

# Amending IDEA in Light of COVID-19 and the State of D/deaf Education

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## Abstract:

Since its inception in 2020, coronavirus (COVID-19) has had a devastating impact on the world community. The majority of the responses to COVID-19 in the United States have been hearing-centric and thus have failed to take into consideration the needs of the D/deaf community, specifically within education. As a result, COVID-19 had a disproportional negative impact on K-12 students who are D/deaf. The switch to online learning during COVID-19 highlighted the problems within the Individuals with Disabilities Education Act (IDEA), an Act intended to provide students with disabilities public education. To protect the education of students who are D/deaf in COVID-19 and post-COVID-19 times, reform to IDEA is necessary. This Note first argues that Congress should amend IDEA to expressly declare that the *Board of Education v. Rowley*, which holds that schools do not have to provide students who are disabled with an education as beneficial as the student’s peers who are non-disabled, is no longer the correct interpretation. Congress should expressly state in a reauthorization of IDEA that IDEA entitles students with disabilities to an equally beneficial education to that given to their peers who are non-disabled. Second, this Note argues that in light of the COVID-19 pandemic and the popularization of virtual learning, Congress should amend IDEA to expressly apply in all online models of education.

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\* J.D., University of Iowa College of Law, 2023. I want to dedicate this Note to my grandfather, Ronald (Ron) Sealey. My grandpa was a Deaf man who went to the Nebraska School for the Deaf from 1949 to 1962.

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I. INTRODUCTION

Coronavirus (COVID-19) began spreading throughout the United States at the beginning of 2020.<sup>1</sup> By March 11, the World Health Organization (WHO) declared COVID-19 a pandemic.<sup>2</sup> As a result of its deadly impact, COVID-19 nearly shut down the United States economy and has impacted every aspect of life in an unparalleled way.<sup>3</sup> Political and social commenters initially described COVID-19 as the great equalizer, impacting all people the same.<sup>4</sup> However, COVID-19 has negatively affected certain groups more than others, one of these groups being individuals with disabilities.<sup>5</sup> University of Pennsylvania Law School professor, Jasmine E. Harris, explained why the pandemic has disproportionately impacted people with disabilities: “It does not take much of a pretext to rollback disability rights. This is because disability rights laws, despite enumerated principles of equal opportunity and civil rights, have always been viewed as ‘nice to do’ and not

<sup>1</sup> CDC Museum COVID-19 Timeline, CDC (Aug. 16, 2022), <https://www.cdc.gov/museum/timeline/covid19.html> [<https://perma.cc/XG8N-8TGM>] (explaining the timeline of the COVID-19 pandemic).

<sup>2</sup> *Id.*

<sup>3</sup> Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19*, (Brookings Glob., Working Paper No. 158, 2021) <https://www.brookings.edu/research/social-and-economic-impact-of-covid-19> [<https://perma.cc/8PD9-GTMU>] (explaining the social and economic impact of COVID-19); Valeria Saladino et al., *The Psychological and Social Impact of COVID-19: New Perspectives of Well-Being*, 11 FRONTIERS PSYCH. 1, 1 (2020) (explaining the psychological impact of COVID-19); OFF. FOR C.R., U.S. DEP’T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/EV9R-8CAX>] (explaining the toll COVID-19 has had on education); COVID-19 Coronavirus Pandemic, WORLDOMETER (Jan. 18, 2023), <https://www.worldometers.info/coronavirus> [<https://perma.cc/4FP5-4JXZ>] (explaining that as of October 2, 2021, COVID-19 is responsible for the deaths of 706,299 people in the U.S. and 4,853,057 people worldwide).

<sup>4</sup> Vincenzo Galasso, *COVID: Not a Great Equalizer*, 66 CESIFO ECON. STUD. 376, 376 (2020) (explaining COVID-19 is not a great equalizer but instead has intensified existing inequalities).

<sup>5</sup> Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. 30, 30–31 (2020) (“Whoever said pandemics were equalizers doesn’t know a thing about disability legal history.”). This Note will refer to anyone with a disability as people with disabilities as opposed to “disabled people.” See *Guidelines for Writing About People with Disabilities*, ADA NAT’L NETWORK, <https://adata.org/factsheet/ADANN-writing> [<https://perma.cc/3D8C-BXAA>] (explaining that when writing about people with disabilities in general, refer to the person first and the disability second).

‘must do’.<sup>6</sup> While many individuals with differing disabilities suffered as a result of the pandemic, a specific group labeled the “forgotten victims of COVID-19” are Deaf, deaf, and hard of hearing individuals (D/deaf).<sup>7</sup>

From the beginning of the pandemic the majority of the responses to COVID-19 have been hearing-centric and have failed to take into consideration the needs of the D/deaf community.<sup>8</sup> For example, multiple plaintiffs who are D/deaf brought lawsuits against the White House and States of New York and Florida for the lack of sign language interpreters at COVID-19 briefings.<sup>9</sup> Individuals who are D/deaf also brought lawsuits against Nike for mandating face masks, but failing to provide their employees with clear face masks.<sup>10</sup> Lastly, individuals who are D/deaf sued organizations and institutions such as Zoom, MIT, and Harvard due to a lack of accurate and free closed captioning services.<sup>11</sup> Such cases demonstrate that

<sup>6</sup> Harris, *supra* note 5, at 30 (explaining why disability rights are in danger of rollbacks).

<sup>7</sup> Sunny Shin, *The Forgotten Victims of the Pandemic: The Deaf Community*, OZY (Apr. 20, 2020), <https://www.ozy.com/news-and-politics/the-forgotten-victims-of-the-pandemic-the-deaf-community/303802> [<https://perma.cc/NR9F-HAZG>] (labeling D/deaf individuals as the forgotten victims of the pandemic). Deafness as an identity is complex and for the purposes of this Note “D/deaf” will be used to refer to the Deaf, deaf, and hard of hearing communities. See *What does D/deaf Mean?*, U. OF GREENWICH, <https://www.gre.ac.uk/support/disability/staart#:~:text=What%20does%20D%2Fdeaf%20mean,%20For%20use%20hearing%20aids> [<https://perma.cc/3FNJ-PXLX>] (“The term D/deaf is used throughout Higher Education and research to describe students who are Deaf (sign language users) and deaf (who are hard of hearing but who have English as their first language and may lipread and/or use hearing aids)”).

<sup>8</sup> *Statement on Accessible Communication for Deaf and Hard of Hearing People During COVID-19 Pandemic*, WORLD FED’N DEAF, <https://wfdeaf.org/news/statement-on-accessible-communication-during-covid-19-pandemic> [<https://perma.cc/3HGE-KGBD>] (explaining how certain protection strategies pose barriers for D/deaf individuals).

<sup>9</sup> *Nat’l Assoc. of the Deaf v. Trump*, 486 F. Supp. 3d 45, 60–61 (D.D.C. 2020) (holding that the White House’s refusal to provide in-frame sign language prevents the D/deaf plaintiffs from accessing the communications, thus violating their First Amendment rights); *Martinez v. Cuomo*, 459 F. Supp. 3d 517, 519–20 (S.D.N.Y. 2020) (holding that the NY Governor’s failure to conduct daily COVID-19 briefings with an in-frame ASL interpreter violated their rights as D/deaf individuals with only limited English-language skills); *Yelapi v. DeSantis*, 487 F. Supp. 3d 1278, 1287–88 (N.D. Fl. 2020) (distinguishing the case from *Martinez* as here the D/deaf individuals had internet service and could and the Florida Governor sometimes provided ASL while the NY Governor never did).

<sup>10</sup> Complaint at 1, *Bunn v. Nike, Inc.*, No. CGC-20-585683 (Cal. Super. Ct. July 29, 2020) (“These mandatory masking requirements serve an important public health and safety purpose. But they can be—and in this case have been—implemented in a manner that discriminates against deaf or hard of hearing individuals in violation of state and federal law.”).

<sup>11</sup> *Nat’l Assoc. of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass. 2016); *National Association of the Deaf Announces Landmark Settlement with Harvard to Improve Online Accessibility*, NAT’L ASSOC. DEAF, <https://www.nad.org/2019/11/27/nad-announces-landmark-settlement-with-harvard-to-improve-online-accessibility> [<https://perma.cc/F9PZ-P2QQ>] (announcing the settlement of the case *Nat’l Assoc. of the Deaf v. Harvard U.*); Mike Ervin, *Smart Ass Cripple: Zoom’s Inaccessibility for Hard-of-Hearing and Deaf Users*, PROGRESSIVE MAG. (Jan. 20,

the government did not keep individuals who are D/deaf in mind when creating solutions to COVID-19.

COVID-19 has likewise disproportionately negatively impacted K–12 students who are D/deaf.<sup>12</sup> Before COVID-19, disparities existed between the quality of education and academic achievements for students who are D/deaf and their peers who are hearing.<sup>13</sup> Moving the majority of education to online platforms increased these already existing disparities.<sup>14</sup> The pandemic forced nearly 93% of households into some form of distance online learning.<sup>15</sup> An international expert on accessible learning environments, Dr. Stephanie W. Cawthon, addressed the problem of COVID-19 and the education of students who are D/deaf by explaining, “[O]nline classrooms are not automatically accessible. There must be an intentional effort to provide access, accommodate needs, and adjust our new learning environments to serve all students equally.”<sup>16</sup>

Congress implemented laws such as the Individuals with Disabilities Education Act (IDEA) because of the awareness that society was not constructed to cater to the needs of individuals with disabilities, and that therefore, the government must take affirmative action to provide access to equal education.<sup>17</sup> Prior to COVID-19, IDEA entitled students who are D/deaf to certain resources to achieve access to equal education, such as

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2021, 8:58 AM) <https://progressive.org/latest/zoom-inaccessibility-hard-of-hearing-erwin-210120> [<https://perma.cc/Y5LN-RJAG>] (discussing the lawsuit against Zoom for charging a monthly fee to individuals who need closed captioning); Jaclyn Leduc, *Overview of NAD v. Harvard and NAD v. MIT Lawsuits*, 3PLAYMEDIA, (Mar. 25, 2020) <https://www.3playmedia.com/blog/harvard-mit-sued-captioning-violation-ada-rehabilitation-act> [<https://perma.cc/6F6L-EJSY>] (discussing the outcomes of *Nat'l Assoc. of the Deaf v. Harvard U.* and *Nat'l Assoc. of the Deaf v. MIT* lawsuits).

<sup>12</sup> OFF. FOR C.R., U.S. DEP'T OF EDUC., *supra* note 3 (explaining the toll COVID-19 has had on education).

<sup>13</sup> *Id.* (explaining that before the pandemic, thousands of students with disabilities filed complaints about violations of their rights to equal access to education and that students with disabilities have significantly lower standardized testing assessments).

<sup>14</sup> *Id.*

<sup>15</sup> Kevin McElrath, *Nearly 93% of Households with School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html> [<https://perma.cc/34RH-QQNB>] (explaining the COVID-19 impact on the education of disabled students and providing statistics concerning the rates of online learning).

<sup>16</sup> *Pandemic Taking Unique Toll on Deaf College Students, According to New Poll*, NAT'L DEAF CTR. ON POSTSECONDARY OUTCOMES (May 12, 2020), <https://www.nationaldeafcenter.org/news/pandemic-taking-unique-toll-deaf-college-students-according-new-poll> [<https://perma.cc/C56E-EPQY>] (explaining the “changing needs for the changing environment”).

<sup>17</sup> *About IDEA*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/idea/about-idea> [<https://perma.cc/XSM9-JKVC>] (“Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy.”).

interpreters, real time captioning (often referred to as CART) services, or other assistive listening devices.<sup>18</sup> Since COVID-19 and the switch to online education, the National Association of the Deaf (NAD) reports receiving an influx of complaints that schools are no longer adequately providing such accommodations.<sup>19</sup> Failure to provide students who are D/deaf with appropriate accommodations to achieve equal education is unacceptable and a violation of IDEA.

The COVID-19 pandemic and the switch to online learning jeopardize both the accessibility and the quality of education for students who are D/deaf.<sup>20</sup> Therefore, in order to protect the education of students who are D/deaf and uphold the purpose of IDEA, reform to IDEA is necessary. This Note will first argue that Congress should amend IDEA to expressly declare that the *Board of Education v. Rowley*<sup>21</sup> majority opinion, which holds that schools do not have to provide students who are disabled with an equally beneficial education to the student's peers who are non-disabled, is no longer the correct interpretation. Congress must explicitly state in a reauthorization of IDEA that IDEA entitles students with disabilities to an equally beneficial education to that given to their peers who are non-disabled. Next, this Note will argue that in light of the COVID-19 pandemic and the popularization of virtual learning, Congress should amend IDEA to expressly apply in all online models of education.

## II. BACKGROUND

The history of D/deaf education is complex, as are the various identities people who are D/deaf claim. In order to understand the need for an amendment to IDEA it is critical to examine many aspects of education for students who are D/deaf. As a result, the background in this Note addresses the distinction between Deaf, deaf, and hard of hearing, the history of D/deaf education, protective laws concerning people with disabilities, and the impact COVID-19 had on the education for children who are D/deaf.

