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## WHY AMERICA IS BETTER OFF BECAUSE OF THE AMERICANS WITH DISABILITIES ACT AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

*Peter Blanck\**

### I. INTRODUCTION

The year 2020 will be the thirtieth anniversary of the Americans with Disabilities Act (“ADA” and as amended “ADAAA”<sup>1</sup>) and the forty-fifth anniversary of the Individuals with Disabilities Education Act (“IDEA”).<sup>2</sup> Although tempting, it is an oversimplification to measure the definitive impact of these laws on the lives of Americans with disabilities by their supposed “successes” or “failures” to date.<sup>3</sup> To the contrary, as for all sweeping policy endeavors, the ADA and IDEA are evolving in the unique American context.<sup>4</sup> Indeed, it may take generations to fulfill the aspirations of these laws, and to undo centuries of segregation, stigmatization, and discrimination on the basis of disability.

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<sup>1</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101-12213).

<sup>2</sup> Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400-1482) (reauthorizing and amending the Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)). The Education of All Handicapped Children Act is commonly abbreviated as the “EAHCA” or the “EHA”.

<sup>3</sup> Compare David A. Garvin & Michael A. Roberto, *What You Don’t Know About Making Decisions*, 79 HARV. BUS. REV. 108 (2001). See also Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271 (2000). My research and writings often use quantitative and qualitative empirical study to examine aspects of these laws. In contrast, this is a commentary on the symposium contributions.

<sup>4</sup> Peter Blanck, *Americans with Disabilities and their Civil Rights: Past, Present, Future*, 66 U. PITT. L. REV. 687 (2005).

Nonetheless, a slew of scholars from various disciplines—law, political science, economics, history, psychology and sociology, and medicine—have seen fit to try to answer the meta-question of whether the ADA and the IDEA have achieved their objectives. Attempts at such scoring use criteria such as employment rates, educational advancement, and cost/benefit analyses. As said, it is difficult to answer such questions with a single or even series of studies.<sup>5</sup> The array of factors to be considered do not lend themselves to easy answers.

Certainly, paradigm-changing laws like the ADA and IDEA influence, and are influenced by, dynamic social forces in combination over time.<sup>6</sup> A range of factors are examined in this Symposium Issue of the *Touro Law Review*. The contributors consider factors such as political action, judicial and governmental agency interpretation,<sup>7</sup> economic and educational practice,<sup>8</sup> demographics,<sup>9</sup> age, race, poverty

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<sup>5</sup> See, e.g., Robert Rosenthal & Peter David Blanck, *Science and Ethics In Conducting, Analyzing, and Reporting Social Science Research: Implications For Social Scientists, Judges and Lawyers*, 68 IND. L. J. 1209 (1993).

<sup>6</sup> LARRY M. LOGUE & PETER BLANCK, RACE, ETHNICITY, AND DISABILITY: VETERANS AND BENEFITS IN POST-CIVIL WAR AMERICA (2010).

<sup>7</sup> See Nicole Buonocore Porter, *Mixed Signals: What Can We Expect from the Supreme Court in this Post-ADA Amendments Act Era?*, 35 TOURO L. REV. 435 (2019); William Brooks, *The Application of Title II of the Americans With Disabilities Act to Employment Discrimination: Why the Circuits Have Gotten It Wrong*, 35 TOURO L. REV. 73 (2019); Mark C. Weber, Endrew F. *Clairvoyance*, 35 TOURO L. REV. 591 (2019).

<sup>8</sup> Terrye Conroy & Mitchell L. Yell, *Free Appropriate Public Education After Endrew F. v. Douglas County School District (2017)*, 35 TOURO L. REV. 101 (2019); Rebecca J. Huss, *Canines in the Classroom Redux: Applying the ADA or the IDEA to Determine Whether a Student Should be Allowed to be Accompanied by a Service Animal at a Primary or Secondary Educational Institution*, 35 TOURO L. REV. 235 (2019).

