ROUGH DRAFT

**2018 Jacobus tenBroek Disability Law Symposium**

**“Fifty Years after tenBroek: The Right to Live in the World Today and Tomorrow”**

Held at:

The National Federation of the Blind

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“Welcome, Introductions, and Opening Remarks” and “Theme Keynote”

8:30 a.m.

MARK RICCOBONO: Good morning, everybody. I'm Mark Riccobono, President of the National Federation of the Blind, and I would like to welcome you to our 2018 Jacobus tenBroek Disability Law Symposium, with snow! In spring!

Appreciate all the effort everybody has made to get here. We sometimes say that the F in our initials stands for flexible. And that will be part of the theme for this year. We have had a number of folks who let the snow keep them away. Can you believe it? Sometimes it wasn't their choice; the airlines weren't too nice to them. Some folks will undoubtedly be getting here a little late, so we'll be a little flexible with some of the presentations. We'll be doing some of our presentations virtually. We're used to having folks in the room so we can talk to them during the coffee breaks and things like that. It will be a little different this year, but I see we still have a very hearty crowd here, so thank you very much for making the effort to be here.

We are glad you're here because being in the room is the way we can have the very dynamic conversations we need to about the future of disability rights and how we work together to shape them.

The National Federation of the Blind knows that blindness is not the characteristic that defines you or your future, that every day we raise the expectations of blind people because we recognize that low expectations creates obstacles between blind people and our dreams, that you can live the life you want and that blindness is not what holds you back.

The federation's legal work is central to our mission of full integration of the blind into society on a basis of equality, and this forum is part of our key work to advance the rights of blind people and all people with disabilities very much in the spirit and direction that Dr. tenBroek set for us many years ago.

And here we are, 50 years beyond his passing. It is a critical time in our nation to talk about how we can continue to advance the notion of disability in the law that really Dr. tenBroek was at the forefront of thinking about and talking about more than 50 years ago.

Our legal work, as I say is central to our work, and it's mostly self funded. So I do want to invite you to be a contributor to the legal program of the National Federation of the Blind, especially not just with your resources and your knowledge but with your dollars. If you're interested in making a contribution to the National Federation of the Blind, we would appreciate it, and you can talk to one of us later.

We do also appreciate your partnership in being here. You're sharing your expertise with us, and the opportunity to work with you to explore what the future might be like as we work together.

This forum is just one of our efforts to work together with some of the best disability rights professionals out there to talk about how every day we raise expectations and continue to advance the work of our organization and many others out there.

This symposium is possible because a number of our sponsors who I would like to take a quick moment to recognize. First is the law office of David Ferleger. David, thank you. He was just up here.

[Applause]

Everyone can wave their gavel in the air. If anybody should happen to fall asleep, just knock them with your gavel, you know?

And we have our gold sponsors: Brown, Goldstein & Levy.

Rosen, Bien, Galvan & Grunfeld.

And Pearson.

Then we have our bronze sponsors, the Burton Blatt Institute; Disability Rights Advocates; Whiteford Taylor Preston; Levin & Curlett; and the AARP Foundation.

We have our white cane sponsors, Amtrak. Probably some people traveled here on Amtrak. LaBarre Law Offices.

And we have our supporters, Lainey Feingold, the Mid-Atlantic ADA Center, and Goldstein, Borgen, Dardarian & Ho.

Thank you to our sponsors for making this law symposium possible.

[Applause]

We have many great topics we want to get to in the next couple days. And I would like to now take a moment to introduce to you and also remind you to silence your cell phones the chair of this symposium who served as the President of the National Federation of the Blind for 28 years and directed our legal work in that capacity. Before that, he did legal work for the federation. And currently he serves as our director of legal programs. So he now has been working in disability rights for more than 40 years. He has created a lot of the momentum, the partnerships that we experience right here in this room. He was central to establishing the Jacobus tenBroek Disability Law Symposium, and also the Disability Rights Bar Association. He did not know Dr. tenBroek, but he has built in the same direction and upon the foundation that Dr. tenBroek worked on, and he has helped to create the relationships that we enjoy in this room that are helping to advance disability rights across the country. He's chaired every one of these gatherings.

So here again to chair our Jacobus tenBroek Disability Law Symposium for 2018 is Dr. Marc Maurer.

[Applause]

MARC MAURER: Thank you, Mr. President. This is President of the National Federation of the Blind.

I appreciate the opportunity to chair the symposium once again.

I want to start by saying that yesterday Howard Rosenblum put together the law day for the Deaf, and I want to express my admiration for what he did. It was called the Deaf Law Day, and the organization that did the work to put it together was the National Association of the Deaf. Howard says that it's the oldest civil rights organization in America. Maybe anywhere in the world.

It seemed to me, I was there briefly at the beginning, that it was getting off to a good start, but it occurs to me that there may be other disability-specific themes that we would want to support. And if there are in the future of these symposia, I should think that we would want to make time, space, and resources available for other disability topics that are law related and specific to a particular disability.

I know that in the National Federation of the Blind, we have concentrated on blindness as our primary disability in which we argue cases, and we started with the proposition that we should argue the legislative priorities dealing with blindness, and of course we still do. We say that we don't have the expertise to talk on the topic of every disability, although the law applies to all disabled categories and consequently we think we have some expert knowledge in the area of the coverage of law, but we don't know about every disability. And consequently, we encourage those who do know about specific disabilities and the techniques to be used for them, we think that it's important that we have conversations about those. So anybody who wants to find a way to expand the kinds of coverages that we deal with should be willing to do that.

Our practice has been to have clients in our arguments and cases that are blind people, but to some degree, if we think that the precedence that may be set are significant and may have an influence upon the lives of blind people, we would represent people with other disabilities and we have taken some cases for individuals with disabilities other than blindness. That means we have to learn a lot about those disabilities.

So thank you very much, Howard, for that.

I notice here that we have a book that is being sold today. "The Future of Disability Law: Essays from the Disability Law Symposium," edited by David Ferleger. The book will be available for purchase in the back of the plenary session area this morning from 10:45-11:00, and it will be available this afternoon from 2:45-3:00. You can ask David about that.

David has just told me that he has been invited to make the argument in the 11th circuit that is the appeal argument, or at least he's one of the appeal team on the Winn-Dixie case, and it is a great temptation -- the argument will take place in May. It's a great temptation to go there and hear David and what kind of argument he wants to make.

I looked at this Disability Law Symposium agenda, and I felt that we're covering a lot of territory. And I thought to myself, where were all you people when I needed you when I started my practice?

[Laughter]

So I was a bit annoyed that you hadn't come along before now, but I'm glad you're here now. It's great to welcome all of you, and we're going to cover all of this territory, and I'm looking forward to all of the expert knowledge that you have to offer. I will be in the various sessions. I will be in the plenary sessions. And we're going to try to keep time in each of the plenary sessions for some questions from the audience. So we'll admonish the presenters to leave a little time each one of these so we can have questions.

And this morning we have to begin with a treat. We had scheduled two people to give a keynote. And I looked at their names and I wondered how we were going to have a keynote with two people delivering it. I was wondering if each one was going to give a line and then the next one would give a line or whatever.

But as it happens, those people have been prevented from being here. Consequently, we have another person to do it. And this is a person that we know. He's been on the law symposium steering committee forever it seems to me. Maybe he has been forever.

This is Robert Dinerstein, an associate dean and professor of law. He's director of the disability rights law clinic at American University, Washington College of Law, where he has taught since 1983. Prior to joining the faculty at the American University, Professor Dinerstein was an attorney in the special litigation section of the civil rights division of the Department of Justice. He handled federal court cases on the rights of people with psychological and intellectual disabilities institutionalized in facilities and the rights of those in juvenile facilities. He served on the President's committee on the mental retardation, now the President's committee on people with intellectual disabilities, from 1994-2001. He has consulted for the World Health Organization regarding the revision of mental health laws in Ghana and Malawi, and for the Open Society Foundations on various projects including their support of disability rights clinics and curricula in southern Africa and Latin America.

He has from time to time worked in the United States as well. He has a degree from Cornell and a law degree from Yale. It is a pleasure, a joy, and a special treat for us to welcome Professor Bob Dinerstein.

[Applause]

ROBERT DINERSTEIN: Thank you, Marc.

Mark Riccobono started us off saying we need to be flexible, which allows me to tell my favorite flexible story on my then 6-year-old now 37-year-old son.

I was teaching one summer in Chile. My son was a notoriously picky eater, he and I said to him before we went, you're going to have to be flexible there. He asked me what that means. And I said, doing things differently and going along.

So we went to Chile. We had a very nice dinner at a restaurant. He looked at it and it wasn't spaghetti with butter so he immediately rejected it. He said "I won't eat this."

I said, "Jonathan, you said you would be flexible."

He said, "Dad, I will decide when to be flexible and when not to be flexible."

[Laughter]

This group thankfully is flexible.

What I've been asked to do by my former colleague and friend Michael Tigar is to read his speech. If any of you know Michael Tigar and know me, there would be no way you would confuse us if we were standing next to each other. I'm 6'4 -- no, no.

[Laughter]

Michael has a full head of hair. He is about 6'3, he has a bit of a drawl in his accent, he's a brilliant colleague. He now mostly spends his time in North Carolina, and sadly he was defeated by the weather.

So I will do my best to read the speech that Michael wrote. I will say this, having known Michael for a while. I've never heard him speak without making some reference to a French philosopher of some kind, and indeed this speech has that.

And I'm fine with references to Derrida, and there's one in here. There is a French phrase as well. Now, I can sort of embarrass myself in Spanish. French is completely just a disaster. So I think I already warned the interpreters about this. I will do my best to give the French phrase, but if it's mangled, please understand the mangling is from me and not Michael, who is from my ear, quite good in French.

So here it goes. I am Michael Tigar.

This conference is, in some great measure, devoted to teaching, learning, and sharing experiences about so many aspects of law that are grouped under the word, quote, disabled, unquote. I cannot claim to be an expert with the qualifications of others who will speak. I am here, rather, to share with you for these few minutes some of what Jacobus tenBroek taught me. He was my professor, my mentor, my colleague, and my friend. He helped me to gain an appreciation of the common elements in all the struggles to redeem the promise of equality.

The title of this conference invites us to think back 50 years and to focus on the right to live in the world. I want to begin 80 years ago, however. In March 1938, a young law student, tenBroek, published two California law review articles on constitutional interpretation. There we can see the germ of ideas he was to pursue for the rest of his life.

I want also to share with you a memory from nearly 60 years ago. It was a September morning in 1958. I was a freshman at UC Berkeley, sitting in my first class, a lucky freshman in Dr. tenBroek's speech course. At 8:00 a.m. that Monday, he strode in, called the roll from Braille cards, and we began. We studied the history and literature of freedom of expression and belief. He led us, careful reading by careful reading, to share the insights and ideas that the constitution's framers had.

As that semester ended, we were reading Alexander Meiklejohn's "Free Speech and its Relation to Self-Government." Dr. tenBroek was helping us to understand that the constitutional idea of free expression was an expression of the framers' view of governance. That is, this right was not a standalone or abstract phrase, but one essential part of an image of people taking part in making the important decisions of their time.

This unitary concept of freedom and its purposes was one reflection of the constitution's historical setting as a product of the enlightenment, the social movement that had toppled kings from their thrones and swept most elements of the feudal system into the dustbin of history. The constitution, as Madison said, rejected the impious doctrine of the old world that people were made for kings and not kings for people, unquote.

Dr. tenBroek provoked us, challenged us, drew upon his encyclopedic memory for the words of these materials he had assigned to us. Although the discussion often proceeded line by line, he was helping us build up a sense of what this constitutional doctrine was about.

The framers' ideal of human needs and human flourishing was of course imperfect. It quickly ran up against the self-interest of the social class that the framers represented. Chattel slavery and genocide of the Native Americans were two of the harsher contradictions to the framers' professed ideals.

So Dr. tenBroek led us to confront the ways in which the framers' concept of human liberation was hemmed in by their own self-interest as white men of property, members of a social class whose personal, political, and material success was based on denying to others the rights to share in that which they possessed. He led us to discover that the Civil War amendments were in some great measure designed not only to strike the bonds from slaves but to move towards a more complete idea of what it means to be human.

In these two semesters, he quickened my own sense of what it might mean to help define and advance the constitution-based concepts of human flourishing. I encountered his influence at every turn. There was a free speech crisis at the radio station where I worked. The ACLU lawyer who helped us was a friend and confidante of Dr. tenBroek, who led the debate. Welfare recipients' rights were under attack. He was there. I read his works on equal protection. In 1949, he wrote, quote, We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights, especially life, liberty, and property, and to do so equally.

However, he noted, quote, the purposes of these framers received short shrift at the hands of the Supreme Court.

I read the book "Prejudice, War, and the Constitution," which he coauthored with two other professors. This remains the leading study of the World War II Japanese internment, documenting the lies, racist fictions, and dubious parentage of the internment orders. It is the book that ought to remind everyone -- and there are so many that need reminding -- of the whirlwind we reap when the seeds of racism are sowed.

In 1965, when I was a law student, Dr. tenBroek called me to his home to discuss an idea he had. When we met, he laid out a plan for the days-long symposium that was to lead first to an issue of the California law review and then to the book, "The Law of the Poor." That book first found its way into print as the longest issue of the California law review in its history. In that symposium, we find his article "The Right to Live in the World: The Disabled in the Law of Torts." By that time, I had met so many of his friends and colleagues that I even learned they had an old nickname for him: "Chick." But I never dared call him that.

In these few minutes that we have together, I can only call to mind the threads of doctrine we find in the life and work of Dr. tenBroek. We can weave them together, and this is what we will find: The promises that the Declaration of Independence and the constitution made were unrealized in the early 19th century. The constitution, said an abolitionist leader, had become a covenant with death.

As Dr. tenBroek noted, the 14th Amendment was designed to recall, reaffirm, and animate the concept of human flourishing that had been proclaimed as the original constitutional ideal. Equal protection was not to be a crabbed and technical way of seeing things. It was an ideal that overruled Dred Scott and cast aside the racist rationale of the Supreme Court's cases on the rights of Native Americans.

In his pioneering work on the 14th Amendment, he noted that after a promising start, the ideal of equal protection was trivialized and shoved aside for more than a century. The Supreme Court had said in 1873 that equal protection of the laws is a pledge of the protection of equal laws, unquote. That was the court's sole 19th century effort to redeem the promise of equality. The Supreme Court was occupied with construing the 14th amendment due process clause and making sure the states did not get in the way of monopolies and trusts, and that the big corporations were not troubled by workers claiming the right to organize.

By the time of Plessy versus Ferguson, the equal protection clause had become a caricature of what its drafters had intended.

I invite you to consider the great sweep of Dr. tenBroek's work and the categories of persons whose lives he chronicled: African-Americans, Japanese-Americans, spouses constrained by unequal family laws, poor people, welfare recipients, members of despised religious faiths. What are all these people trying to do? He said in 1949 that they were trying to, quote, enjoy their natural rights, unquote. In 1966 he refined that phrase: They are trying to live in the world. And the 14th amendment was designed to impose on states the duty to enable them to do just that.

I suggest to you that in all of our work, whether making a statutory or regulatory argument or affirming a broader constitutional idea, we should use and express and say out loud this fundamental truth. "What are you saying, Counsel," the judge inquires?

"I'm saying, your Honor, that my client has the right to live in the world."

The federation's members know this truth better than anyone. This living in the world is not a theory. You have to live it, to speak it every day, in every forum. The philosopher Jacques Derrida imagines someone saying (speaking French). Basically, I want to learn to live.

Derrida uses this verb "apprendre," which can mean to learn or to teach or both at once. As we live in a principled way, telling our truth, we provide an example to others. To live is far more than to survive.

I pause to admire Dr. tenBroek's generosity of spirit, that he lived in a way showing me how I might live. He learned and taught, all at once, with a firm understanding of what he was doing.

Take an example some would say is trivial but which everyone in this room knows is quite fundamental. Among the routine tasks of government is installing and maintaining sidewalks, curbs, crosswalks, and traffic lights. These tasks are done with plans and work orders neutral on their face. Yet one day, responding to urgent demands, governments began to cut down the curbs at intersections, install bumpy strips on walkways, and make traffic lights that chirped, buy buses that would accommodate wheelchairs and crutches. And suddenly people were out there in the streets who were not there before. They were living in the world.

80 years from Jacobus tenBroek's first law review articles, and 50 years from his passing, we are further along than we used to be but nowhere near where we need to be. The right of people to form and live their lives in intimate relationships has been recognized. People have the right to live in marriage, to raise children in stable unions that contribute to human flourishing. In the recent case of Rodriguez versus Colorado, Justice Kennedy reminded us of, quote, the promise of equal treatment under the law that is so central to a functioning democracy and our commitment to the equal dignity of all persons, unquote.

The Supreme Court has at last acknowledged that the early history of equal protection was wrongly confined. The constitution-based right to an education belongs to women and to men, and to the disabled. A university may consider the history of racism in deciding to promote the human values of diversity. Women in the workplace are entitled to equal dignity. Statutes that fulfill the promise of equality must not be interpreted grudgingly but, as we see in the unanimous Endrew F decision, in the informing light of their evident purpose.

