NEW MEXICO LAW REVIEW

Volume 22
Issue 1 *Americans with Disabilities Act (Winter 1992)*

Winter 1992

Introduction

James W. Ellis

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JAMES W. ELLIS*

The Americans with Disabilities Act[1] ("ADA") is one of the most striking political accomplishments by and on behalf of people with disabilities in our history. It represents a national recognition that people with disabling conditions are entitled to participate fully in the lives of their communities, not as a consequence of charity but as a matter of right.[2]

The political circumstances that led to the passage of this legislation are described briefly by Senator Domenici in his Preface to this Symposium issue.[3] The purpose of this Introduction is to provide background on some of the efforts to ensure equal treatment that preceded the introduction of the ADA.[4] These efforts involved both the courts and the Congress. Both the successes and the failures of these earlier efforts help explain the remarkable consensus that developed in recent years that Congressional prohibition of discrimination on the basis of disability was both needed and likely to be successful.

The beginning of modern efforts to achieve legal equality for people with disabilities can be traced to the efforts to prevent exclusion of children with disabilities from the nation's public schools. The belief that it was acceptable to exclude such children, even within the context of mandatory attendance laws, was well entrenched. For example, the Supreme Court of Wisconsin approved the exclusion of a boy with cerebral palsy because he "produces a depressing and nauseating effect upon the teachers and school children."[5] Such practices were frequently sanctioned in the compulsory attendance laws themselves, or even in state constitutions. The New Mexico Constitution provides, for example, an exception for children not having "sufficient physical and mental ability."[6]

These practices of excluding children with disabilities were attacked as unconstitutional in the early 1970s. In two leading cases, *Pennsylvania*

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* Henry Weihofen Professor of Law, University of New Mexico. A.B., Occidental College; J.D., University of California at Berkeley. Professor Ellis testified in favor of the Americans with Disabilities Act before the Judiciary Committee of the United States House of Representatives in his capacity as President of the American Association on Mental Retardation. Professor Ellis was also counsel of record for seven national disability organizations as *amici curiae* before the Supreme Court of the United States in the case of City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

1. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991).

2. *See* Ellis, *Presidential Address 1990 — Mental Retardation at the Close of the 20th Century: A New Realism*, 28 MENTAL RETARDATION 263 (1990).

3. 22 N.M.L. REV. 1 (1992) (this issue).

4. This brief article does not purport to be a comprehensive history, or to describe all the important events that preceded the enactment of the ADA. My purpose is merely to sketch some context and describe part of the background for the congressional action.

5. State *ex rel.* Beattie v. Board of Education, 169 Wis. 231, 172 N.W. 153, 154 (1919).

6. N.M. CONST. art. XII, § 5.

Association for Retarded Children v. Pennsylvania,[7] and *Mills v. Board of Education*,[8] exclusionary policies were held to be violative of the equal protection rights of children with mental retardation.[9] Each of these cases was limited in the scope of its enforcement to the jurisdiction in which it was decided, and neither reached the Supreme Court of the United States.[10] As a result there was no clear national mandate to provide education to all children with disabilities.

That mandate was provided by Congress in 1975 with the passage of the Education for All Handicapped Children Act, now renamed the Individuals with Disabilities Education Act ("IDEA").[11] Under this statute, all children with disabilities were entitled to a "free appropriate public education."[12] Its implementation has meant that millions of children who previously would have been excluded from public school have been enrolled and educated. In addition, the statute has required school districts to reduce or eliminate the segregation of students with disabilities from nondisabled students.[13]

During the same approximate period of time as the passage of the prohibition on educational discrimination, Congress also passed a statute forbidding discrimination against people with disabilities by any recipient of federal funding. Section 504 of the Rehabilitation Act prohibits discrimination against any "otherwise qualified individual" in any federally funded program.[14] This statute pursued the model of other civil rights

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7. 334 F. Supp. 1257 (E.D. Pa. 1971), *on remand*, 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree).

