



Illiteracy is the Disability

Equal Protection for the Deaf in Tennessee Classrooms

by Poppy O'Guin Steele

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In 1979, Sally Struthers and James Woods starred in *And Your Name is Jonah*, a made-for-TV-movie about a little boy whose parents struggle to communicate with him because he is deaf. This little boy is misdiagnosed as learning disabled. He starts school and does not know his name.¹

Unfortunately, this 42-year-old fictional story remains reality in Tennessee today. The most critical period of language acquisition is between birth and five years of age.² If children do not acquire language during this critical period, they struggle to catch up with their language-fluent peers. This means that half of the deaf children in the United States graduate below a 4th-grade reading level.³ Deaf children who cannot communicate through speech or sign language cannot develop language and literacy. Hearing aids and cochlear implants assist some deaf and hard-of-hearing children, but not all.

It is easy to think of a deaf student as a person with needs met by special education services. The difference is that a typical deaf student has the same abilities as other public-school children — except the teacher and students in the

classroom speak a different language.

A brief examination of how the U.S. Supreme Court and the state of Tennessee have addressed the unique needs of deaf children raises eyebrows. But the approaches taken by other states provide a roadmap for higher literacy rates and lower underemployment so that the Deaf population can fully participate in and contribute to society.

I. Leading U.S. Supreme Court Cases Addressing This Issue Send Mixed Messages

The U.S. Supreme Court has held that children are entitled to a free and appropriate education. It would be understandable if the general public assumed that decades after enacting the ADA, IDEA, FERPA and FAPE, students with atypical needs would have adequate resources. However, there is disagreement as to what is adequate. For example, most Tennessee counties do not have administrators who have been trained in deaf education. Some administrators decide what is best for deaf children using the same assessments as those for special education children who are part of the hearing community. The academic potential of those children varies greatly.

Also, being deaf does not mean a person is disabled. It means a person communicates differently. Imagine a hearing person who does not know sign language tours Gallaudet University (a Deaf university) led by a Deaf student. That student communicates only in American Sign Language (ASL). All others on the tour are Deaf and sign. The receptionist is Deaf and signs. The cafeteria workers are Deaf and sign. Who then needs the accommodation? Who then is “disabled?”

In 1954 the greatest of Equal Protection cases involving education made a significant statement on equal access. *Brown v. Board of Education* says:

[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁴



POPPY O'GUIN STEELE is an advocate for Deaf children who experience abuse. She grew up in the Deaf world in Nashville. She has worked as an interpreter, teacher and nonprofit executive director to help Deaf children. Her book *Deaf in a City of Music* contains the stories of some of those Deaf children in Tennessee.

All proceeds from the book go toward research and solutions for the abuse. A 2021 graduate of the Nashville School of Law, she is licensed to practice law in Tennessee.

She is also the grandmother of a signing baby boy, mother of two signing adult daughters and the wife of a signing police detective.

In *Brown*, it was racial segregation. For Deaf children, it is linguistic segregation.⁵

In 1974 the U.S. Supreme Court in *Lau v. Nichols* addressed the inequities in education for Chinese-speaking students who did not know English yet were mainstreamed

without interpreters or access to the language. The court said, “Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”⁶ If students who speak a language other than English cannot be expected to benefit from an education that doesn’t consider their native tongue, Deaf children who have no language whatsoever cannot be expected to acquire a meaningful education if it is provided entirely in English. In *Lau*, the directive was clear: “The district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”⁷ Based on this holding, there is no reason to deny Deaf children access to language.

However, Justice Blackmun in *Lau* noted he would have changed his position if the number of students were smaller.⁸ Likewise, school administrators justify unequal treatment of deaf children because of fewer numbers. However, Justice Blackmun could not have meant “equal protection” if it were not truly equal. To one or to one million, equal protection does not mean preferential treatment to the majority. It is either protection for all, or it is not equal.

While the holding in *Lau* appeared to settle the question of services for Deaf children, the U.S. Supreme Court in 1982 decided in *Board of Education of Hendrick Hudson Central School District v. Rowley* that some education for a deaf child was enough — equal was not necessary. Here, a young girl who was profoundly deaf and used ASL to communicate was denied a sign language interpreter in her classroom.⁹ Her parents, who were both Deaf and communicated in sign language, challenged the decision.

In *Rowley*, the court found that 40% of understanding in the classroom was sufficient. Amy received passing grades, and the court accepted this as proof that the schools were providing her with educational benefits. Therefore, the court determined, she did not need an interpreter to help communicate with teachers

Note: There is a definitional difference between “d” deaf and “D” Deaf. “D” Deaf means a deaf person who identifies with the Deaf community. The “d” deaf means a medical condition of hearing loss. Someone could be hard of hearing and identify as Deaf. Someone could be profoundly deaf and not identify with the Deaf community.