Nonetheless, some aspects of this right to live in the world are still regarded as matters of legislative interpretation, even of legislative grace, and not, as Dr. tenBroek taught us, of constitutional command. The Warren court has taken decisive steps towards acknowledging that governmental action props up, legitimizes, and enables denials of equality. Its expression of the state action theory, as elaborated in the lower federal courts, was an important piece of the equal protection argument. The Rehnquist court rolled back the state action doctrine, so that even an expansive statement such as that in Rodriguez is confined by state action language.

That however is the nature of all of our efforts to breathe life into promises found in the constitutional text. The state is always promising more than it intends to deliver, forever diverting our attention so that it can pick our pockets. This realization does not deter us; it defines our struggle. As a law student, tenBroek wrote, constitutional interpretation is itself always subject to new understanding.

The broad sweep of his work points up another truth: This right to live in the world is indivisible. You may not agree with me, but hear me out. We are in a time of social division that reminds us of the worst days of our national life. Refugees who seek a place to live and need a place in the world to do it are categorized in ways that remind us of the Japanese internment, and a hostile government seeks to turn them away. Racism, disguised as respect for history, finds expression, and we have leaders who do not condemn it. The enablers of these Confederate statutes, these monuments to slavery, have no understanding of what the Civil War amendments mean, and at what great social cost they came. As Paul Beatty has said, "They must think antebellum is a cranky old white lady."

[Laughter]

And yes, assault rifles set for automatic fire, unlimited stocks of cheap ammunition. We have all been reading and hearing of how government complicity brings about a state of affairs in which hundreds of children no longer live in the world.

I do not for a moment suggest that an organization devoted to disability rights should dilute its message or take on all causes. I do say that in its struggle, any organization that raises the banner of equality should frame its demands in terms that acknowledge this indivisibility of the right to live and to flourish. This is an idea that springs from the texts Dr. tenBroek required us to read, the meaning of which his forceful classroom teaching required us to understand.

The federation has, by this same reasoning, the right to say that all who claim to seek social justice should exhibit and express a theory that includes justice for all. I recently read a book that I commend to you in connection with our theme. It is Richard Rothstein's, "The Color of Law: A Forgotten History of How Government Segregated America." He shows us how decades of decisions by local, state, and national government helped to create the segregated housing patterns that have proven to be responsible for a host of other social wrongs and harms. Many of these decisions were ostensibly neutral, designed to foster home ownership. And so the right of people of color to, quote, live in the world, unquote, came to mean, quote, the right to live only in the neighborhood set aside for you, unquote.

Rothstein's basic premise resonates with us, for we are here to address decades of governmental decisions that in fact and in law relegated disabled people to living in a constricted part of the world. His premise invites us to interrogate every government expenditure and decision, and to judge it based on whether it recognizes the right of everyone to live in all of the world.

I am saying to you what you already know. If the abolitionist movement was, as Dr. tenBroek wrote, the great animating force of equal protection, that movement was borne along by the Battle Hymn of the Republic. How fitting that the federation's first song contest winner was "Glory, Glory, Federation."

I also like an old Quaker hymn about the resilience and power of truth: What through the tempest 'round me roar; I hear the truth, it liveth. What though the darkness 'round me close; songs in the night, it giveth.

Thank you.

[Applause]

MARC MAURER: Thank you, Bob.

Your interesting task now is to answer all the questions that Michael might have answered.

[Laughter]

And you can give us your wisdom and attribute it or just take credit for it, depending on how you feel about it. Suit yourself.

ROBERT DINERSTEIN: I was concerned nobody was laughing when it said he was a law student in 1958.

[Laughter]

MARC MAURER: What did Dr. tenBroek say about the sedition laws? That attacks free speech fairly directly. Well, it doesn't matter. That's a different topic.

Are there questions for Professor Dinerstein-Tigar?

It's a quiet morning, Bob. Do you have other things you would like to contribute before we move to the next panel?

ROBERT DINERSTEIN: Only to say, first of all, I think please read the bio of Michael Tigar in the materials. He's really had an extraordinary career in a really almost the Clarence Darrow of his generation, representing people who are despised, people who have been accused of doing things that many people revile. And yet performing in the best fashion of what a lawyer does, which is to represent a client zealously.

He merges that with, again, a level of erudition which is impressive. There are not so many good lawyers and professors.

I'll adjust one other point. He mentioned the Rothstein book, the color of law. It is a wonderful book in terms of clarifying when you look at the world today and where housing is segregated and you think, oh, I guess that just happened because people wanted to live with people like themselves. The book breaks that down in showing, this was really the result of a lot of very specific governmental practices and discrimination that was quite blatant and that today would be seen as such.

It's a quick read if you have some time. It's a wonderful book.

MARC MAURER: So I will ask you a question, I guess. By the way, "Chick" is a name for Dr. tenBroek that came from his school for the blind years. Hazel tenBroek told me they introduced him as Jacobus and the kids thought it sounded like Chickobus. He was born in Canada and blinded by an arrow shot at him when he was a kid. Another kid shot it at him. They were just playing. Unfortunately, that kid was right on target that day.

So he became blinded, and his dad learned that if he came to the U.S., there was a good school in California, and he went to the school for the blind.

Now, Bob, one of the questions that my friend Dan Goldstein asked is why aren't we done with the disability rights argument? Surely we've been at it a long time. Why is it not over?

And I said in response to that question, there is no substantial outrage among the judiciary, or for that matter anybody else. I mean, equality, sure, we need equality, but not for him...

This is the attitude that lots of people have.

Dan said to me one time, I go to the court and I say to the judge, this prospective employee was denied the opportunity to apply for a job for the reason that he's blind and for no other reason.

And the judge says, yeah?

That's the case. Because the judge thinks that's a reasonable response. So there's no outrage. How do we develop outrage for the class of people that we represent?

ROBERT DINERSTEIN: If I had the answer to that, I would, you know, be on my own book tour. But I will say this. I think that, especially when you think about looking back as we are at Dr. tenBroek's work, some of it I think is the movement we alluded to earlier, when you spoke about NFB and how it knows about discrimination against blind people. Other groups focus on particular disabilities. Ever since the ADA there's been wonderful work at building coalitions among different groups, but I think part of the problem is in many situations there's not the same concentration of people with let's say the same disability that generates the kind of outrage that you might expect.

Second thing is, I think that we continue to face problems that may or may not originate discrimination but certainly perpetuate it. The severe underemployment of people with all kinds of disabilities means there are fewer people like the judge you referenced who are familiar with, have worked with, have seen what people with different disabilities can do.

I wonder when it will be time to call an end to "well, people didn't know." At what point can we say, you should have known by now? There are efforts, for example, even a session at this conference, about the amendment to the ADA to require notice to providers of public accommodations about discrimination. And I'm thinking what part of 27 plus years of the ADA don't you understand, right? You know, this might have been a plausible thing to say in 1992. It's hardly plausible in 2018.

So I think you have all that. But then added to all that is the judiciary now is not that of the Warren court. So some of what Michael Tigar alluded to we're not seeing courts do. Even as courts have stood up against executive action, for example, in the last couple of years, but the role of courts making up the balance that the legislative branch doesn't address has been limited by just the nature of who gets appointed to courts. And for all the things -- not to make this a political speech, but with all the things going on in this administration, the appointment of very conservative judges gives me great concern because those are the ones who will be interpreting laws as we go.

I would say the struggle continues. And I think it's both important to recognize some very real progress we've achieved but also not to be self-satisfied about that. And I think the vibrancy of this symposium shows that I think we're not self-satisfied, that we're continuing to ask these questions.

MARC MAURER: I think it would be helpful also, every time a judge is invited, there are questions about what that judge believes regarding, and you list the things that you believe a judge is supposed to know. If the judge has a or the lawyer who is being considered for judicial appointment has a bad record on gender matters, then that gets took a matter of concern and you can ask questions.

I think we should add a significant question section on disability to that inquiry. And I think if we don't do that, then we leave the decision to people who don't know a thing about disability.

Now, the questions about disability in the beginning are going to be awful, I suspect, because the folks who write them won't be very good at it. But I think we better start getting these questions out.

In other words, I think we should have a requirement that we think about disability when we appoint these judges, and we should recognize that some judges with disabilities should be on the bench.

That's at least what I recommend.

ROBERT DINERSTEIN: The one other thing I would add, if you think about the presidential campaign, there was one moment when disability entered into the discourse. I'm sure you all remember it, when then candidate Trump made fun of a reporter with a physical disability. And that was the thing, if you kept looking at the news and what's the Trump candidacy's position on disability, everything always came up with that event, which certainly was something that everybody was except perhaps the speaker was outraged about. It was more, though, look at how awful this man is that he makes fun of such a pitiable person as opposed to, this is a distinguished, recognized reporter being prevented from doing his job by discrimination.

So not only do we have a lot of work to do in the legal realm, but the narrative we want to tell about disability I think we need to continue to be talking about entitlement and rights and not getting the crumbs that society wishes to give to us.

MARC MAURER: Yes, indeed. If the prism through which we look at disability is the one about charitable access to some kind of a life, then we've got the wrong side of it. I, for example, have said numerous times that I am not a broken sighted person. I am a blind person. And that is a fine thing. And if what somebody sees or observes -- I don't like the word "see" because it characterizes everything as visual and I'm not a visual person. So if what a person observes is that there's somebody there who needs charity, I've lost already. Charity is not my favorite thing, although I do have a significant role in a charitable organization. I've always known that's a kind of contradiction in terms, but be that as it may.

I think I've asked all the questions I can think of at the moment. So I'm going to turn this to the next panel unless there are questions from the audience.

Thank you very much, Professor Dinerstein.

[Applause]

“Disparities in Health Care’

9:30 a.m.

MARC MAURER: And if those who are participating on the next panel will come forward, please. We're going to be dealing with the question of disparities in healthcare, a topic that has many aspects.

We have three people to make presentations on this panel. And they are -- if you will excuse me if I mispronounce your names. I think I can do this, but we'll see.

Iris Gonzalez, senior attorney of AARP Foundation Litigation;

David Machledt, senior policy analyst, National Health Law Program;

And Jessica Roberts, associate professor, George Butler Research professor of law, and director of the Health Law and Policy Institute of the University of Houston Law Center.

Which one of you would like to begin?

The last shall be first. Here is Jessica Roberts.

[Applause]

JESSICA ROBERTS: Good morning. Thank you so much to the organizers. I'm delighted and honored to be here with you all today.

As was mentioned, I'm Jessica Roberts, the George Butler research professor and director of health law and policy at the University of Houston Law Center. I will kick off this panel by talking about some of the historical issues people with disabilities have faced and the way in which the Affordable Care Act specifically attempted to address at least some of those issues.

So I will set the tone for the panel. And then my copanellists will speak at greater length about the effectiveness of these changes in actually reducing many of these disparities.

So first, people with disabilities as a group are at greater health risk than people without disabilities. So according to the CDC, as compared to people without disabilities, people with disabilities are more likely to be affected by certain social factors, health-related behaviors, and they experience a general lack of access to healthcare. Specifically adults with disability are more likely to be unemployed, more likely to be a victim of a violent crime, with respect to disease they're more likely to have cardiovascular problems, to be obese, to be smokers, and to engage in little leisure time physical activity.

And finally, because of this lack of healthcare access, adults with a disability are less likely to have a current mammogram or they are also more likely to be unable to access needed healthcare because of costs.

Additionally, according to the office of disease prevention and health promotion, compared with individuals without disabilities, individuals with disabilities are less likely to receive recommended preventive healthcare services such as routine teeth cleanings and cancer screenings. They're at higher risk for obesity, hypertension, injuries, and mood disorders like depression. And they're more likely to engage in unhealthy behaviors such as smoking and inadequate physical activity.

And because of these heightened health risks, access to healthcare is particularly relevant to people with disabilities. However, they have historically had difficulty accessing healthcare. They have greater difficulty gaining access to preventive services. And when people with disabilities are successful in securing access, they frequently have poorer health outcomes than people without disabilities. And they must deal with potential biases with medical professionals.

So research has shown that medical professionals may hold stereotypical beliefs that lead to assumptions and behaviors when dealing with patients with disabilities. They might not want to treat certain individuals with disabilities, and they might underestimate the quality of life that's actually experienced by individuals with disabilities.

Now, these access issues have been further exacerbated by many of the traditional practices of the private for profit health insurance industry. Preexisting condition exclusions allow insurers to discriminate against individuals with disability, as did health status based underwriting practices, allowing insurers to exclude coverage for people with disabilities altogether or to charge more for people with disabilities, sometimes charging so much that it was prohibitively expensive to obtain health insurance, and even popular provisions like cost sharing, things like copays could have a negative impact on people with disabilities who may need to access more healthcare. A $40 copay seems a lot less reasonable if you're going to the doctor multiple times a week.

Despite these realities, people with disabilities have historically not been recognized as a health disparities population. Now, being recognized as a health disparities population is important because that recognition allows governments to take steps to actively reduce inequalities. In the past 5-10 years there's been greater effort to address disparities in healthcare faced by people with disabilities. But one of the questions that I want to tackle today is why it has taken us so long to recognize that there are serious disparities in healthcare related to disability. In some of my scholarship, I have proposed that traditionally lawmakers have understood the laws as being two separate canons, one being health laws and the other being civil rights laws. The under the umbrella of health law, we find things like social welfare benefits. Programs like Medicare and Medicaid that provide benefits to people. These kinds of laws are not traditionally viewed as an instrument of equality or access; they're more frequently construed as entitlements.

Another example is insurance law. Insurance laws may impact people with disabilities, but typically that's not the goal. They have markets to provide consistency and transparency.

And finally public health law is another form of health law, designed to promote population health. Frequently in the context of disability, individuals with disabilities have been the object of public health law in terms of prevention versus being viewed as a population that could be served by public health law.

So those are the health-related laws. We have social welfare benefits, insurance law, and public health law. That's been a separate set of legal protections typically than what we would call civil rights laws, which are laws where the primary goal is to address issues of access and equality often for a particular group. Of course in the disability context, the most well recognized civil rights laws federally are the Rehabilitation Act and the Americans with Disabilities Act. Now, some reasons why health law and civil rights law might have been construed as separate in the past might have to do with how we understand health versus disability. If any of you are familiar with the World Health Organization's definition of health, it's "a state of complete, mental, and physical well-being and not merely the absence of disease." I tell students if this is the definition of health, I have never experienced it.

With that kind of a definition of health in terms of health promotion, and then a legal definition of disability being a substantially limited impairment or record of that kind of impairment or being regarded as having that impairment, you might see how lawmakers might find health and disability to be in opposition. This might explain the failure we've had in the past to include people with disabilities in health disparities research.

Also too possibly responsible in part for this divide could be the disability rights movement itself. The social model of disability worked very hard to demedicalize disability and focus on the social aspects of exclusion.

Also, by rejecting paternalism, we separated disability rights from entitlements. These are potential explanations for why these two areas of law have not come together.

But that's not to say that civil rights law do not apply to healthcare. Just that they've not successfully eliminated the disparities people with disabilities face.

The Rehabilitation Act which covers federally funded entities would apply to those who accept federal funding. Of course Title II of the ADA, applying to state and local government, would apply to a healthcare provider owned or operated by a public entity or under contract with the state, receiving funds from a state Medicare agency, for example.

And Title III of the ADA covers public accommodations. And specifically in the language of that statute, it provides that, quote, professional office of a healthcare provider, hospital, or other, is an example of a covered public accommodation.

So despite the fact that these civil rights laws apply to healthcare, they did not adequately address issues that people with disabilities have faced in accessing healthcare. First there's something Samuel Bagenstos calls the access content distinction. This holds that as long as a given program or public accommodation provides meaningful access to a benefit, it need not provide an equal outcome. An example would be that as long as a health insurer offers the same product to all insurers, the relativity of the product doesn't matter.

Also the Rehabilitation Act has limited application to claims for unintentional discrimination. This means that even if cutting federal funding to a program would have a disparate impact on pends, that doesn't mean they can seek the law for recourse.

And private recourse on many civil rights laws undermines people with disabilities to make a large impact with respect to public health and entitlements, so individual litigants have to file their claims. This requires motivated people to go and take the time and often the large expense to file lawsuits. And we might see the ability of individuals with disabilities to file claims even further limited now that we have the ADA Education and Reform Act that passed the House with a vote of 225-192.

And then finally in disability law, we have the direct threat doctrine, which allows entities to treat people differently as long as there's significant risk of substantial harm to the individual or to others, and this might be used as an excuse for a medical provider not to provide care to an individual with a certain type of disability.

So the ADA and the Rehabilitation Act have fallen short in the healthcare context. To eliminate disparities and improve healthcare access, I've argued we need an alternate paradigm because health disparities are a health issue that requires a health law solution. While not viewed as such, the Affordable Care Act constitutes one of the most substantial civil rights victories for people with disabilities in history. It's an example of something we would consider a health law doing the work of civil rights by providing for access and equality.

