, he or she has "a physical or mental impairment that substantially limits one or more [of the] major life activities."[119] While neither of these statutes defines this language, Congress authorized the EEOC to issue regulations regarding discrimination in the workplace under Title I of the ADA.[120] Congress authorized the DOJ to issue interpretive guidelines regarding discrimination in public and private service organizations under Titles II and III of the ADA.[121] Dr. Bartlett brought suit against the Board as a public licensing entity pursuant to Title II of the ADA.[122] She argued that she had an impairment that substantially limited her major life activities of "learning," "reading" and "working."[123] The DOJ's regulations defining "physical or mental impairment" pursuant to Title II of the ADA include "specific learning disabilities."[124] Furthermore, these regulations define "major life activities" as expressly including "learning and working."[125] Title II regulations do not clarify the meaning of "substantially limits," but the DOJ

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[117] *Id.* at 329.
[118] *Id.* at 327.
[119] 42 U.S.C. § 12101(1)(A) (2009); *see also* 29 U.S.C. § 706(9) (2010).
[120] 42 U.S.C. § 12116 (2006).
[121] 42 U.S.C. § 12134(a) (2006) (Title II, Subtitle A); 42 U.S.C. § 12186(b) (2006) (Title III).
[122] *See* 42 U.S.C. § 12132 (2006).
[123] *Bartlett*, 156 F.3d at 328.
[124] 28 C.F.R. § 35.104 (2011) (Disability).
[125] *Id.*

has said to look to Titles I and III in interpreting Title II, as long as these provisions are not inconsistent with the Rehabilitation Act regulations.[126]

The Second Circuit held that self-accommodating measures employed by Bartlett should not be considered when determining whether she was substantially limited in a major life activity.[127] Given the Supreme Court's decision in *Sutton* that mitigating measures should be part of a substantially limited determination, the case was remanded to the district court.[128] The district court held that Bartlett was not substantially limited given her self-accommodation measures.[129] The Second Circuit disagreed for a second time, finding that average skills on some measures did not offset below average skills on other measures when the latter substantially limited her ability to read.[130] Slow reading speed could be distinguished from wearing contact lenses, which is what the district court used as a comparison.[131]

V. RECOMMENDATIONS

The legal community should promote the understanding that lawyering is just as much about coming up with creative legal arguments as it is about being able to read quickly. The real question should be whether the person who wishes to be a lawyer has the analytical and creative skills to contribute to the profession. We do not ask people whether they can walk the fifteen miles it might take to get to work each morning. We recognize that with the use of a car they can arrive at work on time. Frequently, disabilities can be reasonably accommodated. Yet, it

[126] 28 C.F.R. § 35.103(a) (2011).
[127] Bartlett v. N.Y. State Bd. Of Law Exam'rs., 226 F.3d 69, 74 (2d Cir. 2000).
[128] *Id.*
[129] Bartlett v. N.Y. State Bd. of Law Exam'rs, No. 93 CIV. 4986(SS), 2001 WL 930792, at *1 (S.D.N.Y. Aug. 15, 2001).
[130] *Bartlett*, 226 F.3d at 81.
[131] *Id.*

remains to be seen how broadly the judicial system will be willing to interpret Congress's mandate.[132]

Finding that *Bartlett* does not read at the level of an average person is similar to Justice White's dissent in *Rowley*. In *Rowley*, Justice White used the *Mills* finding to argue that providing Amy with an equal educational opportunity would require an interpreter since, in comparison to her classmates, she could only understand half of what was going on in the classroom.[133] Having a Ph.D. and a J.D. would generally be considered to be above average, yet in the same way Justice White broke Rowley's disability into its component parts, the court of appeals in *Bartlett* concluded that Dr. Bartlett's impairments in automaticity and phonological processing cause a substantial limitation to a major life activity.

Reasonable accommodation of a learning disability offers a useful sliver of the disability debate with which to assess the powerful role that the ADAAA can play in restoring the civil rights of people with disabilities. The ADAAA's clarification of definitions applies to both the ADA and to the Rehabilitation Act giving students generally and law students with learning disabilities in particular clear rights to reasonable accommodations that help them read, concentrate, and learn. While the ADAAA did not need to strengthen "reasonable accommodation" language under the ADA since it was already a very comprehensive

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[132] Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 228 (2008) (noting that, "[u]nfortunately, Congress has done little to assist courts in devising a clearer standard regarding what qualifies as a 'reasonable' accommodation. The original version of the ADA did little to define the concept, leaving it to the courts to flesh out its contours. Unfortunately, the few times the Supreme Court has addressed the concept of reasonable accommodation or reasonable modification, the cases have been so fact specific as to provide little guidance for future cases."); *see also* Conference Panel, *What the ADA Amendments and Higher Education Acts Mean for Law Schools*, 18 AM. U. J. GENDER SOC. POL'Y & L. 13 (2009) [hereinafter *Conference Panel*].

