

## **Disability Policy in Education Settings: The Eisenhower Highway System as a Roadmap**

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### **Introduction**

The federal interstate highway system as we know it today was authorized in 1956, and was only finally “completed” in 1992. Although planning was begun much earlier than 1956, it was President Eisenhower who brought the concept to fruition. He had been influenced by his experiences in the military in 1919 as a young soldier and later by his leadership experiences during World War II, which made him recognize the importance of having a comprehensive highway system to move troops and supplies.

Educational policy for individuals with disabilities has a parallel “road map.” Both programs recognize the value and importance of connecting state and local systems in a comprehensive way and both incorporate a substantial degree of federal funding, but require state cooperation to implement. Both programs took about 35 years to build, and both are programs that would be difficult, if not impossible, for the private sector or even state governments to do themselves.

The Interstate Highway System was intended to connect local and state roadways to a comprehensive federal highway system that would ensure efficient and effective travel from one end of the country to the other. Federal education disability policy attempts to ensure that from birth to entry into the workforce or to independent living, there is an effective set of programs and rights against disability discrimination that work efficiently and fairly.

Today’s interstate highways are intersected by spaghetti junctions, and sometimes have badly planned on-ramps and poor signage. They often have potholes and are not wide enough in some areas. Similarly the federal system of education for those with disabilities intersects with other education policies such as No Child Left Behind, disciplinary policies (such as zero tolerance for guns and drugs), school choice programs, desegregation programs intended to provide equality and ensure diversity, and other social programs.

Just as it is timely to review the interstate highway system, education for individuals with disabilities should be revisited by policymakers. Political agendas and resources will certainly affect whether current education disability policy will have its “potholes” fixed, its access widened, and be provided with better on ramps and signage, and whether the spaghetti junctions will be improved.

This presentation provides a broad historical overview, identifies important areas that need attention, and suggests a strategy for going forward to do so. It discusses where we should be going and how to get there.

## I. Historical Overview – 1861 to 2011

Chapman University was founded in 1861 as a private religiously based institution of higher learning. From the outset Chapman University admitted students of both sexes and all races, certainly progressive for that era. Its history and current philosophy highlight its commitment to interdisciplinary study, including connection to professional programming in law and education. Chapman University is to be congratulated on its 150<sup>th</sup> Anniversary and its distinction in providing quality higher education.

The year 1861 was also the beginning of the Civil War. The war was about slavery although states rights, including the right to regulate and control slavery were a part of that.

There was no nationwide highway system, Public education was only available to a few people, usually those with money.

### A. The Highway System

#### 1) 1861

In 1861 there was certainly no nationwide highway system. The “nation” was not even complete. In 1861 there were only 34 states. While there were a number of “territories” that would later be divided into states, most of the “nation” of states consisted of states in the eastern part of the continent plus California (which became a state in 1850) and Oregon.

Even in the eastern part of the continent, there was no comprehensive system of roadways. In part, this was because the primary means of transportation in 1861 was by water, which accounts for the importance of cities like Louisville during the Civil War. In the latter half of the 19<sup>th</sup> century, as railroads evolved, water transportation diminished in importance. Roads became important for transportation, primarily using horse-power, and they played an important role during the Civil War, as we know from the 1863 battle of Gettysburg, where several major roads intersected.

#### 2) Early 20<sup>th</sup> Century

The plan for a nationwide highway system began in 1921 when the federal government prepared a list of roads needed for national defense purposes. The invention of the automobile was a second major factor to the growth of transportation by road. Early on, however, it was not

apparent whether automobiles would “catch on.” With the Henry Ford creation of the production line for auto manufacturing, the Model T became more accessible not just to the wealthy but to the evolving middle class, and eventually the need for a highway system became more apparent.

The Federal Aid Highway Act of 1925 responded to both the demand for transportation by automobile and the national defense concerns. It standardized road numbering. In addition to a useful numbering system by the 1930s federal policy also envisioned the creation of a comprehensive freeway and expressway system. The construction project was begun, but did not really take on significant growth until 1956. This was, in significant part, due to the re-direction of labor and materials into the war effort which slowed down auto production and road building.