This is not a huge surprise. Advocates pushed Congress to consider the health disparities faced by the disability community when Congress was drafting the Affordable Care Act. One example is advocates argued for understanding things in terms of, quote, the universal, quote, prism of disability. In other words, if the law that Congress passed was good enough for people with disabilities, it will probably be good enough for all Americans.

In addition, grassroots organizing and coalition building took place on a large scale. There was a consortium of people with disabilities with more than 100 cross disability organizations, faith based organizations also lobbying on behalf of individuals with disabilities, and we saw a coming together of disability rights groups and rights groups for the aging population that had not happened historically.

The result was that the Affordable Care Act contains many provisions with a positive outcome for people with disabilities. I'll go through a few examples.

First, the insurance nondiscrimination rules hold great promise for individuals with disabilities, eliminating preexisting conditions. The law provides that, quote, a group health plan and a health insurance offerer may not impose any preexisting condition exclusion with respect to such plan or coverage. Of course this is one of the Affordable Care Act's most popular provisions. By eliminating preexisting conditions, we get rid of some of that historical discrimination people have experienced in accessing affordable insurance.

Also the ACA doesn't allow rate setting discrimination anymore. Health insurers must rely on factors such as whether the plan offers group coverage, the location of where the individual is living, that individual's age, and whether or not that person uses tobacco.

And finally, the ACA prohibits discrimination. Group and individual insurers cannot use health status when making eligibility decisions. Not only can we not use health status in weighting, we can't use it to determine whether or not to offer a policy in the first place.

These rules give people with disabilities access to more meaningful access to health coverage.

Another important aspect of the ACA are its provisions dealing with accessible medical equipment. At the beginning of my presentation I mentioned that people with disabilities experience barriers obtaining routine preventive care and inaccessible medical equipment is one reason why. It might be possible that there are inaccessible scales, mammogram machines, X-ray equipment, etc. So pursuant to the Affordable Care Act, the Access Board issued standards for medical diagnostic equipment in January of last year. Using a collaborative process similar to that in developing guidelines for the ADA. However, at present these standards are not mandatory. The DOJ can adopt them as mandatory; however, right now they're instructive for providers and entities that manufacture medical device equipment.

Another important aspect of the ACA has to do with health disparities research. I also mention that individuals with disabilities are not historically considered a health disparities population for purposes of public health law. However, the ACA is among the first federal legislation to actually recognize people with disabilities as a health disparities population, meaning they can get access to federally funded or supported health programs, and those programs must collect and report data on disability.

Specifically, HHS will collect data on where people with disabilities access care, the availability of accessible facilities and equipment, and disability awareness training for providers to try to eliminate some bias.

These data collection initiatives will allow us to use that information to create initiatives that could hopefully reduce some of the disparities that individuals with disabilities experience in the context of healthcare access.

Other parts of the ACA that have a positive impact on people with disabilities include the creation of a healthcare anti-discrimination right in the form of section 1557 which one of my copanellists will discuss as well as changes to the Medicaid program, the largest source of health insurance for people with disabilities. But I will leave that to my copanellists.

The important take away is that threats to the ACA and other programs seriously put the rights of people with disabilities in peril. This administration that focuses on wellness outcomes could disadvantage people with disabilities if we dial back data reporting provisions, meaning we'll have less access to data and unable to track the disparities we've already long neglected.

So the happy part of my presentation is that the ACA shows us that we can use these other forms of law, things like healthcare, to actually further civil rights. We can use health law as an instrument to provide improved access and greater equality for people with disabilities.

However, in the current contentious political climate where some of those health laws are under attack, there may be a substantial roll back for individuals with disabilities.

Thank you so much for your time. I'm excited for your questions. And again, I'm Jessica Roberts at the University of Houston Law Center. Thank you.

[Applause]

MARC MAURER: Thank you, Jessica. I appreciate that.

Who do we have coming up? Oh, right, Iris Gonzalez is now senior attorney at the AARP. Here she is.

[Applause]

IRIS GONZALEZ: Good morning, everybody. Thanks for having me.

Speaking right after Jessica here provides a really smooth transition into what I was going to talk about. I just want to add to her comments and say that I think that there is another sort of big provision of the Affordable Care Act that would help in eliminating health disparities, and that's the fact that it increases the risk pool or theoretically it increases the risk pool in the private insurance market.

As she mentioned, you know, that is under attack. We know there have been a lot of regulatory actions and inactions that have weakened the individual market and the exchanges. So shoring that up and ensuring that it works how it was intended to work in the long term is a big step toward ensuring that all of the pieces of the puzzle are together of all the different tools that the ACA was supposed to provide to reduce health disparities.

But I'm going to talk about a more specific and obvious tool, and that is section 1557 of the Affordable Care Act otherwise known as the nondiscrimination provision.

The basic elements of section 1557 are that it creates a private right of action with the availability of compensatory damages for the exclusion of participation in, denial of benefits, or discrimination based on race, national origin, sex, age, and disability. And that is in any health program or activity, and this is how it's written, any part of which is receiving federal financial assistance, including credits, subsidies, or contracts of insurance, under any program or activity administered by an executive agency or any entitlement established under this title.

So a health program or activity is defined pretty broadly. I'll talk about that later when I get into the details.

However, the regulations, not the statute itself, the regulations exclude Medicare part B from the definition of health program or activity. And for now I'll say that AARP disagrees with this interpretation in the statute and so stated in its comments to the proposed regulations.

So what legal standards apply to section 1557? Well, the statute itself references and incorporates the four civil rights statutes that deal with national origin, race, sex, disability discrimination. It references and incorporates Section 504 of the Rehabilitation Act. So the legal standards for proving a violation of section 1557 and the remedies are, as we'll see in my discussion of the discussion of the cases that have been brought so far and in the interpretation given by the regulations, they're the same ones that apply to those analogous statutes.

So in essence, a claim for disability discrimination under section 1557 is analyzed under the same legal framework as a claim for disability discrimination under Section 504 of the Rehab Act.

The regulations similarly require reasonable accommodation to avoid discrimination, and of course it has the fundamental alteration defense in there. The regulations and executive order on preempts tell us that stay laws that prevent its application are preempted, and that's very important.

So given that we're looking at the same legal standards that apply in Section 504 cases, the question is: What is the added value of section 1557?

Well, I argue that it has two added values. The most explicit one is that it applies to private insurers on the exchanges. Because of the availability of credits and subsidies, to any insurer that is offering health insurance on the exchanges, they come under the fold.

And the other value is that it explicitly recognizes that we're looking at discrimination in the provision, or any program or activity, that is connected to providing health services. That's a broader interpretation than many of the courts have given to the protections of Section 504.

And it applies to an entity. If any part of the entity receives federal funding. Even if the person that's complaining of discrimination does not benefit from that specific program that gets the federal funding or doesn't participate in the program that gets the federal funding. The key is, if any part of the organization receives federal funding, it falls under section 1557.

So there are some opportunities to improve the reach of section 1557, and I'll discuss those more later.

And to sort of frame up what I see as opportunities to improve the reach of 1557, I want to talk about the litigation that we have seen so far on section 1557 claims.

There have been, you know, roughly 30 plus cases that brought some kind of a section 1557 claim. A little bit under 20, 19 or 20, that had any substantive ruling dealing with section 1557. So the types of discrimination that have been alleged, a lot of them are sex discrimination. Some are race discrimination. And then there have been eight that have a claim of disability discrimination. Some of these have more than one claim. So you have disability and sex discrimination, or in another case you had disability and race discrimination.

So on the eight disability discrimination claims, four of those were for a hospital or clinic's failure to provide appropriate auxiliary aids to Deaf patients. One was an HIV AIDS discrimination claim. That claim essentially was that a scheme that resulted in the higher price of HIV drugs had a disparate impact on people with this disability. That theory didn't survive, and I'll talk a little more about that later.

And then so the other disability claims were dealing with gender dysphoria, and that one is a little bit complicated because the interpretation of what constitutes sex discrimination, that's really what had led to the more extensive litigation and appellate practice with section 1557, because you're going back to Title VII and how sex discrimination is interpreted there. So that gets a little bit more complicated.

But essentially in that decision they just basically said that gender dysphoria is not a disability. That's the ruling when it comes to disability in that case.

Another one was agoraphobia and PTSD as a disability. And then another one was about hep C and the pricing of drugs. If you increase the prices of drugs that are specifically for to treat a chronic condition or disabling condition, it has a disparate impact on people with disabilities, but those theories have not survived, but the case law is ambiguous right now as to whether a disparate impact theory could be successful under section 1557.

So what is the status of these cases? They started being filed pretty early on, even the regulations became effective in the summer of 2016, but the provision was effective before then. Some cases were brought before the regs came out. So there's a little bit of inconsistency in a few cases in how the courts interpret the statute because they didn't have the benefit of the regulations at the time. So we see there's some differing interpretations after the regs came out.

A few of these cases have settled. Usually they settle after a good opinion on a motion to dismiss where the case isn't dismissed, and most of them are still in litigation. I haven't seen any that have gone to trial verdicts or judgments.

So what are the takeaways from the litigation we've seen so far? The case law primarily tells us what claims will survive motions to dismiss. We've had one summary judgment decision, and that's the one that I alluded to earlier. The summary judgment was that gender dysphoria was not a disability. And in addition to no trial verdicts or judgments, there are also no class actions yet that have survived.

So courts are applying the same legal standards for the four civil rights statutes that are referenced in section 1557, including Section 504, and there's no definitive answer on whether this permits disparate impact claims, which I this I is important.

Compensatory damages are available if you can prove intentional discrimination. The way intentional is used, you don't have to prove animus or malice, but that's in there. If you can prove that the discrimination was intentional, there's the availability of compensatory damages.

Of course we know the state is not immune from suit because they can't contract out their nondiscrimination duty. So state entities that contract with a private entity to provide health services are liable when that private entity denies people with disabilities equal access.

So some of the potential litigation strategies that I see sort of going forward with section 1557, I mean, it has its inherent limitations, but I think for those of us who are out there doing impact litigation, bringing cases, or, you know, those of us who are serving individuals in a legal services capacity, I ask you to sort of keep your eyes and ears open for these types of situations because we really want to test the limits of this provision. We need to see whether disparate impact theory of liability can be sustained. And I think that's important because the two cases that even brought up a disparate impact of liability, the decisions were on motions to dismiss and the judges didn't really deal well with that theory. They didn't analyze it well. In one of the cases, it seemed like the judge didn't really understand what a disparate impact theory was, so it was about -- I can't remember which drug it was, but about drug pricing. I think it was the HIV drug one. And he said, well, the prices of the drugs are higher not because they're for people with disabilities but because of X, Y, Z. I'm like, that's exactly what disparate theory is about. They should be neutral! So I'm like, I'm not really sure this is good guidance to go on here. It just seemed like the judge didn't understand the nature of the theory.

And then another case, it was one in which the judge said, well, there are differences of opinion about whether disparate impact theory could survive, and different circuit courts have dealt with it differently, but I don't need to decide that here because I can decide this case on another ground. So that's why I think there's still potential to push this theory and test its limits.

And I think it's really important because really a disparate impact theory of liability is what will get at the policy, the procedures, and the practices that are facially neutral but really affect people's access to quality healthcare and the affordability of that healthcare.

Another opportunity for a potential litigation is to challenge the court's narrow interpretation of associational disability. This is something, associational disability discrimination. This came up in a couple of cases where the parent of a person with disabilities who passed away brought a claim on their behalf, on their own behalf and on behalf of the estate of the person with the disability. And so the defendants brought up, well, she doesn't have standing to bring up her own claim because she's not the person with the disability. So there is an associational disability discrimination theory that is recognized under the ADA and Section 504, but interestingly here, so the ADA's definition is stricter. You know, you have to show that as the person claiming associational disability discrimination, that an actual benefit was denied to you too. Right? So at least one court has said, well, I'm going to take the ADA's definition and use it here, even though Section 504 doesn't have a definition but it's been interpreted more broadly. And I think that's really interesting because section 1557 doesn't reference and incorporate the ADA; it references and incorporates Section 504 of the Rehab Act. So there's some selective picking and choosing going on here. And I think that kind of interpretation should be challenged in good cases.

Some other potential litigation strategies include testing sort of the intersection of age and disability. When I read the text of section 1557, you know, at the beginning of my presentation, the word "age" was in there. Age discrimination is also actionable. But the statute that it references and incorporates is the age discrimination act of 1975, and really I just think that statute has no teeth. It's not been used. There's no case law on it virtually. It has really cumbersome and onerous exhaustion, administrative remedy exhaustion provisions. So I don't see how you could ever bring an age discrimination case if what the courts do is continue to say, to follow the trend they've been following and saying we have to go by the legal standards that have been applied to these other civil rights statutes.

So that's something that should be explored more, and I think is of particular interest because of the practical intersectionality of age and disability, and there's two ways that that happens, as you all know. People with disabilities are living longer, and so then they get to the point later in their lives when they have to deal with the double whammy of disability discrimination and age discrimination because there's a lot of ageism that really affects the kind of access and quality of healthcare that older people get, and both for people with disabilities and older persons, there's a bias that affects them. The bias is that the value of their lives isn't as much as someone who is seen as able and younger, right? So this intersection I think is one that should be explored possibly in a case that alleges both age and disability discrimination, and I think an area that is particularly suited for those parameters is long term care, assisted living. A lot of assisted living now in many states they take Medicaid through the form of waivers for folks, and fingers crossed, AARP will soon be filing I claim in an assisted living context with a section 1557 claim and other disability rights and housing law claims. So trying to test sort of where this goes.

Now, our plaintiff doesn't receive Medicaid. She doesn't benefit from the Medicaid waiver. But the facility takes Medicaid waiver payments, so we're bringing them into the fold that way.

Another area that I think would be interesting to explore in terms of the intersection between age and disability discrimination is something we've been working on at AARP for a while is stopping the inappropriate use of antipsychotic drugs in nursing facilities. Antipsychotics are often given as the first go to for people who have some form of dementia impairment. Basically because there isn't enough or appropriately trained staff to deal sort of with the behavioral challenges that come with dementia. So I think there that there is a dual bias or dual discrimination going on there, because there is a disability there, but also age. You're old, put away in an institution, out of sight, out of mind. So I would really like to figure out a way to deal with that from a civil rights perspective.

And I think that the intersection too is tricky because you want to be sure that when you're bringing your claims you're not diminishing one form of discrimination over another. That's why it's important to bring the right cases forward.

Another thing I think should be explored is on the drug pricing arena. A lot of times drugs that treat certain conditions are placed really high on the formulary for drug prices, and that has a disparate impact on people with disabilities and chronic conditions. The cases we've seen so far haven't recognized that or gone into that disparate impact and I think that really needs to be pushed. This practice of putting these drugs on higher price formularies is something that also AARP mentioned in its comments to the regulation.

And then lastly, I think that we need to bring an Administrative Procedures Act challenge to the regulations exclusion of Medicare part B. Nowhere in the text of the statute. I think it needs to be challenged because you know, people who are receiving health services through Medicare part B, which is going to be more and more people and also a lot of people with disabilities have access to Medicare, they deserve the right to be free from discrimination as well. And I think that needs to be challenged.

But I guess overall most importantly, other than aggressively litigating claims under section 1557, getting creative about the cases you bring and being careful which cases you choose, really can have an impact.

Overall, I think we need to save the ACA. There are a lot of gains in jeopardy. The public doesn't know how much of an important civil rights statute the ACA is, and that it's very important for people with disabilities. But I want to say for everybody. I want to look at this from a prism of, you know, at some point, you know, as she mentioned, none of us are healthy according to the definition of the World Health Organization. And if we are for 5 minutes in our life, we won't stay that way. All of us will need health services. We'll need supports. And so you know, I think we should bring it more towards sort of a universal expectation that this is something that should be available to everyone, and if it's available to everyone, it will help those most in need and also those least in need.

Thank you.

[Applause]

MARC MAURER: Thank you, Iris. There has been litigation on the use of psychotropic medication to control inmates in mental hospitals for the criminally insane. I don't know whether that applies to what you're talking about, but I suspect it might.

The last of the presenters today is David Machledt. I hope I said that properly. Senior policy analyst of the National Health Law Program. Here you all go.

David?

[Applause]

DAVID MACHLEDT: Hello, everyone. Thanks again for the opportunity to speak today. I am a senior policy analyst with the National Health Law Program. My background is in medical anthropology. I have a PhD. I'm also cochair for the health task force for the Consortium for Citizens with Disabilities that we heard about before. So that's cool.

I just want to say we've been through a heck of a difficult year fighting for healthcare. That snow storm we had yesterday was kind of symbolic for me. It's late March in Maryland or D.C. where I live. We've battened down the hatches and we've ridden out a long, cold winter. A couple of weeks ago it felt like spring was just around the corner, but now we're dumped with snow again and saying, not yet... not yet... We've got to keep shoveling.