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<sup>18</sup> *Position Statement: Educating PreK–12 Deaf and Hard of Hearing Students During the COVID-19 Outbreak*, NAT'L ASS'N DEAF, <https://www.nad.org/position-statement-educating-prek-12-deaf-and-hard-of-hearing-students-during-the-covid-19-outbreak> [https://perma.cc/S95F-3Y75] (outlining the position of NAD concerning COVID-19 and Pre-K–12 Education) [hereinafter *Deaf and Hard of Hearing Students*].

<sup>19</sup> *Id.*

<sup>20</sup> BrieAnna J. Frank, *He Felt at Home at a School for Deaf Kids. Then Came the Pandemic—and Online Learning*, ARIZ. CENT., (Oct. 21, 2020, 7:00 AM), <https://www.azcentral.com/story/news/local/phoenix/2020/10/21/even-school-deaf-kids-online-learning-struggle-deaf-boy-covid-19/3573791001> [https://perma.cc/NK6T-RP3R] (explaining that online learning has a “hearing-centric attitude” and the mother of a student who is D/deaf describes the struggles of her child and how the pandemic negatively impacted his educational progress).

<sup>21</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982) (“[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”).

A. *The Distinction Between Deaf, deaf, and Hard of Hearing*

It is important to recognize that people who are D/deaf constitute a diverse group.<sup>22</sup> A person who identifies as D/deaf could label themselves Deaf with a capital D,<sup>23</sup> deaf with a lower case d, hard of hearing, biculturally D/deaf, or marginally D/deaf.<sup>24</sup> The most commonly accepted identities for a person who is D/deaf are Deaf with a capital D, deaf with a lowercase d, and hard of hearing.<sup>25</sup>

The term Deaf with a capital D refers to the group of people who have a strong Deaf identity and who consider themselves to be part of a linguistic and cultural minority.<sup>26</sup> Individuals who identify as Deaf with a capital D, do not consider deafness to be a disability.<sup>27</sup> In fact, the American Sign Language (ASL) sign that translates roughly to “disability” does not include being Deaf.<sup>28</sup> Professors Carol Padden and Tom Humphries explain:

[W]e use the lowercase *deaf* when referring to the audiological condition of not hearing, and the uppercase *Deaf* when referring to a particular group of deaf people who share a language – American Sign Language (ASL) – and a culture. The members of this group . . . have inherited their sign language, use it as a primary means of communication among themselves, and hold a set of beliefs about themselves and their connection to the larger society. We distinguish them from, for example, those who find themselves losing their hearing because of illness, trauma or age; although these people share the condition of not hearing, they do not have access to the knowledge, beliefs, and practices that make up the culture of Deaf people.<sup>29</sup>

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<sup>22</sup> SOLEDAD ZÁRATE, CAPTIONING AND SUBTITLING FOR D/DEAF AND HARD OF HEARING AUDIENCES 21 (2021) (explaining the diversity within the D/deaf identity).

<sup>23</sup> When explaining the difference between Deaf with a capital D and deaf with a lowercase d, I will note whether I am referring to Deaf or deaf by adding “with a capital D” or “with a lowercase d” to each identity.

<sup>24</sup> Diana Burke, *Deaf Education: The Past, Present, and Future*, JMU SCHOLARLY COMMONS 1, 5 (2019) (on file at <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1688&context=honors201019> [<https://perma.cc/3Z4M-9BQ3>]) (explaining the multiple D/deaf identities).

<sup>25</sup> *Community and Culture—Frequently Asked Questions*, NAT’L ASS’N DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions> [<https://perma.cc/8EES-5VKJ>] (explaining the most common D/deaf identities).

<sup>26</sup> ZÁRATE, *supra* note 22, at 21.

<sup>27</sup> *Id.*

<sup>28</sup> Harlan Lane, *Do Deaf People Have a Disability?*, 2 SIGN LANGUAGE STUD. 356, 368 (2002).

<sup>29</sup> CAROL PADDEN & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE 2 (1988) (explaining the difference between Deaf and deaf).

The main difference between Deaf with a capital D and deaf with a lowercase d is the cultural connection with the hearing society.<sup>30</sup> Generally individuals who view themselves as Deaf with capital D, identify with Deaf culture.<sup>31</sup> Whereas, people who identify as deaf with a lowercase d see themselves as a part of hearing culture.<sup>32</sup> People who identify as lower case deaf view their hearing loss as a medical condition, and their primary choice of communication is commonly not ASL but instead some form of oral communication.<sup>33</sup> The distinction between deaf with a lower case d and Deaf with a capital D is often confusing as many people without a hearing impairment are unaware of the variety of D/deaf identities and Deaf culture.<sup>34</sup> Additionally, linguistically Deaf with a capital D and deaf with a lowercase d are only noticeably different in writing and not orally distinguishable, which can create further confusion between the two identities.

Individuals who are D/deaf may also claim other identities, such as hard of hearing, bicultural D/deaf, and marginally D/deaf. Hard of hearing is a separate identity from Deaf with a capital D or deaf with a lowercase d, as people who identify as hard of hearing typically have mild to moderate hearing loss,<sup>35</sup> are often individuals who are newly D/deaf,<sup>36</sup> and commonly view themselves as part of both the hearing and D/deaf world.<sup>37</sup> The bicultural D/deaf identity signifies a positive identification with both Deaf and hearing cultures and the marginal D/deaf identity signifies a lack of identification with either Deaf or hearing cultures.<sup>38</sup> While different categories of deafness exist there is a fluidity between the many labels as there is no “one-size-fits all.”

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Ahmed Khalifa, *What's the Difference Between Deaf with Capital 'D' & Deaf with Small 'D'?*, HEAR ME OUT CC (Dec. 29, 2018), <https://hearoutecc.com/capital-d-small-d-deaf> [<https://perma.cc/WFB6-4EV4>] (explaining the difference between Deaf and deaf).

<sup>34</sup> Sara Nović, *The Hearing World Must Stop Forcing Deaf Culture to Assimilate*, NBC NEWS (Oct. 20, 2017, 12:04 PM), <https://www.nbcnews.com/think/opinion/hearing-world-must-stop-forcing-deaf-culture-assimilate-ncna812461> [<https://perma.cc/KPY2-HPWW>] (explaining Deaf culture and how many hearing individuals are unaware of the Deaf culture).

<sup>35</sup> *The Difference Between d/Deaf and Hard-of-Hearing*, AI MEDIA, <https://www.ai-media.tv/the-difference-between-d-deaf-and-hard-of-hearing-2> [<https://perma.cc/8AR3-V6R2>] (explaining the hard of hearing identity).

<sup>36</sup> PADDEN & HUMPHRIES, *supra* note 29, at 6 (explaining the hard of hearing identity).

<sup>37</sup> Victor Collazo, *Who Am I? The Deaf and Hard of Hearing Identify Themselves*, CYRACOM (July 7, 2014), <https://interpret.cyracom.com/blog/deaf-hard-hearing-identify> [<https://perma.cc/5AJ8-MUAL>].

<sup>38</sup> Madeleine Chapman & Jesper Dammeyer, *The Relationship Between Cochlear Implants and Deaf Identity*, 162 NO. 4 AM. ANNALS DEAF 319, 320 (2017) (explaining how cochlear implants impact the Deaf identity).



How people identify themselves is personal and may be the result of the degree to which they can hear, when and how they lost their hearing, their upbringing, or their preferred methods of communication.<sup>39</sup> There are an estimated eleven million individuals in the United States that consider themselves to fall within one of the D/deaf identities.<sup>40</sup> Part of the reason why there are so many D/deaf identities is because people are either born D/deaf or lose their hearing at various points in life.<sup>41</sup> Deafness can be genetic and it can also result from birth asphyxia, low-birth weight, chronic ear infections, meningitis and other infections, trauma to the ear or head, nutritional and deficiencies.<sup>42</sup>

Additionally, family upbringing impacts D/deaf identities as deafness — while being genetic in some circumstances — is more commonly a culture one does not share with their parents.<sup>43</sup> Only 4% of children who are D/deaf are born to one or more parents who are D/deaf.<sup>44</sup> Therefore, over 95% of children who are D/deaf grow up in hearing households where more often than not they are the first individuals who are D/deaf that their families have personally known.<sup>45</sup> The majority of parents without a hearing impairment, upon learning their child is D/deaf, turn to medical professionals who inform parents of medical devices that are available, such as cochlear implants (CIs).<sup>46</sup>

CIs are controversial in the Deaf community, as the Deaf community views CIs as “the ultimate invasion of the ear, the ultimate denial of deafness, the ultimate refusal to let Deaf children be [D]eaf.”<sup>47</sup> However, the medical community sees CIs as a device that can offer people who are D/deaf access

<sup>39</sup> ZÁRATE, *supra* note 22, at 23 (explaining the reasons for the diversity of D/deaf identities).

<sup>40</sup> *Deaf Demographics and Employment: Demographics Statistics*, RIT LIBRS., <https://infoguides.rit.edu/c.php?g=380750&p=2706325> [https://perma.cc/399L-LNXJ] (explaining the number of individuals who identify as D/deaf).

<sup>41</sup> *Deafness and Hearing Loss*, WORLD HEALTH ORG. (Apr. 1, 2021), <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss> [https://perma.cc/2MS2-TD3C], (explaining the various ways individuals become D/deaf).

<sup>42</sup> *Id.*

<sup>43</sup> Ross E. Mitchell & Michael A. Karchmer, *Chasing the Mythical Ten Percent: Parental Hearing Status of Deaf and Hard of Hearing Students in the United States*, 4 GALLAUDET U. PRESS 138, 157 (2004).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> James McWilliams, *When Deafness is Medicalized inside the Culture Clash over Cochlear Implants*, PAC. STANDARD (Jan. 6, 2018), <https://psmag.com/news/the-culture-clash-over-cochlear-implants> [https://perma.cc/J6U2-PQAC] (explaining the medical communities support of Cochlear Implants).

<sup>47</sup> Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 33 (1997) (explaining the D/deaf communities view on Cochlear Implants).



to spoken language as in some cases, an implant can help an individual make out certain sounds.<sup>48</sup> Whether an individual who is D/deaf has CIs and the age they were when they had them surgically implanted often impacts how they view their D/deaf identity.<sup>49</sup>

Another factor that plays a role in how an individual who is D/deaf identifies themselves is their preferred method of communication.<sup>50</sup> Communication for individuals who are D/deaf includes: residual hearing, spoken English often augmented with a hearing aid or CIs, ASL, cued speech, speech reading (lip reading), and gestures.<sup>51</sup> Identity and communication access often go hand-in-hand as “when children are raised according to the limitation of each of the labels, it can also influence the way they learn to communicate or receive information.”<sup>52</sup> There is no “one-size-fits-all” approach to communication in the same way there is no one D/deaf identity.<sup>53</sup>

Lastly, when considering different preferred methods of communication it is critical to recognize that English and ASL are two different languages.<sup>54</sup> It is often mistakenly believed that ASL is not a language, but instead “English on the hands” or “pictures in the air.”<sup>55</sup> However, ASL is its own unique language, complete with its own grammar and structure that is unrelated to English.<sup>56</sup> William Stokoe, Carl Croneberg, and Dorothy Casterline were the first to break ASL down into its linguistic components in their work “Dictionary of American Sign Language” in 1965.<sup>57</sup> This work

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<sup>48</sup> McWilliams, *supra* note 46.

<sup>49</sup> Chapman & Danmeyer, *supra* note 38, at 320 (“Children did not evince identity as either deaf or hearing but were somewhere between.”).

<sup>50</sup> ZÁRATE, *supra* note 22, at 23 (explaining how D/deaf people communicate impacts their D/deaf identity).

<sup>51</sup> *Communicating with the Deaf: Tip Sheet*, NAT’L DEAF CTR., <https://www.nationaldeafcenter.org/sites/default/files/Communicating%20with%20Deaf%20Individuals.pdf> [<https://perma.cc/UF2R-HU39>] (explaining the various ways individuals who are D/deaf communicate).

<sup>52</sup> Nichole Hickman, *Deaf Awareness: The Many Ways to Be*, AVA (Sept. 24, 2021), <https://blog.ava.me/deaf-awareness-the-many-ways-to-be> [<https://perma.cc/H67P-RLE2>].

<sup>53</sup> *Communicating with the Deaf*, *supra* note 51.

<sup>54</sup> *American Sign Language*, NAT’L INST. ON DEAFNESS & OTHER COMM’N DISORDERS, <https://www.nidcd.nih.gov/health/american-sign-language> [<https://perma.cc/5P28-RBSQ>] (“ASL is a language completely separate and distinct from English.”).

