Hastings Constitutional Law Quarterly

Volume 47
Number 4 *Summer 2020*

Article 6

Summer 2020

Neurodiversity in Public Schools: A Critique of Special Education in America

Pallavi M. Vishwanath

Neurodiversity in Public Schools: A Critique of Special Education in America

by PALLAVI M. VISHWANATH*

Introduction

"Today, education is perhaps the most important function of state and local governments."[1] If equal educational opportunity were a constitutional right, then all students could have the opportunity to maximize their potential. Alternatively, the lack of cultural, political, and legal recognition of intelligence pluralism results in lost human potential and societal contribution.[2] When a society only considers specific ways of learning to be "typical," it implies that limited ways of cognitive performance, reasoning, socialization, perception of stimuli, and emotional processing give people competitive benefits in education and the marketplace.[3] Neurodiverse expressions of intelligence and cognition are consequently "atypical," stigmatized, and labeled as disabilities. Individuals with disabilities, or neurodiverse abilities, are often excluded from social and civil citizenship because they do not have equal opportunity to maximize their potential.[4] As a result, societies are harmed because there is great loss in human potential.[5]

Atypical brain structure and functioning are quantitatively and qualitatively relevant to a variety of systems, which not only affects individuals but also democracy as a whole.[6] Millions of adolescents diagnosed with a wide range of neurodiverse conditions ranging from neurodevelopmental disorders to learning disabilities will transition into

* University of California, Hastings, Juris Doctor Candidate, 2020; Master in the Study of Law, University of California, Hastings 2016; Bachelor of Arts, Saint Louis University 2014. The author would like to thank Andrea Lollini for his helpful comments and advice for this Note. This Note is dedicated to Derrick High and the Valley Children's Hospital.

1. Brown v. Bd. Of Educ., 347 U.S. 483, 493 (1954).
2. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 64 (2011).
3. Andrea Lollini, *Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective*, 51 N.Y.U. J. INT'L L. & POL. 69, 132.
4. *Id*.
5. Imoukhuede, *supra* note 2.
6. Lollini, *supra* note 3, at 83.

adulthood over the next decade, which significantly impacts healthcare and social security systems.[7] People with learning disabilities typically struggle with underemployment and face additional exposure to the criminal justice system because of the lack of equal education.[8] Accordingly, misunderstanding and excluding neurodiverse individuals is detrimental to societies on multiple levels.

Public education is the means for governments to ensure that all people enter the marketplace with foundational tools to effectively compete in society despite unequal advantages and intergenerational factors outside an individual's control.[9] Inequality in education services often excludes individuals with neurodiverse traits from social and civil citizenship. For instance, a majority of incarcerated youth in America have learning and emptional disabilities.[10] Analyzing special education in public schools reveals how a society values the potential of and contribution from individuals with neurodiverse traits or disabled students.

Although the United States statutorily establishes public education for all students, education is not considered a fundamental right under the United States Constitution. Instead, education seems to be treated as a service rather than a right. Under the Equal Protection Clause of the Fourteenth Amendment, students must only be provided with access to public education services. This standard leaves the American government with an ambiguous duty to provide students with services that subjectively benefit individual students differently. Further, this standard allows separate, unequal, and different educational opportunities for students with disabilities.[11] Although the United States has passed federal, state, and local laws in attempts to protect students from discrimination, these laws are not synonymous with developing every students' potential. This is because racial or gender discrimination receive stricter levels of review than disability discrimination. As a result, "equal" education for disabled students drastically varies by region, time period, and forum.[12]

Canada, on the other hand, recognizes education as a constitutional right and renounces the "separate but equal" inquiry for disabled students.[13] This is because Canada finds a governmental duty to meaningfully maximize

7. Lollini, *supra* note 3, at 82.

8. Candace Cortiella & Sheldon H. Horowitz, *The State of Learning Disabilities: Facts, Trends and Emerging Issues*, NAT'L CTR. FOR LEARNING DISABILITIES (2014).

9. Imoukhuede, *supra* note 2, at 48.

10. Nat'l Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, June 18, 2015, at 6.

11. Bd. of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 199 (1982).

12. Perry A. Zirkel, *The autism case law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 91(2002).

13. Moore v. British Columbia (Education), [2012] 3 S.C.R. 360 (Can.).

every student's potential regardless of disability.[14] Canada also acknowledges that wasted human potential harms both individual students and society at large. The contrasting governmental commitments to provide equal education in America and Canada demonstrate opposite duties to maximize students' potentials.