### 3) 1950s to 2011

The 1956 Federal Aid Highway Act (also known as the national Interstate Defense Highways Act and listed in a Congressional publication as one of the ten most important laws of the last half of the 20<sup>th</sup> century because of its impact on American life) authorized the Interstate Highway System as we know it today. The system as originally planned was completed with the opening of I-70 through Glenwood Canyon in Colorado in 1992, about thirty-five years after the first construction on the new system began.

The first project was begun in 1956 in Kansas (or Missouri), making I-70 the first and last highway worked on. There is a dispute between Kansas and Missouri about which state *really* had the first construction. This perhaps echoes the longstanding feuds between the states about whether Kansas should be a nonslave state. Today the dispute is found in the rivalry during the college basketball season.

Perhaps it was because people wanted to get through Kansas quickly that Kansas was the first (or tied for first) state to construct the highway, or perhaps it was because President Eisenhower grew up in Abilene, Kansas which is on I-70. This new interstate re-routed much interstate traffic from US 24 and US 40 (farther north). Or perhaps it was because it made sense to begin construction in the middle of the country (where there was probably less difficulty in obtaining easements and rights of way).

The advantages of the interstate system were that one was not slowed down by small towns – you never had to get off if you had an unlimited fuel supply. The speed limits were generally higher. Speed limits are an example of the role of states, which determine them, although federal law sets maximum speed limits, taking into account various concerns such as the cost of oil and safety issues. Additional benefits of an interstate highway system include military troop mobility and other uses for defense strategy. Evacuations during disasters are also aided by such systems.

Interstate highways are constructed and maintained by a combination of federal and state sources, with the federal government being responsible for 90% of the cost. About 70% of the costs come from fuel taxes and tolls. Federal, state, and local authorities collect these revenues. The remaining costs for maintaining the highways are from general funds, bond issues, and property and other

taxes. The costs related to expanding interstate roadway infrastructure relating to suburban development have diminished funds available for general new construction. New projects are thus more dependent on tolls. States that want to fund new projects on existing interstates must receive Congressional approval. As we will see, there are parallels to special education policy.

#### 4) 2011

So what is the status of the interstate system in 2011? Not surprisingly, there is a significant need for new roads and for repairs to existing roads as well as a need to widen existing interstates to allow for the increase in the number of automobiles. Highway 405 in Los Angeles and the famous “Carmageddon” is an example of such a project. The major obstacle to improvement (in addition of the obvious logistical challenges of shutting down a major freeway for improvements) is funding. And the major challenge to getting funding is a combination of the current economic recession and the challenge of getting Congress to focus on anything – as the summer 2011 debt ceiling debates demonstrate.

So, what is the relationship of this overview and history of the federal highway system to the federal policy on education for individuals with disabilities? The next portion of this paper presents those parallels.

### B. Education Policy for Students with Disabilities

#### 1) 1861

In 1861 there was certainly no comprehensive public education system for anyone in America, much less for those with special education needs. Often education primarily consisted of “home schooling” in some cases, self taught. Abraham Lincoln’s education is such an example.

In the United States, public education has always been and remains primarily the responsibility of state and local school systems. The role of state governments in education is significant and primary. The Constitutional provisions under the Fourteenth Amendment requiring equal protection and due process have created powerful incentives for states to treat students equally, and to accept federal dollars to aid the states in doing so.

There is no federal mandate to provide publicly funded education, but yet every state does so and has for many years. Before 1861, education (even “public” education) was only available to wealthy individuals. The concept of a free public education at the elementary school level (which included compulsory attendance laws in many states) evolved by the end of the 19<sup>th</sup> century. Of course, with the realities of slavery, such education was not available to black children, before the Civil War, and there were penalties for teaching slaves to read.

In 1861, for students with disabilities, there was very little, if any, opportunity for education. The rare exception was the existence of separate, special schools, such as the Perkins School for the Blind, which was founded in 1829 and the Wright-Humason School for the Deaf, both attended by Helen Keller. There was certainly no general availability of such education to all children, and it was almost certainly because of the financial ability and status of the Keller

family that Helen Keller received any education.

The beginning of federal support for higher education began in this era. Federal funding to support state universities was provided under the Morrill Acts of 1862 and 1890, which also allowed for increased research by scholars and students in public colleges and universities. The federally funded research, in turn, became part of the basis for changing attitudes and policies towards education generally and special education in particular.