<sup>9</sup> The demographic shifts are pronounced for individuals with disabilities, as more older individuals live with disabilities and many live in poverty, have lower education, and experience multiple forms of discrimination on the basis of disability, gender, race, and ethnicity. See Peter Blanck, *The First "A" in the ADA: And 25 More "A"s Toward Equality for Americans with Disabilities*, 4 INCLUSION 46 (2016); Peter Blanck, *ADA at 25 and People With Cognitive Disabilities: From Action to Inclusion*, 3 INCLUSION 46 (2015) (making these points). Over the coming years, the American population will include greater numbers of children and adults who have cognitive disabilities such as autism and learning disabilities and who face stigma and discrimination in education and employment and other activities central to daily life. *Id.*

status, sexuality,<sup>10</sup> sexual orientation and gender identity,<sup>11</sup> ethnicity, as well as explicit and “implicit” attitudes<sup>12</sup> towards differing disabilities (mental<sup>13</sup> and physical). The contributors observe other social influencers such as culture and spiritual beliefs,<sup>14</sup> and even environmental factors,<sup>15</sup> which influence views about inclusion and individual participation in society.<sup>16</sup> The perspectives offered reflect the diversity of experience and interest of the contributors. One recurring thread in the contributions is recognition that the ADA and IDEA are evolving social endeavors, and not policy contests to be “won” or “lost.”<sup>17</sup>

This Symposium Issue of the *Touro Law Review* thus examines the *evolving* ADA and IDEA, with consideration of disability stigma and discrimination, educational practice, employment opportunity, inclusion and participation in community as well as conceptions of individual dignity, personhood, and identity. In considering the contributions as a whole,<sup>18</sup> my goal is to affirm the title of this closing

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<sup>10</sup> Julia Epstein & Stephen A. Rosenbaum, *Revisiting Ashley X: An Essay on Disabled Bodily Integrity, Sexuality, Dignity, and Family Caregiving*, 35 TOURO L. REV. 197 (2019) (discussing the right to bodily integrity by persons with disabilities, and the use of Supported Decision-Making (“SDM”) to enhance individual legal capacity, dignity, and community integration; SDM discussed *infra*).

<sup>11</sup> Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25 (2019) (discussing gender dysphoria discrimination—“incongruence between one’s assigned sex at birth and one’s gender identity”—and the ADA).

<sup>12</sup> Dustin Rynders, *Battling Implicit Bias in the IDEA to Advocate for African American Students With Disabilities*, 35 TOURO L. REV. 461 (2019) (addressing implicit bias and disability). See also Peter Blanck et al., *Disability and LGBTQ+ Advancement and Rights in the Legal Profession*, U. D.C. DAVID A. CLARKE SCH. L., L. REV. (forthcoming 2019) (discussing implicit bias and barriers associated with people with non-obvious disabilities, and individuals who are LGBTQ+ who experience similar barriers).

<sup>13</sup> Michael L. Perlin et al., “*Some Things are Too Hot to Touch*”: *Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 35 TOURO L. REV. 405 (2019).

<sup>14</sup> Randy Lee, *Andrew F.’s Journey to a Free Appropriate Public Education: What Can We Learn from Love?*, 35 TOURO L. REV. 379 (2019).

<sup>15</sup> Karen Syma Czapanskiy, *Preschool and Lead Exposed Kids: The IDEA Just Isn’t Good Enough*, 35 TOURO L. REV. 171 (2019) (environmental lead exposure and disability).

<sup>16</sup> Donald H. Stone, *The Least Restrictive Environment for Providing Education, Treatment, and Community Services for Persons with Disabilities: Rethinking the Concept*, 35 TOURO L. REV. 523 (2019).

<sup>17</sup> Compare Garvin & Roberto, *supra* note 3, at 108-09 (decision making as “[a] process characterized by inquiry rather than advocacy tends to produce decisions of higher quality”).

<sup>18</sup> In this essay, I refer to many of the symposium contributions. See also Peter Blanck & Jonathan G. Martinis, “*The Right to Make Choices*”: *The National Resource Center for Supported Decision-Making*, 3 INCLUSION 24 (2015).

essay; that is, “Why America is Better Off Because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act.”