This Note reasons that a country or democracy is most benefitted when there is a recognized governmental duty to maximize the potential of every student via public education. Further, it exposes how a difference in governmental duty to provide equal education drastically affects students' dignity and potential. Part I describes the history of the American public education system. Part II explains the development of special education in the United States and the ambiguous governmental duty to educate American students. Part III discusses Canadian case law regarding special education to show that providing access to equal educational opportunities promotes a healthy democracy. Ultimately, this Note argues that in defining education as a right, rather than a service, America can better establish equality in public education and foster the human potential of all students to become productive members of society.

I. Public Education in America: Unequal Opportunities

The right to education is not a fundamental right under the United States Constitution, but Congress has passed statutes with the goal of creating a governmental duty to provide students with an education.[15] American courts seem to interpret these vague statutes to find that education services are provided successfully unless there is an obvious due process violation. Although Congress amended education acts with the intent to be more inclusive of students with disabilities, there are great discrepancies in courts' interpretations of equal access to public education and assessments of the appropriate levels of inclusion.[16] These discrepancies are better understood by analyzing students' access to public education generally before examining the rippling consequences on students with disabilities.

The United States Supreme Court held that education is not a fundamental right in *San Antonio Independent School District v. Rodriguez*.[17] Parents of poor, minority students attending schools financed by a low property tax base brought a class action against the school district in the District Court for the Western District of Texas.[18] Plaintiffs argued

14. *Id.*

15. *Rowley*, 458 U.S. at 179.

16. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147 (2007).

17. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

18. *Id.* at 4–5.

that education is an implied right because education is essential to effectively exercise First Amendment rights and intelligently utilize the right to vote.[19] They further alleged that disparity in public education funding and quality of education among school districts violated their guaranteed equal rights under the Equal Protection Clause of the Fourteenth Amendment.[20] The District Court found the financing scheme unconstitutional because the court recognized education as a fundamental right; however, the Supreme Court struck down the lower court's approach.[21] The Supreme Court explained that education is not within the limited category of constitutionally protected rights, and even if it was, the Texas education system did not fail to provide the basic minimal skills necessary for that purpose.[22] Further, the Court found that plaintiffs' equal protection rights were not violated because the tax scheme assured a basic education for every child in the state.[23]

In *United States v. Virginia*, the Supreme Court maintained that separate learning institutions for students based on sex and opportunities are constitutional so long as there is "substantial" equality.[24] In that case, the Virginia Military Institute ("VMI") was the only higher public education institution in Virginia for military leadership.[25] VMI utilized an "adversative" method to instill physical and mental discipline in its cadets and had a male-only admissions policy.[26] The United States sued the Commonwealth of Virginia alleging an equal protection violation for maintaining a college exclusively for males.[27] The United States District Court for the Western District of Virginia ruled for the Commonwealth, but the Fourth Circuit Court of Appeals remanded and tasked Virginia with creating a remedial plan.[28] Virginia created a parallel program for women that did not use the adversarial method, but instead used a less-rigorous, nonmilitary, cooperative training program to account for perceived differences in learning styles between men and women.[29] This program lacked funding, prestige, and the graduates would "not have the advantage afforded by a VMI degree."[30]

The parallel program for women was built on generic and outdated assumptions about the sexes, which resulted in inferior educational methods

19. *Rodriguez*, 411 U.S. at 35.
20. *Id.* at 16.
21. *Id.* at 6.
22. *Id.* at 37.
23. *Id.* at 49.
24. United States v. Virginia, 518 U.S. 515, 554 (1996).
25. *Id.* at 519.
26. *Id.* at 520.
27. *Id.* at 523.
28. *Virginia*, 518 U.S. at 525.
29. *Id.* at 527.
30. *Virginia*, 518 U.S. at 527.

and lack of prestige. The Supreme Court found that this bifurcated approach resulted in an unacceptable and unconstitutional disparity.[31] Chief Justice William Rehnquist clarified in his Concurring Opinion that the Court's rationale supported separate but equal institutions separated on the basis of sex *if* the same quality of education were offered at each institution.[32] The Court, therefore, ruled that separation in education is inherently unequal when a protected class such as race is concerned, but this is not necessarily true when a quasi-protected class such as gender is concerned.[33] This narrow holding, therefore, did not find that separation in education was unequal and unconstitutional in all applications, but only in limited situations.