## 2) Early 20<sup>th</sup> Century

By 1918, compulsory attendance (at least for students without disabilities) had been enacted in every state. The Catholic Church, however, initially opposed such schooling and established private Catholic Schools. For a brief time some states made it illegal to attend private schools of any kind.

Also during the first part of the 20<sup>th</sup> century, an expansion of public education to the high school level was taking place. Compulsory attendance increased to age 16 in most states. Similarly, although providing free public education to all age eligible students at the college level did not become part of state education systems, there was a dramatic increase in the number of students enrolling in college during this time period.

During this time period, there was some increase in providing children with disabilities an education, but again in separate settings and with the underlying basis of removing stress on the child. Eventually diluted academic training and training for manual work was provided, still in segregated settings. The philosophy of avoiding disruption in the regular classroom was part of this. Many students with disabilities never attended school.

## 3) 1950-2011

### *The Basic System*

Just as the Interstate Highway System, had its beginnings in Kansas, special education also had a “beginning” in Kansas. The 1954 *Brown v. Board of Education of Topeka* Supreme Court cases, struck down “separate but equal” education for black students in Kansas and four other state school systems. That decision established that under the Fourteenth Amendment, separate education was inherently unequal because of the stigma attached to separate education and the deprivation of interaction with children of other races. Such education was also a denial of due process.

This principle was then applied in the litigation brought several years later in a number of states regarding separation of children with disabilities, and in some cases complete removal from public education. The lower court cases that were the catalyst for the federal law to support special education were *PARC* (1971) and *Mills* (1972) regarding school policies in Pennsylvania and the District of Columbia. In those cases school systems were enjoined from denying education who with intellectual disabilities (then mental retardation) and students whose behavior was disruptive although the behavior was based in disability.

Congress recognized that while these decisions established that states that provided public education to students (which all do) must provide it to students with disabilities as a Constitutional matter, it would be extremely helpful to provide federal funding to support the higher costs of special education. It would also be good to provide a system that ensured some consistency in terms of procedure and substance from state to state.

### *Education for Students with Disabilities – Federal Legislation – The Foundations*

The education for students with disabilities as a federal policy really began in 1973 with the Rehabilitation Act. It required that programs receiving federal financial assistance (which is all states do) not to discriminate on the basis of disability (then “handicap”).

This was followed by the Education for the Handicapped Children Act (EAHCA) in 1975 which included procedural safeguards not in place in the 1974 version of the statute. Finally completing the “road map” were the 1990 Americans with Disabilities and the 2008 Amendments broadening the definition of coverage.

Basically EAHCA offered federal funding to states that would follow a specific set of guidelines – ensuring a free appropriate education that was individualized for all age eligible students. The education was to be provided in the least restrictive appropriate setting (known as mainstreaming). It requires states to implement a system of “child find” to identify eligible students. It further mandates procedural safeguards to ensure impartial due process and a review and appellate process. Because states were required to do most of this as a result of the *PARC/Mills* decisions, all but New Mexico elected to seek the EAHCA funding. Eventually New Mexico recognized that because the state received federal funding for other educational programs, it was probably required under Section 504 to provide a very similar program of special education anyway.

The EAHCA had a number of key elements. These are -- appropriate education (which includes related services), in the least restrictive environment (known as mainstreaming), individualized to each child’s needs, for all (zero reject), at no cost to the parents. Key to its effectiveness was the provision for procedural safeguards. The courts have devoted substantial attention to clarifying and interpreting what the statutory and regulatory provisions require. Between 15 and 20 Supreme Court decisions and hundreds of lower court decisions have addressed education for students with disabilities or related issues since 1975.

### *Comparisons to the Interstate Highway System*

This paper uses the metaphor of the roadmap to compare the interstate highway system to education policy for students with disabilities. The EAHCA initially focused on special education for students with disabilities from kindergarten to graduation from high school (students aged 5-18).

Like I-70 in Kansas (which is in the middle of the country), it would eventually link to individuals at both ends, but initially it began in the middle age group. Like any new program

(or new road), there were a few rocky initial start up years. Just as the on-ramps to I-70 had to be built for the highway to be used, schools had to figure out how to do the outreach, identification, and placement of this large group of students. This was a challenge given that in 1975 there were 8 million students with disabilities, of which 3 million were being inappropriately educated and 1 million were totally excluded from school. As schools learned how to identify the children and make the placements, the system improved and began to work relatively well.