## II. THE AMERICANS WITH DISABILITIES ACT (“ADA”) AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (“IDEA”)

This Symposium Issue brings to the fore stories and struggles of Americans with disabilities, and their family members and supporters.<sup>19</sup> The individuals engaging the ADA and IDEA are by no means monolithic or defined by the nature of their disabilities. Rather, they share a common aspiration for inclusion, self-advancement, and personal dignity. They are “persons” first, each of whom seek *individual* consideration of their unique human identities.<sup>20</sup> Their personas, like for us all, are shaped by society as well as by skills, emotions, motivations, and preferences over time with experience in the world. This fluidity exemplifies the evolving quality of human experience.<sup>21</sup>

The principles of the ADA and IDEA align with this dynamic and individualized view of personhood. “Disability” is said to be a natural part of life. Often, it is only society’s attitudes and barriers that lead to perceived difference, whether it be physical or mental. This has not always been the case in America and around the world. Indeed, it is a relatively recent shift in perspective captured by the IDEA and the ADA, and it builds on the rights movements of African-Americans, women, older adults, and individuals with differing sexual orientations and gender identities.<sup>22</sup>

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<sup>19</sup> Joshua B. Kay, *Advocating for Children with Disabilities in Child Protection Cases*, 35 TOURO L. REV. 345 (2019).

<sup>20</sup> See, e.g., Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991 (2011). Deborah Stienstra & Leon Nyerere, *Race, Ethnicity and Disability: Charting Complex and Intersectional Terrains*, in *DISABILITY IN THE GLOBAL SOUTH: THE CRITICAL HANDBOOK* 255-268 (Shaun Grech & Karen Soldatic eds., 2016). For historical perspectives, see, e.g., LOGUE & BLANCK, *supra* note 6; LARRY M. LOGUE & PETER BLANCK, *HEAVY LADEN: UNION VETERANS, PSYCHOLOGICAL ILLNESS, AND SUICIDE* (2018).

<sup>21</sup> Sharon Barnartt, *Using Role Theory and Fluidity of Disability*, in *RETHINKING DISABILITY: WORLD PERSPECTIVES IN CULTURE AND SOCIETY* 47-57 (Patrick Devlieger et al. eds., 2016) (discussing role intersectionality and fluidity in the context of disability). See also Alecia M. Santuzzi & Pamela R. Waltz, *Disability in the Workplace: A Unique and Variable Identity*, 42 J. MGMT. 1111 (2016).

<sup>22</sup> See, e.g., LOGUE & BLANCK, *supra* note 6; LOGUE & BLANCK, *HEAVY LADEN*, *supra* note 20.

It should not be taken for granted that the modern view of disability is a dramatic change in perspective, from a medical state to be cured and pitied, or tolerated when “worthy,” towards acceptance and accommodation of difference as part of the human experience and individual identity.<sup>23</sup> As such, the ADA and IDEA’s core is as much shaped by respect for human diversity as they are aimed at eradicating discrimination in society. The IDEA and ADA reinforce that support for human diversity is central to the opportunity for inclusion and participation in education, employment, and community living, and must be accompanied by changes or accommodations by society itself.<sup>24</sup>

Accordingly, the ADA’s “integration mandate” was affirmed by the U.S. Supreme Court in the seminal ADA Title II case *Olmstead v L.C.*<sup>25</sup> As akin to its predecessor in the area of race and education, *Brown v. Board of Education*,<sup>26</sup> *Olmstead* mandates that state-sponsored separate and nonintegrated living arrangements may be discriminatory towards people with disabilities who desire and may live with appropriate supports in the community.<sup>27</sup> *Olmstead*, like the IDEA’s public school mainstreaming presumption, rejects a belief that all children with disabilities learn best in separate classes, just as it rejects that individuals with disabilities may best advance vocational skills in segregated sheltered workshops. The Supreme Court concluded that unjustified separation from the community constitutes discrimination under the ADA.<sup>28</sup>

*Olmstead*’s integration mandate is changing lives for the better, particularly when appropriate community and decision-making supports are made available to individuals with disabilities.<sup>29</sup> The

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<sup>23</sup> PETER BLANCK, *EQUALITY: THE STRUGGLE FOR WEB ACCESSIBILITY BY PERSONS WITH COGNITIVE DISABILITIES* (2014). For a historical perspective on the medical model, see LOGUE & BLANCK, *HEAVY LADEN*, *supra* note 20.

<sup>24</sup> LISA SCHUR ET AL., *PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED?* (2013).

<sup>25</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>26</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>27</sup> Katherine E. McDonald et al., *The March Goes On: Community Access for People With Disabilities*, 43 *J. COMMUNITY PSYCHOL.* 348 (2015).