Unlike the Supreme Court of Canada in *Moore v. British Columbia*,[34] the Supreme Court of the United States failed to reject a "separate but equal" inquiry.[35] The Supreme Court of the United States only considered the exclusion of women unconstitutional because there was no "exceedingly persuasive justification" for their exclusion.[36] The decisions in *San Antonio Independent School District v. Rodriguez* and *United States v. Virginia* reveal how America justifies unequal educational opportunities: education is not a right and separate is not inherently unequal. As a result, American public schools institutionally isolate vulnerable students who have atypical cognitive performance or learning styles.[37]

The American approach lacks an understanding of neurodiversity or cognitive pluralism because it labels students as typical and atypical learners. Labeling atypical students as "disabled" substantially limits their ability to reach their maximum potential because of the disparity in the quality and adequacy of the public education they receive.[38] Despite America's progress in passing federal legislation to establish equal public education, disparity endures. Because the Supreme Court of the United States does not inherently reject a "separate but equal" justification and does not consider education a fundamental right, special education is a secondary service within American public education.

31. *Id.* at 553–54.
32. *Id.* at 565 (Rehnquist, W., concurring) (emphasis added).
33. *Id.* at 533–34.
34. *See infra* pp. 18-20.
35. *Virginia*, 518 U.S. at 564 (Rehnquist, W., concurring) (". . . it is not the exclusion of women that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women").
36. *Id*. at 524.
37. Hensel, *supra* note 16, at 1147–48.
38. *Id*.

II. Special Education in America: The Refusal to Maximize Potential

Before Congress passed the Education for All Handicapped Children Act ("EAHCA"), there were more than eight million children with disabilities, most of whom were excluded from any sort of educational opportunity.[39] In the early 1970s, the decisions in *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*[40] and *Mills v. Board of Education of District of Columbia*[41] recognized the exclusion of disabled students from public education as a violation of due process rights and equal protection under the law. In 1975, Congress passed the EAHCA to require that public schools accepting federal funds provide equal access to education.[42] In 1990, Congress reauthorized the EAHCA and renamed it the Individuals with Disabilities Education Act ("IDEA").[43] The United States Supreme Court first addressed the government's duty to provide equal education to students with disabilities in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.[44] Later, the Supreme Court clarified the governmental duty to provide a free and appropriate education to disabled students in *Endrew F. v. Douglas County School District Re-1*.[45]

A. EAHCA: Establishing Public Education for Disabled Students

In 1971, the District Court of the Eastern District of Pennsylvania held that no child shall be denied access to free public education based on their disability.[46] In *PARC v. Commonwealth of Pennsylvania*,[47] plaintiffs, parents of thirteen intellectually disabled students deemed to be uneducable, argued that Pennsylvania violated their equal protection rights by refusing to provide them with a free public education.[48] This case ultimately affirmed that equality in education requires the government to place each disabled child in a free public program of education and training appropriate to the child's capacity because all disabled students "are capable of benefiting from a program of education and training."[49] The Eastern District of Pennsylvania

39. Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 1 BYU EDUC. & L.J. 189 (2006).

40. Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1258 (1971) (hereinafter "*PARC*").

41. Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 878 (D.D.C. 1972).

42. Hensel, *supra* note 16, at 1148.

43. *Id*. at 1156.

44. *Rowley*, 458 U.S. at 192.

45. Endrew F. v. Douglas County Sch. Dist. Re-1, 137 S. Ct. 988, 991 (2017).

46. *PARC*, 334 F. Supp. at 1258.

47. *Id.*

48. *Id.*

49. *PARC*, 334 F. Supp. at 1265.

was the first court to recognize that students with disabilities are entitled to a public school education.[50]

Months later, in *Mills v. Board of Education of District of Columbia*, the United States District Court for the District of Columbia held that the District of Columbia must provide children of school age with a free and suitable publicly-supported education, regardless of the child's mental, physical, or emotional disability or impairment.[51] The Court also held that lack of funding is not a justifiable reason to exclude a child from public education.[52] In *Mills*, seven students with disabilities were denied education because they were classified as having behavioral issues.[53] The District Court for the District of Columbia held that denying plaintiffs and their class publicly supported education and excluding them from schooling without review violated the due process of law.[54] The court reasoned that excluding children with disabilities from the public school system also denied them equal protection under the Fourteenth Amendment, which is a component of the due process that binds the District under the Fifth Amendment.[55] The court cited the Supreme Court's opinion in *Brown v. Board of Education* to reason that: "[c]ompulsory school attendance laws . . . demonstrate our recognition of the importance of education to our democratic society. . . . *Such an opportunity, where the state has undertaken to provide it, is a right which must be made on equal terms*."[56]