So as Iris and Jessica have already pointed out, the ACA helped to bridge the gap between health law and civil rights law. I will say there are folks in my office who have done a lot of work on 1557, including bringing a complaint, the complaint on HIV drug copays, where in Florida there were plans that were putting all of their HIV medications into the highest tier of copayments. And there is that provision in the law also about discriminatory benefit design.

So I will say, in the regulations for 1557, that issue was raised as complaint and there were changes that happened in Florida due to that complaint.

But I want to say, I'm going to be a Debbie Downer here. I'm going to turn around and tell you that after all of that that attempts to bridge these things, we are now facing a whole bunch of potential threats that could erase some of those gains and some of the gains that we've made that I will call baby steps towards reducing health disparities.

But before I go there, I want to take a minute to think about how the ACA has moved the needle in terms of health disparities. According to the Kaiser Family Foundation, uninsurance rates for black, Hispanic, and Asian populations have declined faster than they did for whites -- they also declined for whites -- between 2013-2015.

There are still substantial gaps in coverage between these different populations, but the gaps have gotten smaller, and that's an important step forward.

Another commonwealth funded study, in 2017, found that disparity gaps have decreased across various measures, the insurance rates, but also the percent of people who have a usual provider.

Prior research suggests that that kind of coverage gains and changes in these other areas generally translates to better health outcomes. And that also passes the common sense test.

We've also seen coverage drops in Medicaid expansion states being more significant and larger. I want to point out that in the Medicaid expansion, that includes millions of people with significant disabilities. People who maybe didn't meet the strict social security criteria for disability or have not been able to previously qualify for Medicaid for some reason, including a lot of people with behavioral health conditions. As many as 3 in 10 adults have some kind of behavioral health condition in the expansion that can create barriers. Depending how you define disability, something north of 1 in 5 expansion adults are also living with a significant disability.

We've also seen millions of others with preexisting conditions who can now find more affordable health insurance on the ACA marketplace.

So things were going in the right direction. And then we had this bump in the road, a health landscape change in the end of 2016. Last year, you know, when this administration started, it looked like the ACA was going to be repealed and Medicaid would get federal funding limits known as per capita caps that would lead to massive cuts and millions of people losing insurance.

Those cuts would have disproportionately affected people with disabilities who rely on Medicaid coverage for medical care and for their long term care and I can go into that in Q and A if you want. Luckily, that hasn't happened. And that's thanks to a huge advocacy surge, including loud voices from the disability community of people in the Hart Senate building getting arrested. It made a huge impression and a huge difference. And the threat of major legislative changes right now has subsided for the time being.

But, Debbie Downer, we still face big threats from administrative changes. And I'm going to talk about those threats and how they could exacerbate health disparities going forward and why we need to continue that push until we get to spring.

I don't have time for a lot of details on these specific measures. I'm happy to talk about them. I've spent a lot of time on them and others in my organization during Q and A.

ACA, three things to point to: Undermining access to coverage, making it harder and more expensive to get coverage. Policies that undermine the comprehensiveness of coverage, particularly targeting the essential health benefits, which are 10 categories that the ACA said every marketplace plan and other small market plan has to cover. And then there's measures that if eroded protections around preexisting conditions and have led towards splitting or dividing the risk pool, and I'll talk about that.

On the Medicaid side, the general theme here is that there's been a push in some states to do things that will make it harder to get enrolled and stay enrolled. One of the goals of the ACA was to make Medicaid simpler. I tried to say simple, but I thought, no, it's not. Make it easier to get into. There's a single streamlined application. You're supposed to be able to apply online. They simplified the mechanism for becoming eligible. They got rid of asset tests which often tripped people up not because they have too many assets but because it takes time to get all that together and every time you add an extra hurdle, someone trips.

So these new requirements that will mostly go through 1115 waivers include things like waiting periods, lock outs, waivers of nonemergency medical transportation, work requirements which you might have heard about recently, and even things like time limits on Medicaid coverage, lifetime limits.

We also have a spade of new rulemaking. There's a proposed rule out right now that will allow providers to refuse certain kinds of services to people based on their exemptions and the regulation expands who that applies to. There's rumors of revamping of 1557 regulations that were finalized last year. There's a whole bunch of other things that are on our plate right now. In terms of ACA marketplace stability, we've seen death by a thousand cuts. The big regulations didn't work; now we're seeing other kinds of what you might call sabotage.

In terms of premiums, enrollment, that first bullet, shortening of the enrollment period to 6 weeks from 3 months, restricting enrollment periods and who can get them. There's a massive cut to the outreach and advertising budget, a cut to support for healthcare navigators who help people sign up for insurance. And finally, there was cutting off of cautionary reduction payments which caused premiums to go up even more.

In terms of weakening the EHB, there's a proposed rule out, hasn't been finalized yet, that would change the rules for EHB. And among other things, it would set a ceiling on plans. So whatever state had as essential health benefits in 2017, that's as far as it's going to be able to go. If it wanted to add or change a benchmark to a more comprehensive benefit, the state would have to defray those costs if the rules finalize as was said.

There's also a new definition for a lot of ways for states to make their EHB less comprehensive. There are new rules that make it easier to substitute benefits, within a particular EHB category, to have lower amounts of coverage. And there's also a new definition of what an employer sponsored base benchmark plan can be. And that is any plan that has an enrollment over 5,000 people. So you could have an outlier plan with low benefits that still has 5,000 people and could then be considered a base benchmark plan across the 50 states.

So that's a dangerous thing.

There's also broadening access to things called association health plans, which are sort of like plans offered by a farm bureau or something, making it easier to access those plans, and those plans are not subject to EHB. They're regulated as large group plans.

And there's other things.

Finally, in terms of splitting the risk pool, we had legislative proposals that would have gone back to the pre-ACA days of high risk pools in insurance, and that has a very checkered history in terms of leaving people with extremely high -- leaving people with preexisting conditions, limiting coverage, capping enrollment, and for those people who got in, had extremely high out of pocket expenses.

But basically that association health plan rule and another rule about short term health coverage is another sort of end around the ACA that would allow those plans to offer skimpier coverage, which siphons off healthier enrollees by giving them lower premiums which doesn't amount for comprehensive coverage, and doing things like say not offering mental health coverage or not offering prescription drug coverage on a plan. Someone with a preexisting condition wouldn't be attracted to those plans, which leaves a sicker risk pool in the health marketplace, which means those premiums go up even higher and you have a de facto high risk pool.

What are the implications for people with disabilities and chronic conditions? Higher out-of-pocket costs is one. More difficulty getting and keeping coverage. And really returning to the days before the ACA which healthcare was not covered by these nondiscrimination laws, so breaking that link.

In terms of Medicaid, I'm really going to focus on Medicaid expansion waivers. This is something my organization I've done a lot of work on. We're currently involved in litigation in Kentucky, but I want to give a little bit about why these matter for people with disabilities because a lot of media coverage of this is that people with disabilities are excluded from that or the Medicaid expansion, you know, there's a misnomer that it's something meant for adults who don't have disabilities.

As I explained, that's not really true when you look at the ground. We have millions of people with disabilities who previously fell through the cracks in Medicaid and in those states that have expanded Medicaid are finally able to get coverage. Especially people with mental health conditions and behavioral health conditions who previously had trouble with the disability definitions.

So what is an 1115 waiver? The statute says this is in existence since 1962. It is meant for a way for Medicaid to test novel innovative approaches and allows states or the secretary to waive certain Medicaid rules in order to test those pilots. So it was pilot demonstration programs. There are guardrails on what the secretary can approve. One is that it has to have a demonstration value and have experimental value. It's supposed to be likely to promote the objectives of the Medicaid program, which basically are to furnish medical assistance. And it is limited in scope. In other words, you can only waive things for the time and for the reasons necessary to carry out that pilot program, and it's limited to things that are in section 1902 of the Social Security Act which is a huge provision which covers a lot of different things in Medicaid but not everything.

So historically, the scope of 1115 has gone way beyond the notion of what it was originally intended for, just to be a demonstration program. There's some elements, managed care is a good example, family planning is another example of things that were tested first and eventually moved into the statute as state plan options. That hasn't been the case in a state like Arizona, which came into Medicaid program in 1981 or '82 with a Medicaid demonstration. That is now its whole state Medicaid program and it has been running that experiment since 1982.

So now about a third of all Medicaid spending actually goes through 1115. This is a huge subset of the Medicaid program. And that's why it's really important to pay attention to what's going on in Medicaid expansions.

So what we have is, you know, some states that didn't want to accept the straight Medicaid expansion that was in the ACA. Mostly these are republican governors or legislatures who wanted to do their own thing. We have premiums, provisions like premiums, disenrollment if you fail to pay the premiums with a lock out in some states, waivers of retroactive eligibility, nonmedical transportation, new efforts with punitive healthy behavior incentives. And what we've seen is every time one state has gotten one waiver for premiums, the next state that came in asked for that waiver plus something more, right? So we've moved beyond those things and now we have lifetime limits, proposals for drug testing. These have not been approved yet. And then a work requirement which has been now approved in three different states: Arkansas, Kentucky, and Indiana.

This was previously rejected under the prior administration.

Why are work requirements and these things important for people with disabilities? They make it harder to stay on Medicaid. And I'm going to look at work requirements a little bit more. The way that this is sold, it's people who can work should work. And people with disabilities are going to be excluded from this.

(Light laughter).

Thank you. I'm glad to hear people are skeptical of that claim. One, people on Medicaid expansion, it's hard to screen for disabilities. Most states don't have a screen in place right now. So they haven't even developed that. Let alone whether you develop an adequate screen and how you're going to do that to get people to flag.

What we've seen with the approval so far, there's definition in the regulations called medically frail and people who are medically frail in the Medicaid expansion are exempt from work requirements. However, there's a vast disparity in who gets flagged as medically frail. In Arkansas for example, the state has had a medically frail screen and has about a 7.5% of the people in their expansion were declared medically frail. In Indiana it's more like 21%. In other states it could be higher. So this is a huge difference. Someone who doesn't get flagged for some reason or doesn't qualify for that medically frail exemption is going to have to complete those work requirements. Even someone who is exempt is going to have to go through that process, and that process itself adds red tape, it adds difficulty, and anytime you add those hurdles, what happens? People lose coverage.

What our experience has been looking at other programs that have put work requirements in place, like TANF, is that there's been a disproportionate effect on people with disabilities, people who have barriers to finding employment. There's no added supports in the work requirements that have been approved so far. There has been language saying they would accommodate people with disabilities, but you're not talking about a new supported employment program.

Kentucky has a requirement that it make a good faith effort to connect people with employment opportunities. Um... anyway...

[Laughter]

So what you have is even people who are complying or who should be exempt are going to have more trouble getting exempt. You're adding a huge amount of bureaucracy to the system that we already complain about has way too much red tape. And what the effective of this is going to be is high costs on Medicaid agencies, high administrative burden, and you're also going to have people with disabilities who are losing their coverage. In Kentucky, the state estimated -- the state itself estimated that 95,000 people would lose coverage through implementation of all of those waivers I was talking about, including premiums and other things.

In Indiana, its actuary estimated 25,000 people would lose coverage due only to the work requirement. And that did include an analysis of all the people who will fall by the wayside because of the added verification requirements.

So the big message here is that we need to be paying attention to what's going on in these states. What can you guys do? The first thing is we're not in an environment where we're likely to get a lot of headway at the federal -- with the administration. So the key action here is at the state level, knowing what's happening in the 50 states. There's a lot of states that have work requirements and other 1115 demonstrations ongoing right now. We need people to come out, apply media pressure, do advocacy with your elected officials. There's been successful advocacy in Kansas where legislators pulled back a work requirement about pressure of how poorly run their previous one was on managed care for Medicaid and that has stalled out at least for the time being that push for work requirement and I give a lot of credit for those advocates.

We need expertise from disability perspective on how these kind of provisions will have a disproportionate effect on people with disabilities. People who have extra barriers to work.

And finally, there's the litigation angle. I'm happy to talk about that a little bit. We've brought a claim against HHS in the D.C. district court for the approval of the Kentucky waiver that happened in January, and of course the subsequent approvals we're looking at very closely and we'll see what happens.

With that, I want to say people with disabilities face more barriers to accessing care than other groups, and these barriers are multiplied for people with disabilities who experience other discrimination due to race, ethnicity, age, and sexual orientation. I think that that intersectionality is really important to think about in our work. Though the major legislative push to repeal the ACA and cap Medicaid is now on the back burner, we're still in great danger of losing some of the gains to end nondiscrimination protections in the ACA and in Medicaid. Those protections are really important tools to help promote policies that can help move us toward more health equity in our system. The immediate focus has to be on limiting these threats like to Medicaid expansive waivers and comments on regulations, getting those things on the books, that also helps out with litigation.

The voices of the disability community have been absolutely crucial in holding back hugely damaging legislative changes to Medicaid, and that attention and effort is still needed as those administrative efforts to undermine the laws continue.

Hopefully spring is around the corner.

[Applause]

MARC MAURER: Well, thank you, David. I appreciate your comments. A Debbie Downer, we say. Why do we always blame it on Debbie?

[Laughter]

Maybe it should be a David Downer.

DAVID MACHLEDT: That's what my colleagues say.

MARC MAURER: You know, everybody wants to know about us in certain cases. Whenever I go to fly somewhere, somebody wants to know if I have a disability. I have a great reluctance to tell them, because they already have an opinion about what I'm supposed to be and what I'm supposed to do before I show up.

So the argument that I always say, do I tell them ahead of time what I expect and what I need? Or do I just go there and do the best I can at the time? Because maybe I won't get a preexisting set of thoughts that I run into.

And what you've talked about is whether or not we should disclose, and of course the question is how are we going to disclose and how are we going to be labeled amongst other things.

So I can appreciate your Debbie/David Downer status these days.

We do have time for questions. I can think of a couple of hundred. Why don't you guys start? Who would like to speak? Please identify yourself. We have microphones out there. One standing on a stand and one that's portable. So probably we can get two.

Al?

>> Hi. Good morning.

MARC MAURER: You're not Al.

>> My name is Caitlin Parton from the Massachusetts P&A. I was wondering what are the suits have so far been filed and where they have taken place.

IRIS GONZALEZ: So I can't remember all of them except I remember when I was looking through the cases, there were disproportionate amount filed in the eastern district of Louisiana. A lot of those were motions where the judges didn't dismiss. So that's where I've seen the most cases, but I would have to go back and look, and I can take a quick look over my notes and get back to you with more specifics because I have them right here on my computer, but I remember noticing that and going, wow, this is a hotspot for section 1557 claims!

MARC MAURER: Al?

>> Yes, sir.

MARC MAURER: You're not the one. I thought you were seeking the floor, but apparently not.

Who is next?

>> Hopefully you can hear me. I was just curious and I think I know the answer to this question in some respects, but what might be any potential role for like healthcare organizations, hospital groups, trade groups, and things like that to try to add something to the conversation that might be helpful? I know there's some ways in which these groups might stand in the way of progress, but is there any potential opportunity for them to be an ally?

IRIS GONZALEZ: Are you talking sort of in terms of reducing health disparities in general?

>> Right.

JESSICA ROBERTS: So I think as a general matter, on the healthcare provider side, with the healthcare providers and those industries and what they do, I think recognizing people with disabilities as a meaningful population that they are serving. So in the context of healthcare in this country, we do have a kind of consumer-driven model. So there's actually a great market for medical device companies to develop better, more accessible equipment, right?

Also, too, this is not something that relates to disability, but certain healthcare providers get reputations for better serving obese individuals and then get the larger share of patients coming to them. So you can imagine a particular provider or institution being really accessible or disability friendly and individuals with disabilities going out and saying, I had a positive experience here, right, and then that is something that generates better care and leads to the benefit of both parties.

So I would just say that acknowledge people with disabilities, acknowledge their needs, specifically in the context of healthcare, and then meet their needs. Right? Because I mean, the status of insurance aside, they need this access and there's opportunity for mutual benefit I think.

IRIS GONZALEZ: And if I could just add to that, I would say try to work on doing a better training. Cultural competency training of all your staff and everyone. Not just the direct care providers, but everyone who works at the hospital.

What I'm seeing in these cases and I'm sure many of you have experienced, people just don't get it. They don't get what you need. They don't take the time to understand. They don't really want to understand. They're sort of like, this is my job, this is what I'm told to do.

So if I need an interpreter versus whatever machine you have for me that doesn't work for me, there's a reason I need an interpreter. Don't tell me this is the only thing I can offer you. You're not understanding my needs. That's a lack of training and cultural competency. In some sense, it's a lack of empathy. It's better to get at it with training and cultural competency aspect of it I think because I don't necessarily think that people who are like on the direct lines are necessarily, you know, they're not bad people; they're just trying to do their job the way they've been told they have to do it. So let's change what they tell them about how they do it.

>> And with respect to the regulatory efforts and things coming down that you've all spoken about, where are those trade groups? Where are the medical providers and the insurance companies weighing in?

DAVID MACHLEDT: I can take this one.