<sup>55</sup> Michelle Jay, *Deaf Culture Essentials*, START ASL (Feb. 15, 2021), <https://www.startasl.com/deaf-culture> [<https://perma.cc/4SXG-EMVY>] (explaining the cultural significance of ASL).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

established ASL as a language as unique and concrete as any other and it is the official language of the Deaf.<sup>58</sup>

### B. *The History of D/deaf Education*

D/deaf education in the United States began in the early 1800s.<sup>59</sup> Prior to then, there was no standard sign language and no schooling options for children who were D/deaf.<sup>60</sup> Instead, there were various signing systems created in the rare D/deaf communities, now known as “old ASL.”<sup>61</sup> In 1814, Dr. Thomas Hopkins Gallaudet decided to teach his neighbor, Alice Cogswell, a child who was D/deaf, to communicate.<sup>62</sup> Gallaudet traveled to Europe, where there was a more concrete history of D/deaf education,<sup>63</sup> and returned with Laurent Clerc, a teacher who identified as D/deaf who taught students who were D/deaf in France.<sup>64</sup> In 1817, the two men along with Alice’s father, Mason Fitch Cogswell, founded the first free school for students who are D/deaf, the Connecticut Asylum for the Education and Instruction of Deaf and Dumb Persons.<sup>65</sup> Today, this school is known as the American School for the Deaf.<sup>66</sup> At the formation of the school, students traveled from all over the United States and brought signs they learned or created from home with them, which, when combined with the signs from French Sign Language that Gallaudet learned from Clerc, created the ASL

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<sup>58</sup> *Id.*

<sup>59</sup> Michelle Jay, *Hist. of Am. Sign Language*, START ASL (Feb. 15, 2021), <https://www.startasl.com/history-of-american-sign-language> [https://perma.cc/BP9X-4VMK].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; Russell S. Rosen, *Descriptions of the American deaf Community, 1830-2000: Epistemic Found.*, 23 *DISABILITY & SOC’Y* 129, 133 (2008) (Prior to “the formation of schools for the deaf in America in the early 19<sup>th</sup> Century, with rare exceptions, deaf people lived under largely solitary conditions. After the formation of such schools they became a community with their own language, organizations and cultural traditions.”).

<sup>62</sup> Jay, *supra* note 59 (explaining that Gallaudet and Alice first communicated through hand signs they made up together, and then Gallaudet went to Europe to learn a more concrete language structure).

<sup>63</sup> *1000 BC–1700*, DEAF HIST. EU., <https://deafhistory.eu> [https://perma.cc/4XWK-PAEE] (explaining that the first school for students who were D/deaf was in France in 1755).

<sup>64</sup> Jay, *supra* note 59 (explaining the development of schools for the Deaf and ASL).

<sup>65</sup> *Cmty. & Culture—Frequently Asked Questions*, NAT’L ASS’N DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions> [https://perma.cc/NCF3-K4H9] (explaining that “deaf and dumb” is offensive to people who are D/deaf and is no longer used).

<sup>66</sup> Barry A. Crouch & Brian H. Greenwald, *Hearing with the Eye: The Rise of Deaf Educ. in the U.S.*, in *THE DEAF HISTORY READER* 24, 39 (John Vickrey Van Cleve ed., 2007); *Fla. Health Deafness Terminology & Myths*, FLA. DEP’T HEALTH (Mar. 10, 2021, 12:14 PM) <https://www.floridahealth.gov/provider-and-partner-resources/fcdh9/general-information/deafness-terminology-myths.html> [https://perma.cc/BZF9-ESGR] (explaining why “deaf and dumb” is no longer an appropriate way to describe D/deaf individuals).

that is known today.<sup>67</sup> By founding the school, Gallaudet, Clerc, and Cogswell formally started both an established sign language and D/deaf education in America.<sup>68</sup>

The creation of a school for children who are D/deaf “led rapidly to the creation of a strong sense of community and the development of a common culture.”<sup>69</sup> People who identified as D/deaf began to capitalize the word Deaf, and by doing so, raised it from a medical condition to a way of life.<sup>70</sup> ASL became the connecting language within Deaf culture.<sup>71</sup> As a result of the creation of the first school for the D/deaf and the beginning of Deaf culture, many schools for the D/deaf followed suit. One of these schools included the first college for students who are D/deaf, Gallaudet College in 1864, which today is known as Gallaudet University.<sup>72</sup> At schools for the D/deaf, teachers celebrated deafness by signing with students and not placing an emphasis on students’ oral communication skills.<sup>73</sup>

While the D/deaf community and their allies were cultivating a cultural identity centered around ASL, others were furthering a narrative that individuals who are D/deaf are less capable and defective.<sup>74</sup> One of these individuals was Alexander Graham Bell, who in the 1860s claimed that ASL was inferior to English and pushed for the practice of oralism to be the main teaching method in schools for the D/deaf.<sup>75</sup> Oralism is the pedagogical approach of suppressing sign language in favor of using lip reading, speech,

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<sup>67</sup> Jay, *supra* note 59; Crouch & Greenwald, *supra* note 66, at 24 (explaining that in 1815, John Braidwood opened a school for deaf children in Virginia; however, the school folded within a few years).

<sup>68</sup> Jay, *supra* note 59.

<sup>69</sup> Caroline Jackson, *The Individuals with Disabilities Education Act and its Impact on the Deaf Community*, 6 STAN. J.C.R. & C.L. 355, 359 (2010) (explaining the impact of schools for the Deaf on D/deaf students).

<sup>70</sup> JANET CERNEY, *DEAF EDUCATION IN AMERICA: VOICES OF CHILDREN FROM INCLUSION SETTINGS 15–16* (2007) (explaining the impact schools for the Deaf had on the D/deaf community).

<sup>71</sup> Jackson, *supra* note 69, at 359.

<sup>72</sup> *History & Traditions*, GALLAUDET U., <https://www.gallaudet.edu/about/history-and-traditions> [<https://perma.cc/ZY7D-PAAE>] (explaining how Gallaudet University was the first university for D/deaf students).

<sup>73</sup> Joseph Christopher Hill, *Language Attitudes in the American Deaf Community*, 18 SOCIOLINGUISTICS DEAF CMTYS 26 (2012).

<sup>74</sup> Brian H. Greenwald, *Alexander Graham Bell and His Role in Oral Education*, DISABILITY HIST. MUSEUM, <https://www.disabilitymuseum.org/dhm/edu/essay.html?id=59> [<https://perma.cc/C6SS-W9J5>] (explaining the difficulties the Deaf community faced against the hearing community).

<sup>75</sup> Brian H. Greenwald, *The Real “Toll” of A.G. Bell: Lessons about Eugenics*, 9 SIGN LANGUAGE STUD. 258, 262–63 (2009) (explaining that Alexander Graham Bell’s efforts to end Deafness is rooted in eugenics).

and mimicking the mouth shapes and breathing patterns of speech.<sup>76</sup> Oralism directly threatened the D/deaf communities and the ability for students who are D/deaf to succeed as it requires learning and speaking a language the students could not hear.<sup>77</sup> Many communities forced children who were D/deaf to assimilate into hearing schools that required them to learn English and forbade the use of ASL.<sup>78</sup> In 1880, 164 delegates gathered for the Second International Congress on the Education of the Deaf, and together they passed a resolution banning sign language in schools in favor of oralism.<sup>79</sup> Of the 164 delegates, only one was D/deaf.<sup>80</sup>

Following the conference, schools for the D/deaf underwent major changes and the dominance of oralism had a devastating impact on thousands of students who were D/deaf.<sup>81</sup> Oralism is harmful because it requires students who are D/deaf to utilize lipreading as their sole method of communication.<sup>82</sup> Lipreading is mostly contextual guess work and forced children who are D/deaf to “learn something about sound when the eyes were not meant to hear.”<sup>83</sup> As an overwhelming majority of children who are D/deaf have parents who are hearing, a large number of these parents enrolled their children in oral schools as these hearing parents were unfamiliar with a positive D/deaf identity and unable to teach ASL at home.<sup>84</sup>

Fortunately, the shift to oralism did not destroy the D/deaf community and Deaf culture.<sup>85</sup> Students who were D/deaf still utilized ASL everywhere

<sup>76</sup> Alexander Graham Bell, *supra* note 74 (defining “oralism”).

<sup>77</sup> Rosen, *supra* note 61 at 133; Lane, *supra* note 28, at 370 (explaining that oralism has its roots in eugenics as the central purpose of the large-scale oral education of Deaf children was, according to U.S. leaders, to discourage reproduction by Deaf people by discouraging their socializing and marriage).

<sup>78</sup> Rosen, *supra* note 61, at 133; Lane, *supra* note 28, at 370.

<sup>79</sup> Allegra Ringo, *Understanding Deafness: Not Everyone Wants to be Fixed*, ATLANTIC (Aug. 9, 2013), <https://www.theatlantic.com/health/archive/2013/08/understanding-deafness-not-everyone-wants-to-be-fixed/278527> [<https://perma.cc/382W-Y4ED>] (explaining that the resolution was passed to “encourage spoken language skills, and thus [restore] the deaf-mute to society.”).

<sup>80</sup> *Id.*

<sup>81</sup> Hill, *supra* note 73, at 26 (explaining the impact of oralism on D/deaf education).

<sup>82</sup> *Id.*

<sup>83</sup> Rachel Kolb, *Seeing at the Speed of Sound*, STAN. MAG. (Mar./Apr. 2013), <https://stanfordmag.org/contents/seeing-at-the-speed-of-sound> [<https://perma.cc/25S4-6HJ4>] (explaining from the perspective of a D/deaf individual the struggles of lipreading).

<sup>84</sup> Mitchel & Karchmer, *supra* note 43, at 157 (explaining that only an estimated four percent of D/deaf children are born to D/deaf parents); Jackson, *supra* note 69, at 360 (“As the primary decision makers in the lives of more than ninety percent of deaf children, a growing number of these [hearing] parents began enrolling their children in oral schools, with many Deaf families following suit.”).

<sup>85</sup> PADDEN & HUMPHRIES, *supra* note 29, at 5–6 (explaining how sign language was still used outside of the classroom in Deaf schools).

but the classroom.<sup>86</sup> Additionally, oral schools still served a crucial cultural role as they brought together children who identified as D/deaf.<sup>87</sup> Thus, Deaf culture and ASL were able to continue despite the efforts of those advocating for oralism.

Decades later, attention turned to children who were D/deaf who were falling behind academically.<sup>88</sup> Oralism was not working.<sup>89</sup> Researchers realized that exposure to sign language could enhance children's ability to understand academic material.<sup>90</sup> As a result, schools for the D/deaf reintegrated ASL back into their classrooms in the 1960s.<sup>91</sup> However, what this means is that for almost a hundred years a damaging and ineffective teaching method, oralism, was pushed on D/deaf students.

Despite setbacks like the push for oralism, since the beginning of D/deaf education to now the D/deaf community has made massive strides. For example, due to efforts of those in the D/deaf community there are now more than one hundred and eight schools dedicated to teaching K–12 students who are D/deaf,<sup>92</sup> ASL is now an acknowledged language,<sup>93</sup> and there are several policies and laws implemented to protect the rights of people who are D/deaf, such as ADA, the Rehabilitation Act, and IDEA.<sup>94</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Hill, *supra* note 73, at 26.

<sup>89</sup> Stephen P. Quigley, *The Deaf and the Hard of Hearing*, 39 REV. EDUC. RSCH. 103, 115–16 (1969).

<sup>90</sup> *Id.*

<sup>91</sup> Hill, *supra* note 73, at 26.

<sup>92</sup> *Schools and Programs for Deaf and Hard of Hearing Students in the U.S.*, LAURENT CLERC NAT'L DEAF EDUC. CTR., <https://web.archive.org/web/20220802094315/https://clercenter.gallaudet.edu/national-resources/info/info-to-go/national-resources-and-directories/schools-and-programs.html> [https://perma.cc/4GYW-LKJS].

<sup>93</sup> Josh Chamot, *American Sign Language Spoken Here*, NAT'L SCI. FOUND. (June 25, 2003), [https://www.nsf.gov/discoveries/disc\\_summ.jsp?cntn\\_id=100168](https://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=100168) [https://perma.cc/P3S3-R8QB].

<sup>94</sup> See generally Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2018) (prohibiting discrimination against people with disabilities in several areas, including employment, transportation, public accommodations, communications, and access to state and local government's programs and services); Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (2018) (prohibiting discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment and in the employment practices of federal contractors); Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (2018) (ensuring students with disabilities are provided with Free Appropriate Public Education that is tailored to their individual needs).