Similar to its analysis in *United States v. Virginia*, the Court did not reject the notion of a "separate but equal" approach.[57] It did, however, find that the Board of Education shall not exclude any child from a regular public school unless the child is provided adequate alternative educational services suited to the child's needs, and a constitutionally adequate prior review of the child's "status, progress, and the adequacy of any educational alternative."[58]

Neither *PARC* nor *Mills* clarified what equal education looked like for a neurodiverse student population. Neither court went further than acknowledging that disabled children's due process and equal protection rights were violated when they had no access to public schools. Although both *PARC* and *Mills* held that disabled children must have access to adequate and publicly supported education, neither required a specific

50. Gordon, *supra* note 39, at 193.
51. Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 878 (D.D.C. 1972).
52. *Id.* at 876.
53. *Id*. at 868.
54. *Id*. at 875.
55. *Id.*
56. *Id.* (emphasis added).
57. *Virginia*, 518 U.S. at 525.
58. *Mills*, 348 F. Supp. at 878.

standard level of education.[59] Congress attempted to address this ambiguity by passing the EAHCA in 1975 which guaranteed access to public schools, support, and necessary services to achieve a "free[,] appropriate public education" ("FAPE") to all children.[60]

B. Developing FAPE in EAHCA and IDEA

In 1990, the United States Congress reauthorized and renamed EAHCA[61] to IDEA.[62] Like EAHCA, IDEA offered federal funding to assist States in educating children with disabilities. Still, IDEA provides no substantive guidance regarding the level of education for students with disabilities.[63] Congress' intent can, therefore, be better understood from examining IDEA's development.

In 1997, significantly new amendments to IDEA were passed. First, state and local education agencies ("LEAs"), such as a public board of education, were to assess and ensure the effectiveness of efforts to educate children with disabilities. Second, IDEA emphasized access to the general curriculum in an attempt to guarantee full inclusion with general education students. Third, discipline standards and procedures incorporated the use of behavioral assessments and behavioral intervention plans. Fourth, a provision was added in favor of the use of positive behavioral interventions and supports for children with disabilities that impeded their learning or the learning of others. Finally, parents' role in the decision-making process was significantly strengthened.[64] These changes were prompted by Congress' fear of the growing population of students receiving special education services due to the expanding eligibility standard under IDEA. This made Congress fear that the Act was no longer serving the "truly disabled" as Congress intended.[65]

Congress, therefore, amended the definition of children "with a disability" by giving states the discretion to include children between the ages of three and nine experiencing "developmental delays" in the coverage of the statute.[66] Young children may not exactly fit within categories of disabilities identified in IDEA and this possibly avoided problems associated with early mislabeling. Congress urged the United States Department of Education and state agencies to carefully consider in every evaluation: the

59. *Rowley*, 458 U.S. at 192.
60. Gordon, *supra* note 39, at 194; EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975).
61. EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975).
62. IDEA, Pub. L. No. 101-476, 104 Stat. 1142 (1990).
63. Gordon, *supra* note 39, at 195.
64. H. Rutherford Turnbull III, Brennan L. Wilcox & Matthew J. Stowe, *A Brief Overview of Special Education Law with Focus on Autism*, 32 J. OF AUTISM & DEVELOPMENTAL DISORDERS 479 (2002).
65. Hensel, *supra* note 16, at 1150.
66. *Id.* at 1151.

high rate of misdiagnoses based on race, mislabeling children who simply had not previously received proper academic support, and children with limited English proficiency.[67]

IDEA was amended again in 2004 with eligibility concerns at the forefront.[68] The amended statute required states to maintain policies and procedures designed to prevent the inappropriate overload, or disproportional representation by race and ethnicity of children as related to labeling a child as disabled. The Act permitted LEAs to use up to 15% of federal funding to create "early intervening services" for students who were not identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.[69] Congress hoped this would help distinguish children with different learning styles from children with disabilities, reduce special education referrals, and benefit the general classroom environment by reducing academic and behavioral problems.[70] These amendments reflect a move towards recognizing neurodiversity by arming public schools with pluralistic resources. This approach, however, is still based on treating students as typical or atypical learners with rights to consequently different qualities of education.