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or peers.¹⁰

The dissent written by Justice White in *Rowley* points out that the Education of the Handicapped Act of 1974 (renamed IDEA in 1990) requires a “full educational opportunity to all handicapped children.”¹¹ He said:

The basic floor of opportunity is ... intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom — less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.¹²

Justice White did not argue the Equal Protection cases as precedence but argued Congressional intent:

[T]he purpose of the Act was described as tailoring each handicapped child’s educational plan to enable the child “to achieve his or her maximum potential.” ... Senator Stafford, one of the sponsors of the Act, declared: “We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive.” ... The legislative history ... intends to give handicapped children an educational opportunity commensurate with that given other children.¹³

Justice White showed that Congress wanted the “handicapped child” to be provided an education equal to her peers. However, the holding of *Rowley* said that any educational benefit was enough.

Rowley’s holding is contrary to *Brown* and *Lau* in which children were deemed worthy of receiving an equal opportunity to learn. This decision has influenced court rulings ever since.

Ironically, the U.S. Supreme Court in *Plyler v. Doe*, the same year as *Rowley*, decided children of immigrants without documentation in Texas had the full protection of the Equal Protection clause. To disallow these children an education was discrimination so grievous that it would affect them, and the nation, for the rest of their lives. Texas had refused to allow these children to attend public schools. Texas said the cost was insurmountable, and the parents were not Texas taxpayers. The court held that the state did not have a reason good enough to deny children that right:

[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. ... **Illiteracy is an enduring disability.** The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.¹⁴

The court concluded the Texas law forbidding children from attending school “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives.”¹⁵

The concurring opinion further stated:

[T]he Texas scheme inevitably will create “a subclass of illiterate persons.” ... [W]hen the State provides an education to some and denies it to others, it ... creates class distinctions of a type fundamentally inconsistent with those purposes ... of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage. ... And when those children are members of an identifiable group, that group — through the State’s action — will have been converted into a discrete underclass.¹⁶

The 1982 U.S. Supreme Court ruled in support of the *Plyler* children saying to deny Equal Protection would make them an underclass. Then in *Rowley* the court said equal education for a deaf child was unnecessary. Any educational benefit for her was sufficient.

The most recent U. S. Supreme Court case addressing these issues was *Endrew F. ex rel. Joseph F. v. Douglas County School District*. It seemingly clarified *Rowley* to be more supportive of special education students. Endrew was a young man with autism whose progress through fourth grade stalled, and his parents were displeased. They enrolled him in a private school where he improved immensely. The parents then went back to the public school Individualized Education Program (IEP) team meeting with the private school’s plan. The IEP team did not accept it. The case progressed through the courts with their interpretation of *Rowley*: any educational benefit was acceptable. The Supreme Court rejected the lower court’s interpretation. Chief Justice Roberts wrote:

This Court went on to reject the “equal opportunity” standard adopted by the lower courts, concluding that “free appropriate public education” was a phrase “too complex to be captured by the word ‘equal’ whether one is speaking of opportunities or services.”¹⁷

Endrew’s parents argue that the Act goes even further. In their view, a FAPE [Free and Appropriate Public Education] is “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”¹⁸

The court disagreed with Endrew’s parents that “substantially



equal” was what the IDEA drafters had in mind. The chief justice continued:

Mindful that Congress . . . has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.¹⁹

The court concluded any change toward an “equal” standard must come from Congress. Chief Justice Roberts said the states had the authority to remedy the inequities that Congress has not addressed.²⁰

II. Looking to Other States Can Help Tennessee Bridge the Gap

Other states have taken advantage of research to improve deaf education. Tennessee can learn from their successes.

1. Deaf Child Bill of Rights

Seventeen states have begun their road to reform with a Deaf Child Bill of Rights (DCBR).²¹ The first DCBR was passed in South Dakota in 1993, led by Lawrence Siegel. These Bills of Rights generally adopt basic rights for Deaf children: the right to acquire language, be a part of society, have qualified teachers, have language peers, and have an opportunity to succeed. Like with state constitutions, each state has adapted the DCBR to fit its needs. Many states have addressed the right to language through a Deaf Mentor program.²² Tennessee passed that portion of DCBR with the Deaf Mentor pilot in 2019.²³ The Deaf Mentor and Parent Advisor Program provides support to families with children who have hearing loss. A trained Deaf Mentor and Parent Advisor engages with families, educating them in communication, expe-

riences, language modeling and advocacy.