8. 348 F. Supp. 866 (D.D.C. 1972).

9. The *Pennsylvania* case ("*PARC*") involved the equal protection clause of the fourteenth amendment. The *Mills* case involved the equal protection "component" of the due process clause of the fifth amendment. *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954).

10. It is worth noting that these victories, in the absence of legislation, probably could not be replicated under current constitutional doctrine and before the current membership of the Supreme Court of the United States. In cases subsequent to *PARC* and *Mills*, the Court has made clear that it does not consider mental retardation to be a suspect or semi-suspect class and that in its view education is not a fundamental right. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In the absence of either of the "triggers" of heightened judicial scrutiny, the exclusion of children with disabilities would be evaluated under the rational basis test. Although some Justices have suggested that total exclusion from public schools would invite a different analysis, *see, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982), it is far from certain that the Court would not defer to an argument by local school officials that they had a reasoned basis for excluding children with disabilities who would be difficult and expensive to educate. *See generally* Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450 (1988) (suggesting limits to the *Plyler* rationale); Youngberg v. Romeo, 457 U.S. 307 (1982) (importance of judicial deference to the judgments of the government's professionals in the area of developmental disabilities).

11. 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1992). This statute has been commonly known by its public law designation, Pub. L. 94-142. When the law was reauthorized and amended in 1990 it was renamed the "Individuals with Disabilities Education Act." Pub. L. 101-476.

12. *See generally* H.R. TURNBULL & A. TURNBULL, FREE APPROPRIATE PUBLIC EDUCATION: LAW AND IMPLEMENTATION (1978).

13. 20 U.S.C.A. § 1412(5)(B) (West Supp. 1992) (state must ensure that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily").

14. 29 U.S.C.A. § 794(a) (West Supp. 1991).

statutes that had prohibited discrimination on the basis of race and gender.[15] Because of the extensive scope of federally funded activities in American life, section 504 extended protection against discrimination to a significant number of areas.[16]

But despite the success of these statutes,[17] a great deal of the discrimination encountered by people with disabilities remained outside the scope of the law's prohibitions. By the mid-1980s, discrimination was prohibited in the public schools and by recipients of federal funding, but in almost no other circumstances. At that time, a major effort was made to achieve recognition that invidious discrimination on the basis of disability was unconstitutional.

In *City of Cleburne v. Cleburne Living Center*,[18] the Supreme Court of the United States was asked to decide whether people with mental retardation[19] were entitled to the judicial protection afforded to racial minorities, women, and others under the equal protection clause of the fourteenth amendment. The Fifth Circuit had held that mental retardation was a semi-suspect classification,[20] and therefore entitled to such consideration. The Supreme Court held that it was not.[21]

The traditional factors considered by the Court in deciding whether a class is disadvantaged in a way that requires special judicial protection include a history of invidious discrimination, immutability of the trait, and political powerlessness and disenfranchisement.[22] In *Cleburne*, the Court considered each of these factors as they related to people with mental retardation. The Justices acknowledged that there was a substantial and persistent history of invidious discrimination against people with mental retardation. Indeed, five members of the Court chose to characterize this history of mistreatment as "grotesque."[23] Furthermore, no

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15. For a discussion of the origins of section 504, see R. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984).

16. Debates about public transportation have been among the most prominent topics of discussion and litigation under section 504. *See, e.g.*, R. KATZMAN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED (1986); Cook, *The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 LOY. L.A.L. REV. 1471 (1987); Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988). A less controversial, but more obvious manifestation of 504 is the required removal of physical barriers to public facilities.

17. Another, more recent, statutory approach was the enactment of the Fair Housing Amendments of 1988. This statute made it unlawful, for the first time, to discriminate on the basis of handicap in the provision of housing. 42 U.S.C.A. § 3604(f) (West Supp. 1991).

18. 473 U.S. 432 (1985).

19. The case involved people with mental retardation, rather than the broader class of all people with mental and physical disabilities. Because mental retardation is a readily and objectively identifiable disability and because the history of invidious discrimination against this group was particularly virulent, it presented the strongest claim for constitutional protection from discrimination.

20. Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984).

21. For a fuller discussion of *Cleburne*, see Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987).

22. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

23. *Cleburne*, 473 U.S. at 454 (Stevens, J. and Burger, C.J., concurring) (quoting Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984); *id.* at 461 (Marshall, J., Brennan, J., and Blackmun, J., concurring in part and dissenting in part).

Justice questioned the fact that mental retardation is an immutable trait.[24]

The claim for protected constitutional status foundered on two considerations. The first was disenfranchisement. The majority noted that Congress and state legislatures had enacted a number of laws benefitting people with mental retardation, including the Education of the Handicapped Act and the Developmental Disabilities Assistance and Bill of Rights Act. The existence of these laws, declared the majority, "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers."[25]

The second, and apparently more significant reason for rejecting a recognition of the need for heightened scrutiny, was the majority's view that mental retardation was a classification that legislators could use for some legitimate purposes. As a result, it would be unwise to subject any laws using the classification to more than minimal judicial scrutiny. In other words, because the classification was not presumptively irrelevant to all legitimate legislative goals, its use would be presumed to be legitimate.[26]

The net result was that after *Cleburne*, laws disadvantaging people with mental retardation or any other disability would be evaluated under the most deferential standard, the so-called rational basis test. The courts would presume such laws to be constitutional, and therefore would seldom intervene on behalf of citizens with disabilities.[27] Constitutional challenge to laws that disadvantage people with disabilities therefore became, in most cases, unrealistic.

It is against this backdrop of patchwork federal legislation and a judicially-closed door to constitutional litigation that the Congress considered the ADA. The ADA extended federal protection from discrimination beyond the schools and beyond the reach of federal funding. It reached private discriminatory conduct that would have been beyond the scope of constitutional protection even if the Court had granted heightened protection in *Cleburne*. And, most importantly, it articulated a clear national statement that discrimination on the basis of disability was as offensive and unacceptable to the American people as discrimination on the basis of race, gender, or age.

The precise extent to which the ADA will change the way America does business, and the number of previously closed doors it will open

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24. *See, e.g., id.* at 442.

25. *Id.* at 445. Paradoxically, the passage of ADA could be read as additional confirmation of the Court's perspective.

26. For discussion of presumptive irrelevance, see Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENTARY 375 (1986).

27. Confusion has predictably resulted from the fact that the Court announced that heightened scrutiny was constitutionally unwarranted and inappropriate, but then proceeded to analyze the statute in issue with a methodology that appeared to involve the principal elements of heightened scrutiny. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1444 (2d ed. 1988); J. NOWAK & R. ROTUNDA, CONSTITUTIONAL LAW 590 n.69 (4th ed. 1991); Minow, *supra* note 21 at 116; Ellis, *supra* note 26 at 376 n.7. This doctrinal ambiguity has left lower courts to sort out whether they are supposed to employ the test that the Supreme Court announced or the one that the Court appears to have used. Most courts appear to have chosen the deferential standard. *See, e.g., In re* Harhut, 385 N.W.2d 305 (Minn. 1986).

for Americans with disabilities remains to be seen; a full evaluation will have to await years of litigation and judicial interpretation. It is important to recognize at the beginning of this effort, however, how dramatic and important the enactment itself is. The articles in this Symposium demonstrate the importance of what Congress has accomplished and suggest some of the directions in which the changes it requires will take us.

The Americans with Disabilities Act is a profound statement about the role of people with disabilities in their communities and in their nation. One small measure of how far we have come can be seen in a statute uncovered in preparing the *amicus* brief in *Cleburne*. In 1920, Mississippi passed a statute granting jurisdiction to its state courts "in all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which renders the subjects *unfit for citizenship*."[28] If the ADA were to accomplish nothing else, it would definitively declare that no disability renders any individual unfit for citizenship.

28. Act of April 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294 (emphasis added).