<sup>28</sup> See PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* (3d ed. 2014).

<sup>29</sup> See, e.g., Hatice Uyanik et al., *Supported Decision-Making: Implications from Positive Psychology for Assessment and Intervention in Rehabilitation and Employment*, 27 *J. OCCUPATIONAL REHABILITATION* 498 (2017); Dilip V. Jeste et al., *Supported Decision Making in Serious Mental Illnesses*, 81 *PSYCHIATRY: INTERPERSONAL & BIOLOGICAL PROCESSES* 28 (2018); Anna Arstein-Kerslake et al., *Future Directions in Supported Decision-Making*, 37 *DISABILITY STUDIES Q.* (2017), <http://dsq-sds.org/article/view/5070/4549>.

slippery slope of segregation in education, employment, and housing<sup>30</sup> was found in the ADA preamble to have led to less opportunity for individual growth, community engagement, and self-determination.

Although the U.S. Supreme Court ruled in *Brown* in 1954 that unequal racially segregated schools were prohibited by the U.S. Constitution, the exclusion of children with disabilities in public education was not barred until enactment in 1975 of the precursor to the IDEA, the “Education of All Handicapped Children Act.”<sup>31</sup> In 1975, over half of the more than eight million American children with disabilities did not receive suitable and integrated educations, and one million of those children were excluded entirely from public schools.<sup>32</sup>

The significance of educational rights to children with disabilities cannot be overstated. The state of affairs that led to enactment in 1975 involved pervasively deficient educational practice. Rud Turnbull notes these harmful factors included that children with disabilities were excluded from public schools by placing them on long waiting lists, and they were the recipients of disciplinary and exclusionary practices to remove them from public school without attempt at program modification and individualized accommodation.<sup>33</sup>

Many children also were misclassified as disabled and as having a particular type of disability. This state of affairs was tainted further by racially and culturally biased evaluation procedures, inadequately trained teachers, and a lack of multidisciplinary team approaches in educational practice. As for the ADA, the IDEA signaled a shift in the national paradigm of public education for children with disabilities. Instead of applying one curriculum and learning methodology for all, the IDEA required an appropriate individualized public education for children with disabilities.

One focus of the symposium contributors is on the importance of the U.S. Supreme Court’s 2017 decision in *Endrew F. ex rel.*

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<sup>30</sup> Nonetheless, prominent ethicists argue that in the United States we should “Bring Back the Asylum” because deinstitutionalization for persons with mental disabilities has turned into transinstitutionalization in nursing homes, general hospitals, prisons, and homelessness. See Blanck, *The First “A” in the ADA*, *supra* note 9 (citing Dominick A. Sisti et al., *Improving Long-Term Psychiatric Care: Bring Back the Asylum*, 313 J. AM. MED. ASS’N 243 (2015)).

<sup>31</sup> See discussion of IDEA *infra* notes 32-35 and accompanying text.

<sup>32</sup> See PETER BLANCK ET AL., *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW*, at 1:1 (2d ed. 2013).

<sup>33</sup> *Id.* (citing H. Rutherford Turnbull III et al., *A Policy Analysis of “Least Restrictive” Education of Handicapped Children*, 14 RUTGERS L.J. 489 (1983)).

*Douglas F. v. Douglas County School District RE-1*.<sup>34</sup> The Court held the IDEA’s free appropriate public education (“FAPE”)<sup>35</sup> principle was meant as more than a *de minimis* standard. Rather, in *Endrew F.* the IDEA’s objective for a FAPE must be reasonably ambitious given the circumstances.<sup>36</sup> Congress’s intention in the IDEA is to *prepare* students with disabilities for further education and integration in employment and community living. *Endrew F.* endorses the IDEA’s principle for an appropriately ambitious public education, as does *Olmstead* in its validation of the ADA’s integration mandate.