Today, there are an estimated 308,000 D/deaf students between the ages of five and seventeen in the United States.<sup>95</sup> Approximately 75,000 of these students are on individualized education plans (IEPs) and of that 75,000 roughly 20.8% are in specialized schools and programs for students who are D/deaf.<sup>96</sup> The remaining 77.4% of the 75,000 D/deaf students who have IEPs are mainstreamed in general education.<sup>97</sup> Additionally, there are approximately 233,648 D/deaf students who are mainstreamed without IEPs.<sup>98</sup>

Many factors play a role in a parent's decision to enroll their child who is D/deaf either in a school for the D/deaf or a mainstreamed school where students who are D/deaf are integrated with students who are hearing.<sup>99</sup> A major factor is the different advantages and disadvantages schools for the D/deaf and mainstreamed schools offer. For example, in a school for the D/deaf the student who is D/deaf will be one of many students who are D/deaf, teachers are more likely to be D/deaf, and ASL is the main form of communication.<sup>100</sup> But it may be difficult to find such a school in a nearby town.<sup>101</sup> In integrated schools, a student who is D/deaf may be the only student who is D/deaf in the school, teachers are rarely D/deaf, and little to no ASL is used.<sup>102</sup> But these mainstreamed schools are widely available.<sup>103</sup> Other factors that impact a parent's decision include the parent's involvement or understanding of D/deaf culture,<sup>104</sup> the child's level of

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<sup>95</sup> *American Community Survey: Disability Characteristics*, U.S. CENSUS BUREAU (2018) <https://data.census.gov/cedsci/table?q=hearing%20impairment&hidePreview=false&tid=ACSS11Y2018.S1810&vintage=2018> [https://perma.cc/3P4T-2BR6].

<sup>96</sup> *Table 204.30. Children 3 to 21 Years Old Served Under Individuals with Disabilities Education Act (IDEA), Part B, by Type of Disability: Selected years, 1976–77 through 2017–18*, U.S. DEP'T OF EDUC. (Apr. 20, 2020), [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_204.30.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_204.30.asp) [https://perma.cc/55E7-7J5A].

<sup>97</sup> *Id.*

<sup>98</sup> *American Community Survey: Disability Characteristics*, *supra* note 95.

<sup>99</sup> *School Placement Considerations for Students Who are Deaf and Hard of Hearing*, HANDS & VOICES, <https://handsandvoices.org/needs/placement.html> [https://perma.cc/T55R-MB2K] (explaining that parents have the responsibility of picking the type of school for their Deaf, deaf, or hard of hearing child).

<sup>100</sup> Ahmed Khalifa, *Mainstream School vs Deaf School: What's the Difference and the Respective Pros & Cons?*, HEAR ME OUT! [CC] (Dec. 18, 2019) <https://hear-me-out.com/mainstream-school-vs-deaf-school> [https://perma.cc/VD3S-P922].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Position Statement on Schools for the Deaf*, NAT'L ASS'N OF THE DEAF, <https://www.nad.org/about-us/position-statements/position-statement-on-schools-for-the-deaf> [https://perma.cc/WT2E-BBDR].

hearing loss,<sup>105</sup> use of speech,<sup>106</sup> socioeconomic background, and more. While selecting the school for a child who is D/deaf is a complex matter, disability law entitles the child to receive a free and appropriate education, regardless of the type of school they attend.<sup>107</sup>

### C. *The Protective Laws*

In 1975, Congress passed the Education of All Handicapped Children Act,<sup>108</sup> later renamed the Individuals with Disabilities Education Act otherwise known as IDEA.<sup>109</sup> Congress passed IDEA to ensure educational access and rights for children with disabilities.<sup>110</sup> IDEA creates an affirmative right for all children with disabilities to receive a free and appropriate public education (FAPE).<sup>111</sup> IDEA defines FAPE as a:

[S]pecial education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the [required] individualized education program . . . .<sup>112</sup>

In addition to a FAPE, IDEA requires that each student receives their education in the least restrictive environment (LRE).<sup>113</sup> States have to ensure “to the maximum extent appropriate,” that they place students with disabilities in an educational setting with their peers who are non-disabled. Furthermore, states can remove students with disabilities from the general

<sup>105</sup>Howard W. Francis et al., *Trends in Educational Placement and Cost-Benefit Considerations in Children with Cochlear Implants*, 125 ARCH OTOLARYNGOLOGY HEAD NECK SURG. 499, 503–04 (1999) (explaining that children with lower ability to hear are more likely to rely on ASL or a form of manual communication and attend schools for the Deaf and those with CIs are more likely to be mainstreamed).

<sup>106</sup>Yuelin Li et al., *Parental Decision Making and the Choice of Communication Modality for the Child Who is Deaf*, 157 ARCH PEDIATR. ADOLESC. MED. 162, 164 (concluding that parents who chose to have their Deaf, deaf, or hard of hearing child communicate orally preferred a “regular class in a public school.”).

<sup>107</sup>Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (2004).

<sup>108</sup>*Id.* §§ 1400-85.

<sup>109</sup>42 U.S.C. § 12101 (1990) (changing the name from Education for All Handicapped Children Act to the Individuals with Disabilities Education Act).

<sup>110</sup>Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 612(1)(B), 89 Stat. 773, 780 (1975).

<sup>111</sup>Pub. L. No. 94-142 § 4(a)(4), 89 Stat. 775.

<sup>112</sup>*Id.*

<sup>113</sup>*Id.* § 612 (5)(B), 89 Stat. 781 (current version at 20 U.S.C. §1412(a)(5)(A) (2006)). The current Code of Federal Regulations tracks the statutory language verbatim.



education setting only “when the nature or the severity of the handicap” is such that the student cannot access an education.<sup>114</sup>

To achieve a FAPE in the LRE, each school has to assemble a team to design an IEP for each student.<sup>115</sup> Such a team consists of “a representative of the local educational agency, . . . the teacher, [and] the parents.”<sup>116</sup> According to IDEA, the student’s team has to meet annually and create a set of educational goals for the student, design support services appropriate to meet these goals, and continuously reassess the student’s progress over the course of the year.<sup>117</sup>

The case, *Board of Education v. Rowley*,<sup>118</sup> determined the meaning of the term “appropriate” within a FAPE.<sup>119</sup> *Rowley* centered around whether IDEA required a school to provide an ASL interpreter to a child who identified as D/deaf.<sup>120</sup> The child was “advancing easily from grade to grade” but was understanding “considerably less of what goes on in class than she could if she were not deaf.”<sup>121</sup> The Supreme Court held that schools are not obligated to “maximize the potential” of every child but only need to create a “personalized instruction [plan] with sufficient support services to permit the handicapped child to benefit educationally from that instruction.”<sup>122</sup> Additionally, the Court held that the IEP for the student with a disability does not have to have an educational benefit equal to the student’s peers who are non-disabled.<sup>123</sup> In reaching these holdings the Court in *Rowley* relied on cases such as *Pennsylvania Association for Retarded Children v. Commonwealth (PARC)*<sup>124</sup> and *Mills v. Board of Education*.<sup>125</sup> *Rowley* interpreted *PARC* and *Mills* to both support the notion that IDEA guarantees students with disabilities access to education but not equal educational benefits with students who are non-

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<sup>114</sup> *Id.*; see also 34 C.F.R. § 300.114 (2010).

<sup>115</sup> Pub. L. No. 94-142 § 4(a)(4)(18), 89 Stat. at 775.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176 at 185 (1982).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (discussing how the student here was a deaf child born to deaf parents who wanted her to have a sign language interpreter instead of the school relying on her to lipread to learn).

<sup>121</sup> *Id.* at 185, 210.

<sup>122</sup> *Id.* at 200, 203.

<sup>123</sup> *Id.* at 192 (“[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”).

<sup>124</sup> *Pa. Ass’n for Retarded Children v. Pennsylvania (PARC)*, 343 F. Supp. 279, 297 (E.D. Penn. 1972) (holding that public schools cannot exclude children with disabilities).

<sup>125</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874-875 (D.D.C. 1972) (holding that public schools cannot exclude children with disabilities).

disabled. However, the foundation of *PARC* and *Mills* came from *Brown v. Board of Education*<sup>126</sup> and all three cases focused on including students into public school systems. None of the three cases that form the foundation of *Rowley* support withholding equal education from students with disabilities.

The dissent in *Rowley* pointed out structural flaws in the majority's argument as the dissent focused on what the majority chose to leave out of their analysis.<sup>127</sup> The majority failed to acknowledge the following sources: (1) the act, IDEA, itself which states it will provide a "full educational opportunity to all handicapped children," (2) Senate reports that say the Act "guarantee[s] that handicapped children are provided equal educational opportunity", and (3) quotes from one of the sponsors of the Act, Senator Stafford who said, "[W]e can all agree that education [given to a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive."<sup>128</sup> Despite these clear flaws in the majority's analysis, *Rowley* remains good law today, meaning children with disabilities are still not entitled to the same level of educational opportunities that their classmates who are non-disabled receive.<sup>129</sup>

Additionally, there has been litigation to determine the issue of placement in the LRE. Several circuit courts, such as the Fifth Circuit in *Daniel R.R. v. State Board of Education*,<sup>130</sup> found that the LRE provision in IDEA had a "strong preference in favor of mainstreaming."<sup>131</sup> Courts have also found that academic opportunities are not the sole factor in deciding whether a child with a disability attends a mainstream school.<sup>132</sup> Other factors, such as nonacademic experiences may favor mainstream placement,

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<sup>126</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954) (holding public schools cannot exclude students based on their race).

<sup>127</sup> *Id.* at 212 (White, J., dissenting).

<sup>128</sup> *Id.* at 213–14.

<sup>129</sup> *See* *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947–51 (9th Cir. 2010) (holding that the Court's decision in *Rowley* remains good law).

<sup>130</sup> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989).

<sup>131</sup> *Id.* at 1044 (citing § 1412(5)(B) of IDEA as establishing a preference for mainstreaming); *see also* *A.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987) (stating that § 1412(5) "significantly qualifies the mainstreaming requirement by stating that it should be implemented 'to the maximum extent appropriate,' and that it is inapplicable where education in a mainstream environment 'cannot be achieved satisfactorily'"); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) ("The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference.").

<sup>132</sup> *Daniel R.R.*, 874 F.2d at 1049.

even if the student would receive greater academic benefits from a specialized setting, such as a school for the D/deaf.<sup>133</sup>

Litigation regarding FAPE and LRE has resulted in a lop-sided standard, where “integration must be absolutely maximized, [but] the actual education provided need only satisfy the ‘basic’ floor of an adequate educational opportunity.”<sup>134</sup> *Springdale School District v. Grace*<sup>135</sup> was one of the earliest cases to balance the competing provisions.<sup>136</sup> In *Springdale*, parents sued for the right of their child who was D/deaf to go to a local public school instead of the state school for the D/deaf as the school district preferred.<sup>137</sup> Despite the district court’s analysis of the comparative advantages of the Arkansas School for the Deaf, and its holding that the D/deaf school would be best for the child’s educational needs, the Eighth Circuit held that IDEA did not require the best educational environment for the child and that IDEA demonstrated a clear preference for mainstreaming.<sup>138</sup> *Springdale* highlights the tension between the D/deaf community and parents who are hearing.<sup>139</sup> Additionally, the holding of *Springdale* emphasizes the courts’ interpretations of IDEA as valuing educational integration over educational quality.

Following cases such as *Rowley* and *Springdale*, Congress created the Commission on the Education of the Deaf (COED) to develop a report on the state of D/deaf education.<sup>140</sup> The report brought attention to the serious difficulties facing students who are D/deaf.<sup>141</sup> COED attributed the struggles of students who are D/deaf to “inappropriate and inadequate education services” that do not take in all necessary factors when creating an IEP.<sup>142</sup> The necessary factors COED identified included: “communicative needs and preferred mode of communication, linguistic needs, severity of hearing loss, student’s academic level and style of learning, social needs, placement

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<sup>133</sup> *Id.* (“For example, a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide for him. In such a case, the benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically.”).

<sup>134</sup> Jackson, *supra* note 69, at 364.

<sup>135</sup> *Springdale Sch. Dist. No. 50 v. Grace*, 693 F.2d 41, 41 (8th Cir. 1982).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 42.

<sup>139</sup> *Panel Calls Education of Deaf Unsatisfactory*, N.Y. TIMES, Mar. 15, 1988, at Section A, Page 32.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> COMM’N ON EDUC. OF THE DEAF, TOWARD EQUALITY: EDUCATION OF THE DEAF 20 (1988), <http://archive.gao.gov/t2pbat17/135760.pdf> [<https://perma.cc/PQ2Z-5534>].

preference, emotional needs, individual motivation, cultural needs, and family support.”<sup>143</sup>

Additionally, COED received input from parents, students who are D/deaf, and professional personnel that pointed to the LRE provision as the main reason the students were not receiving an appropriate education.<sup>144</sup> COED stated that the Department of Education focused on LRE as the primary provision when determining D/deaf education, but that “the provision of an appropriate education is paramount. LRE, a purely placement issue, is secondary.”<sup>145</sup> Therefore, COED reported that due to misinterpretations of the LRE provision, courts incorrectly placed priority on education integration over education quality.<sup>146</sup>

Congress amended IDEA in 1997, 2004, and 2015. The 1997 amendment included some of the necessary factors COED brought attention to.<sup>147</sup> For example, the amendment requires the team designing the IEP to consider: “the child’s language and communication needs, opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode.”<sup>148</sup> However, the amendment did not require schools to provide for these needs; it simply recommended them. As a result, the standards for FAPE and LRE from *Rowley* and *Daniel R.R.* remained in existence and the 1997 amendment relied on the interpretation of the courts to raise the standards for FAPEs. In *J.L. v. Mercer Unified School District*, the Ninth Circuit held that Congress did not change the definition of FAPE or expressly reject *Rowley*.<sup>149</sup> Thus, the 1997 amendment did not change the existing standard of *Rowley* and *Daniel R.R.*<sup>150</sup>

In 2004, Congress again amended IDEA primarily to align the statute with the No Child Left Behind Act of 2001.<sup>151</sup> This second amendment to

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<sup>143</sup> *Id.* at 20–21.