I'll speak in terms of the Medicaid expansion. The push to get more states to do Medicaid expansion and to accept those funds has been an experience with lots of what I might call strange bedfellows. Like the hospital associations are on board in many states. And I think that's been a really powerful way to lobby states. And I think in terms of some of the more damaging potential proposals for 1115 waivers, there's been a broad coalition of groups, not just sort of your progressive groups but managed care plans. The association of health insurance has written letters that have been really positive on a lot of the regulatory comments.

But also in terms of getting states to accept that Medicaid expansion. It's good for state economies. There are many beneficial outcomes. And that also helps get more people with disabilities covered at a macro level, and that's really important.

These other things, you know, attention to managed long term services and supports, that's been a big problem, and we are working a lot on -- I've done a fair amount of work on that with the managed care regulations improving accountability and oversight and that kind of thing. And there's been a lot of plans involved in those discussions in Washington, D.C., reaching out to the disability community to talk about how to do that better. So I think that's another place where that is happening.

JESSICA ROBERTS: Also too, the Access Board guidelines, that's a collaborative process too, the desire to get multiple stakeholders in and talk about the needs and also the ability to meet the needs. That's a situation where you would have healthcare providers and medical device producers talking to people with disabilities, what are your needs and what are the sorts of designs of things that we can create to meet those needs. I think that's a great model for thinking about a lot of these issues, that we need to be having these conversations to enact that change.

MARC MAURER: So one of you said that you have to show intentional -- I think it's what you said -- discrimination. Not animus but intent.

Is knowledge enough? I mean, all of the providers that sign the contracts shall the law requires nondiscrimination. The contracts require it. Is that enough? Which one of you said that?

IRIS GONZALEZ: That was me. This is Iris.

Yes. I mean, I think it's enough to show, you know, you knew the person had a disability and you denied the person equal access or equal enjoyment to the services. So I pointed that out because when we think of intent, you know, we immediately go to "they meant to do something bad to the person," but that's not how the law interprets that term in this context. So I just wanted to make that clear.

MARC MAURER: Who is next?

>> This is Daniel Hodges with Pearson mentees.

One of the things we haven't covered all that extensively, for those of us who are blind but also have other disabilities or other health conditions, helping care providers distinguish the symptoms or issues that are directly attributable to that disability from those that are not. For instance, something can coexist in a person but could not be correlated. My case, for instance, I have had issues with walking ever since I was a child, but it took literally decades to finally be able to educate providers on the orthopedic issues that I have that were directly causing that versus trying to misattribute those issues from blindness and the direct things there.

So I guess how do we go about teaching providers how to separate what may or may not be legitimately related versus what is simply coexisting and almost coincidental in a sense?

JESSICA ROBERTS: So I think some of that issue goes back to the cultural competency kinds of things that Iris was talking about. Just providing better education for medical professionals in terms of how to deal with individuals with disabilities and the kinds of questions that are appropriate, the kinds of questions that are not, and really like all things, it is great to get folks at the institutional professional level, but really the best place to get them is in terms of education. So just better educating our doctors in medical school about disability and treatment and how to treat a whole person in a way that actually reflects their experience and not in a way that builds in these kinds of biases and assumptions about functioning and relationships and things.

I think personally, we need to better educate our doctors about how to deal with individuals with disabilities. And in the process of doing that, I think we will be able to de-bias.

MARC MAURER: Very good. Who is seeking the floor?

>> May I?

MARC MAURER: You may.

>> My name is Beth Pepper. I'm with the Department of Justice in the school rights division, but I'm actually here in my personal capacity.

[Laughter]

I have to say that.

[Laughter]

MARC MAURER: We were thinking of asking you a few questions.

[Laughter]

>> So my question goes to this issue of intersectionality, and I think, David, you may have mentioned at the end. I was just curious as to the relationship between some of the topics you described and the type of discrimination that persons of color experience in healthcare. And whether there are analogies or parallels and whether or not jurisprudence with regard to access for persons of color is in a better place, and for people with disabilities, whether there are benefits to looking at that case law and whether or not there has been any way in which the issues pertaining to people with disabilities can borrow from or be informed by or in some way that area might be instructive.

IRIS GONZALEZ: So I think that that is possible, and that is the reason why a lot of times multiple claims are brought, right? It's race discrimination and disability discrimination. Sex discrimination and disability discrimination.

And the problem is that what you're going to get is judges interpreting what they think the discrimination is really about. And it's about also like what kind of evidence can you bring that race was a factor versus disability, and then there's going to be that weighing of, was it more disability or was it more race. Or was it both. It just depends on the facts of the case.

It's good we have section 1557 and we already have legal standards of discrimination to go by based on the preexisting statutes, but in a way, that's also a limitation. I wish that 1557 would have been written with its own set of standards explicitly, and that it wouldn't have been tied to that. There's a section in the statute that says basically that nothing in the statute shall be interpreted to provide any less protections than current civil rights statutes. So the argument is that it's the floor, not the ceiling. But what we have is, you know, judges saying, well, we already have guidance here in all this case law with the civil rights statutes that have been litigated, and section 1557 references and incorporates them, so that's what we're going to go by.

I don't necessarily think that's what the statute says. It just says it's a floor. So there's really an opportunity there to argue for more protections because there's a different I think and specific intent behind section 1557, is recognizing healthcare activity and services as deserving of special protection.

JESSICA ROBERTS: Also too, if you have a pure intersectionality claim where you really can't parse out the two different categories and you're stuck with different standards, which standard are you going to proceed under, the one that references the Rehab Act or --

IRIS GONZALEZ: It hasn't been addressed.

JESSICA ROBERTS: It's a problem for judges to figure out. But I think in itself, if you can get intersectionality kinds of cases and then say that this section 1557 is greater than the sum of its parts, that it's actually intended to do more, want to take sort of best part of these underlying statutes, not the worst part of them and how they've been interpreted and create a better, more meaningful, more robust civil rights care for these categories.

MARC MAURER: Other questions?

>> Hi, I was just behind you, actually. And I will hand the microphone over right away, but I just have it right now.

This is Silvia Yee. Partly building on the question that's already asked. So I have two parts. One was whether looking at 1557 as the sum of its parts, whether it's a way to get around solely by reason of because it's there and seems to go against intersectional interpretation of 504, but again, with that as a floor only, and not a ceiling, maybe there's a way to get past that.

The other 1557 question I had was, we've been thinking a lot about the benefit to design aspect of 1557, how benefit design and discrimination of it is explicitly included in the EHB regulations. I'm wondering about the timing of something like that. Will 1557 allow us to get around that classic car parts analogy? You can go to a camera store. The ADA means you can get into the camera store but you can't look at the cameras in there. And the fact that 1557 allows us to look at actual insurance, and there's such a history of insurance discrimination, everything from we cover you getting a cochlear implant but we won't cover you getting the services and supports and devices you may need as a person who is Deaf to function in the world. And we've been looking at this a lot with regard to durable medical equipment, and a lot of discriminatory, historically, practices in insurance about what's covered and what's not and limitations placed on wheelchair coverage, etc.

I think my question is about the timing of such things. Here we are with threats to -- I mean, I don't think insurance companies necessarily ever thought of as sympathetic parties. Now is probably a time when CRS payments have been done away with and there's a question about the viability of insurance markets, etc.

When is a good time to raise this somewhat second generation aspect of 1557 to really tackle and try to get at the benefit design of insurance and how it discriminates against people with disabilities?

JESSICA ROBERTS: I would say something that makes 1557 exciting is the explicit application to health insurance. In the longer law review article where I go through the ways in which various civil rights statutes have failed, this is a way in which they have failed by saying we all have equal access to the same plan and therefore you have meaningful access to what's your problem and then looking at the fact that the actual coverage is something that falls terribly short for certain individuals.

I can't speak to the timing but in my mind, we needed it precisely to get at the kinds of things that you're describing, the kinds of second generation discrimination, right, so you're not having outward exclusions but you're having this kind of disparate impact and we're building in biases about in terms of what's the appropriate way to approach a given disability, it covers a cochlear implant but not other things.

So the timing with the ACA under threat I think that 1557 is under threat. So maybe not now but this is just one of the reasons why we need to fight to keep the ACA intact. That's going to prove to be a really, really important aspect of section 1557 and it's really important that we save it.

IRIS GONZALEZ: That's where I think the disparate impact liability theory could come into play.

I also think some of the sex discrimination cases with gender dysphoria and different benefits providing like breast reconstruction to one sex and not the other and for one purpose and not the other, I think that case law as it's developed may help sort of build those theories in a more strictly disability context, but it's all sort of emerging but the timing really is key.

DAVID MACHLEDT: I don't have a lot to add since I wish I had my colleague Wayne or Jen here to talk, but I will say I think, you know, there is the open possibility of this regulation -- it's being actively reviewed right now. In terms of timing, it could be a use it or lose it thing. There are cases right now built on 1557 as a statute and others that are really the national injunction is really about one part of the regulation, the current regulations. So you know, getting case law that is based on the statute might be helpful in the context of that regulation being rethought. It's just a thought.

So but I think being thoughtful about what cases to bring and talking to the people doing that work is really important in coming up with that strategy.

MARC MAURER: One more question.

>> Just quickly I wanted to follow up on Caitlin's question. Disability claims have been brought in New York and Louisiana, but also 1557 cases in Wisconsin, D.C., Iowa, Illinois, Texas. There's been like six in the northern district of Texas that are sex discrimination cases. So it's fraught.

Sorry to interrupt. Next question.

>> My question is directed at David. So you had referenced some current attacks on Medicaid coverage, and I was wondering if you know if any of those laws like the one in Arkansas, if they allow for home maker services to help an individual work to explore Medicaid coverage and if you're aware of any cases where that's have been used to temporarily obtain Medicaid coverage in our current political environment.

DAVID MACHLEDT: To give an honest answer, I don't know about that particular case. I'm happy to follow up with you and do that research and get back to you. Why don't you come talk to me offline and I'll give you my card and we can talk.

MARC MAURER: Okay. I appreciate your presentations and a matter of significant need is outlined in what you said. So we have to make plans to have strategies to pursue the objectives you have outlined here.

Thank you very much to the three of you.

[Applause]

We're getting to the break and we'll be doing that in a moment. We have a couple of announcements.

We do have six workshops coming up. The Endrew F decision is one of them. We've got understanding your rights in the doctor's office, ending police violence against people with disabilities, doctors without barriers, beyond guardianship, and essential guide to the Workforce Innovation and Opportunity Act.

Let's see. We have an announcement about lost and found.

LOU ANN BLAKE: Anyone who was lost an iPhone with a red back on it, please see me, Lou Ann Blake, at the registration table. Thank you.

MARC MAURER: David Ferleger's book is available for sale in the back of the room. Are you going to tell us how much it costs, David? I'm sure you can afford it.

All right. At noon we have lunch on the other side of the room where we had breakfast, so please be there at noon.

[Workshops]

“Lunch and Keynote Speaker”

12:00 p.m.

MARC MAURER: We'll be starting the programming in about 5 minutes. So if you have more things to get, we'll be starting in about 5 minutes.

So if I may have your attention, please. May I have your attention, please.

So welcome to the luncheon of the Jacobus tenBroek Disability Law Symposium. There's plenty of food, so if you get a little peckish, you can get a little more.

The National Federation of the Blind is honored to have the law symposium here, and we are pleased to offer the facilities and some of the ideas, and I'm glad to welcome everybody who would like to participate.

I heard some planning to expand the coverage of the law today, which always cheers me right up.

So the law symposium is doing its work.

The National Federation of the Blind took its first case in 1954. Dr. tenBroek authorized that. I don't believe he served as counsel on the case. I became President of the federation in 1986. I had taken cases on behalf of disabled people before I became President, and I authorized bringing hundreds of cases during the time I served in the presidency.

We know that we must adopt laws that protect the rights of disabled people. We know that without enforcing them, they matter less than they might. Consequently, we do our best to bring the cases that are going to make systemic change for us. During the course of our history, starting back in 1954, our President has always been responsible for managing our litigation. That is so because litigation is a program element for us. We can't get the protection of the law without enforcing the law.

Today we hear from the President of the National Federation of the Blind. He is responsible for our litigation strategy. He does get a lot of advice. I am director of legal policy for the National Federation of the Blind, and when I have advice, somehow or another, I offer it. But we use a good many lawyers around the country. Scott LaBarre is in the audience. He offers advice. We use Brown, Goldstein & Levy. Several of you are in the audience, and you all give advice. Used to be that Daniel Goldstein would call me up and tell me what to do. When I pointed this out to him, he said, "No, you called me up and told me what to do." So I guess we had a mutual method of approach.

The President of the National Federation of the Blind is a blind person. Our first President was Dr. tenBroek. He served for 23 years in the presidency. He made a significant difference in disability rights partly by his writing, partly by his speaking, partly by the cases he authorized or pursued. Some he pursued personally. And partly because of the heart that he had.

Our current President has now served for almost 4 years. He came to us as an education expert, having run the education program dealing with blindness in the state of Wisconsin. He was raised in Wisconsin, so he has a Midwest background.

He likes to tell stories about his coming. Some of them indicate the nature of how we conduct our business. I'll offer two. He walked into my office after he had come here to work. He said, "I'm here to report; what do I do?"

Now, I don't remember this. He tells me that I said to him, "Were you at the convention last summer?"

He said yes.

He tells me I said to him, "Did you hear that we're going to have an education program for blind children next summer?"

And he said yes.

And I said, "That's what you're going to do."

And he said, "Good. What's the plan?"

And I said, according to him, "That's what I've got you for."

Then he goes on to say there wasn't a plan, but of course there was a plan. The plan was to get the brightest guy I could find to do the education program for blind kids, and we've been doing it ever since. We're going to have educational programs in 40 states this summer based upon the work that our President has done. We have 50 different programs of education and we're doing the most aggressive science and engineering programs in the nation having to do with blind children, mostly imagined and put together by our President.

We get the students here and we get them to build boats. We give them the equipment to build boats. And they have a week to build a boat. Or 5 days.

When they get done with it after the fourth day, we take the boats and put them in the water, and then we get them to climb in the boats to find out if they're going to sink.

[Laughter]

We haven't lost anybody yet, so I'm pleased to say that he's imagined great progress.

I was sitting in my office, and I know that because at the 200th anniversary of the birth of Louis Braille, born in 1809, we have a coin with his face on it in real readable Braille, the only one struck in the United States, and I was sitting there thinking we should expand the ways we're known and the ways that blind people come to be a part of our society and I said, you know, we ought to get this on the Space Shuttle.

About two weeks later, he said, "I've arranged to have it on the Space Shuttle."

It was just a thought I was throwing out, and he says it was an assignment so he went and did it.

[Laughter]

And I sat there in the stands in Florida and observed the Space Shuttle fly into space. It shook the stands, and I took the recording of that incident and I brought it to our national convention, and I played it at our national convention talking about our education programs, and it shook the room. Everybody thought, well, that is quite an exhibition of power of the kind that you can't get in most places, and the National Federation of the Blind has been part of it and we had astronauts there to talk about how we're going to expand opportunities for the blind who may be going into space.

This is the character of our President. He believes in the litigation strategy that we have. He asks for advice. And I can tell you for sure he gets it. So he is pursuing the enforcement of law in the United States. As I say, we have about 50 cases going at the moment.

I am delighted that we have a person of that kind of character to lead us and to direct our litigation strategy.

Here is Mark Riccobono.

[Applause]

MARK RICCOBONO: Thank you very much, Dr. Maurer, for that introduction.

And good afternoon.

We'll try that again... Good afternoon.

>> Good afternoon!

MARK RICCOBONO: Okay. I know, you were taking a bite, right? That's the classic problem.

It is a pleasure to be here this afternoon, and I think that I'm not for certain but registration wise this may be one of our or the best law symposium we've had. And certainly the enthusiasm in the audience is as high as ever. I was a little worried this morning when the bus hadn't shown up yet. We only had two tables full at breakfast, but the lunch is completely full so I'm glad you are all here.

Individually, we are scattered, ineffective, and inarticulate, subject to the life of oppression of the social worker and the arrogance of the governmental administrator.

Collectively, we had the masters of our own future, and the successful guardians of our own common interests.

These words, delivered by Jacobus tenBroek, at the founding of the National Federation of the Blind in the fall of 1940, represent the fundamental elements that are at the foundation of his legacy today.

Those fundamentals are what I hope to emphasize this afternoon. My presentation is an unusual one for this law symposium, but only because the primary content delivered during the past 10 gatherings has typically been from those trained in the law. I, unlike the majority of this room, have no law degree, have not been welcomed into the noble profession.

[Laughter]

And by the way, I am not subject to the endless array of one liners about lawyers.

[Laughter]

While others in this room may be better equipped to articulate Dr. tenBroek's impact on the law 50 years after his passing, I offer something more fundamental regarding his life's work and its lasting contributions to our great nation and the world.

This afternoon I wish to emphasize as Dr. tenBroek's work did that disability rights require more than the law itself. They also require what might be broadly described as disability rights movements.

I use the word "movements" to make the point that we can view disability rights as having multiple intersecting movements, one being the organized blind movement.

Sir Walter Scott said, "A lawyer without history or literature is a mere mechanic, a working mason. If he possesses some of these, he might venture to call himself an architect."