The list of protected impairments under IDEA includes the following categories of disabilities: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, autism, orthopedic impairments, traumatic brain injury, specific learning disabilities, and other health impairments.[71] IDEA conditions federal funding on state compliance with the statute, particularly that every eligible child receives a FAPE by means of a uniquely tailored "individualized education program" ("IEP").[72] The IEP is a comprehensive plan created by a students' "IEP team" of teachers, school officials, advocates and the student's parents or guardians that tailors the student's education based on a child's individual circumstances.

If there is a disagreement between the students' parents or guardians and school officials, IDEA provides informal mediation. If the mediation does not resolve the disagreement, there is a due process hearing before the state or LEA. The losing party may seek redress in state or federal court.[73] Although IDEA implements many ways to provide disabled students with equal education, the amendments seem to focus on what is *appropriate*

67. Hensel, *supra* note 16, at 1157.
68. *Id.* at 1159.
69. *Id.*
70. H.R. Rep. No. 108-77 at 104 (2003).
71. Hensel, *supra* note 16, at 1163.
72. *Rowley*, 458 U.S. at 182.
73. *Rowley*, 458 U.S. at 182.

more than what is substantively *equal*. The Supreme Court of the United States' decisions in the *Board of Education of the Hendrick Hudson Central School District v. Rowley*[74] and *Endrew F. v Douglas County School District*[75] exemplify the type of education that the American government finds a duty to provide.

In *Rowley*, the Supreme Court found that providing a specialized education to disabled children generated ". . . no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children."[76] Plaintiff Amy Rowley successfully completed kindergarten in a regular classroom because her IEP included the use of a hearing aid. Plaintiff's parents wanted a sign language interpreter in all her academic classes along with the other services proposed in her IEP. The interpreter, school administrators, the district's Committee on the Handicapped, and the New York Commissioner of Education denied the request because Rowley was "achieving educationally, academically, and socially without such assistance."[77] The Rowleys claimed that the administrator's denial of the sign language interpreter constituted a denial of FAPE in the United District Court for the Southern District of New York.[78]

The District Court assumed it possessed the responsibility to give content to the requirement of an "appropriate education." The court held that FAPE required that the potential of the disabled student be measured to her performance and that resulting differential be compared to the shortfall experienced by nondisabled students.[79] Although Rowley performed better than the average child in her class and was advancing from grade to grade, the court found that her education under FAPE was causing a disparity in her true potential.[80] A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Supreme Court, however, disagreed.[81]

Although the Court agreed that Congress failed to substantively define an appropriate level of education for disabled students, it found an express definition for a "free appropriate public education." A FAPE includes special education and related services: a) provided at public expense, under public supervision and direction, and without charge; b) meeting the standards of the State educational agency; c) including an appropriate preschool, elementary, or secondary school education in the State involved;

74. *Id.* at 203.
75. *Endrew F.*, 137 S. Ct. at 203.
76. *Rowley*, 458 U.S. at 198.
77. *Id*. at 185.
78. *Id.*
79. *Id.* at 186.
80. *Id.* at 185.
81. *Id.* at 210.

and d) provided in conformity with the IEP.[82] The Court concluded there was no duty to maximize students' potential; rather, "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction . . . the child is receiving a 'free appropriate education'" and thus satisfied the statute.[83]

In *Rowley,* the Dissent argued that providing some educational benefit was not enough to meet the unique needs of disabled children.[84] Rowley understood less than half of what was said in the classroom and her opportunity to education was unarguably unequal to her fellow classmates.[85] However, the Court reasoned that, when the EAHCA passed, Congress only intended to make public education available to disabled children who were previously excluded from the system.[86] Against this backdrop, the Court read the statute to simply require states to provide meaningful access to education, which was satisfied if they provide a "basic floor of opportunity" to disabled students.[87] The *Rowley* Court held that the school satisfied its obligation by providing Rowley with services that provided enough educational benefits to allow her to perform above average in a general classroom.[88]

The Majority relied on *PARC* and *Mills* to explain that States had no imposed obligation beyond the requirement that handicapped children receive some form of specialized education services.[89] The Court looked at Senate reports and legislative history to decide that disabled children receive an "appropriate education" when personalized educational services are provided, but the Court did "not think that such statements imply a congressional intent to achieve strict equality of opportunity or services."[90] Therefore, the goal was not to provide each disabled child with an equal educational opportunity because ". . . public school systems undoubtedly differ from student to student . . . . The requirement that States provide "equal" opportunities would thus seem to present an entirely unworkable standard . . . ."[91] The Justices declined to establish a single test to determine if the level of education provided to disabled students was adequate under the law.[92] As a result, after *Rowley*, federal courts developed their own twist

82. *Rowley*, 458 U.S. at 189.
83. *Id.*
84. *Id.* at 192 (White, B., dissenting).
85. *Id.*
86. *Id.* at 199.
87. *Id.* at 200.
88. *Rowley*, 458 U.S. at 176.
89. *Id.* at 197.
90. *Id.* at 198.
91. *Id.*
92. *Rowley*, 458 U.S. at 202.

on the substantive requirement under FAPE without maximizing disabled students' potential to learn.