<sup>144</sup> *Id.* at 25.

<sup>145</sup> *Id.* at 26.

<sup>146</sup> *Id.* at 25.

<sup>147</sup> 20 U.S.C. § 1414(d)(3)(B) (2006).

<sup>148</sup> *Id.*

<sup>149</sup> *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 941 (9th Cir. 2010).

<sup>150</sup> *Id.*

<sup>151</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; Nat’l Ctr. for Learning Disabilities, *Highlights of Key Provisions and Important Changes in the Final Regulations for IDEA 2004*, LD ONLINE, <http://www.ldonline.org/article/11201> [https://perma.cc/R2C6-S74Q] (explaining the implements of 2004 IDEA include: adding procedures for identifying disabled students,

IDEA required schools to provide for the developmental and functional needs of students with disabilities.<sup>152</sup> As a result, the 2004 amendment required schools to consider the communication needs of students who are D/deaf within the context of their developmental and functional needs.<sup>153</sup> However, the 2004 Amendments did not expressly change the existing *Rowley* standard.<sup>154</sup>

Finally, the last time Congress amended IDEA was in 2015.<sup>155</sup> The two major changes in the 2015 amendment were the elimination of the “highly qualified” requirement for special education teachers and the elimination of “essential components of reading instruction” that were the result of the 2004 amendment.<sup>156</sup> Congress amended IDEA in 2015 to align it with Every Student Succeeds Act, an act that requires states to measure students’ performances as an accountability system.<sup>157</sup> These changes in the 2015 amendment did not concern the standards of *Rowley*. Therefore, as IDEA currently stands, the standards of *Rowley* and *Daniel R.R.* remain in place, requiring prioritization of integration and that the education provided must only satisfy the “basic floor” of an adequate educational opportunity.<sup>158</sup>

#### *D. The Impact of COVID-19 on D/deaf Education*

One of the fields most impacted by COVID-19 was education due to widespread school closings and social distancing.<sup>159</sup> As a result of COVID-19, schools moved online and over 93% of households with school-age

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defining special education teachers as needing to be highly qualified, creating reasons for members of IEP teams to be excused from attending IEP meetings, requiring every disabled student that graduates receives a summary of performance); No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301.

<sup>152</sup> 20 U.S.C. § 1400(c)(5)(A)(i), (E) (2006).

<sup>153</sup> *Id.*

<sup>154</sup> *B.D. v. Puyallup Sch. Dist.*, No. C09-5020RJB, 2009 WL 2971753, at \*8 (W.D. Wash. 2009) (“The parents have not shown that the standard under the 2004 amendments to the IDEA would require a standard higher or different than that set forth in *Rowley*.”).

<sup>155</sup> *Amendments to IDEA Made by ESSA*, PARTNERS RES. NETWORK, <https://prntexas.org/amendments-to-idea-made-by-essa> [<https://perma.cc/5PJC-D953>] (explaining the 2015 IDEA amendments).

<sup>156</sup> *Id.*

<sup>157</sup> *IDEA Final Regulations: Aligning IDEA and ESSA to Support Students with Disabilities*, NAT’L CTR FOR LEARNING DISABILITIES, <https://www.nclد.org/news/policy-and-advocacy/idea-final-regulations-aligning-idea-and-essa-to-support-students-with-disabilities> [<https://perma.cc/PGP2-6D6D>].

<sup>158</sup> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982).

<sup>159</sup> Thomas A. Mayes, *The Long, Cold Shadow of Before: Special Education During and After COVID-19*, 30 S. CAL. REV. L. & SOC. JUST. 89, 91 (2021) (explaining the impact of COVID-19 on education).

children reported them using some form of distance learning.<sup>160</sup> The typical form of learning during the pandemic was online learning on a videoconferencing platform like Zoom.<sup>161</sup> Zoom allowed schools to set up virtual videos, conferences, webinars, and live chats.<sup>162</sup> While the move to online learning impacted all students, one group of students disproportionately negatively impacted by online learning were children with disabilities. “COVID-19 is a perfect storm of systemic flaws with people with disabilities at its eye.”<sup>163</sup> However, due to the hearing centric approach to combating problems from COVID-19, COVID-19 specifically disproportionately impacted children who are D/deaf.

Children who are D/deaf learn in a variety of different ways based on their preferred communication method.<sup>164</sup> The various ways to communicate with a student who is D/deaf are with ASL, cued speech, speech reading (lip reading), gestures, or using residual hearing and spoken English augmented with a hearing aid or cochlear implant.<sup>165</sup> Due to protective anti-disability laws, students also learn in schools with the help of auxiliary aids such as interpreters, captioning services, and or assistive listening devices.<sup>166</sup>

Before COVID-19 many schools took a child’s preferred method of communication into account for their IEP planning and provided these students with the necessary appropriate auxiliary aids.<sup>167</sup> However, following the move to online learning, the NAD received many reports that schools and educational programs are not providing students who are D/deaf with the necessary accommodations.<sup>168</sup> COVID-19 has been especially challenging for students who are D/deaf, as many of the responses to the pandemic have been hearing-centric. Therefore, during the pandemic,

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<sup>160</sup> McElrath, *supra* note 15.

<sup>161</sup> William Antonelli, *What is Zoom? A Comprehensive Guide to the Wildly Popular Video-Chatting Service for Computers and Smartphones*, BUS. INSIDER (Nov. 18, 2020, 1:52 PM) <https://www.businessinsider.com/what-is-zoom-guide> [<https://perma.cc/DR2V-S5MU>] (explaining the video conferencing platform Zoom).

<sup>162</sup> *Id.*

<sup>163</sup> Harris, *supra* note 5, at 33.

<sup>164</sup> *Communicating with Deaf Individuals: Tip Sheet*, *supra* note 51 (explaining the different D/deaf communication modes).

<sup>165</sup> *Id.*

<sup>166</sup> *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, U.S. DEPT. OF JUST. & U.S. DEPT. OF EDUC. (Nov. 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf> [<https://perma.cc/J7RM-MSEV>] (explaining auxiliary aids D/deaf students use to communicate with).

<sup>167</sup> *Position Statement: Education PreK-12 Deaf and Hard of Hearing Students During the COVID-19 Outbreak*, *supra* note 18.

<sup>168</sup> *Id.*

learning was generally more difficult for students who are D/deaf than their peers who are hearing.

Two responses to combat challenges from the pandemic have been face masks and online learning through Zoom. Both of these solutions pose substantial obstacles for people who are D/deaf. The Centers for Disease Control and Prevention (CDC) first recommended the use of face masks in any public place at the end of March 2020.<sup>169</sup> While face masks reduce the spread of the COVID-19 virus,<sup>170</sup> they also reduce sound frequencies and the ability to see visual cues, such as facial expressions.<sup>171</sup> Individuals who are D/deaf, regardless of their preferred method of communication, rely on some manner of visual cues to communicate, such as mouth movement or facial expression.<sup>172</sup> Additionally, for some individuals who are D/deaf who can hear certain frequencies, face masks can diminish the already limited sound.<sup>173</sup>

As a result of the problems cloth face masks and traditional medical face masks present, disability rights advocates pushed for transparent face masks.<sup>174</sup> However, the problem with transparent face masks is that the materials used dampen sound more than cloth masks, which makes it a difficult tradeoff for individuals who rely on both residual hearing and visual cues.<sup>175</sup> Furthermore, the issue with transparent face masks is that hearing people need to be the ones wearing those masks, not only people who are D/deaf.<sup>176</sup> So, if only people who are D/deaf make the adjustment to transparent face masks this does not fully solve the issue. The mask issue is also present in schools.<sup>177</sup> While the majority of schools were completely online for the school year of 2020, the mask issue is more relevant for the

<sup>169</sup> Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings in Public*, NPR (Apr. 3, 2020, 5:49 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public> [<https://perma.cc/T3R5-8JWX>] (explaining the CDC recommendations of facemasks to lessen the COVID-19 spread).

<sup>170</sup> *Id.*

<sup>171</sup> Kait Sanchez, *Deaf People Face Unique Challenges as Pandemic Drags On*, VERGE (Jan. 29, 2021, 1:16 PM), <https://www.theverge.com/22254591/deaf-communication-tech-access-coronavirus-isolation> [<https://perma.cc/4A5G-KPJM>] (explaining the challenges of facemasks for D/deaf individuals).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Deaf and Hard of Hearing Students*, *supra* note 18.

<sup>175</sup> Sanchez, *supra* note 171.

<sup>176</sup> *Id.*

<sup>177</sup> *Additional Considerations for the Use of Masks Among K12 Students*, CDC (Sept. 4, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/CFC\\_Guide\\_for\\_School\\_Administrators.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/CFC_Guide_for_School_Administrators.pdf) [<https://perma.cc/FS2E-66A9>] (explaining the CDC's recommendations for masking among K12 students in possible student scenarios).



school year of 2021–2022, as depending on the school masks are either mandated or heavily recommended.<sup>178</sup>

Another challenge arising with the solutions to COVID-19 is the use of Zoom and similar videoconferencing tools for online learning. Zoom is not an appropriate form of education for students who are D/deaf if the student relies on any form of captioning or lipreading.<sup>179</sup> Zoom did not offer free captioning for everyone until the fall of 2021.<sup>180</sup> This means that for months during the beginning of a deadly pandemic where videoconferencing was the most common tool used for communication, Zoom required individuals who are D/deaf to pay for accessibility.<sup>181</sup> Only after media attention highlighted the problem and individuals filed lawsuits did Zoom make free captioning options available.<sup>182</sup> Zoom now offers three ways to use captioning,<sup>183</sup> The host can assign someone to type the captions, a user can pay for third party closed captioning service, and Zoom provides live transcription.<sup>184</sup>

However, there are significant issues with all caption options Zoom provides. Having a person in the Zoom meeting type the captions will almost

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<sup>178</sup> Matt Zalaznick, *Mask Tracker: Last Batch of K-12 Mandates Are Quickly Coming to an End*, DIST. ADMIN. (Mar. 23, 2022), <https://web.archive.org/web/20220323142930/https://districtadministration.com/track-school-mask-rules-requirements-state-by-state> [<https://perma.cc/UN7D-B3NF>] (outlining schools that are and are not requiring facemasks); *Burbio's K-12 School Opening Tracker*, BURBIO (June 25, 2022), <https://about.burbio.com/school-opening-tracker> [<https://perma.cc/G27K-BPTA>] (tracking K–12 school openings in the United States).

<sup>179</sup> *Zoom: Accessibility for Deaf and Hard-of-Hearing*, AM. BAR ASS'N: COMM'N ON DISABILITY RTS., <https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/zoom-accessibility-tips.pdf> [<https://perma.cc/6T3K-A7SA>] (“if you are required to use speech-to-text support for any compliance or accessibility needs in your meetings and webinars, Zoom does not recommend using this live transcription feature but instead a manual captioner or service that may be able to guarantee a specific accuracy.”).

<sup>180</sup> Shari Eberts, *People with Hearing Loss Shouldn't Have to Pay Zoom for Captions*, WASH. POST (Dec. 17, 2020, 12:15 PM), <https://www.washingtonpost.com/opinions/2020/12/17/zoom-captions-hearing-loss-free> [<https://perma.cc/Q92M-C9CE>] (discussing how Zoom makes individuals pay for captions and the impact this has on the Deaf, deaf, and hard of hearing communities).

<sup>181</sup> *Id.*

<sup>182</sup> Mike Ervin, *Smart Ass Cripple: Zoom's Inaccessibility for Hard-of-Hearing and Deaf Users*, PROGRESSIVE MAG. (Jan. 20, 2021, 8:58 AM), <https://progressive.org/latest/zoom-inaccessibility-hard-of-hearing-ervin-210120> [<https://perma.cc/7DGZ-BBGB>] (discussing the lawsuit against Zoom for charging a monthly fee to individuals who need closed captioning).

<sup>183</sup> Jenny Beck, *Create Zoom Captions for Accessibility*, MEDIUM (Apr. 28, 2020), <https://medium.com/voices-through-silence/create-zoom-captions-for-accessibility-8ba1f4ac6ed1> [<https://perma.cc/X8JW-X6AB>] (explaining the captioning options provided by Zoom).