I believe that if Dr. tenBroek were here today, he would tell us that we do not need more disability rights lawyers, although the actual number of legal professionals with expertise in disability is not sufficient. But we do need more disability rights architects.

While the law, especially the constitution, was a central focus of Dr. tenBroek's work, it is not his greatest legacy. Dr. tenBroek understood that the most powerful mechanism for influencing the law and its implementation was to build a movement. His primary movement was the National Federation of the Blind, and had he been granted more time on this earth, I am confident other movements would have followed.

Building a movement was so central to who Dr. tenBroek was and how he thought about the law that upon his death, Kenneth Jernigan said, "It would be equally accurate to say that the man was the embodiment of the movement, or that the movement was the embodiment of the man."

In 1952 Dr. tenBroek delivered an address to the convention of the National Federation of the Blind. A movement that was still in its early stage. He said, in part, "The essence of democracy consists in four indispensable guarantees to the individual citizen. The guarantees of liberty, equality, opportunity, and security. Full membership in a democratic society, that is to say, entitles the individual to liberty and thought and action. Equality of treatment. Opportunity to develop his potentialities and security against the calamities of fortune over which he has no effective control."

The withholding or withdrawal by society of any of these fundamental rights from an individual leaves him at best in a role of probationary membership, of second class citizenship, and to that extent refutes the practice and violates the spirit of democracy.

Dr. tenBroek used the individualized construction of democracy to demonstrate the areas where people with disabilities were denied equal treatment and protection under the law. However, he recognized that the most powerful way to effect change was through coordinated action by individuals through a movement.

In 1957, he articulated the importance of association in the context of the right of the blind to organize, which was being threatened by agencies for the blind, attempting to protect the custodial institutions they had established. He said, "The blind of America have bound themselves together primarily in order to unbind themselves from the arbitrary shackles which throughout all history have confined their movements and smothered their self-expression."

Their emancipation from this social straightjacket requires the achievement of three essential and inseparable rights, three rights which constitute the fountainhead of American democracy, and the recognized birthright of ordinary citizens. They are the right to organize, the right to speak, and the right to be heard.

Dr. tenBroek's words from more than six decades ago are as relevant today as they were at that time, and they easily apply to all people with disabilities.

What, then, are the fundamentals of movements? And how can we, lawyers and mere mortals, contribute to those fundamentals? In order to enhance the right of the disabled to live in the world, with all of the liberty, equality, opportunity, and security of our democracy?

I offer this short list of fundamentals to be woven into the foundation of our legal work in an effort to stimulate conversation about how we continue to build disability rights movements.

Number one, ownership. In any movement, it is essential that those at the heart of the movement are in control of its direction. We would not consider a woman's movement authentic if it was not driven by women. Nor should we expect disability rights to be largely driven by those without disabilities. This is not to discourage those without disabilities who are some of our most powerful disability rights champions. It is to recognize that in some places, disability rights priorities are not determined by people with disabilities, but by individuals who appear to take pride in speaking for people with disabilities.

To support the ideal of ownership, we must be thoughtful about how we bring disability rights cases forward and how we coordinate legal work among organizations. The legal professionals that work within the structures of disability-run organizations understand this very well. Our annual tenBroek symposium and the work of the Disability Rights Bar Association are attempts to coordinate strategies, resources, and priorities with those who may not be working directly with disability-run organizations. Legal counsel should be careful to ensure that their words and actions are consistent with that value.

As we grow the network of individuals interested in disability cases, it becomes increasingly difficult to coordinate. Disability rights attorneys are going to interpret aspects of the law differently, and there will be bad actors in the mix, as has been overemphasized in recent attempts to diminish the Americans with Disabilities Act.

These challenges make it even more important for people with disabilities to drive the direction of legal efforts across the country.

Two, community. In any movement, there has to be a sense of common purpose. And a high value placed on bringing a community of individuals together. Dr. tenBroek spent as much time on those activities as he did on studying and teaching about the constitution.

As disability rights lawyers, what more can we do to help people with disabilities to connect and build their own leadership circles? One thing we can and should be doing is helping people with disabilities be well informed about the law and how to protect their own rights. This means being proactive and providing training to people with disabilities and their families.

Through those activities, we will provide a forum for people with disabilities to connect with each other and we will find opportunities to assist individuals in building their leadership skills. We will also cultivate more people with disabilities who are interested in getting into the legal profession. Especially if we use those opportunities to highlight lawyers with disabilities.

There are still many places in this nation where people with disabilities are not well connected and our best disability rights lawyers can be powerful facilitators for making those connections. Even 77 years after the creation of the National Federation of the Blind, there are still blind individuals who are isolated and not connected to the community we have built. This means we have more work to do, to realize the full growth of our movement. I am certain there are plenty of other places throughout the country where that potential exists as well.

Number three, power. We need more people with disabilities and disability rights experts in positions of power inside and outside of the legal profession. You can be certain that in any place Dr. tenBroek had the opportunity to be, he asserted his right to be there and got disability rights to be part of the conversation. Dr. tenBroek also assisted other blind people to get into positions of authority so they could raise the profile of blind people and the organized blind movement. We need to strategize and cultivate opportunities to get more of our people into appointments on the federal courts but also elected to local, state, and national office and into the boardrooms of major corporations.

[Applause]

We should influence progress using our legal expertise and our standing in the community. We need people in this room to be thinking 5 and 10 years down the road and how we can get the right people in line for opportunities that will arise.

More importantly, we need people in this room to stretch beyond their current circle, to reach for opportunities that may seem out of reach today. There is not enough power in our disability rights movements, and we should not be shy about finding ways to get more of it.

Number four, awareness. Dr. tenBroek recognized even in the early 1940s that creating public awareness about the capacity of people with disabilities was vitally important. How do we use the legal work we do to get more recognition of disability into the mainstream media? How can we use our expertise in the law to direct more documentary film makers, bloggers, and authors to cover disability from an authentic point of view? With any case we take on, we should be considering what the public awareness opportunities might be. Oftentimes the National Federation of the Blind is asked to keep settlement agreements confidential. We do not agree to do so because of our obligations to our members. However, we also do not accept confidentiality because it benefits those working on accessibility to talk about it publicly. Even if they did not come to the idea being accessible on their own. Those things that get talked about are viewed as being most important. #jtblaw18, by the way.

We need disability, disability rights, and the advantages of systems that include the widest group of people to be talked about more. Public awareness is essential to movements, and it should be a primary focus in everything that we do.

Number five, tools for self-advocacy and self-expression. We do not have enough capacity to tackle all of the legal cases that need to be pursued related to disability. Thus we need to continue to build better tools to empower people with disabilities to exercise efforts to protect their rights and express outrage about barriers they face outside of hiring a lawyer. How do we help people discover where complaints should be filed? Utilize templates for raising concerns regarding every day barriers? And share accessibility concerns through new media channels?

If a local business refuses to meet its accessibility obligations, how can we effectively share that information and create pressure on the business? With Google is enabling indicators of accessibility in its mapping applications. But what about indicating a lack of accessibility? Maybe we could establish an emoji that indicates inaccessibility.

[Laughter]

You may not realize that in the thousands of emoji that now exist, there are none that I am aware of that express an accessibility barrier or failure. Why not? If a bank website is not accessible, in addition to legal action, what if we create tools that allow all customers to express their disappointment and maybe even leave the bank.

As disability rights lawyers, we should be seeking nonlegal tools that improve self-advocacy and self-expression by people with disabilities. In the process, people with disabilities will generate data that will be useful in supporting legal cases.

These are some fundamentals that I believe every disability rights lawyer should keep in mind to contribute to the greater effort of disability rights movements. My goal is not to diminish the vital importance of the legal expertise we have gathered together through our Jacobus tenBroek disability law symposia over the past decade. In its own right, this is a disability rights movement.

My aim is to raise the expectations of every disability rights lawyer to the understanding that the most important aspect of your work as Dr. tenBroek modeled for you is to be an integral part of a movement. This means finding ways to contribute to ownership, community, power, awareness, and tools within disability rights movements.

50 years after tenBroek, we should continue to build movements using modern tools, innovative approaches, and all of the advantages that we have gained during the past 50 years.

The aim of every disability rights lawyer should not merely be to do well in protecting the liberty, equality, opportunity, and security of their individual clients. The aim should be to contribute to the broader movements such that you might also be remembered as we in the National Federation of the Blind remember Jacobus tenBroek.

In closing, I invite you to aim for the tenBroek standard for you: Will it be equally true to say that you were the embodiment of the movement or that the movement was the embodiment of the disability rights lawyer?

Thank you.

[Applause]

MARC MAURER: Thank you, there, Mark Riccobono.

President Riccobono has done a lot of work to encourage blind people and other people with disabilities to be in the places he recommended. He has found a way to befriend the CEO of the Microsoft Corporation. And I don't know that he can call him every day, but he can call him now and then.

And more of that is needed. We need to get disability to be on the map of the people in the Congress, the people in the judiciary, and the people in the corporations that make our country what it is along with the people of the United States.

So thank you very much for those presentations, and we'll take this to heart as we go forward.

Pearson is one of our sponsors of this Disability Law Symposium. And we have to talk about a program that Pearson is pursuing, which is one that encourages people with disabilities, we have a senior counsel for trademark and copyright law at Pearson who is a mentor in this program and the person who is being the student in the mentor relationship is Daniel Hodges, who will be starting law school in the fall. And to give us a few minutes about the program of Pearson, here is Delisa Key.

[Applause]

Lou Ann said they were here.

>> We're on our way.

>> They're coming.

MARC MAURER: Lou Ann, are you there?

>> I'm here. Daniel is coming too.

Thank you. Well, I am incredibly impressed by this crowd, especially given the weather we've had over the last couple of days.

Thank you, Dr. Maurer, for this amazing event, and Mark Riccobono. I've met some really wonderful people already today.

As Dr. Maurer said, Pearson and the NFB almost a year ago embarked on a mentoring program that I was lucky to be able to join. And there were 18 mentees and 18 mentors from our legal function, and I think most of us were attorneys. We started out on a 12-week program, and we met each week with our mentees, who did not live near us. All of our conversations were by FaceTime or by telephone. And that's when I met Daniel.

Daniel had no interest in going to law school when I met him. I didn't see any way of persuading him either.

But after talking and doing some of these great Pearson online tools that we have, gauging our grit -- and Daniel has amazing grit, especially tenacity, which is the T of grit -- and talking more and more and imparting on Daniel the incredible value of networking and making connections, in the fall of this year he said to me, "I think I want to go to law school."

And I said, "What?"

So Daniel took the LSAT, and Daniel told me that he finally realized not just after talking to me but talking to all of the connections he made -- Daniel had three LinkedIn connections when we started talking. I think yesterday we talked and he had almost 700.

But after making all these connections and networking and talking to people, last spring Daniel said to me, "It's not that I started thinking about what I could do anymore; it's about what I wanted to do." At that point, Daniel said, "I want to go to law school."

So last Friday I got an amazing voice mail message early in the morning that Daniel had been accepted to the University of Baltimore.

[Applause]

And as Daniel and I talked more and more, Daniel revealed to me what his goal in the mentorship program was, and that was, he said, "I want you to realize that being blind is normal."

It truly is normal, and I think one of the things that Dr. Maurer said this morning was he talked about this broken paradigm or prism he said, the broken prism of life is a charitable outlook. And really, being blind and working with the blind is not charitable. It's working with someone who is normal.

So I really got a lot out of this mentoring program with Daniel. I think I got more out of it than he did.

So now I would like to introduce you to a friend of mine who is not just normal but extraordinary, and incredibly tenacious, Daniel Hodges.

[Applause]

DANIEL HODGES: Well, thank you for that.

I beg to differ with you as far as who got more out of this because I honestly, I finally after a year confided with her last night on our way to dinner that I just, the last hurdle for me to pursue law was for me to accept that I was capable after all the denied opportunities, after all the educational barriers, after being held back from being able to learn Braille until I was 18 despite having almost no usable vision, despite everything else that has happened, that I still could do this.

And the realization comes: It's because of those things that I want to do this.

As President Ricobonno said a few minutes ago, we are not striving to be lawyers; we are striving to be disability rights architects. I understood that long before I understood that law school was a path for me.

I am feeling very blessed to look back on the times where we have had to fight battles, everything from like I said the educational barriers all the way to my kids' mother and I literally having social services beat us home from the hospital with our firstborn child explicitly because both parents were blind, and that was on the paperwork. That was the exclusive reason why that happened.

So I feel very fortunate to be able to take these opportunities to work with some of you. I've met many of you. What I have found in expressing to colleagues, mentors, peers who don't understand why we are here and why this matters is, the disability rights movement is a microcosm of the human rights movement. It allows for us to become fully participating members of society. We can change the world just like everyone else hopes to.

Thank you and I'm so grateful to be here today.

[Applause]

MARC MAURER: I notice she's gone already.

>> I'm right here.

MARC MAURER: Suppose somebody wants to get into this mentorship program. Do you tell them how to do it or do they just set up?

>> If you show up, we welcome you with open arms. But everybody received in their envelopes a handout that talks about the mentorship program. And we also have a table in the next room over where we have some materials on the mentorship program.

So first of all, I would say please reach out to any of our mentees who are here. We have Ann and Daniel and Sam is coming this afternoon. Or the mentors who are also here, Andy and Tara and Liz and me who is also coming this afternoon, and we can absolutely tell you more about the program. There's lots to tell. It's not just this 5-minute talk. We can take your names and get your contact information. So Daniel may convince you to apply to law school.

MARC MAURER: Thank you.

We're supposed to be in the other room in 7 minutes for the next session of the law symposium. Don't miss it!

[Break]

"The Impacts of Integration of Students with Disabilities into the Public Education System"

1:30 p.m.

MARC MAURER: All right. If I may have your attention, please. Ordinarily we start these things on time, as you know.

On the other hand, I remember someone telling me I was violating the law. He said, "You've got some material on your website that is not captioned and you know that is a violation of the law."

I said, "You know, that's interesting. Let's see if we can change that."

So our obligation here and the need is to have an accessible program. We were working out the system to have an accessible program, and we insist on having one like that. Now I believe we've got it. So I'm sorry we're a little late, but that's because we are going to do this thing the way it is supposed to be done. Not just that it's the law but a good idea.

This afternoon we talk about the impacts of students with disabilities into the public education system and we have three eminent persons to present. They are Selene Almazan, legal director of the Council of Parent Attorneys and Advocates; Wanda Blanchett, who is dean and distinguished professor at Rutgers Graduate School of Education; and Ruth Colker, distinguished university professor and Heck Faust Memorial Chair in constitutional law at Moritz College of Law.

Now, we have an interesting experiment today because two of these people are going to be making their presentation by technological means rather than being in person in the room. We'll see how well this works.

As I understand it, Wanda begins this presentation. So let's start with Wanda Blanchett.

[Applause]

WANDA BLANCHETT: Thank you all so very much. I certainly would have preferred to have been present with you, but due to our fourth nor'easter in four weeks, I am sitting talking to you from my office at Rutgers.

I would first of all like to thank Lou Ann for her tremendous efforts in keeping us in the loop dealing with the weather.

The title of the session today is the impacts of integration of students with disabilities into the public education system. I'm going to start because much of my work takes a historical look at the treatment of students of color as well as students with disabilities, and I think that you already know there are significant parallels between the educational experiences of students of color as well as students with disabilities. And of course there are various points in which these students intersect in terms of being members of both groups. So we're not talking about necessarily discreet categories here.

With regard to the historical treatment of students of color, given that many of you have a legal background in the audience, you would be familiar with the fact that up until Plessy versus Ferguson, schools were segregated. And certainly even following the decision in Plessy versus Ferguson, schools were still legally segregated in the United States. And it was through the advocacy of a number of individuals over a long period of time that we were able to finally get to the historic Brown decision. And with that decision, for the first time the court stated that it was illegal to continue the segregation of students, of African-American and other students of color.

Prior to that time we had white schools that were white-only schools, and then we had primarily African-American schools. And of course the impetus for the Brown case was around the fact that the schools were deemed to be separate and unequal. I shudder to think of what would have happened had there been comparable educational opportunities available to students in the black-only schools, but that certainly wasn't the case. And the conditions in which they were attending school were also really troubling.

But there were also some very positive components to the black-only schools. Mainly that included the teachers and educators that were committed to the students, many of whom often had terminal degrees, especially in subject matter areas, because many of them although they held PhDs were not able to hold professorial positions at universities.

So the conditions prior to the litigation of the Brown decision are very important to where we are today, because it was with that decision that the courts indicated that we could no longer continue the practice that had deemed to be appropriate in the decision of Plessy versus Ferguson.

Now, the other component that's very important is the fact that for many decades, we were having a little conversation about this as we were waiting to be hooked in to the technology, but where we are today is a result of many decades of advocacy on the part of primarily parents and mothers concerned about the educational experiences that their children were not receiving in public education, whether that be African-American mothers and concerned community members or whether that be parents of children with disabilities and concerned citizens. A lot of their advocacy resulted in our current privileges that we now enjoy, although we still don't necessarily have equity with regard to the enjoyment of those privileges.