[133] Hendrick Hudson District Bd. of Educ. v. Rowley, 458 U.S. 176, 193 (1982).

framework, this article recommends that federal disability legislation's broad "reasonable accommodation" provisions be implemented without further delay.

Litigation may turn on nuanced hardship analyses[134] but general recognition should be forthcoming that, as the EEOC explains, "most accommodations can be provided at little or no cost."[135] Mastroianni goes on to address the important role of law schools in following through on the ADA's mandate:

> I think it's important for us to take a step back and look at how wrong the United States Supreme Court and the lower federal courts were in interpreting this law. What are we not getting across in legal education that's enabling judges and enabling attorneys who are working with these laws to understand that, yes, the definition of "disability" is broad; that yes, it's a remedial civil rights statute and it should be interpreted broadly.[136]

I recommend that legal education emphasize the acquisition of critical thinking skills and the effectiveness of a combination of superior intellect, judgment, dedication, and interpersonal skills in serving society. Part of this paradigm shift involves achieving a broader recognition of assistive technology and other reasonable accommodations as well as recognition of leaders in the legal profession who have disabilities. The National Association of Law Students with Disabilities has begun establishing mentoring and networking communities.[137] Existing networks of all stripes can help support the disability community to thrive in a legal arena.

Disability is a cross-cutting issue that can and should be considered with regard to infrastructure, assistive technology, and educational theory. Recognizing that universal design can optimize learning and assessment across an entire learning community can lead to increasing

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[134] *Conference Panel*, *supra* note 132, at 30.

[135] U.S. Equal Employment Opportunity Commission*, Reasonable Accommodations for People with Disabilities*, EEOC, www.eeoc.gov/facts/accommodations-attorneys.html (last visited Feb. 2, 2011); *see also* Donald H. Stone, *The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms Into the Profession? An Empirical Study of the Disabled Lawyer*, 27 LAW & INEQ. 93, 103 (2009).

[136] *Conference Panels*, supra note 132, at 24.

[137] *Id.* at 26.

small group interaction, take-home assignments, and a range of multi-sensory teaching approaches. Computers have allowed many attorneys with disabilities to work independently, reducing the need to request accommodations. For others it is still important to obtain extended exam and assignment time, interpreters, texts in an alternate format, etc. Beyond task-based accommodations, individual law schools, the American Bar Association ("ABA"), and the American Association of Law Schools ("AALS") can collectively play a powerful role in supporting the establishment and linkage of disability support and advocacy communities.

My recommendation, as courts begin to balance reasonable accommodations *vis-a-vis* academic and licensing standards under the ADAAA,[138] is to implement best practices that maximize optimal learning and assessment conditions for everyone. While cost is a concern to legal and professional institutions alike, equity and efficiency can be balanced through broad implementation of requisite reasonable accommodations pursuant to federal disability legislation.

VI. CONCLUSION

In the over three decades since the passage of the Rehabilitation Act in 1973 we have come a long way in ensuring that the civil rights of people with disabilities are respected. Given the lag time between passing such laws as the ADA and having them effectively implemented, the law is still in it's infancy in coming to terms with recognizing civil rights on the basis of

[138] Jenkins v. Nat'l Bd. of Med. Exam'rs, No. 08-5371, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (detailing how plaintiff, a third-year medical student, was diagnosed with a reading disorder early in life and had received accommodations throughout his academic career). The Jenkins case did not resolve the balancing between academic standards and reasonable accommodations. *See also* Hensel, *supra* note 107, at 672, 684 (noting further that, "[t]he ADAAA will undoubtedly expand eligibility for students with disabilities in elementary and secondary school seeking accommodations pursuant to § 504 of the Rehabilitation Act. This may prove to be problematic for schools, particularly in the context of children with learning disabilities. The newly liberal § 504 eligibility standards are in tension with the restrictive threshold interpretation that some courts and administrative hearing officers have given to learning disabilities under IDEA. This conflict has the potential to result in confusion for administrators and the inconsistent treatment of similarly situated children.").

disability. We have a great deal of work yet to do to embrace individuals who have disabilities on a participatory level.