While DCBRs are important progress, the national parent organization Hands & Voices notes the DCBRs are “an important first step in having the state formally acknowledge the unique needs of our children, [but a DCBR] does not automatically resolve all problems and immediately change program options.”²⁴

2. LEAD-K

The most recent change in Deaf education that is appearing in states is the Language Equality and Acquisition for Deaf Kids (LEAD-K) legislation. LEAD-K is a national campaign to raise awareness of deaf children’s challenges in acquiring language and literacy. It promotes ‘reading-ready by kindergarten’ with tracking for deaf children, a co-operative effort between the Departments of Health and Education.²⁵

Louisiana recently passed its version of LEAD-K, which establishes a task force of professionals who are knowledgeable about Deaf children’s language acquisition to assess language milestones and make recommendations for policy, standards and practices. It is a first step in gathering data concerning language deprivation in deaf children.²⁶

An article from Loyola University says, “The LEAD-K campaign has developed model legislation for adoption by states. Since 2016, 12 states have adopted a form of the LEAD-K model bill. There are approximately 15 more states with LEAD-K teams in various stages of development.”²⁷ LEAD-K’s strength lies in its inclusiveness. It is embraced by the National Association of the Deaf (NAD), Gallaudet University, and A. G. Bell Association of the Deaf and Hard of Hearing. There is a grassroots movement in Tennessee for such a change.²⁸

3. Board of Regents

Access to language and literacy begins with coordinated efforts among many professional fields, families and state departments — as the Louisiana LEAD-K legislation addressed with its task force. There is no standard answer for deaf children’s education. Those making life-altering decisions for deaf children need to be informed and discerning. One person cannot hold all the experience and education required for such a challenge. A team, however, can accomplish the task.

To address these needs in its state, New Mexico’s legislature in 1996 established a Board of Regents who reports to the governor.²⁹ This board of five people is selected by the governor and consists of Deaf members and professionals. This team in New Mexico established a Task Force for Deaf Education in 2003 and recommended the DCBR in 2004.³⁰ They are well known in the Deaf world as the star program for Deaf education.

Writing about these systemic changes for states’ Deaf education programs, Lawrence Siegel, who has been a national expert and

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advocate for special needs children for more than 35 years, says:

The determination of what constitutes an appropriate program for deaf and hard of hearing children and the development of educational programs must be based on individual communication needs and those needs must fundamentally determine the components, budgets, staffing, and location of specific programs.

The law must formally recognize that communication assessment, development, and access are central to such programs and are the foundation for the actual delivery system.³¹

These principals are evident in Louisiana's LEAD-K legislation as well as New Mexico's efforts. This requires the coordination of multiple entities and state departments. A team of professionals, parents, and Deaf/hard-of-hearing people with differing communication modalities could work together for comprehensive, unifying systemic progress.

III: The Cost of No Change, or Inefficient Change, Is Diminished Quality of Life for Deaf Tennesseans and Significantly Higher Costs for the Entire State

As with most progress in legislation, cost is a challenge. Deaf education is no different. The cost of FM systems, which teachers wear for sound clarity for hard-of-hearing students, and flashing fire alarms are examples of extra costs associated with deaf students. But, cost alone cannot dictate policy where access is the issue. Schools and public buildings already provide ADA-required wheelchair ramps and braille on signs. Interpreters and qualified teachers should be no different.

More importantly, responsible spending on education for a deaf child will reap a savings when she reaches adulthood, as she will become a contributor to the tax base and not a recipient of it. From 2012 to 2016, 45.2% of Deaf adults reported being employed compared to 71.1% of hearing adults in Tennessee.³²

Cost savings can be found elsewhere when appropriate resources are allocated for education. Logically, if children cannot communicate with their families, peers, teachers and potential employers, then mental health issues will arise. The National Association of State Directors of Special Education Inc. notes that

When adults do not provide a rich language and communication environment ... that is accessible to the child during this critical period of development, children are more likely to fall behind in the development of their speech and language skills, sign language development, social skills, academic performance and their future career options.³³

The National Association of the Deaf (NAD) has written position papers for mental health professionals because of

the great need for deaf counseling. The statistics for drug and alcohol abuse, physical and sexual abuse, abuse in prison, among other mental health issues that require state-funded social services are high among deaf people. Much of these costs could be avoided by providing access to language from birth so that these children receive resources provided to hearing children at this crucial age. The need to communicate is a basic human need and should be a human right protected by the 14th Amendment.