<sup>184</sup> *Id.*

certainly not be sufficient for individuals who are D/deaf.<sup>185</sup> There will be significant lag time with the typing and the average person lacks typing skills necessary for their captioning to be accurate enough for a person who is D/deaf.<sup>186</sup>

Additionally, there are many issues with using a closed captioning service. Closed captioning services are expensive<sup>187</sup> and there are only two main forms available: having a third-party person type everything or automatic speech recognition (ASR).<sup>188</sup> ASR is a form of live transcription and is a recent development.<sup>189</sup> While ASR is a step in the right direction for accessibility, it has many issues.<sup>190</sup> The industry standard for caption accuracy is a 99% accuracy rate.<sup>191</sup> Captions for people who are D/deaf can be incredibly useful, but only if they are accurate and well synchronized, otherwise they do more harm than good.<sup>192</sup> Even a 95% accuracy rate is insufficient and the majority of ASR technology is at 80% accuracy.<sup>193</sup>

For an ASR system to have accuracy rates in the 90s, the following conditions must be met: (1) there is only one speaker, (2) the speaker is reading from a script or speaks with no grammatical or speech errors, (3) all speakers have high-quality microphones and speak at an appropriate distance from the microphone, (4) there is no background noise, and (5) all conditions remain constant.<sup>194</sup> If even two or three of these conditions go unmet, 50% or more of the transcript would be inaccurate.<sup>195</sup> Because of the

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<sup>185</sup> *Zoom Meetings and Live Transcriptions*, U. MELB., <https://www.unimelb.edu.au/accessibility/tutorials/zoom/zoom-meetings-and-closed-captions> [<https://perma.cc/S8HC-36YE>] (explaining how someone in the Zoom room typing captioning will not be accurate enough for a D/deaf individual as captions must be close to 99% accurate to be sufficient).

<sup>186</sup> *Id.*

<sup>187</sup> Eberts, *supra* note 180 (“captioning services running at \$200 per hour or higher”).

<sup>188</sup> Beck, *supra* note 183 (explaining the options with closed captioning).

<sup>189</sup> *The Ultimate Guide to Closed Captioning*, 3PLAY MEDIA, <https://www.3playmedia.com/learn/popular-topics/closed-captioning/#quality> [<https://perma.cc/YVF8-B5FP>] (explaining the industry standard for captioning).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Shari Eberts, *To Create Equal Access, Captions Must be High-Quality*, LIVING WITH HEARING LOSS (July 27, 2021), <https://livingwithhearingloss.com/2021/07/27/to-create-equal-access-captions-must-be-high-quality> [<https://perma.cc/MM82-BZXH>] (explaining the necessity of accurate captions from the perspective of a person who is D/deaf).

<sup>193</sup> *The Ultimate Guide to Closed Captioning*, *supra* note 189 (explains the state of captioning currently).

<sup>194</sup> Jaclyn Leduc, *The Current State of Automatic Speech Recognition*, 3PLAY MEDIA (Dec. 5, 2018), <https://www.3playmedia.com/blog/the-current-state-of-automatic-speech-recognition-why-we-still-need-humans-for-captioning> [<https://perma.cc/SS9N-JKGU>] (explaining requirements for high accuracy in captioning).

<sup>195</sup> *Id.*

inconsistencies and limitations of current ASR technologies, Zoom does not recommend using their live transcription feature if a user is required to use the speech-to-text support for accessibility needs.<sup>196</sup> Therefore, in essence, Zoom does not recommend people who are D/deaf use their captioning. Besides the above-mentioned causes of errors, another issue with ASR technologies are time delays, which also negatively impacts a student who is D/deaf from following along in class.<sup>197</sup> Therefore, none of the captioning options provided by Zoom and other similar teleconferencing services are effective learning formats for students who are D/deaf.

Furthermore, online learning generally is ineffective for students who are D/deaf who rely on lipreading as a communication and learning method.<sup>198</sup> In the best situations lipreading is “mostly sophisticated guesswork.”<sup>199</sup> Kevin Garrison, a professor who identifies as D/deaf at Angelo State University, compares lipreading to “doing real-time jigsaw puzzle work.”<sup>200</sup> Rachel Kolb, a disability rights advocate and writer who is D/deaf, explains that “[f]illing in the blanks is the essence of lipreading, but the ability to decipher often depends on factors outside of my control.”<sup>201</sup> In a perfect situation, only about 30% of speech is discernable from the face and lips.<sup>202</sup> However, things like thin lips, mumbling, speaking from the back of the throat, unexpressive faces, speaking too fast, laughing too much, slurring words, children with high or babyish voices, moustaches or beards, accents,

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<sup>196</sup> Zoom: *Accessibility for Deaf and Hard-of-Hearing*, *supra* note 179 (“[I]f you are required to use speech-to-text support for any compliance or accessibility needs in your meetings and webinars, Zoom does not recommend using this live transcription feature but instead a manual captioner or service that may be able to guarantee a specific accuracy.”).

<sup>197</sup> Lin Yao et al., *Effects of Automated Transcription Delay on Non-native Speakers’ Comprehension in Real-time Computer-Mediated Communication*, 6946 LECTURE NOTES COMPUT. SCI. 207, 207 (2011).

<sup>198</sup> *How Pandemic Excluded Deaf Students from Online Learning Space?*, EDUC. MAG., <https://www.theeducationmagazine.com/pandemic-deaf-students-online-learning-space> [<https://perma.cc/8F6C-QQFF>] (explaining that the education of students who are D/deaf suffers because of the online format and lists poor internet connection, lip-reading problems, lack of captions, and poor lighting as causes); *How Does a Deaf Person Communicate?*, HEARING DOGS FOR DEAF PEOPLE, <https://www.hearingdogs.org.uk/deafness-and-hearing-loss/how-deaf-people-communicate> [<https://perma.cc/5LHT-X7GH>] (explaining the difficulties of lip-reading).

<sup>199</sup> Kevin Garrison, *Unmasking My Deaf Experience During COVID-19*, INSIDE HIGHER EDUC. (Oct. 8, 2020), <https://www.insidehighered.com/advice/2020/10/08/exceptional-challenges-being-deaf-professor-during-time-face-masks-opinion> [<https://perma.cc/8X32-WY4D>] (explaining from the perspective of a person who is D/deaf how challenging communication has been in COVID-19).

<sup>200</sup> *Id.*

<sup>201</sup> Kolb, *supra* note 83.

<sup>202</sup> FERNANDO LOIZIDES ET AL., *BREAKING BOUNDARIES WITH LIVE TRANSCRIBE: EXPANDING USE CASES BEYOND STANDARD CAPTIONING SCENARIOS*, (2020).

and more, can also make it more difficult to discern what is being said.<sup>203</sup> Relying solely on lipreading for learning is difficult for a student who is D/deaf,<sup>204</sup> and the challenges of lipreading increase in online learning formats. Weak internet connections that impact the video capturing lip movements and any discussions that involve more than one person can also make lip-reading nearly impossible.<sup>205</sup>

Even when children who are D/deaf have appropriate accommodations, learning in an online format comes with challenges children who are hearing do not encounter. Jennifer Reid, the vice principal at an Arizona school for children who are D/deaf explained:

Visual attention is really difficult for our students . . . . It takes a lot for your brain to visually attend to something. And as a hearing person, we can just look off in the distance and keep listening. But for a deaf person, you have to stay focused visually. When doing that for an extended period the brain just doesn't function like that.<sup>206</sup>

Before COVID-19, students who identified as D/deaf faced significant barriers in order to access education and needed visual aids, lecture notes, and web-based instructional materials.<sup>207</sup> In addition, some students also needed interpreters and the quality of that aid depended on the interpreters' understanding and ability to communicate the course material.<sup>208</sup> Because of COVID-19, schools must now provide all of these services online. Schools are having difficulties meeting the students' educational needs and providing these services due to the challenges of the online format and the large number and variety of students with hearing disabilities.<sup>209</sup>

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<sup>203</sup> Kolb, *supra* note 83.

<sup>204</sup> *Id.* ("Filling in the blanks is the essence of lipreading, but the ability to decipher often depends on factors outside of my control.")

<sup>205</sup> Eberts, *supra* note 180.

<sup>206</sup> Katelyn Keenehan, *Deaf Students at Arizona School Will Learn Virtually, but Not Without Obstacles*, CRONKITE NEWS: ARIZ. PBS (Sept. 14, 2020) <https://cronkitenews.azpbs.org/2020/09/14/deaf-students-arizona-school-learn-virtually> [<https://perma.cc/L2A3-JAW5>].

<sup>207</sup> Amanda Bao, *Online Learning with a Bonus*, 29 AM. SOC'Y ENG'G EDUC. 41, 41 (2020).

<sup>208</sup> *Id.*; Brenda Schick et al., *Look Who's Being Left Behind: Educational Interpreters and Access to Education for Deaf and Hard-of-Hearing Students*, 11 J. DEAF STUD. & DEAF EDUC. 3, 3 (2005) (finding that approximately 60% of ASL interpreters had inadequate skills to provide full access to Deaf, deaf, and hard of hearing students).

<sup>209</sup> Kate Henley Averett, *Remote Learning, COVID-19, and Children with Disabilities*, 7 AERA OPEN 1, 1 (2021) (examining interviews with families of children with disabilities and the challenges with remote learning).

The NAD has received reports indicating school districts have been struggling to meet the needs of their students with disabilities.<sup>210</sup> While the United States Department of Education released a statement announcing it was giving schools flexibility in interpreting IDEA,<sup>211</sup> failure to ensure accessibility to students who are D/deaf is a violation of those students' rights under IDEA, Section 504 of the Rehabilitation Act, and the ADA.<sup>212</sup> Additionally, the Department of Education explained these federal disability laws do not prevent schools from providing distance learning during the COVID-19 pandemic.<sup>213</sup> However, there have been issues with the ways in which schools have tried to avoid violating IDEA.<sup>214</sup> For example, there are reports of some schools that delayed the move to distance learning to avoid potential legal liability and other schools and education organizations that pushed to receive waivers from disability laws.<sup>215</sup> Some schools have even required parents of children receiving special education to sign waivers promising not to sue the district in order for their students with disabilities to access online services.<sup>216</sup>

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which included a provision that allowed the Education Secretary to request waivers to parts of the special education laws during the pandemic.<sup>217</sup> The then Secretary, Betsy DeVos, ultimately did not recommend that Congress waive the main requirements of the federal laws, the FAPE and LRE requirements of IDEA.<sup>218</sup> However, while Secretary DeVos was making her decision, the Department of Education received a number of requests for limited waivers of IDEA

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<sup>210</sup> *Deaf and Hard of Hearing Students*, *supra* note 18.

<sup>211</sup> U.S. Department of Education Releases Guidance to States on Assessing Student Learning During the Pandemic, U.S. DEP'T OF EDUC. (Feb. 22, 2021), <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-states-assessing-student-learning-during-pandemic> [<https://perma.cc/QV8J-JTGT>].

<sup>212</sup> *Deaf and Hard of Hearing Students*, *supra* note 18; 20 U.S.C. § 1400 (2006); 29 U.S.C. § 794; 42 U.S.C. §§ 12101–12213 (2018).

<sup>213</sup> *Deaf and Hard of Hearing Students*, *supra* note 18.

<sup>214</sup> Harris, *supra* note 5, at 40.

<sup>215</sup> *Id.*

<sup>216</sup> Rebecca Klein, *To Access Online Services, New Jersey Students with Disabilities Must Promise Not to Sue*, HUFFPOST (Apr. 25, 2020, 1:33 PM), [https://www.huffpost.com/entry/new-jersey-special-education-online-services-waiver-coronavirus\\_n\\_5ea4637ec5b6d3763590790c](https://www.huffpost.com/entry/new-jersey-special-education-online-services-waiver-coronavirus_n_5ea4637ec5b6d3763590790c) [<https://perma.cc/S8ZM-XM9N>].

<sup>217</sup> See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 3511(d)(4), 134 Stat. 286 (2020).

<sup>218</sup> Elissa Nadworny, *Secretary DeVos Forgoes Waiving Disability Law Amid School Closures*, NPR (Apr. 28, 2020, 11:48 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/847305749/secretary-devos-forgoes-waiving-disability-law-amid-school-closures> [<https://perma.cc/AB3E-J3KF>].

provisions.<sup>219</sup> Many petitioners sought waivers arguing that “meeting all the requirements in IDEA is impossible” in this unprecedented time.<sup>220</sup>

While the pandemic is unprecedented in scope, it is not the first national emergency the United States educational system has had to withstand.<sup>221</sup> Natural disasters like Hurricanes Harvey, Irma, and Maria in 2017 and Hurricanes Katerina and Rita posed similar problems, likewise forcing the government to determine how to handle long-term disrupted school instruction for thousands of students, including students with disabilities receiving IEPs.<sup>222</sup> As explained by University of Pennsylvania Law professor, Jasmine Harris:

[T]he nature of the current public health crisis may differ from these hurricanes in scope . . . ; however, the suggestion that school districts could not possibly figure out how to meaningfully serve students with disabilities as grounds for waiver of substantive provisions of the IDEA is hyperbolic at best. In fact, federal relief legislation in prior crises specifically included funding to get students with disabilities back into routines as quickly as possible[.]<sup>223</sup>

COVID-19 is a challenge for schools. However, schools must continue to protect the education of students with disabilities and do so by continuing to follow IDEA.