So shortly after the Brown decision in 1954, parents and other advocates determined that the timing was really right for them to capitalize upon the decision in the historic Brown case, and that's when we started to see the disability rights movement in terms of the pursuit of a free and appropriate public education for all children really take hold in terms of being able to litigate around the concerns that parents had about the fact that their children were not guaranteed a free and appropriate public education, and that the fact that we still had at that time many segregated institutions. It was common practice for individuals with disabilities to be segregated. We had a variety of different ways of engaging in that segregation, so we had our schools for the blind, we had our human development centers in every state. Some states had multiple facilities that were state and federally funded to segregate individuals with disabilities.

But thankfully we were able to get the passage of the handicapped children act of 1975 which was the first time that we actually had legally protected rights of every child with a disability to a free and appropriate public education in the least restrictive environment.

But shortly after that, we started to notice some other trends. And I apologize if you can hear trains coming through. Our campus is not far from the train station.

[Laughter]

The train is either going to New York or it's headed towards Philadelphia. But at any rate, there were some other practices shortly after we saw, so I want to connect two things very clearly.

So Brown versus Board of Education in 1954 was the first time that we had equal protection under the law for students of color. Namely African-American students and other students of color at the time.

Then with the passage of the Education for All Handicapped Children Act of 1975 was the first time that we had equal protection under the law for students with disabilities regardless of the disability as long as it was covered under the broad spectrum of the law.

But one of the things that we started to notice was that even though Brown had been passed in 1954, schools were still by and large throughout the south, and in some other areas, were still pretty much segregated. And in part they were still segregated because there was resistance to the integration of schools. So we saw a number of other initiatives that had to be litigated to go back into the courts and get desegregation laws on the desegregation orders in order for school districts to try to move them to where they needed to be with integration. So there was lots of resistance is what I'm getting to.

The other thing that we noticed, though, was that in New York City and in California, we started to notice New York City, in 1968, Mexican American students were being -- I'm sorry. African-American students were being placed in special education in New York City at rates that really exceeded their proportion in the general school population. So he raised the question about whether or not it was justifiable that so many African-American students were being placed in special education when they had for supposedly what we now term high incidence disabilities. And he called attention to the fact that they were placed in the most significant disability categories, despite the fact that their white peers demonstrated far more visible disabilities.

At the same time, Jane Mercer, 1973, started to notice similar patterns of behavior in terms of Mexican American students being placed in special education in categories for at that time profound mental retardation, you know, trainable mental retardation, the only terminology that thank God we have moved beyond.

So the two of them started to see these patterns.

Well, what I've been able to do in my work is to illustrate that these patterns were not a coincidence. They were deliberate efforts to resist integration.

And then even when students of color have legitimate disabilities for which they are entitled to services under what is now IDEA, we notice that their treatment was very different. So even though, and I'm covering many years of history here quickly, so please don't take it lightly. There were a lot of things that happened in between. And I'm just giving a brief overview.

But we started to notice that even though we had another movement towards more inclusive education and it was certainly the right thing for us to do as a country and it's the right thing for us to keep working to try to get right, we have noticed that even though many students with disabilities now, well over 60% of students with disabilities that are educated in PK schools today are spending the overwhelming majority of their day in the general education classroom, and that's really great news.

But what we have noticed is that it's not true for students of color. Students of color are still the ones that are most likely to be educated in separate schools and/or facilities and/or to spend the overwhelming majority of their day in a self-contained classroom.

So this is just a brief overview of where we have been as a society. And certainly we have much work left to be done.

I want to be respectful of my time, so I will stop there, but I'm happy to continue the dialogue, and we have set aside some time to do that.

MARC MAURER: Very good.

Thank you very much.

Now we hear from Professor Ruth Colker.

[Applause]

RUTH COLKER: Thank you, and let me also thank Lou Ann for her amazing efforts to get this going when some of us couldn't even make it to Baltimore. So thank you for everyone's patience, and I hope that you can hear me well today.

I loved the remarks that Wanda started us off with. They're so important. In Ohio, there was a study done by our education department that very much showed those very hard rates of racial segregation in Ohio and the fact that black and white students are getting very different educational opportunities when they're in special education. The segregated facilities tend to be the worst. So I really hope you take to heart what she had to say to start us off because those are really important observations.

I was asked today to speak to the Endrew F case. So I'm going to talk about that. Unfortunately I don't have a lot of good news to report but I think it's important for us all to be educated on these subjects and to think about what that means doing advocacy for these students.

As many of you probably are familiar with the Endrew F case, briefly the case involved a young child with autism whose parents had chosen to send him to the Fire Fly Autism House because the public school was allegedly doing a poor job of educating him.

The issue in the case, there were a number of issues in the case, but the case was about whether the parents could get reimbursement for the tuition at the private school that they had chosen to send him to when the public school was not providing him with FAPE. And so the court had to decide what standard do we apply in deciding whether this young boy was receiving a free and appropriate public education. It was a split in the circuits at the time as to how high that standard should be and whether any possible improvement should be enough or whether we should hold the school district to a higher standard. So the question was, what does Rawley need.

The Supreme Court ruled in Endrew F that the IDEA requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. And although that doesn't sound like the highest standard we could imagine, that was the better choice available to the court at that time that it did insist that there be educational progress and the progress should be appropriate in light of the child's circumstances.

So Endrew F is considered to be a victory given the choices available to the court. But the question for us today is what does that have to do with integration.

The court in Endrew F said that the IDEA sets high standards for students who are fully integrated and it may be clear we need equivalent standards for students not in an equivalent environment, and the goals may differ but every student has the chance to meet high objectives. And they also said children should be taught in the regular classroom quote whenever possible.

Some members have said it's great that the Endrew F court in two places emphasized children should be in the regular classroom quote whenever possible, that we should expect students to be fully integrated into the regular classroom as sort of the default principle. And it mentioned that the act prefers children to be educated in the regular classroom. So that's all good news for students with disabilities.

So why do I think that this case is not as important to the integration mandate as one might hope? The reason I think this case is somewhat less important than people might otherwise think is that in Endrew F, like most of the cases that make it to the Supreme Court, in most of the appellate cases under the IDEA, the legal question is whether the parent should get reimbursement for sending their child to a private educational environment. The parents are so distraught with the education available in the public school that they spend money out of their own pocket to send their child to a private environment rather than the public school. Those private schools the parents choose in those circumstances are almost always disability segregated. I don't know for a fact that Endrew F was going to a segregated facility, but it was called the Fire Fly Autism House, and I would bet it's full of children with autism.

Now I'm not here to say those parents made the wrong decision. I've never met their family. That's not my point.

The point is that this case is not about the question of whether the public school was offering Endrew F the most integrated environment possible. This is the case where the parents opted out of the public school to send their child to a private school that has to be more segregated than any educational environment than the public school was probably offering them.

In the record, there's discussion of the fact that the district had been having Endrew F spend more and more time not in the general education classroom under the assumption that he had previously been in the general education classroom. So this is a case where most likely the child was attending a more segregated environment as a result of this litigation rather than a more integrated environment.

So when you read special education cases as I do, one of the things I think you should always keep in mind in thinking about these cases is where is this child being educated? What have the parents asked for? And you will see in many of these cases what the parent has requested is to put their child in a more segregated environment.

That puts us in interesting positions as advocates. Do we want to ask parents to rethink that decision or is that the right decision for their child even though we think the default rules should be for the most integrated environment possible?

So what have the courts done with Endrew F? I have tried to read all the post Endrew F case law to get a sense of how the courts have been interpreting it. And what I want to emphasize is that although the disability rights community has often said that when we read Endrew F we should note how the Supreme Court in three different passages mentions that the child should be in the regular education classroom whenever possible, so it understands the integration presumption, but it's also true that the Endrew F case says the IDEA requires an educational program reasonably calculated to enable a child to make progress in light of the child's circumstances.

And what I have seen in the post Endrew F litigation is that that phrase, "in light of the child's circumstances" is the phrase most often cited by district courts and courts of appeals in interpreting Endrew F, and they use the phrase "in light of the child's circumstances" often to say that it's okay for the child to be in a more segregated environment because that is really all that this child can possibly handle.

So if I was a school district lawyer, and I am not, but if I were, it's the "in light of the child's circumstances" clause that I would want to keep putting in the face of a court to say, what we're doing is good enough, the Endrew F case doesn't actually hold us to the high standard.

In reading on this case, I have looked to see whether there have been any cases in which the integration presumption is emphasized, you know, wins out.

I was able to find maybe two cases that somewhat have to do with that thesis. There's one case from Tennessee IL versus Knox County Board of Education from 2017. It's a pretty troubling case, as these cases often are. It was a case involving a child with Down syndrome. The mother consistently took the position that her child should have no more than 20 minutes of special education a day. She really wanted her child to be in a fully integrated environment as much as possible.

School district got around that rule in the IEP by having the child for 4 hours or for a significant period sitting in essentially a hallway in a sort of restrained area. Very inhumane behavior. And without notifying the mother of this segregated situation for this child, totally in violation of the school district's policies on seclusion and restraint. So when the mother found out about that, she pulled the kid from public school and litigated the school district not offering her child FAPE. The case settles, she gets a victory, although as often happens in these cases, they put her kid into a private school because she was not satisfied with the education the public school was offering.

So it was an interesting case. The mother wanted her child in an integrated environment, the school district acted horrifically, she wins, I don't know if she would call it a victory because obviously her child was treated very poorly before this happened. And the child ends up going to a private school. I don't know if it was segregated on the basis of disability, but I would be surprised to learn it wasn't.

Another case that is also fairly recent is the Natick Public School in 2017, a dispute between the parents and school district about the child's education. And the school district prevails by saying that they were the one offering the child the more integrated education. So they -- and this sometimes happens in these cases. The school district says oh, the private placement that the parent is seeking is actually not as good a placement because the placement that we're offering is the more integrated placement. So sometimes the integration mandate is a tool that the school district uses rather than the parent.

So that's I guess the news that I have to offer which is that these cases are really complicated. They often involve tuition reimbursement where the parent is sending the child to a private school where the parent doesn't want the child to be in a fully integrated environment, and we don't always know the race of these parents, but I suspect maybe they're white middle class parents with the resources to put their child this a private school and seek tuition reimbursement. That's hard to do if you don't have the money in your pocket to pay for the private school itself.

One of the issues that Wanda has written about is not all segregated placements are the same. The segregated placements that these white middle class parents are often seeking may in fact be good placements but the segregated placements that we see poor and minority children being forced into, the ones I see in my state of Ohio, are not good placements. They're not placements where parents would typically voluntarily place their child if they have any kinds of choices to be made. And I guess the question will be going forward, you know, can we use the Endrew F case in any way to push courts to raise the standards for what we expect the school districts so that these really pitiful awful segregated placements won't be foisted on poor children. But I don't see any case law that we've reached that outcome but I hope our final speaker can offer us some good news on the subject.

[Applause]

MARC MAURER: Which brings us to the presentation of Selene Almazan.

SELENE ALMAZAN: Thank you. Thank you for inviting us to the symposium. This is our first time here, so I appreciate it. I've heard a lot about it through the years.

So I'm going to start off my very first time at the symposium sort of disagreeing with Dr. Ruth Colker, which will sort of make me a little nervous.

So she worked on Endrew F as did many others in this room, Bazelon included.

And the decision I think has wonderful language in it to put forth this idea that you are entitled to challenging and ambitious goals. And going back to what Wanda said at the very beginning, you know, we have this really rich history of marginalizing not only people because of disability but also marginalizing because of race.

And the Endrew F decision challenges school districts to look at what the IDEA requires. It is a procedure-laden and substantive law that guarantees the rights, the civil rights, of students with disabilities and provides a roadmap on how to ensure that those civil rights are upheld.

From our perspective, looking at that roadmap, that the IDEA requires through the process of the individualized education program, the IEP process, is really the key here.

Endrew's parents wanted that public school placement to work, but he had some behaviors that were related to his autism, and the school system failed -- failed -- to conduct a functional assessment to look at what those behaviors were and what the root cause of them were.

Failed to do that in order to keep him in a less restrictive setting.

Once they went to Fire Fly, they came back and they said, we want to come back to our public school. And the school district gave them the same IEP and no offer of a functional behavior assessment and no offer of a behavior intervention plan, which are key components to keeping kids in general education classes.

So while Endrew F doesn't discuss necessarily the general education classroom and it is about a family that was seeking reimbursement, they were a family who went to Fire Fly only because it was the very last resort for them and they had a kid who had been failing for a couple of years and they didn't have any more time to waste.

And I think that's what happens with families: They don't have any more time to waste and the clock is ticking.

So that's what they decided to do.

For them, they were very fortunate that the Supreme Court got it. It was a very, very low standard in the tenth circuit. It's de minimis. Ruth is correct the case law so far has not borne out what we were hoping it would bear out. A couple of us in this room were on a panel in the summertime with Brian Wolfman, one of the attorneys for Endrew. And we talked about it's really those cases we're developing now that are so important, utilizing the standard.

So utilizing the standard, ensuring that school districts give students challenging and ambitious goals, to not make assumptions on what a child can do based to on what their disability is, but based upon what they can demonstrate that they can do.

So that's my take on Endrew for right now. It is a work in progress. COPA and Bazelon have been filing amicus briefs in least restrictive environment cases around the country trying to advance this idea that there is an application of challenging and ambitious goals, the roadmap of the IEP, the obligations of the IEP team, the obligation like in Endrew to go back to an IEP team table and look at progress if you see no progress. That's what we call course correction. It's incumbent upon school teams to reconvene and see what is working and what is not working to prevent parents from becoming so frustrated that they decide to look at something else.

So that's my take on Endrew. There's also some language that school systems have to provide cogent and responsive reasons for what they do in an IEP team table and we need to hold school systems accountable. What is a cogent or responsive reason that you're making these decisions? So I think there's a lot to look at in the decision, and a lot in the IEP process and the IDEA.

The statute is a beautiful thing, and so are the regulations. It is full of so many rights and so many things to argue at an IEP team table and at a hearing.

So that's my two cents on the Endrew F.

I wanted to talk a little bit about some of the research that COPA has been doing for the National Council on Disability. We recently completed a five-report series for NCD and the five topics were the segregation of students with disabilities, English learners and low income students, the Every Student Succeeds Act, the underfunding of the IDEA, and monitoring and compliance.

Briefly, I wanted to talk a little bit about the statistics. I know that Wanda touched to on them, but some of the things that we found in our study is that there remains a very large gap depending on where you live on your zip code on whether or not you're getting access to general education classrooms if you're a child with a disability. And that's unfortunate.

The data for the 2015-2016 school years show that Alabama, Vermont, Nebraska, North Dakota, and Kentucky have the highest rates of including kids with disabilities in the general education classrooms. The ones with the lowest, the states with the lowest averages, the average for the entire country including the islands and Guam and Samoa and the Virgin Islands is about 68%. So you're looking at places like Florida, 72%. Alabama, 84%. Nebraska, 76%. So you're living there, you have a disability, chances are you're going to get access to general education classroom.

Compared to New Jersey, Montana, Illinois, and Arkansas where there is a real struggle to get access. And these states, Hawaii is at 37%. Montana is at 47%. We also discovered in our research that students with intellectual disabilities and multiple disabilities participate in general education classes at 17% and at 13%. So 17% of students with an intellectual disability participate in a general education classroom. Which is really astounding. The really alarming part of that data is that if you look at data from 2005-2015, those numbers have not moved that much in 10 years. So there's still a lot of work to be done, a lot of bias if you have a child with an intellectual disability diagnosis or if you have a child with a multiple disabilities, there's no presumption of competence, unfortunately.

Wanda did talk about the disproportionality or the discrepancy in white students and Native American students being included in general education classes at far higher rates than students who are African-American.

One of the other things we looked at in the segregation report is Florida has a high rate of children with disabilities who are participating in general education classes at 72%. They have a state statute that defines inclusion, which is really kind of interesting. So there is a definition that is in their state statute that school teams have to look at and the hypothesis of obviously that drives the greater placement into general education classes.

Now, New Jersey conversely has a settlement agreement brought about by litigation Disability Rights Advocates in New Jersey, but no state policy ever changed once the settlement agreement came into being. So no policies changed, no statutes changed. And, in fact, what remains in New Jersey is a state code that talks about ratios. You know, 3:1 for an autism class. 5:1. I'm making these numbers up. But you get the idea. They have a code that talks about ratios. And so it would seem to me that that would encourage placement based on grouping rather than on individualization, and individualization is at the core of the IDEA and the IEP.

There has never been a federal withholding of money for failing to comply with the least restrictive environment mandate. The Office of Special Education Programs since at least 1994 have issued dear colleague letters and guidance on LRE. Most recently in January of 2017 there was a dear colleague letter that was issued talking about ensuring access to high quality early education childhood programs.

The reports which are online at the NCD website have a lot of research, and there is a ton of research based on 30 years or more of research on the benefits of inclusive placements or placement in general education for children with disabilities and children without disabilities.