IDEA did succeed in ending the exclusion of students with disabilities from public school, providing a range of special education programs, and giving schools incentives to increase their provisions for children with disabilities. In return for complying with federal statutory mandates, Congress provides states with partial funding. Therefore, if states offer special education services within certain specifications, they can receive federal aid. While this has helped schools create programs, it has also distorted the identification process. As a result, the labeling process sometimes drives services. Separating special education services from funding mechanisms, however, would dismantle the equilibrium of incentives. If IDEA were not funded, schools would have inefficient incentives to provide services. That is to say, schools would have a strong incentive to avoid identifying students with disabilities. If IDEA were fully funded, however, there would be no incentive to make sure the costs of the service were worthwhile to the special needs child. In this way, IDEA enables change by providing new resources, but the change is bound by the limitations of these resources.

If enough states increase the standard of educational services provided to children with disabilities, then the Supreme Court may overturn the *Rowley* precedent. The paradox of compensation, however, illustrates that the latter would simply reverse incentives—still leaving one party with the incentive to be inefficient in analyzing the costs and benefits of providing special education services. Proportional quality programming, on the other hand, can alleviate the tension created by establishing individualized rights for one disadvantaged group by evaluating those rights in relation to legitimate goals of the system in which those rights must be provided. The success of a quality approach, however, depends on decision-makers' ability to

remain committed to establishing protective rights for special needs children without allowing these rights to preempt those of non-disabled children. In this way, we can go beyond simply allowing every child to occupy a chair in the classroom to providing each child the opportunity to learn.

What happens, however, when students who are over the age of twenty-one try to request accommodations in undergraduate and graduate programs? Higher education is becoming an essential credential in a competitive market place. IDEA, however, no longer protects these students' rights to special accommodations. Ultimately, individual biases cannot be eliminated through legislation. However, when those personal misconceptions affect an individual's ability to pursue their legal right to equal education and access to professional entrance examinations, then it is society's responsibility to end such institutionalized discrimination.

In our society, we need to recognize how dangerous it is to set aside individuals who are unable to conform to a given mold no matter how economically or socially efficient restricted access may appear. In Rawls' theory of justice, individuals are put in a room without knowing where in society they would return.[139] They are deprived of a sense of history and thus do not know whether they were a minority group in the past or will be so in the future. This veil of ignorance takes away all cultural and historical perspective. Rawls first tenet, that there would be a maximum level of liberty, would ensure that each person has as much liberty as possible as long as everyone else has the same level of liberty. His second tenet that social and economic inequalities would be arranged in accordance with the greatest benefit of the least advantaged and that positions would be open to all ensures equal opportunity. In predicting what maxims people would create for society, Rawls points out that no one would want to be on the bottom.[140]

[139] RAWLS, *supra* note 11.
[140] *Id*.

People would decide to make everyone equal—thus, maximizing the benefit of the least advantaged in order to raise them up to the same level as those who are already advantaged.

While Rawls does not provide a historical account of how people have gone about protecting civil rights, his theory of justice provides a useful philosophical rational for granting such rights. Like any model, there are problems with thinking that reality will correspond perfectly with such a hypothetical state of society. Lack of exposure and understanding of disabilities in general can skew people's commitment to providing a sufficient safety net in the area of disability protection. A substantial body of litigation provides evidence of this lack of commitment. Furthermore, there are some disabilities to which people do not believe they would be susceptible. Ignorance and irrational discounting of personal risk can lead to an insufficient level of disability protection.

There are disabilities that tend not to develop until later in a person's life. Despite the fact that learning disabilities can result from severe head injuries, people who do not already have a learning disability generally do not believe that they are susceptible to such a condition. Thus, applying Rawls decision-making model to accommodating the needs of people with learning disabilities may not work as well as applying the theory to accommodating a condition to which people feel more susceptible. The scenario is complicated by the level of ignorance about the hidden nature of learning disabilities *vis-a-vis* the more obvious needs of someone who uses a wheel chair. Reality appears to only reflect half of a Rawlsian model. While we do not know what will occur in the future, we are not blind to the past or to present hierarchies of physical and mental aptitude. Nor do we set aside the existing distribution of wealth when deciding whether to pay for civil rights measures for people with disabilities. Within this middle ground lies a substantial opportunity to carry out the full intent of Congress in passing federal

disability legislation. Now that we have clarified a broad civil rights approach, the legal community can move on to helping individuals with disabilities obtain reasonable accommodations.