Finally, perhaps the most compelling reason to change our approach to deaf education is the sobering statistic that at least 50% of deaf children experience sexual abuse.³⁴ The reason is largely a result of the language barrier. Deaf children are perfect victims if they cannot tell anyone what is happening.

In Abraham Maslow's hierarchy of needs (something every education major studies), he explains the basic needs of humanity: until a child is safe, warm and fed, she cannot learn commas and semicolons. For a Deaf child, that begins with communicating danger in her world. The *Plyler* court said:

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. ... We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.³⁵

A Deaf child's ability to communicate is her first line of defense. Before she tackles an English class, she must be able to get help when she needs it.

IV: It Is Time for Change in Tennessee's Deaf Education

The Department of Education (DOE) and Tennessee Early Intervention System have recently established a Memorandum of Understanding³⁶ to improve communication and cooperation in services for families after early identification. This is an opportunity to affect these children's lives by providing these resources from day one. Adopting some of the approaches embraced by other states, such as a Deaf Board of Regents, could be a comprehensive implementation of fiscally responsible Deaf initiatives across the state. The wise decisions made today on behalf of deaf children will provide lasting benefits for the entire state. III

Notes

1. *And Your Name is Jonah* (MGM 1979).
2. National Association of State Directors of Special Education, Inc., 3 *Optimizing Outcomes for Students Who Are Deaf and Hard of Hearing: Educational Service Guidelines 2* (2018).
3. Stephanie Cawthon, *Schools for the Deaf and No Child Left Behind Act*, 149 (4) *American Annals of the Deaf* 314, (2004).
4. *Brown v. Bd. of Ed. of Topeka*, Shawnee Cty., Kan., 347 U.S. 483, 493, (1954).

5. Lawrence Siegel, *The Human Right to Language: Communication Access for Deaf Children* 97 (2008).

6. *Lau v. Nichols*, 414 U.S. 563, 566(1974).

7. *Id.* at 568. (emphasis added)

8. *Lau*, 414 U.S. at 571–72.

9. *Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982).

10. *Id.*

11. 20 U.S.C. Sec. 1412(2)(A).

12. *Rowley*, 458 U.S. at 215.

13. *Id.* at 214.

14. *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982). (emphasis added)

15. *Id.* at 223–24. (emphasis added)

16. *Id.* at 234.

17. *Andrew F ex rel. Joseph F v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 995 (2017).

18. *Id.* at 1001.

19. *Id.*

20. *Id.*

21. California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Montana, Nevada, New Mexico, North Carolina, Rhode Island, South Dakota, Virginia, Texas.

22. Gallaudet University, www.vl2family.org (last visited April 8, 2021).

23. *Tenn. Code Ann.* § 49-10-904.

24. Hands & Voices, www.handsandvoices.org/comcon/articles/dcbr.htm (last visited March 8, 2021).

25. <https://www.lead-k.org/leadkfaq/>

26. www.deaffocus.org

27. Christina Payne-Tsoupros, “Lessons from the Lead-K Campaign for Language Equality for Deaf and Hard of Hearing Children,” 51 *Loy. U. Chi. L.J.* 107 (2019).

28. Sharon Bryant, Legislative Liaison, Tennessee Association of the Deaf Conference. LEAD-K Presentation. (Nov. 2020).

29. *N.M. Stat. Ann.* § 21-6-1 (West 2020).

30. https://www.nmsd.k12.nm.us/about_n_m_s_d/n_m_task_force.

31. Lawrence Siegel, “The Educational and Communication Needs of Deaf and Hard of Hearing Children: A Statement of Principle Regarding Fundamental Systemic Educational Changes,” 145 (2) *American Annals of the Deaf* 33 (2001).

32. Carrie Garberoglio, Stephanie Cawthon and Mark Bond, “Deaf People and Employment in the United States: 2016,” *National Deaf Center on Postsecondary Outcomes* 12, 15 (2016).

33. National Association of State Directors of Special Education Inc., 3 *Optimizing Outcomes for Students Who Are Deaf and Hard of Hearing: Educational Service Guidelines* 14 (2018).

34. National Child Traumatic Stress Network, “Deaf children have higher rates of sexual abuse and inadequate treatment: White paper seeks to bridge gaps,” www.nctsn.net (Oct. 2006).

35. *Plyler*, 457 U.S. at 221.

36. Interagency Agreement Between the State of Tenn. Dep’t of Intellectual and Dev. Disabilities & Dep’t of Educ. (February 2021) (on file with author).

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