### *Higher education*

For higher education, roads were also being built. In 1973, Congress enacted amendments to the Vocational Rehabilitation Act. Unlike the thoughtful detailed plan for EAHCA, Section 504 of the Rehabilitation Act was a minimalist statute – prohibiting discrimination on the basis of handicap (later disability) by programs receiving federal financial assistance – which included virtually all state public K-12 school systems and most institutions of higher education through federal research grants and/or providing federal student loan support.

Section 504, however, was not initially very effective for supporting education for college age students for two major reasons. First, almost no one knew or understood its implications for many years. The statute had passed with little fanfare. If you don't know there is a great new stretch of highway, you're probably not going to make an effort to use it. If you don't know you have rights in higher education as a student with a disability, you're probably not going to try to enforce those rights.

Second, in 1973 college age students with disabilities were not yet adequately prepared to go to college because they had not had the benefits of a special education law at that point. If there are no on-ramps to the highway, you can't get on. This lack of awareness and preparation is why the sequence of education policy development after K-12 is considered a later development, even though the 1973 Rehabilitation Act it preceded the 1975 special education statute.

### *Adding coverage – infants and toddlers and preschoolers (0-5)- the 1986 amendments*

Just as more stretches of the Interstate Highway System were built over the years and connections to other roads were made, the EAHCA evolved. In 1986, Congress added the infants and toddlers provisions (a new stretch of highway). This did not provide services as comprehensively as for children in K-12, but it recognized the necessity of a policy that was comprehensive and gave financial incentives to states to provide programming for children from birth. Although the state education system could apply for this funding and administer the programming, another public or private agency could do so, as long as it was coordinated with the education system. This is an area where a spaghetti junction problem could and did occur because communication and coordination did not always work well when more than one agency or program was involved. But the 1986 amendments did extend coverage to early childhood.

### *Transition services- the 1990 amendments*

Similarly, it was recognized that once the child either graduated from high school or received the maximum age for eligibility (depending on the state, but almost always no later than age 23), he or she could easily reach a “dead end” on the education highway with no place to go. Federal policymakers recognized the value of a comprehensive “interstate” or lifetime protection program. To respond to that, in 1990, the EAHCA was amended to require that schools ensure a transition plan for students age 16 (or earlier if appropriate), so that the student could transition to college, vocational training, employment, or independent living.

The challenge this has created, however, is like the highways that don’t have good signage to the beltway or interchange to get to the next highway, there has not always been good signage/communication when students transition from high school to college. Higher education students come to college with expectations that they will have the same set of rights (such as an Individualized Education Plan) and that the college has the burden to find them, pay for their testing, and place them in a setting so they can learn – when the reality is that in college the obligation is on the student to make known the disability and to provide and pay for the documentation to justify an accommodation. The “signage” for these interchanges is not good and it sets up some “crashes” as a result. This is particularly true today with millennial behavior from college age students who grew up with technology that created an expectation of instant responses and having to absorb information-overload, which makes them stressed.

#### *The Americans with Disabilities Act of 1990*

The 1990 amendments to EAHCA renamed the statute to be the Individuals with Disabilities Education Act (IDEA), recognizing the more politically correct language using disability instead of handicap. It was also the year that the Americans with Disabilities Act (ADA) became law. Although the ADA did not really add much more in terms of substantive protections to Section 504, the ADA received much more publicity, and parents began to use the ADA and Section 504 along with IDEA more frequently in their challenges in K-12 settings. By 1990, students with disabilities were entering college in significant numbers and higher education was increasingly faced with challenges ranging from the cost of interpreters for deaf students to appropriate reasonable accommodations for students with learning disabilities and related conditions such as ADD and ADHD.

#### *Roadside and technical assistance*

Like the highway system that provides roadside assistance, by 1990 more technical assistance from federal agencies, particularly the Department of Education, was available at both K-12 and college levels, but the increasing numbers and new challenges have made it difficult for schools and for colleges. Financial incentives for teacher training for special education helped, but perhaps not enough to respond to the high burnout rate, and the difficulties of finding teachers who would work in rural areas or failing schools. There is also evidence that even within the Department of Education, different agencies (Office for Civil Rights, Office of Special Education and Rehabilitative Services, and the Office for Postsecondary Education) do not communicate well.