The year 2017 was significant also for the Court’s endorsement of ADA Title II’s nondiscrimination principle in state and local governmental programs offered by public schools to students with disabilities. In *Fry v. Napoleon Community Schools*,<sup>37</sup> the Court considered the IDEA’s “exhaustion” of administrative remedies in a dispute over a child’s FAPE, which also involved alleged discrimination under ADA Title II.<sup>38</sup>

The IDEA establishes administrative safeguards to ensure that parents play an active role in educational decision-making for their children, as well as a process by which to evaluate and place children with disabilities. The system involves hearing procedures to resolve disputes about the services provided for a child with a disability. Professors Porter and Huss review the Court’s conclusion in *Fry* that parents in an IDEA dispute may maintain a separate ADA Title II lawsuit to remedy alleged program discrimination by a public school district.<sup>39</sup> In noting that IDEA’s administrative obligations apply to the denial of a FAPE, the Court found this did not necessarily preclude program discrimination claims under ADA Title II.<sup>40</sup>

*Endrew F.* and *Fry* endorse means under the IDEA and ADA for individuals and their families to remedy alleged educational and programmatic discrimination in public schools. As said, at issue in *Endrew F.* was the reach of the IDEA’s FAPE requirements. In *Fry*, the dispute centered on use of a service animal as a program modification to enable the full and equal enjoyment of educational

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<sup>34</sup> 137 S. Ct. 988, 993 (2017).

<sup>35</sup> 20 U.S.C. § 1412(a)(1) (2018).

<sup>36</sup> Lee, *supra* note 14.

<sup>37</sup> 137 S. Ct. 743 (2017).

<sup>38</sup> Porter, *supra* note 7; Huss, *supra* note 8.

<sup>39</sup> Porter, *supra* note 7.

<sup>40</sup> *Id.*

services by a student with a disability. In each case, at issue was the right of a child with a disability to meaningfully advance in public education. *Andrew F.* and *Fry* are all the more notable, given in the past decade there have been no major Supreme Court ADA decisions, although the contributors discuss pending differences among the U.S. Courts of Appeals<sup>41</sup> on an array of ADA interpretive issues.<sup>42</sup>

### III. RIGHTS AND ASPIRATIONS, AND CONTRIBUTIONS TO THIS SYMPOSIUM ISSUE

There are at least two other recurring themes that I discern in this Symposium Issue that affirm the title of this essay: (1) the central importance today of the ADA and IDEA for ensuring the rights of millions of Americans living with disabilities, and (2) the aspirational and symbolic significance of an inclusive and participatory American society, with respect for individual dignity and meaningful community engagement. In asserting these themes, the contributors tell of the experiences of Andrew, Ehlena (*Fry*), and others, to show the impact of the integration and inclusion drive as inspired by the ADA and IDEA.<sup>43</sup>

The stories of Andrew and Ehlena are brought to the fore by numerous contributors. Professor Lee offers a compelling narrative about Andrew as a child living with a severe disability and his parents' struggles on his behalf. In asking "Who is Drew?," Lee writes of Drew's story as one "about the importance of law and the importance of process" to the future aspirations for American children with disabilities.

As other contributors observe, these aspirations for inclusion and participation are further complicated by race, poverty, sexual orientation and gender identify, and attitudinal stigma about mental and physical disabilities. Another significant barrier involves children with

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<sup>41</sup> See, e.g., Weber, *supra* note 7; Conroy & Yell, *supra* note 8.

<sup>42</sup> See, e.g., Brooks, *supra* note 7 (viability of claim of employment discrimination against a state or local governmental under ADA Title II, or whether such employment claims must properly be filed under ADA Title I).

<sup>43</sup> See, e.g., Peter Blanck, *Justice for All? Stories about Americans with Disabilities and Their Civil Rights*, 8 J. GENDER, RACE & JUST. 1 (2004); Blanck, *supra* note 4; Peter Blanck, "The Right to Live in the World": *Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. ON C.L. & C.R. 367 (2008). Compare Porter, *supra* note 7, at 458 ("Unfortunately for disability rights advocates, I do not think that the picture is rosy. Despite the pro-plaintiff 2017 opinions, my reading of those cases is that they are not pro-disability so much as they are pro-education of children.").

disabilities who are underserved in the educational system who, for a variety of reasons, then engage the juvenile justice and thereafter adult correctional systems.

America's correctional facilities presently hold unconscionably high numbers of children and adults with disabilities (primarily mental disabilities), who have been failed by the public school system.<sup>44</sup> Professor Kay likewise reviews how children with disabilities are underserved in America's social welfare systems, such as in child protective services.<sup>45</sup> Nonetheless, Professor Weber, and Professors Conroy and Yell, examine the application of *Andrew F.* by the lower courts, with near-term outcomes reflecting promise in application of the Supreme Court's decision.