Some courts, like the Tenth Circuit, bent the Court's finding in *Rowley* to mean that states satisfied their duty to provide equal education to disabled students when students barely made *some*, or *de minimis*, progress.[93] In *Endrew F. v. Douglas County School District Re-1*,[94] the Supreme Court clarified that FAPE required more than *de minimis* progress. The Court found that schools must provide students with an education "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[95] Plaintiff ("Endrew") attended public school from preschool through fourth grade, when his academic and functional progress stalled.[96] Endrew's parents felt that he was not making meaningful progress due to the lack of advancement in the goals and objectives in his IEP. They further contended that many objectives in Endrew's IEP were discontinued or abandoned because he did not make adequate progress and the school district failed to adequately address his increased inability to access the educational environment. Because the school district failed to conduct a functional behavioral assessment, implement appropriate positive behavioral support, or develop an appropriate behavioral improvement plan, Endrew enrolled in a private school specializing in the education of children with autism.[97]

Endrew's parents claimed that the school district failed provide an IEP that was reasonably calculated to provide Endrew with FAPE and sought reimbursement for the private school tuition and transportation costs. The school district refused. The administrative law judge ruled in favor of the school district, concluding that the proposed IEP was reasonably calculated to enable Endrew to receive educational benefits and, therefore, the IEP was not a denial of FAPE.[98] The District Court of Colorado affirmed because Endrew made some minimal progress and "[i]n the court's view, that was all *Rowley* demanded."[99] The Court of Appeals for the Tenth Circuit affirmed finding that *Rowley* stated that an IEP is adequate if it calculated to confer an educational benefit that is merely more than *de minimis*.[100] The Supreme Court rejected the *de minimis* standard, but still held that *Rowley* imposed no

93. *Endrew F.*, 137 S. Ct. at 991 (emphasis added).
94. *Id.* at 996.
95. *Id.* at 993.
96. *Id.*
97. *Id.*
98. *Id.* at 997.
99. *Endrew F.*, 137 S. Ct. at 997.
100. *Id.*

explicit substantive standard, nor did it guarantee any level of education or potential outcome.[101]

Again, the Court did not establish a duty to maximize the potential of students through education, disabled or not. The American approach to equality in education only creates a minimal duty to ensure that disabled students are not excluded from access to basic public education and that their IEP is reasonably calculated to enable a student to make *appropriate* progress, not maximum progress. The Court rejected Endrew's parent's argument that FAPE should provide disabled children ". . . opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities."[102] Instead, IDEA simply requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.[103]

Justice Roberts noted the factual differences between the plaintiffs in both *Rowley* and *Endrew* to show that what may be educationally appropriate for one studentm may not be appropriate for another, therefore, assessment should be child focused and not criterion or normative based.[104] America, therefore, legally permits institutional isolation and educational disparity because *equal* education is not a right enjoyed by all students. This shows that separate and unequal educational services are not unconstitutional by default. Canada's approach to equal education starkly differs because it rejects categorizing students in a typical versus atypical label within neurodiversity. Canada instead compares disabled students' access and progress to all children receiving education generally to ensure substantively equal education.

III. Education in Canada

Canada recognizes education as a right and takes a substantive approach to equality by recognizing a governmental duty to maximize student's potential. The Canadian Charter of Rights and Freedom guarantees Canadian citizens' right to education.[105] Because English and French are both official languages of Canada, the Charter constitutionally guarantees

101. *Endrew F*., 137 S. Ct. at 1000-01.

102. *Id.* at 1001 (citation omitted).

103. *Id.*

104. *Compare Rowley*, 458 U.S. 176, 198 (holding that disabled students' potential need not be maximized), *and Endrew F*., 137 S. Ct. 988, 1001 (holding that an educational program should be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances).