#### *Repairs and rebuilding*



Just as highways have had to be rebuilt or repaired when a major tragedy occurs – such as an earthquake or a flood or a bridge collapse, schools and colleges have had to respond to crisis situations such as Columbine and Virginia Tech. These situations require an understanding of both disability discrimination law and privacy requirements. Health crisis situations such as HIV (in the late 1980s) and H1N1 (more recently) have required schools and colleges to rethink their existing requirements for students with disabilities within the context of the privacy, health safety and physical safety context of other laws.

In response to high risk behavior and concerns about violence in the communities, both K-12 schools and colleges have revamped and revisited their policies in ways that affect students with disabilities. The guidance about privacy requirements under FERPA (in response to Virginia Tech) have given schools more flexibility in communicating about dangerous behaviors to parents and others in the community. The IDEA was amended in 1997 and 2004 to clarify what is permissible in terms of disciplinary removal and other discipline concerns when students with disabilities are involved.

#### *Increasing stress and anxiety*

Related to disciplinary issues is the general concern about students with psychological problems – ranging from depression to exam anxiety to anorexia to ADD/ADHD to bipolar disorder and schizophrenia. What are the rights of these students and what are the obligations? At the K-12 level - which might include expensive residential or private school placements) or at the higher education level (which might include concerns about students entering health care professions or other professions where their behavior and conduct is a factor in the character and fitness of the field) what is permissible and what is mandated within the context of federal disability education policy? Which of these individuals are even “disabled” within the laws? This is an area where courts have reached varying results depending on the circuit court. Different jurisdictions apply similar but not identical tests for determining the educational agency’s obligation to pay for documentation regarding whether someone is substantially limited in a major life activity.

#### *Spaghetti Junctions – School choice and No Child Left Behind*

Like major highways that intersect in cities, there are a number of areas where other laws intersect with educational policy for students with disabilities. From my perspectives as someone who has followed these issues for over three decades, there are two major areas where these intersecting policies are particularly challenging. These are school choice and No Child Left Behind – which themselves have intersections with each other.

#### *Failing schools – “A Nation at Risk”*

A major “spaghetti junction” where federal education policy meets special education policy is the No Child Left Behind Act of 2001. NCLB is intended to improve school performance by making schools accountable if they are to receive federal funding. Its underlying principles arose out of the school choice era beginning in the 1980s. Between the

1980s and early 1990s all states changes compulsory education requirements to allow home schooling.

The 1983 “A Nation at Risk” report issued by the national Commission on Excellence in Education warned that public education was “threatening our very future as a Nation and a people.”

### *Waiting for Superman*

The responses to the 1983 report included allowing tax credits, providing voucher systems, and funding charter schools. The response included the highly acclaimed documentary movie, “Waiting for Superman,” featuring a charter school in Harlem, highlights the urgent need for school reform. Geoffrey Canada’s response was to establish a charter school within a significantly challenged neighborhood in Harlem. While a very successful program, it should be noted that it has been in place for over 20 years, and has had a significant influx of private funding. For some, this documentary validates the need for school choice, but for others it has reinforced the priority of fixing existing schools.

### *School choice*

School choice includes programs such as home schooling, neighborhood schools, magnet schools, charter schools, and voucher systems. Such programs sometimes allow for tax credits for private school payment. They often add complex issues of separation of church and state for private schools operated by religious organizations.

In general, the school choice movement is another response to failing schools. One theory is that if public schools have competition, they will be better. So far, the success of these experiments is mixed. While there are some highly successful charter schools, there also many that have not improved educational quality for these students. Voucher programs often take funds away from schools that need them most and divert them to other places. Leaving aside the debate about whether such programs are generally successful at improving education, they are generally not positive for special education students.

### *Dead end ahead*

School choice options allow for the experimentation with alternative educational programs. Charter schools may permit substantial changes in teaching methodology, teaching materials, and curriculum. Some charter schools focus specifically on students with disabilities. Choice programs, however, often operate in a way that is directly or indirectly exclusionary. They are directly exclusionary because of eligibility requirements or because they do not provide accommodations for the student to receive an education within that choice option. To the extent that choice programs have disparately low access for students with disabilities, these students will be disparately left behind in the regular school. This violates the mainstreaming goal of special education.