### III. ANALYSIS

After examining the state of D/deaf education in the United States, the current problems with IDEA, and the impact the COVID-19 pandemic has had on the education of students with disabilities, it is clear Congress must amend IDEA. IDEA was originally created by Congress in 1975 to ensure that schools afford students with disabilities the opportunity to receive a FAPE.<sup>224</sup> In the past, Congress amended the law when necessary, and in light of the COVID-19 pandemic amendments are once again necessary to uphold the purpose of IDEA. This Note will first argue that to protect the integrity of IDEA and uphold congressional intent, Congress should amend IDEA to expressly declare that the *Rowley* majority opinion is no longer the correct interpretation. Congress should explicitly state that IDEA entitles students

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<sup>219</sup> Harris, *supra* note 5, at 40.

<sup>220</sup> Michelle Diamant, *DeVos Could Recommend Waiving IDEA Protections*, DISABILITY SCOOP (Apr. 13, 2020), <https://www.disabilitycoop.com/2020/04/13/devos-could-recommend-waiving-idea-protections/28146> [<https://perma.cc/2TUD-YYJY>].

<sup>221</sup> Harris, *supra* note 5, at 43.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> 20 U.S.C. § 1400 (2006).

with disabilities to an equally beneficial education to that given to their peers who are non-disabled. Next, this Note will argue that in light of the COVID-19 pandemic and the popularization of virtual learning, Congress should amend IDEA to expressly state IDEA continues to apply in all online modes of education.

*A. Congress Must Amend IDEA to Expressly Declare that the Rowley Majority is an Incorrect Interpretation of IDEA*

*Rowley*<sup>225</sup> held that IDEA does not require a State to maximize the potential of each student with a disability through their FAPE equally to that of their peers who are non-disabled.<sup>226</sup> In doing so, the Supreme Court asserted that IDEA's purpose was "more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside."<sup>227</sup> The Court's decision in *Rowley* directly contradicts the congressional intent of IDEA.<sup>228</sup> Furthermore, it is implicit within the amendments of IDEA that *Rowley* is not the correct interpretation.

Congress enacted IDEA because the majority of students with disabilities were "either totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"<sup>229</sup> The majority in *Rowley* acknowledged this, and likewise conceded:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.<sup>230</sup>

However, the *Rowley* majority reasoned that because Congress did not prescribe the level of education, as long as the student with disabilities "benefits" from the education, IDEA is not violated.<sup>231</sup>

The majority in *Rowley* incorrectly interpreted IDEA. The dissent pointed this out and makes the much stronger argument. The dissent asserts that the

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<sup>225</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 177.

<sup>228</sup> *Id.*

<sup>229</sup> H.R. Rep. No. 94-332, p. 2 (1975)

<sup>230</sup> *Rowley*, 458 U.S. at 200-01.

<sup>231</sup> *Id.* at 189.



majority failed to acknowledge multiple sources available to them including: (1) the act, IDEA, itself which states it will provide a “full educational opportunity to all handicapped children,” (2) Senate reports that say the Act “guarantee[s] that handicapped children are provided equal educational opportunity”, and (3) quotes from one of the sponsors of the Act, Senator Stafford who said, “We can all agree that education [given to a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive.”<sup>232</sup> The dissent highlighted these sources the majority chose to leave out of their analysis.<sup>233</sup>

The dissent applied the correct interpretative lens, as to adopt the majority’s approach is to ignore legislative history, overlook the purpose of IDEA, and seeks to limit the rights of marginalized students. Opening the classroom to students with disabilities means nothing if their access to educational benefits is not of equal quality to that of their peers who are non-disabled. The majority points to the cases of *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*<sup>234</sup> and *Mills v. Board of Education*<sup>235</sup> to bolster their argument that IDEA guarantees students with disabilities access to education but not to equal education.<sup>236</sup> However, in doing so, the majority overlooked the fact that both *PARC* and *Mills* were established on the backbone of *Brown v. Board of Education*<sup>237</sup> in efforts to continue to expand educational rights of students, not to limit them.<sup>238</sup>

*Brown* rejected the validity of the separate but equal doctrine holding that “separate but equal” facilities for Black students are inherently unequal and by doing so increased the rights and educational opportunities of students.<sup>239</sup> Based on *Brown’s* holding, the District Court for the Eastern District of Pennsylvania asked in *PARC*—if the Supreme Court ended the separate but equal education of Black students, how could states continue to segregate on the basis of disability?<sup>240</sup> *Mills* likewise employed the *Brown* holding to assert that if Black students had a right to a public education, so did students with

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<sup>232</sup> *Id.* at 213–14 (emphasis omitted).

<sup>233</sup> *Id.* at 214.

<sup>234</sup> *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 297 (E.D. Penn. 1972).

<sup>235</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874–75 (D.D.C. 1972).

<sup>236</sup> *Rowley*, 458 U.S. at 192–95.

<sup>237</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

<sup>238</sup> Mitchell Yell, *Brown v. Board of Education (1954) and the Development of Special Education*, SPED L. BLOG (July 20, 2019), <https://spedlawblog.com/2019/07/20/brown-v-board-of-education-1954-and-the-development-of-special-education> [<https://perma.cc/D825-SDX5>].

<sup>239</sup> *Brown*, 347 U.S. at 488.

<sup>240</sup> *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 297 (E.D. Penn. 1972).

disabilities.<sup>241</sup> The majority in *Rowley* misses the point of what these three cases are holding: students should not be denied education.

The natural progression of cases building from *Brown*, *PARC*, and *Mills* is continuing to expand the rights of students and provide more students with equal educational benefits and opportunity. However, instead of doing this, *Rowley* fully stops this natural progression and takes many steps backwards by limiting the educational benefits to students with disabilities by defining an “appropriate” education as one that allows the child to benefit educationally, but not equally, to that of their peers who are non-disabled. By expecting less from students with disabilities and not maximizing their potential, students with disabilities are given an unequal educational benefit from their peers who are non-disabled. Congress created IDEA because they wanted to do more than just open the door to students with disabilities to public school, they wanted students with disabilities to be “provided equal educational opportunities.”<sup>242</sup> By holding that IDEA does not require schools to raise the standard for students with disabilities to make it equal to the outcomes and educational benefits of their peers who are non-disabled, *Rowley* fails to uphold the intent of IDEA and misinterprets *PARC* and *Mills*.

The *Rowley* majority argues that educational opportunities and the level of educational understandings inevitably differ from student to student. But that argument makes light of the issue at hand.<sup>243</sup> In reality, *Rowley* is saying that the educational opportunities and the level of educational understandings inevitably differ from a student with a disability to a student with no disability. This belief and therefore this holding is not in line with the purpose of IDEA, which was to open the door and raise the educational opportunities of students with disabilities to those equal to their peers who are non-disabled. The majority overlooks this. Inclusion of the student in the physical classroom does not negate the fact that the *Rowley* majority is limiting the rights of students with disabilities by holding that IDEA does not require a state to maximize the potential and provide educational benefits to each student with a disability equally to that of their peers who are non-disabled.

Additionally, it is implicit in the amendments of IDEA that the *Rowley* majority did not correctly interpret the meaning of an “appropriate” education within a FAPE. With the 1997 amendment to the IDEA, Congress expressly changed the focus from access to education to high expectations

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<sup>241</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874–75 (D.D.C. 1972).

<sup>242</sup> *Rowley*, 458 U.S. at 213–14 (White, J., dissenting).

<sup>243</sup> *Rowley*, 458 U.S. at 198 (“The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.”).

and genuine educational results for students with disabilities.<sup>244</sup> The amendments explicitly mandated for states to establish performance goals for students with disabilities in their IEPs that are consistent with the goals and standards set for all students.<sup>245</sup> Furthermore, the 1997 amendment emphasized access to the general curriculum.<sup>246</sup> The House Committee Reports explained that the Committee:

[B]elieves that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education. Educational achievement for children with disabilities, while improving, is still less than satisfactory. This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement.<sup>247</sup>

Likewise, Congress reaffirmed this change in the findings section of IDEA by stating, “Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible.”<sup>248</sup> The 1997 amendment requires states to implement the high expectations of state educational standards into the IEP programming for students with disabilities. The 1997 amendment demonstrates that FAPE is now aligned with the expectations of state education standards. Therefore, the 1997 amendment to IDEA implicitly asserts that an FAPE requires more than access to a basic floor of opportunity.

Like the 1997 amendment, the 2004 amendment of IDEA implicitly asserted that *Rowley* was not a correct interpretation of FAPE.<sup>249</sup> The 2004 amendment primarily aligned IDEA with the No Child Left Behind Statute (NCLB). Congress designed NCLB to hold schools and states accountable for all students and to close student achievement gaps by providing all

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<sup>244</sup> Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, HARBOR HOUSE L. PRESS, INC. (2003), <https://www.harborhouselaw.com/articles/rowley.reexamine.johnson.htm> [https://perma.cc/73WF-GQ7C].

<sup>245</sup> 20 U.S.C.A. § 1412(a)(16) (2002).

<sup>246</sup> *Id.*

<sup>247</sup> H.R. REP. 105–95, at 83–84 (1997).

<sup>248</sup> 20 U.S.C.A. 1400(c)(5)(A), (E)(i) (2002).

<sup>249</sup> 20 U.S.C. § 1400 (2004).

children with the opportunity to obtain a high-quality education.<sup>250</sup> Congress then closely aligned the 2004 IDEA to NCLB to provide students with disabilities access to high expectation in order to meet developmental goals.<sup>251</sup> The 2004 amendment continued to affirm the change from providing students with disabilities with access to education to high expectations and genuine educational results. In the purposes section of the 2004 IDEA, Congress expressed similar sentiments to the 1997 amendment as they found that:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children...in order to meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and be prepared to lead productive and independent adult lives.<sup>252</sup>

In both the 1997 and 2004 amendments to IDEA Congress continued to raise the bar for educational equality for students with disabilities. In 1997, Congress used the phrase “to the maximum extent possible” to describe providing students with disabilities access to the general curriculum.<sup>253</sup> Then in 2004, Congress used the phrase “to the maximum extent possible” to describe students with disabilities meeting developmental goals and challenging expectations equal to that of their peers who are non-disabled.<sup>254</sup> Additionally, in 2004 Congress stated that a purpose of the 2004 amendment is to prepare students with disabilities for “further education.”<sup>255</sup> By adding “further education,” Congress established a new outcome and expectation

<sup>250</sup> Candace Cortiella, *NCLB and IDEA: What Parents of Students with Disabilities Need to Know and Do*, LD ONLINE (2006), <http://www.ldonline.org/article/11846> [<https://perma.cc/LZS4-4XKF>] (explaining that every state is required to: develop challenging academic standards that are the same for every student, develop annual academic assessments for all students, ensure that there is a highly qualified teacher in every classroom, produce an annual statewide Report Card of performance and make the report available to the public, etc.); *Every Student Succeeds Act (ESSA)*, WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, <https://www.k12.wa.us/policy-funding/grants-grant-management/every-student-succeeds-act-essa> [<https://perma.cc/E5H8-MFSH>] (explaining the purpose of NCLB—the *No Child Left Behind Act* was changed to *Every Student Succeeds Act* in 2015).

<sup>251</sup> Cortiella, *supra* note 250; *Individuals with Disabilities Education Act (IDEA) and No Child Left Behind Act (NCLB)*, WORKING TOGETHER FOR STUDENTS WITH DISABILITIES (Dec. 2005), <https://www2.ed.gov/admins/lead/spced/toolkit/faqs.doc> [<https://perma.cc/Z828-D7FT>] (explaining that because of the NCLB and 2004 IDEA all states are “paying attention to testing students with disabilities and are using those results to hold schools accountable for the performance of these students”).

<sup>252</sup> 20 U.S.C. § 1400(c)(5)(A) (2004).

<sup>253</sup> *Id.* § 1412(a)(16) (2002).

<sup>254</sup> *Id.* § 1400(c)(5)(A).

<sup>255</sup> *Id.* § 1400(d)(1)(A).

for students with disabilities that was missing from earlier enactments of IDEA. Through enacting reauthorizations of IDEA in both 1997 and 2004, Congress raised the bar for education for students with disabilities. *Rowley*'s holding is inconsistent with the higher standards set in the 1997 and 2004 reauthorization of the IDEA. Therefore, it is implicit within IDEA that *Rowley* is not the correct interpretation of IDEA.