105. Canadian Charter of Rights and Freedoms, S 16 & 23, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (Can.).

access to education in either language.[106] The Charter ensures that the government provides education to Canadian children in their parents' primary language, even in areas where only a minority of residents speak that language.[107] As a result, Canadian students have the constitutional right to attend classes taught in either first language French classes in provinces where French is not the majority language, or taught in English where English is not the majority language. Education is a civil right because Canada recognizes that education is "necessary for the preservation and promotion" of communities and dignity of all students.[108]

The Charter also guarantees equal rights stating every individual is ". . . equal before and under the law and has the right to the equal protection and benefit of the law . . . ."[109] Unlike the United States, Canada has a substantive approach to equality—a focus on the effect or impact rather than treatment or discriminatory intent. This approach to equality, along with the right to education, allows better development of diverse human potential that the United States would benefit from.

A. Equal Rights in Canada

In *Eldridge v. British Columbia*,[110] the Supreme Court of Canada provides the basis for equality rights for diverse cognitive groups. Appellants Robin Eldridge and Linda Warren were born deaf and wished to have the use of sign language interpreters with their doctors in hospitals covered by their health insurance.[111] A private company supplied interpreters in the past, but this service was discontinued due to a lack of funding.[112] Appellants claimed that the communication barrier between them and their doctors resulted in lesser quality of care, which infringed on their right to equal benefit of the law under the Charter.[113] The Court unanimously held that the Charter protected equality rights to protect human dignity and rectify discrimination against disadvantaged groups.[114] The Court held that British Columbia was obliged to provide translators to the deaf to provide equal access to core benefits accorded to everyone under the British Columbia healthcare scheme.[115] Failing to provide ASL translators

106. Canadian Charter of Rights and Freedoms, *supra* note 105.
107. *Id.*
108. Constitution Act 1982 S 15.1 (Can.).
109. *Id.*
110. [1997] 3 SCR 624.
111. *Id.* at 625.
112. *Id.* at 636.
113. *Id.* at 636.
114. *Id.* at 626.
115. *Id.* at 690.

for the deaf effectively denied to one group of disabled people the benefit granted by law to other people.[116]

In *Auton v. British Columbia*,[117] the Court distinguished its holding in *Eldridge* when it held that access to a benefit that the law has not conferred to any group of people is not subject to the equality provision in the Charter. In *Auton*, four infant, autistic petitioners sued the government for not funding a behavioral therapy for all autistic children between the ages of three and six years old.[118] The claimants needed to show unequal treatment under the law, specifically that they did not receive a benefit that the law provided to someone else.[119] The promise of equality, therefore, had to be confined to benefits and burdens "of the law."[120] Petitioners argued that the unequal treatment stemmed from funding medically required treatments for children or adults with mental illness, while refusing to fund medically required therapy to autistic children. The Court found, however, that the legislative scheme only provided that medically necessary treatment, or core services, are funded if they are "medically required."[121] In the end, the therapy in question was found only to be emergent in nature, not "medically necessary," and, therefore, there was no discrimination.[122] Still, the Court emphasized using a substantive and contextual approach to equality rather than a narrow, formalistic approach.[123]

More importantly, the Court emphasized that equality is understood as a comparative concept requiring a claimant to point to some person who has been better treated in order to ground a claim.[124] The Court rejected plaintiff's attempts to compare autistic children to children suffering other disabilities. Instead, the Court held that the appropriate comparator group was a non-disabled person who sought or received funding for a non-core therapy that was becoming recognized as medically required.[125] This approach to neurodiversity is significant because the comparator groups look past distinctions separating people deemed to be typical or atypical. This substantive approach to equality is what sets education equality in Canada apart from the categorically, separate education in the United States.

116. *Eldridge*, 3 SCR at 690.
117. Auton (Guardian ad litem of) v. British Columbia (AG), [2004] 3 S.C.R. 657.
118. *Id.* at 663.
119. *Id.* at 669.
120. *Id.* at 671.
121. *Id.* at 696.
122. *Id.*
123. *Auton*, 3 S.C.R. at 670.
124. Lollini, *supra* note 3, at 19.
125. *Id.*