Not forgotten by the contributors is the state of affairs for children with disabilities prior to the 1975 enactment of the Education of All Handicapped Children Act. Before then, there was no federal right to an appropriately individualized public education for children with disabilities.

Conroy and Yell's survey of U.S. Court of Appeals' decisions taken a little more than one year after the *Andrew F.* decision shows there has been incremental acceptance of the more ambitious FAPE paradigm, however, more remains to "raise[] the educational benefit bar" for children with disabilities.<sup>46</sup> Even so, the evolving IDEA is providing hope to parents that their children with disabilities will not be "sitting idly"<sup>47</sup> in public schools, with only an expectation for their *de minimis* advancement.

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<sup>44</sup> See Peter Blanck, *Disability in Prison*, 26 U. S. CAL. INTERDISC. L.J. 309 (2017); Blanck, *supra* note 43.

<sup>45</sup> Kay, *supra* note 19.

<sup>46</sup> Conroy & Yell, *supra* note 8, at 126-28 ("It will take years for a body of new FAPE cases to advance through the administrative and federal review processes. . . . [I]n the sixteen months after the Supreme Court's decision in *Andrew*, only the Second, Fifth and Ninth Circuit Courts of Appeals have decided a post-*Andrew* substantive FAPE case. . . . In our review of the post-*Andrew* FAPE cases, no circuit used the 'merely more than *de minimis*' language rejected by the Supreme Court in *Andrew* and several acknowledged its demise. However, no two circuits used the exact same language or approach.").

<sup>47</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) ("The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an 'ambitious' piece of legislation enacted 'in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] *sitting idly* in regular classrooms awaiting the time when they were old enough to 'drop out.'") A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act. That the progress contemplated by the IEP must be appropriate in light of the

Professor Huss gives voice to the story of Ehlena Fry and her service dog Wonder, which is to help Ehlena navigate mobility and physical tasks in school to further her inclusion and participation. At some point, Wonder was not allowed to go with Ehlena to her elementary school, allegedly denying her equal access to the school's programs and services offered.<sup>48</sup> The Supreme Court, in deciding for the Frys, held that Ehlena's ADA Title II lawsuit may proceed because its cause root involved allegations of discrimination on the basis of disability in programs offered by the public school, independent of possible deficiencies in Ehlena's FAPE.

These and other stories of struggle and hope signal that without recourse from IDEA and its sister ADA there would be less ambition to integrate and accommodate children with disabilities in public schools. The IDEA affirms the inclusive educational rights of children with disabilities,<sup>49</sup> which did not exist prior to 1975. The ADA enshrines the centrality of inclusive programs provided by states and local governments, along with the right of program modifications and individualized accommodation in accord with *Olmstead's* integration mandate.

After the federal district court ruled on remand that the school district did not provide Endrew an adequate education and must reimburse his family the cost of sending him to a private school for students with disabilities, Endrew's mother said

it was the opinion handed down by the U.S. Supreme Court last year—one raising the bar for special needs instruction in public schools—that was critical on a wider level. That ruling, she said, has already helped other families she knows who are trying to get a better education for their children with special needs. “*It is*

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child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be ‘*special*ly designed’ to meet a child's ‘*unique* needs’ through an ‘[i]ndividualized education program.’” (first emphasis added) (citations omitted)).

<sup>48</sup> See Huss, *supra* note 8 (ADA Title II coverage of service animals).

<sup>49</sup> See, e.g., Peter Blanck & Jonathan Martinis, *Supported Decision-Making as an Alternative to Guardianship: Law, Policy, Research, and Practice* (forthcoming 2019); KARRIE A. SHOGREN ET AL., SUPPORTED DECISION-MAKING: THEORY, RESEARCH, AND PRACTICE TO ENHANCE SELF-DETERMINATION AND QUALITY OF LIFE (2019).