### *No Child Left Behind – carrots and sticks*

Along with school choice programs at the state and local level, the federal level has taken the approach of providing carrots and sticks for ensuring quality education. In 2001, Congress passed the statute known as “No Child Left Behind (NCLB).” Key to its operation is an elaborate system of accountability and meeting performance goals. States that wanted to receive federal education dollars under the program were required to comply with NCLB mandates.

The key principles of NCLB include having highly qualified teachers, scientifically based instruction, and demonstration of adequate yearly progress (assessed by testing instruments that had not been validated for students with special needs).

While most education advocates support the general goals of NCLB and its inclusion of special education in those goals – particularly the accountability and teacher training – NCLB has been criticized for both general education and special education. In particular, the testing measures have been viewed as being negative for education (too much teaching to the test) and as working against special education because it marginalizes these students by emphasizing testing instead of implementing the individualized education plan. Another outcome is an increase in drop-out rates for not only special education students, but also for low achieving (often low income minority) students in some school systems.

One controversial aspect of NCLB is the requirement to have a system known as “response to intervention” which requires burdensome data collection about special education students. Penalties for not meeting goals include loss of federal funding, allowing students to transfer to non-failing schools (if there is really anywhere to go), closing schools, and reorganizing schools.

#### *No Child Left Behind – spaghetti junctions with special education*

No Child Left Behind was intended to remedy this by using federal funding as a “carrot” and holding out the penalty of withdrawing such funding (the “stick”) unless states implemented a detailed plan to ensure accountability and performance.

To receive certain funding under NCLB, states must provide for highly qualified teachers and meet a number of other requirements. National proficiency tests must be used and 100 percent of students must be proficient in math and reading by 2014, with states allowed to set interim benchmarks. Students with disabilities (except for a very small percentage) are *not exempted* from the proficiency tests and measurements. NCLB has been criticized on a number of fronts, including the disincentive to schools to include students with disabilities in their schools.

Another clash (or unmanageable spaghetti junction) between NCLB and special education is the requirement for highly qualified teachers. Rural areas and other less desirable schools face significant challenges, particularly lack resources, to attract both the regular and the special education teachers needed to meet the goals of proficiency. In addition the NCLB Scientifically Based Instruction (SBI) requirement mandates that instruction be based on scientifically based research. Currently most research on effective teaching is based on general

groups that did not include special populations and did not demonstrate effectiveness for students with different disabilities. It also clashes with the philosophy of special education that the program should be individualized for each student.

So, while the accountability goals of NCLB are positive, the unintended consequences have made this quite negative for implementation of IDEA. There is strong bipartisan support to change the law because the targets are unrealistic, the guidelines are too rigid, and the implementation is problematic. It also requires time and resources for elaborate record-keeping. On September 23, 2011, President Obama announced plans to grant extensive waivers under NCLB, in recognition of the fact that no state would meet the goals by 2014. The impact of that announcement (and its constitutionality) remains to be seen.

*Completing the “route” to support and protection – widening the road - 2008*

The current new challenges for education for students with disabilities are found in the final segment of the “road” or federal policy. Just as the final piece to the Interstate Highway System was completed about 35 years after the first stretch was built in Kansas in 1956, the most recent and perhaps for the moment, the final major piece of disability policy legislation was added in 2008 (about 35 years after the 1973 Rehabilitation Act). This was the ADA Amendments Act of 2008 (ADAAA), which clarified that the definition of who is protected should be a broad one.

In response to Supreme Court decisions from 1999 and 2002 which had narrowed the definition of disability, Congress amended the Rehabilitation Act and ADA to ensure that individuals who use medication or other mitigating measures are still covered, even if those measures mean that the individual is not substantially limited in a major life activity when they are using them. The ADAAA also add to the list of major life activities to clarify that activities such as learning, concentrating, and communicating are included. A major life activity also includes the operation of a major bodily function, such as the immune system, digestive, and respiratory systems. This amendment ensures that students with HIV, diabetes, and similar conditions are generally protected by Section 504 of the Rehabilitation Act and by the Americans with Disabilities Act. As a result, students with asthma and epilepsy are more likely to be entitled to nondiscrimination and reasonable accommodation. It means that students with a broad range of mental health problems are also more likely to be protected.

This “widening of the road” that completed the educational highway for students with disabilities applies to early childhood, K-12, and higher education. While the types of cases that might be brought under each of these age groups might be different, it is a significant opening up of the freeways (at least if you can find the on-ramp).