Previously, Congress enacted reauthorizations of IDEA when confronted with new information concerning the state of education for students with disabilities.<sup>256</sup> In light of the COVID-19 pandemic, Congress has been presented with information that demonstrates the necessity of revising IDEA. The state of education for students with disabilities, specifically students who are D/deaf, is concerning.<sup>257</sup> Since the start of the pandemic the NAD has received countless reports of schools ending certain accommodations for D/deaf students<sup>258</sup> and the current accommodations offered through video conference platforms like Zoom are insufficient to properly teach students who are D/deaf.<sup>259</sup> As a result, the state of D/deaf education is hovering around or below the *Rowley* standard. However, it is clear the standard from *Rowley* is not the correct interpretation Congress intended courts to reach. Therefore, Congress should reauthorize the IDEA and make expressly clear that *Rowley* is not the correct interpretation of “appropriate” within FAPE. Congress should explicitly include in a reauthorization of IDEA that IDEA entitled students with disabilities to an educational opportunity equal to that that given their peers who are non-disabled.

B. *Congress Must Amend IDEA to Expressly Account for Online Models of Education*

The COVID-19 pandemic changed K–12 education, as the overwhelming majority of students' education moved from the classroom to technology-based distance learning.<sup>260</sup> The move to all online modes of education completely disrupted the IEPs of students with disabilities, specifically for the roughly 75,000 students who are D/deaf enrolled in

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<sup>256</sup> KYRIE E. DRAGOO, CONG. RSCH. SERV., R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 10 (2019), <https://crsreports.congress.gov/product/pdf/R/R44624> [<https://perma.cc/8KH3-S9QU>].

<sup>257</sup> *Deaf and Hard of Hearing Students*, *supra* note 18.

<sup>258</sup> *Id.*

<sup>259</sup> *Zoom: Accessibility for Deaf and Hard-of-Hearing*, *supra* note 179 (explaining that Zoom's live transcriptions should not be used for any speech-to-text support accessibility uses and that Zoom requires third party closed captioning to be accessible for D/deaf users).

<sup>260</sup> McElrath, *supra* note 15.

specialized schools and public schools.<sup>261</sup> Currently, IDEA does not mention whether it applies for all online modes of education. In light of COVID-19, the confusion surrounding whether IDEA must be followed in an online format, and generally because of the move to more technology-based services throughout the United States, Congress must amend IDEA to expressly state it continues to apply in all online modes of education.

As of now, IDEA establishes that students with disabilities are entitled to a FAPE and within the Act the role of technology is specifically mentioned in a few places.<sup>262</sup> For example, § 1401(2) asserts that students with disabilities are entitled to “assistive technology service,” which is “any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.”<sup>263</sup> IDEA also states that schools receiving grants under IDEA shall use the funds to “encourag[e] and support[] the training of special education and regular education teachers and administrators to effectively use and integrate technology . . . into curricula and instruction[.]”<sup>264</sup> Lastly, IDEA mentions technology in § 1454(b)(7) as it states part of the requirements of funding include:

[A]ssisting local educational agencies to serve children with disabilities through the development and use of proven, innovative strategies to deliver intensive professional development programs that are both cost effective and easily accessible, such as strategies that involve delivery through the use of technology, peer networks, and distance learning.<sup>265</sup>

Nowhere in the statute does it expressly account for the application of IDEA in all online models of education. The closest these subsections get to addressing online education is by referring to the use of technology as “assistive.”<sup>266</sup> These subsections implicitly protect students who are disabled in all online modes of education. However, implicit protection is not sufficient; COVID-19 has made it clear that access to equal education for students who are disabled is vulnerable and the return to all online education is a potential. Therefore, Congress must explicitly state, through a

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<sup>261</sup> Table 204.30. *Children 3 to 21 Years Old Served Under Individuals with Disabilities Education Act (IDEA), Part B, by Type of Disability: Selected years, 1976-77 through 2017-18*, U.S. DEP'T OF EDUC., INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) DATABASE (Apr. 20, 2020) [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_204.30.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_204.30.asp) [<https://perma.cc/2EVR-E5J5>].

<sup>262</sup> 20 U.S.C. § 1400 (2004).

<sup>263</sup> *Id.* § 1401(2).

<sup>264</sup> *Id.* § 1454 (a)(2)(A).

<sup>265</sup> *Id.* § 1454(b)(7).

<sup>266</sup> *Id.* § 1401(2).

reauthorization of IDEA, that IDEA continues to apply even in all online modes of education.

Extending protection in online modes of education is pivotal because students who are disabled were not protected in the initial move to all online-based learning. During COVID-19, the government released several guidelines and documents concerning whether the application and adherence of IDEA during the pandemic was still necessary.<sup>267</sup> These documents stated that states must continue to follow IDEA.<sup>268</sup> However, the guidelines and documents were not legally binding.<sup>269</sup> Additionally, in the CARES Act, Congress included a provision that allowed Secretary DeVos to request waivers to parts of IDEA and the United States Department of Education released a statement announcing it was giving schools flexibility in interpreting IDEA.<sup>270</sup> While ultimately, the Government and Secretary DeVos upheld the complete enforcement of IDEA, the fact that the equal education protection of approximately 7.3 million students (or 14% of all public school students) was in jeopardy is a matter of concern, and demonstrates the vulnerability of the access to equal education for students with disabilities.<sup>271</sup> Congress enacted IDEA to provide and protect education for students with disabilities and adherence to IDEA during the pandemic, while certainly difficult, should not be rolled back.

Legal accountability and protection are even more important during COVID-19, specifically for students who are D/deaf. While all students who are disabled suffered from a move to online learning, students who are D/deaf faced a unique hardship of losing communication. Students who are D/deaf communicate through residual hearing, spoken English often augmented with a hearing aid or cochlear implant, ASL, cued speech, speech reading (lip reading), and gestures.<sup>272</sup> Video conferencing platforms like Zoom took away or made more difficult many of these methods of

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<sup>267</sup> *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, U.S. DEP'T OF EDUC. (Mar. 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf> [<https://perma.cc/6VQU-TBY8>].

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *See Coronavirus Aid, Relief, and Economic Security (CARES) Act*, Pub. L. No. 116–36, § 3511(d)(4), 134 Stat. 286 (2020); *U.S. Department of Education Releases Guidance to States on Assessing Student Learning During the Pandemic*, U.S. DEP'T OF EDUC. (Feb. 22, 2021), <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-states-assessing-student-learning-during-pandemic> [<https://perma.cc/YZV2-2YN9>].

<sup>271</sup> *Students with Disabilities*, IES NCES: NAT'L CTR. EDUC. STAT. (May 2021) <https://nces.ed.gov/programs/coe/indicator/cgg> [<https://perma.cc/6C4L-DRS7>].

<sup>272</sup> *Communicating with the Deaf*, *supra* note 51 (explaining the various ways individuals who are D/deaf communicate).



communication.<sup>273</sup> Many modes of communication are hindered through platforms like Zoom because of a lack of accurate captions, the inefficiency of lipreading, being unable to view sign language clearly, and the struggle to see non-verbal cues with obstructed views of faces and body language.<sup>274</sup> Additionally, Zoom and other video conferencing platforms commonly have choppy audio, time delays, or pixelated video.<sup>275</sup> Without a new IEP accounting for new difficulties with online learning, the likelihood students who are D/deaf would gain any benefit is slim to none. As a result, adherence to IDEA in online learning is critical and the reauthorization of IDEA must expressly protect the IEPs for students with disabilities in all online based learning models.

Additionally, Congress must amend IDEA to expressly extend protection and apply in online learning models as distance learning is a strong possibility in the future. First, while the majority of K–12 schools have returned to in-person education,<sup>276</sup> COVID-19 is not over, and there is a possibility that schools will have to resume technology-based distance learning. Currently, COVID-19 is still running rampant as experts assert that the pandemic will be under control once 90–95% of the population have a degree of immunity from immunization or previous infection.<sup>277</sup> As of October 19, 2021, only 57.1% of the United States population was fully vaccinated.<sup>278</sup> Some schools are already returning to remote instruction because of a lack of vaccinations and high number of COVID-19 cases.<sup>279</sup>

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<sup>273</sup> Patrick deHahn, *Zoom Fatigue is Something the Deaf Community Knows Very Well*, QUARTZ (May 13, 2020), <https://qz.com/1855404/zoom-fatigue-is-something-the-deaf-community-knows-very-well> [<https://perma.cc/3FRD-QDD7>] (explaining the difficulty of Zoom for D/deaf individuals).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Megan Ferren, *Remote Learning and School Reopenings: What Worked and What Didn't*, CTR. FOR AM. PROGRESS (July 6, 2021, 9:00 A.M.), <https://www.americanprogress.org/issues/education-k-12/reports/2021/07/06/501221/remote-learning-school-reopenings-worked-didnt> [<https://perma.cc/DE6E-NWKJ>] (“As of May 3, 2021, only 1[%] of districts across the country were fully remote, 46[%] were hybrid, and 53[%] were fully open.”).

<sup>277</sup> Michelle Fay Cortez, *Here's What the Next Six Months of the Pandemic Will Bring*, BLOOMBERG (Sept. 12, 2021, 4:00 PM), <https://www.bloomberg.com/news/features/2021-09-12/6-month-covid-outlook-2021> [<https://perma.cc/9MA7-XHPX>] (“what seems clear is that the pandemic will not be over in six months.”)

<sup>278</sup> Katie Adams, *States Ranked by Percentage of Population Fully Vaccinated*, BECKER'S HOSP. REV. (Oct. 25, 2021), <https://www.beckershospitalreview.com/public-health/states-ranked-by-percentage-of-population-vaccinated-march-15.html> [<https://perma.cc/6RLJ-EH5N>] (calculating the rate of vaccinated individuals in the US).

<sup>279</sup> Daniella Silva & Heidi Przybyla, *Some U.S. Schools Switch to Remote Learning, Delay Start of Classes as Omicron Surge Disrupts Return from Winter Break*, NBC NEWS (Jan. 3, 2022, 5:49 P.M.), <https://www.nbcnews.com/news/us-news/us-schools-switch-remote-learning-delay-start-classes-omicron-surge-di-rcna10795> [<https://perma.cc/5E82-7J8X>] (explaining some schools are returning to distance learning).

Second, due to the influx of technology, the return to online based learning in the future is a possibility regardless of COVID-19. According to a survey of 1,000 parents of K–12 students, over 45% would keep their children fully online following the pandemic and 22% would choose a hybrid model.<sup>280</sup> In addition, colleges and universities were once completely in-person until the 1980s, and before COVID-19 about a third of the 20.6 million college students were taking online classes.<sup>281</sup> The idea that K–12 schools could return to online learning despite COVID-19 is a possibility and is another reason Congress must amend the IDEA to account for all models of online learning.

Ultimately, while online learning posed a unique hardship for D/deaf students, reauthorizing IDEA to include a provision to ensure schools maintain appropriate education plans would benefit all students with disabilities. Disability law is vulnerable and COVID-19 emphasized this. IDEA must protect students with disabilities in all models of education, including online formats. In light of COVID-19 and the increasingly technological world, Congress must react and reauthorize IDEA to expressly state IDEA continues to apply in online modes of education.

#### IV. CONCLUSION

IDEA is a transformative piece of legislation that created access to education for students with disabilities. However, IDEA is not without flaws and when necessary, Congress must amend IDEA in order to uphold the purpose of the act. The purpose of IDEA was to provide a “full educational opportunity to all handicapped children,” and “guarantee that handicapped children are provided *equal* educational opportunity.”<sup>282</sup> Currently, schools are not upholding the purpose of IDEA by abiding to the standard of *Rowley*,<sup>283</sup> which holds that IDEA does not require schools to maximize the potential of each student who is disabled through their FAPE equal to that of their peers who are nondisabled.<sup>284</sup> Accordingly, Congress must amend IDEA to expressly assert that *Rowley* is in direct opposition to the purpose of IDEA. Additionally, the current IDEA does not explicitly account for the continued application of IDEA in online forms of education. There is the possibility that K–12 schools will have to again implement some form of

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<sup>280</sup> Rebecca Torchia, *Is Virtual Learning Here to Stay for K–12?*, ED TECH: FOCUS ON K–12 (Apr. 26, 2021), <https://edtechmagazine.com/k12/article/2021/04/virtual-learning-here-stay-k-12-perfcon> [<https://perma.cc/C2SW-HGG2>] (outlining survey responses concerning parent’s desire to have their children do in person or virtual learning).

<sup>281</sup> Evan Thompson, *A History of Online Education*, BEST SCH. (Sept. 12, 2022), <https://thebestschools.org/magazine/online-education-history> [<https://perma.cc/SNQ6-JWTY>] (explaining the history of online education).

<sup>282</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 213 (1982) (White, J., dissenting).

<sup>283</sup> *Id.* at 192.

<sup>284</sup> *Id.*

online education in the post-COVID-19 era and Congress must take affirmative steps to account for this by amending IDEA.

In light of COVID-19 and its impact on D/deaf education, Congress must amend IDEA to raise the standard of education for students with disabilities equal to that of their peers who are non-disabled. To do so, Congress must reauthorize IDEA to explicitly assert that IDEA entitles students with disabilities to an equally beneficial education to that given to their peers who are non-disabled. Additionally, Congress must amend IDEA to expressly apply to all online models of education. To protect the education learning of students who are D/deaf and uphold the purpose of the IDEA, reform to the IDEA is necessary.