*already making a difference in the lives of other families.”*<sup>50</sup>

“I saw with my own eyes how Wonder helped my daughter grow more self-reliant and confident,” Ehlena’s mother said.<sup>51</sup>

Margaret Gilmour in the same way remarked:

I believe in a public education and the benefits of inclusion. Inclusion means my son, despite his learning differences, is placed in a regular ed classroom for the majority of the day, with necessary accommodations. *Inclusion only works as long as the school accepts that all students can be equal participants and are pushed to reach their potential.* And, when trained educators are given the support they need to make inclusion successful.<sup>52</sup>

With similar resolve, Ehlena’s mother said of the unanimous Supreme Court *Fry* decision: “For us, it’s just that no child should have their life put on hold because they choose to be as independent as possible by using a medically prescribed service dog. *This is huge for families going through discrimination.*”<sup>53</sup>

Why is it “huge” to endorse a better education aimed at independence and inclusion for children with disabilities? Because, as Professor Stone writes, it is a recognition of “acceptance and connection” to society.<sup>54</sup> The ADA preserves this right of people with disabilities to enjoy governmental offerings in community settings, or

<sup>50</sup> See John Aguilar, *Douglas County Schools Must Pay the Private Education Costs of Student Who Has Autism, Judge Rules: Ruling May Put an End to Long-Running Case Involving Endrew F. of Highlands Ranch*, DENVER POST (Feb. 12, 2018, 4:54 PM), <https://www.denverpost.com/2018/02/12/douglas-county-schools-private-education-costs/> (emphasis added) (quoting Endrew’s mother). See also Diana Autin et al., *Endrew F. Supreme Court Case: Strengthening The Voices of Families At IEP Meetings*, ePARENT.COM (Apr. 18, 2018), <https://www.eparent.com/features-3/endrew-f-supreme-court-case-strengthening-the-voices-of-families-at-iep-meetings/>.

<sup>51</sup> Andrew Chung, *A Girl Named Ehlena and a Dog Named Wonder Win At the U.S. Supreme Court*, REUTERS (Feb. 22, 2017, 10:31 AM), <https://www.reuters.com/article/us-usa-court-dog-idUSKBN1611Y6> (quoting Ehlena’s mother).

<sup>52</sup> Margaret Gilmour, *My Son Is In Special Education And I Want Him To Be Challenged*, NPR (July 11, 2017, 5:30 AM), <https://www.npr.org/sections/ed/2017/07/11/534787935/my-son-is-in-special-education-and-i-want-him-to-be-challenged> (emphasis added).

<sup>53</sup> Mark Walsh, *Supreme Court Backs Family in Case on Denial of Service Dog in School*, EDUC. WEEK (Feb. 22, 2017, 11:29 AM), [http://blogs.edweek.org/edweek/school\\_law/2017/02/supreme\\_court\\_backs\\_family\\_in\\_service\\_dog\\_school\\_case.html](http://blogs.edweek.org/edweek/school_law/2017/02/supreme_court_backs_family_in_service_dog_school_case.html) (emphasis added).

<sup>54</sup> Stone, *supra* note 16.

in a “least restrictive environment,” in housing, healthcare, employment, and education.

This mandate means that individuals with disabilities are to have a meaningful say over their life decisions. In the areas of self-reliance, dignity, and independence, *Olmstead* is giving voice to questions about the widespread use of overly-broad and unnecessary guardianship (“substitute *decision-making*”) in an individual’s “best interests.”<sup>55</sup> Our research, and that of others, shows self-determination and the supports to advance the right to make life choices are key elements for an independent life. Too often, people with disabilities are placed in guardianships that deny them their right to make daily life choices about where they live and who they interact with, their education and finances, and their health care.

In part driven by the *Olmstead* integration mandate and the IDEA’s person-centered approach, conceptions of Supported Decision-Making (“SDM”) are taking hold across the United States.<sup>56</sup> SDM—where people use trusted friends, family members, and professionals to help understand the choices they face that they may make their own decisions—is a means for increasing self-reliance and personal choice by empowering people with cognitive, mental health and other conditions to make decisions about their lives to the maximum extent possible.

In among the first studies of their kind, the Burton Blatt Institute<sup>57</sup> and its partners are examining across the U.S., with hundreds of individuals with cognitive and mental health disabilities and their supporters, the use of SDM.<sup>58</sup> As for Ehlena, Andrew, and millions of others, self-determination is self-sustaining, making people better prepared to make life choices to the maximum of their abilities.