In a sense, the ADAAA of 2008 “widened the highway” by giving a greater number of individuals a right to use the “highway” or the educational program. But as we know from “Carmageddon” in Los Angeles, widening the highway is not always easy. Sometimes you have to close down the highway while you do it (which was in a sense what happened between 2002 and 2008 while Congress worked on the amending the definition of disability). But even when you re-open it (the highway or the coverage for a broad category of students) there can be some

major challenges if the “on ramps” and speed limits and signage are not part of the widening plan.

- 4) 2011 – Where Are We Now? Can We Make the Major Renovations? Can We Even Fix the Potholes? Can We At Least Improve the On Ramps or the Road Signs?

While this 35 year policy development for students with disabilities has been going on, there has been an economic recession in recent years. Add that to the general public concern about failing schools, particularly urban public schools and the response of creating school choice options. And finally, our recent legislative gridlock over raising the debt ceiling highlights the challenge for making any new major policy changes, or even overhauling programs such as NCLB that are desperately in need of attention.

Just as resource limitations and government paralysis mean that lots of bridges and overpasses will go unrepaired in the near future, these same problems may make it unlikely that much will happen to make any major fixes. Even the on-ramps and signage and the potholes may not be fixed.

So while it may be unlikely in the near future that major federal intervention will occur (and in fact funding reductions seem likely), it is important that advocates and policymakers have some “shovel-ready” projects ready to go when things improve. And in the meantime, there are some potholes that can be fixed without major federal involvement.

## II. The Role of Government – and the Impact on Roads and Schools

As the debt crisis politics of summer 2011 played out, the pundits discussed what it all means. There was a substantial voice that when the cuts really have to happen, because the stand-off of compromise about Medicare/Medicaid/Social Security entitlements and tax increases, we will have to face what gets cut. As Joe Scarborough lamented on *Morning Joe* in early August 2011 – it will probably be roads and schools.

I believe that the “moderate middle” which is a large segment of the American people – that while we must cut bad and wasteful spending, we cannot cut infrastructure spending. Just as roads have strengthened our defense system and provided for efficient movement of goods in a way that benefits the economy and provide for an efficient exit during hurricanes and other major events, our system of public education is a critical aspect of our infrastructure. We must sustain a program of education for all students – including those with disabilities – for a number of reason, including that it is in our economic interest to do so. Without an educated population base, we will most certainly become less competitive in a world economy.

My hope is that as we debate the role of government generally and the role of the federal government specifically, we have a realistic discussion of the costs and benefits of how government is involved. Government can regulate, it can fund, and it can reward and punish. It can provide expertise. It can do big things that no person or even big corporation or wealthy individual can do. To quote Abraham Lincoln, “*The legitimate object of government, is to do for*

*a community of people, whatever they need to have done, but can not do, at all, or can not, so well do, for themselves in their separate, and individual capacities.”*

Those who care about these issues must be involved in the public discourse about the tradeoffs of changing our long standing program of public education. Included in that discourse is the value of the almost four decade old federal program of ensuring that students with disabilities have a free appropriate education in the least restrictive environment, that is individualized to each student’s needs and abilities with procedural safeguards to ensure those protections. The program we have in place is in need of fine tuning, but it must remain in place and it must be funded at an appropriate level.

*What are the “big things”?*

There are some *big* things that intersect with education policy that need to be added. Just like the bridges are the “big things” for highways, the clarification of who is covered, especially in higher education is a “big thing.” While the ADA Amendments Act of 2008 and the 2011 EEOC regulations pursuant to the ADAAA provide some guidance, we will need more resources to carry out these expectations.

For students with psychological conditions, access to affordable mental health services is a “big thing” – providing funding and a mechanism to encourage students to seek help and to allow them to maintain privacy in doing so.

Previously noted are some of the problems of NCLB and school choice for students with disabilities. These are “big things” that need to be rethought – for NCLB it will occur in its reauthorization. For school choice, this will be more state by state, but scholarly guidance on this discussion is important.

*Potholes and infrastructure improvements*

The basic infrastructure of special education is in place. But more funding is needed for everything, but particularly for early childhood education. More teaching training is needed, and a discussion of how to fund and support teachers of students with disabilities who too often suffer from burnout which results in high attrition. We need to look at how our disciplinary policies are working as they relate to students with disabilities and to rethink what may not be working.