B. Equal Education in Canada

In *Moore v. British Columbia*, the Supreme Court of Canada held that students with disabilities are entitled to necessary educational accommodations in order to access and benefit from public education.[126] In this case, Jeffrey Moore had a learning disability that required intensive remediation to read.[127] The North Vancouver School District provided Moore with a range of support services, but a funding shortage in the Province resulted in eliminating the program crucial to Moore's education.[128] School officials advised Moore to attend private school for the remediation he required, but his parents had to pay for the remediation.[129] Moore's father filed a complaint on his behalf alleging that the school district and Province discriminated against him because of his disability and denied him a service customarily available to the public.[130] The Human Rights Tribunal found the Province and school district's actions unconstitutional.[131] The Court of Appeal for British Columbia, however, overturned the Tribunal decision and held that there was no discrimination against Moore because he was not treated differently than other students with disabilities.[132] Finally, the Supreme Court of Canada found it offensive that the Court of Appeals compared Moore only to students with disabilities and agreed with the Tribunal's decision.[133]

The Court held that the service Moore was entitled to under the British Columbia Human Rights Code was education generally, not special education specifically.[134] The Canadian government, therefore, acknowledged that the reason children are entitled to an education is because a healthy democracy and economy require their educated contribution:

> This is because defining special education as the service at issue risks descending into a kind of 'separate but equal approach' . . . comparing [Moore] only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination . . . if compared only to other special needs students, full consideration cannot be given to whether he had meaningful

126. Moore v. British Columbia, [2012] 3 S.C.R. 360 (Can.).
127. *Id.* at 361.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Moore*, 3. S.C.R. at 361.
133. *Id.* at 362.
134. *Id.*

> access to education to which *all* students in British Columbia are entitled.[135]

Moore holds that adequate special education is not a dispensable luxury because it provides access for children with disabilities to the statutory commitment to education made to all children.[136] This holding that students with disabilities have an equal right to education as students without disabilities starkly contrasts to America's approach to equal education.

Conclusion

Approaching equality with a focus on effect or impact, as in Canada, instead of treatment or discriminatory effect, as in the United States, compels a democracy to maximize the potential of every student rather than a typical few. This approach better supports neurodiversity because a society has a duty to make education quality and access substantively equal rather than formally equal. A democracy can better establish this approach to educational equality by considering education as a fundamental right and inherently rejecting a separate but equal analysis.

Public education in the United States falls short of public education in Canada because America does not recognize education as a constitutional right and fails to find a duty to maximize every students' potential. Canada, on the other hand, provides the same type of educational standards for every student, not only because it is just, but because it is a function of democracy. Canada, therefore, approaches equal education to be maximizing every students' potential. This approach makes use of neurodiversity because it maximizes the ability of all learners, whether they are atypical or not.

The government has the means to provide people with foundational tools to compete and contribute to society with equal advantage through public education.[137] When American public schools institutionally isolate vulnerable students who have atypical cognitive performance or learning styles, it harms its own democracy.[138] High rates of children of color enrolled in special education with either undiagnosed or untreated language and learning disabilities reflect the discriminatory and ignorant reality of the American public school system.[139] Additionally, many disabled youth in the

135. *Id.*
136. *Moore*, 3. S.C.R. at 362.
137. Imoukhuede, *supra* note 2, at 48.
138. Hensel, *supra* note 16, at 1147–48.
139. Shameka Stanford & Bahiyyah Muhammad, *The Confluence of Language and Learning Disorders and the School-To-Prison Pipeline Among Minority Students of Color: A Critical Race Theory*, 26 AM. U. J. GENDER & SOC. POL'Y & L. 691, 698 (2018).

American juvenile justice and criminal justice systems are deprived of an appropriate education that could disrupt the school-to-prison pipeline.[140]

Because Congress only intended to make public education available to disabled children who were previously excluded from the system, the government does not find a duty to maximize disabled students' potential. Education is not a fundamental right, therefore, providing equal education for disabled students is not an integral service available. Instead, providing disabled students with unequal education suffices because they will make *appropriate* progress. As a result, disabled students in American public schools do not have a right to maximize their human potential and contribute to society.

America appears to treat education as a service rather than a right. This contributes to the vague governmental duty to educate individual students differently based on categorizing students as disabled or not, making a typical versus atypical distinction. This duty promotes separate, unequal, and different educational opportunities for students with disabilities.[141] Canada, on the other hand, renounces the "separate but equal" inquiry for disabled students because all students have an equal right to education.[142] This is because Canada finds a governmental duty to meaningfully maximize every student's potential regardless of disability.[143] These two approaches reflect contrasting governmental commitments to incorporate neurodiversity into the democracy; an incorporation that benefits both individuals and societies at large.

140. Cortiella & Horowitz, *supra* note 8.
141. *Rowley*, 458 U.S. at 199.
142. Moore, 3 S.C.R. at 360.
143. *Id.*