SDM has the potential to empower people of all ages to benefit from increased life control, independence, and community engagement. These benefits are pronounced for persons with cognitive and mental disabilities, who for too long have been disenfranchised

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<sup>55</sup> See, e.g., Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 INCLUSION 2 (2015); Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. ST. L. REV. 1111 (2013); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act*, 81 U. COLO. L. REV. 157 (2010).

<sup>56</sup> Blanck & Martinis, *supra* 49.

<sup>57</sup> See BURTON BLATT INSTITUTE, [HTTP://BBI.SYR.EDU](http://bbi.syr.edu) (LAST VISITED DEC. 19, 2018).

<sup>58</sup> See *Community Living and Supported Decision-Making*, BURTON BLATT INST., [http://bbi.syr.edu/projects/Community\\_Living\\_DRRP/index.html](http://bbi.syr.edu/projects/Community_Living_DRRP/index.html) (last visited Dec. 19, 2018).

from their life decisions.<sup>59</sup> Professors Perlin and Lynch believe perhaps there is no group that has been denied personal say over their lives more than individuals with mental and cognitive disabilities.<sup>60</sup>

#### IV. CLOSING

Active engagement and advocacy by people with disabilities of all ages, and their family members and supporters, are needed to advance the evolving ADA and IDEA. These laws are aspirational declarations for inclusion and not segregation, and for participation in society and not disempowerment from community. They are foundational elements of an American policy framework designed to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” in education, employment, health care, housing, governmental programs, and in access to the built and digital public environments.<sup>61</sup>

The ADA and IDEA’s principles are being achieved incrementally, when discrimination is challenged and brought to the fore. *Andrew F. and Fry* affirm that discrimination against children with disabilities in public education violates the law.<sup>62</sup> Why is America better off because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act? Andrew and Ehlena’s parents know why their children’s lives are better because of the IDEA and the ADA. They, and millions of other children with disabilities, have a fighting chance for an appropriately ambitious education that they may engage meaningfully in their communities.

To imagine the world without the ADA and IDEA is to envision continued segregation and marginalization, where human separation based on physical or mental difference alone is tolerated. This “It’s a Wonderful Life” scenario is taken from the name of the classic film in which Clarence Odbody (*Angel Second Class*) helps George Bailey understand what his community in Bedford Falls would have become had he not been born.<sup>63</sup>

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<sup>59</sup> Stone, *supra* note 16; Perlin et al., *supra* note 13. See also LOGUE & BLANCK, HEAVY LADEN, *supra* note 20.

<sup>60</sup> Perlin et al., *supra* note 13. See also Jeste et al., *supra* note 29; LOGUE & BLANCK, HEAVY LADEN, *supra* note 20.

<sup>61</sup> 42 U.S.C. § 12101 (2018) (providing the ADA findings and purpose).

<sup>62</sup> Stone, *supra* note 16.

<sup>63</sup> IT’S A WONDERFUL LIFE (Frank Capra 1946).

George Bailey’s town would have become a “Pottersville,” where people have lost a sense of community, dignity and compassion. Unfortunately, people with disabilities and their families know what it is like to live in Pottersville, the city named after Mr. Potter, a slumlord, who ironically uses a wheelchair as a relic of the film’s portrayal of disabled individuals as villains and monsters.

Former U.S. Attorney General Dick Thornburgh has said that through the ADA (and laws like the IDEA), America “has taken an important—and long overdue—step toward bringing people with disabilities all over the world into the mainstream of the human rights movement.”<sup>64</sup>

Today, the ADA and the IDEA touch the lives of a new generation of children with disabilities and their families. These individuals have not known America without the ADA and the IDEA, with their principles of inclusion, participation, and integration. America is better off because of the ADA and the IDEA. As guiding beacons, they offer hope towards a future in which all people, regardless of difference, will be welcomed as full and equal members of society.

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<sup>64</sup> DICK THORNBURGH, RESPECTING THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: BEFORE THE FOREIGN RELATIONS COMMITTEE OF THE U.S. SENATE HEARING 3 (2012), [http://www.foreign.senate.gov/imo/media/doc/Dick\\_Thornburgh\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Dick_Thornburgh_Testimony.pdf).