One of the areas that I see most often in my own work is that students entering college do not realize that K-12 is different than higher education. The transition services mandate of IDEA does not seem to be effective and more needs to be done to fix that “pothole.” And faculty and staff in higher education need more training about the increasing numbers of students with a broad array of disabilities – what they will require and how to do so in a constructive way.

*Widening the roads (or perhaps narrowing them?)*

Are there places where we should be making sure that the road for a student with a

disability is wide enough and sufficiently accessible? Some that come to mind are whether the ADA is creating burdensome challenges for colleges (and even for K-12) – the student with exam anxiety who should be given considerate treatment as a matter of good practice and policy, but who perhaps should not be entitled to the legal protections of the ADA or Rehab Act.

Are too many minority students being channeled into special education? Do certain testing procedures (such as IQ tests) disproportionately place students in low performing classes – so that it should be abolished? Or is IQ testing needed to ensure eligibility for some of these students for services based on a learning disability?

And finally, the challenge of ensuring that technology – from distance learning, to Kindle requirements, to websites, to classroom power point – is accessible. We need to be sure that educational policy addresses inclusion of students with disabilities in accessing new technology.

### *Crystal Ball*

The discussion about the government role is at the core of whether disability education policy will have its spaghetti junctions fixed, its bridges repaired, its highways widened and repaved, or whether there will be just a few potholes that are fixed (or even if that will be done).

In my view, once this debate is resolved (which may not occur until after the next election), what should be fixed are both big things (the spaghetti junctions) and little things (the potholes, on ramps and signage).

For the highway system, we have in place the easements and basic plan. The same is true for education for students with disabilities. What I would encourage policymakers to do while the political debate about amendments and resources continues, is to start working on “shovel ready” projects that can be done once the debate settles.

It is important to be positive and pro-active in addressing some of the issues raised in this paper, and to be ready to respond once the dust settles. Those who care about inclusion of students with disabilities must not wait, to see what Congress or state education agencies do. Scholars and advocates must be part of the conversation that influences policymakers – through their research, their expertise and their advocacy skills.

## References – publications by Laura Rothstein

### *Books*

SPECIAL EDUCATION LAW (4<sup>th</sup> edition) (Sage Publications 2009) (with Scott F. Johnson)

### *Book Chapters*

*Disability Rights*, Encyclopedia of Diversity in Education (Sage Publications) (2010)

*Southeastern Community College v. Davis*, chapter in EDUCATION STORIES, Michael Olivas & Ronna Schneider eds. (Foundation Press 2007)

*Judicial Intent and Legal Precedents*, pp. 71-106, edited by Loring C. Brinckerhoff, Stan F. Shaw, and Joan M. McGuire, POSTSECONDARY EDUCATION AND TRANSITION FOR STUDENTS WITH LEARNING DISABILITIES (2d edition) (pro. ed. Austin Texas 2002)

*School Choice and Students with Disabilities*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY, edited by Stephen Sugarman and Frank Kemerer (Brookings Institution 1999)

### *Articles*

“Telescopes, Microscopes, and Crystal Balls: Disability Discrimination Law and Policy in Higher Education: How Those in Higher Education Can and Should Influence Policy,” paper presented at the National Conference on Law and Higher Education, the Center, Stetson University College of Law upon receiving the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship, February 7, 2011

*Higher Education and Students with Disabilities: A Fifty Year Retrospective*, (symposium issue on the 50<sup>th</sup> Anniversary of NACUA), 36 JOURNAL OF COLLEGE & UNIVERSITY LAW 846 (2010) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1653466](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653466)

*Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 JOURNAL OF COLLEGE & UNIVERSITY LAW 101 (2009)

*Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is?* 13 TEXAS JOURNAL OF CIVIL LIBERTIES AND CIVIL RIGHTS 403-412 (2008)

*Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69, UNIVERSITY OF PITTSBURGH LAW REVIEW 531-566 (2008)

*Millennials and Disability Law: Revisiting Southeastern Community College v. Davis: Emerging Issues for Students with Disabilities*,” 34 JOURNAL OF COLLEGE & UNIVERSITY LAW 167-199 (2007)



*Disability Law and Higher Education: A Roadmap for Where We Have Been and Where We May Be Heading*, 63 MARYLAND LAW REVIEW 101-138 (2004)