Some of the recommendations that we talked about are really good teaching practices. And things that as advocates I think are important for us to ask questions about, the delivery of instruction. I mean, that's the very definition of specialized instruction. The very definition of special education is specialized instruction, and specialized instruction is the content methodology or delivery of instruction.

And so looking at supports for teachers, looking at differentiated instruction in classrooms, looking at data based instructional decisions, looking at positive behavioral instruction plans, peer assisted learning, culturally responsive teaching and multitiered systems of support are all things to look at and what the research shows are important for ensuring that general education placement is successful for students with disabilities.

Our English learner report, we also looked at English learners and the nexus between being an EL student with a disability and also living in poverty. And 10% of the 6 million school aged students eligible for IDEA nationally are identified as English learners, and I didn't even realize how large that number was until we did the report series.

And 58% of students that are eligible for special education are from low income houses compared to 46% of non-IDEA students. So that's a statistic that I'm sure everybody is aware of that most children with disabilities live in poverty in this country.

Looking at the effects on disproportionality, we found that students with specific learning disability and hearing impairment have higher proportions of students who are also classified as English learners. We also found that students from low income families were considerably more likely to be identified for special education and that English learners and low income students with disabilities are both disproportionately placed in substantially separate classrooms and the rate of placement for low income students was more than double for non-low income students.

It all comes down, though, to looking at the family engagement and for families new to our country trying to navigate the system.

Finally, the third report we did on the Every Student Succeeds Act in 2017, it includes several very specific provisions that require states to hold students with disabilities at the same high academic standards as all other students and include those students in state accountability systems. That's so important because it's really a presumption of competence and really holding school systems responsible for the education of children with disabilities.

And ensure that students with the most significant cognitive disabilities and their families understand the impact of choosing alternate standards. The alternate assessment standards. And assessments on that student's access to the general curriculum and to a regular high school diploma. So before students are place on the alternative assessment track and taken off the diploma track, make sure families understand the effect of that:

And then the ESSA requires school districts now to improve school conditions by reducing the incidents of bullying and harassment and the overuse of discipline practices that remove students from the classroom through suspensions and expulsions and the use of aversive behavioral inventions, restraints and ex collusion, which is one of COPA's priorities.

So that's kind of the overview of some of the research that we've done in looking at the impact of having a disability being a student with an intellectual disability, being a student that might be an English learner and live in poverty, and the access is still varied depending on where you're from, depending on where you live. And there's still a lot of work to be done. However, I do think that the IDEA does contain that roadmap. I think that Endrew F provides us with some additional tools that we can use to require school districts to do what they need and what they've always been required to do, which is to implement it in an individualized fashion.

Thank you.

[Applause]

MARC MAURER: Thank you very much to all three of you.

Do the panel members have questions for each other?

RUTH COLKER: Could I make a little response to the disagreement with me?

[Laughter]

MARC MAURER: Well, it's always good to do that. Yes, please.

RUTH COLKER: I don't think we really disagree. I absolutely agree that the parents in Endrew F as I said were upset that their son was being educated more and more outside the general education classroom and the program the district were providing them and they were very critical of the program (static) -- but still factually, are the way the case was structured, as a last resort, send a child to a private school and the relief the court is offering is reimbursement for that private education, not reintegration into the public school setting. And that's I think unfortunate and may very well that that's is what the parents like and maybe someday they can return to their regular public school classroom. I hope that's the case.

Those are the stories these cases tell, and it's the same frustrating story in the Knox County case. That mother could not have been more adamant that she wanted her son with Down syndrome in a regular classroom with no more than 20 minutes of special education. The school district puts her in an untenable situation after her son has been exposed to exclusion and restraint that she opts out to a private school and seeks reimbursement.

I don't think as first order the parents are seeking a segregated environment, but it is what happens in these cases and that's unfortunate that even when these parents prevail, their children end up in segregated environments.

The other point I wanted to make in terms of the Ohio study I mentioned, some people say build it and they will come. So if the school district in these urban areas, in Ohio that would be Toledo, Cincinnati, Columbus, Cleveland, and they succeed, they will place children there. Because of the composition racially, who lives in urban school environments, that's going to be disproportionate. In rural communities, they don't have segregated facilities so no one is placed there because they don't exist. So I think one strategy for us to consider is do we want to be fighting at the local level as we have for residential placements. We're not talking today about Olmstead and the like. We have at previous conferences. This is an Olmstead problem. We build it and they will come. Is that the best use of public resources to build these highly segregated disability only facilities and then see them populated with minority children?

So I don't know anything about the situation in New Jersey. Maybe Wanda could inform us about the explanation for the high rates of segregation there, but is that part of the pattern there with the urban environments, they're building it and then they get placed there?

WANDA BLANCHETT: Well, actually, I wanted to respond to a couple of things. First of all, I agree with you completely in terms of your characterization of what often occurs when parents do win a litigated action around the reimbursement for private schooling.

First of all, I think the point that you made initially in your opening comments were right on the money, which is that, first of all, those options to have private school as an option for your child is it afforded to all parents? And we know historically it is not afforded to low income parents across the board. So when it comes to low income parents and students, we miss no opportunity to discriminate, right?

And certainly it's also not afforded to even middle class and upper class parents of color. So again, those options are not available to all.

The other component that I would say, and I agree, and I think we're all -- I work a lot with parent agencies and parent support initiatives, and I can tell you, we're all saying that parents ought to choose the option best for their child. But I also think that we have to be mindful of the fact that resegregation is resegregation.

So even if the parents are doing -- if they're choosing the lesser of the evils, if you will, for their child, we don't want resegregation to occur one child at a time. So we have to be very mindful of that.

With regard to New Jersey, well, first of all, we don't have enough time to fully discuss some of the challenges that parents of color and parents of students with disabilities and sometimes they are intersected, we don't have enough time to discuss the challenges that parents have experienced in ensuring that their children receive a free and appropriate public education in the least restrictive environment in New Jersey.

New Jersey has a long history of a number of litigated actions needing to take place for us to get to the, quote/unquote, level of integration that we have today.

So I suspect that the rates that you see are influenced by the fact that certainly in the urban cores of New Jersey, the overwhelming majority of the students are students of color. And the overwhelming majority of the students are children whose family live at or below the poverty line.

And again, I mean, we didn't have time to go into all the details on this today, but we do know that there certainly are different educational options and different educational experiences that students experience in schools today.

One thing that I'll mention before I stop, and that's the fact that when we take a look at today's schools, a lot of people like to say, oh, schools are more diverse than they've ever been! But when you really look at it, schools are not more diverse today than they've ever been. Schools are more segregated today than they've ever been.

And I'll just stop there.

MARC MAURER: Okay. Now, Selene says she can't help but explain it also, so here she is.

SELENE ALMAZAN: You know, having been involved about 11-12 years ago of fighting the building of a segregated school in a local county in Maryland, it was completely and absolutely bruising because it's an opportunity to pit one parent against another parent, and it is really not for the faint of heart. It's really very difficult.

And then working as an attorney a couple of years later, again, assisting a local county to get rid of their self-contained classrooms because the disparity of the amount the children of color in a self-contained classroom in one part of the county and their academic acquisition, which was abysmal, compared to the upper middle class white county on the other side of the highway and how they had, you know, taken their money, the parents' money through the PTA and gotten all these wonderful things in these self-contained classrooms and they want to hang on to that, having been involved in that and having my children accosted in schools by teachers who were upset with what I was doing, I don't relish going back to that because it does pit parent against parent and makes things very difficult. It was so difficult for me, actually, that I could not even go to my gym because people were so angry over what they perceived what my actions. I don't have enough power to have a whole county make a decision, right? I wish I did.

But you know, galvanizing and organizing parents would have to include keeping people together. And there are people who, parents for their own reasons, and I absolutely do not judge that, I have two children with disabilities, make decisions for their children. And that's the decision that they make.

But if we're going to talk to families about preventing the built -- you know, if you build it, they will come, I agree with Ruth about that, we have to make sure they stay together and nobody is judged for the decisions that they make, and I think that's tricky, as a community organizer, as an advocate, as a grassroots organizer.

So that's all I wanted to respond to. I agree with Ruth and I agree with what Wanda said, that we are headed into or have reached the point where our communities are not as diverse, or our schools, and that includes not just class, color, socioeconomic, but it also includes disabilities and that's a shame.

RUTH COLKER: Absolutely.

MARC MAURER: Here's what I want to know, these two things. A few years ago -- I run this meeting for blind people, has 3,000 people or so in it every year. I did it for 28 years. And a few years ago I got my best advisers together and I said to them, "I want an education program this summer. And I want the best education system in the country that deals with blindness that there is. Who is doing a good job?"

The silence then was the same as it is now.

Nobody had an answer for me. So I want to know who is doing a good job and I want to know what is a good job.

The second thing I want to know is this: With the IEP process as it is, how do you get systemic change? You can't do it one kid at a time.

WANDA BLANCHETT: I'm sorry, but I didn't hear the first part of your question.

MARC MAURER: The first question is who is doing a good job and how do you know when it's a good job? What is a good job in the education system?

Who can you point to and say, that is an example of where we want to be?

WANDA BLANCHETT: Well, I will start on that one given that I'm in education. I think we have a number of examples of individual teachers that are doing a phenomenal job. We work in some of those schools here in and around our campus, and throughout the state. So I think that there are teachers that are doing a very good job.

My criticism is not of teachers. My criticism is of systemic issues and challenges and the infrastructures that teachers often work in that create havoc for them to do the things that they are trying to do well.

My other criticism is around the fact that despite us having very clear and convincing evidence that well prepared teachers can make a difference with all children, regardless of where they start, we seemingly are not interested in or don't seem to have the will to place well prepared teachers in all classrooms with all children.

So the challenge isn't to find individual teachers and/or school districts that are doing well, because we have those. The challenge is to replicate that consistently across all communities.

MARC MAURER: Anybody else on this panel want to try it? So far I've heard that there is no school district in the U.S. that's doing a good job. That you can find a teacher now and then and sometimes a bunch of them, but there is no system that's worth writing home about. And that's the trouble. We've got to figure out what is the system we want before we can go get it.

WANDA BLANCHETT: Well, first of all, I just have to say, that's not true.

MARC MAURER: If there's somebody doing a good job, point them out.

WANDA BLANCHETT: All right. Contact me. I'll give you some examples.

MARC MAURER: Okay. But you know, a teacher I can find. I know a bunch of good teachers. I would like to see a good administrative system that encourages the education of people with disabilities. So far I haven't found it. And if I'm supposed to help build one, I gotta know what it looks like.

WANDA BLANCHETT: I agree.

MARC MAURER: Okay. I've asked my questions. What you got?

[Laughter]

Anybody have questions?

>> Hi.

WANDA BLANCHETT: Conference is over.

>> My name is Mr. Alvarez from Washington, D.C. One of the things that we're seeing in D.C. is the provision of mental health services through school-based community centers. And on the one hand, I think it could be a good idea in theory in that the mental health services are provided within the school, within the community. They're often provided in the native language of the student in areas where there's a high Spanish speaking or other population.

But on the other hand, it kind of takes away the responsibility of the LEA to provide those services, and especially when those services are not consistent, you're not able to hold the health center responsible the way you are an LEA who is not providing consistent or appropriate services.

So I'm just wondering if, you know, community-based or school-based community health centers is something that you guys have looked at or if you guys have a take on that.

MARC MAURER: Who wants to tackle it?

SELENE ALMAZAN: I'll start. I agree with you that the LEAs are then off the hook and you can't compel them. They are responsible for that portion of a student's education. You just look at what happened in Florida and how that person was not -- either not identified or not helped by the school system. They knew they had a problem with him and it was easier to expel him than anything else.

I think that when you look at trauma-informed practices, those things need to be in our local school systems. It should be part of the responsibility, it is part of the responsibility of a local education agency to ensure that a child is evaluated or assessed in all areas of suspected disability, including mental health.

WANDA BLANCHETT: I couldn't agree more.

MARC MAURER: Pardon?

WANDA BLANCHETT: I said I couldn't agree more.

MARC MAURER: Okay.

>> I have a couple of I guess points or questions. I guess one on Ruth's point about most of these cases being tuition reimbursement cases, I think one problem is the public interest community has often abandoned special education cases saying there’s a private bar for special ed because there are attorneys' fees and therefore most of these cases are being brought by private attorneys being paid by parents and parents pay private attorneys when they think it's going to be financially advantageous to them and if you have a tuition payment of hundreds of thousands of dollars, then it's worthwhile to hire a lawyer.

So many people, even middle class, will not hire a lawyer because it cost them money and I think if public interest community had more support for special education litigation, that would be really beneficial because the way it works, the dynamics of the case, is that the parents who bring these cases are parents for whom it's worthwhile to spend 20 or $30,000 or more on a hearing out of pocket.

I guess my second point is on what Dr. Maurer asked. Some of the great schools that provide wonderful education for kids with disabilities are not public schools. They're Montessori schools and other schools really designed with individualized instruction. And some of the private placement cases committed to inclusion have been to get funding for those kinds of schools.

And one of the problems public schools have is the lack of funding because, you know, it's easier in a Montessori school with 15 kids in the classroom to do inclusion than in a public school classroom in an inner city with 30-40 students.

I guess those were my two points.

RUTH COLKER: If I could respond, especially to the first comment, in Columbus I helped get some funding for us to have our local disability rights organization have an attorney embedded in the organization whose job it is just to go to IEP meetings. Not to litigate, but just to attend IEP meetings. Not always for low income families but oftentimes for low income families.

And it's my firm belief that these organizations and others need to do a better job of helping parents have advocates at these meetings. It's very unrealistic to expect parents as nonexperts to attend these meetings and advocate for their child and that in my experience in the advocacy I do on a volunteer basis, just the fact that I walk into the room changes the dynamic and the result. I can keep my mouth shut, but the school district know what's they should be doing but they get away with egregious practices because no one is watching.

So I don't think litigation is really the answer because if you have to litigate, you've lost because years will pass before you get a legal result. But if you can achieve a good answer at that IEP meeting, have an effect on a child, it doesn't take a huge time commitment to achieve that good result. So I wish more law schools around the country, education departments around the country, would train their students to do volunteer advocacy at IEP meetings to have a transformative effect.

It's only one child at a time. It's not the structural change I would like, but I think it is a small thing we each can commit to doing that can have a profound impact in a child's life.

WANDA BLANCHETT: I agree with you on that, Ruth.

I also think it's very critically important for our parent resource centers, and I know they're working towards this, to be able to reach out to those parents that are most in need of the kind of advocacy services that you are describing because oftentimes the parents who need the services the most are reluctant for any number of reasons or may not even know that such services exist.

The other comment that I would make is related to the commenter's comments regarding Montessori schools. Certainly there are a number of Montessori schools that are public schools. The so part of the issue I think for a lot of parents still comes back to knowing the full array of options that are available to them in their local communities and being able to fully access all of the resources.

RUTH COLKER: If I could just give one little anecdote, I know in various urban school districts where I live, they schedule the IEP meetings 15 minutes apart, they know it's unrealistic for the parents to show up because of the demands on their time and they can just cut and paste from one IEP to another. They have some unbelievable statements in these IEPs that when I get a hand on them occasionally I'm just shocked at.

But no one is watching. So you can get away with it. And so I think that it should be unconstitutional. This would take us someplace else but I think it's unconstitutional for children not to be represented at IEP meetings. It's their rights being deprived when school districts just rubber stamp one IEP after another every 15 minutes. I wish we could stop that practice but I don't know how we can do that.

[Applause]

WANDA BLANCHETT: Sign me up.

MARC MAURER: Maybe we could find a plaintiff somewhere.

You know, I appreciate this. The educational system for me has been a frustration. I have tried to figure out a way to address it so that systemic change can happen. And it is a frustrating effort to do. You can win a case and it's one kid, and the system is hard to change. So we've got to think of a way to do that.

We are having the book -- oh. Thank you very much. You have stimulated my mind a lot this afternoon and I'm sure you have for everybody else. So I appreciate it.

[Applause]

We have the book the future of disability law, and this is David Ferleger who put this together and he's selling it for $12 in the back of the room.

We are having a break. We do have the workshops coming up. We have several of them. I will let you look them up yourself.

I was told that some people missed the fact that when we have these breaks there is coffee generally speaking in the other room and very often cookies so don't miss it. We'll get back together after the workshops at 4:15.

[Workshops]

"Separate and Unequal in Employment"

4:15 p.m.

MARC MAURER: We will be getting underway in a minute, if the panel members will please come up.

We're going to undertake the panel this afternoon on employment. It says "Separate and Unequal in Employment."

You folks over there near the coffee, give us your attention, please.

You might give us your attention over there back of the room, please. Thank you.

I have an announcement to make that goes like this. Some of you may not have discovered this yet, but Dan Goldstein has arrived. You know the law symposium may now expect comment from him.

>> He was the one talking in the back!

[Laughter]

MARC MAURER: "Separate and Unequal in Employment." We have three people to present this: Brian East, senior attorney at Disability Rights Texas; Regina Kline, a partner of Brown, Goldstein & Levy; and Howard Rosenblum, chief executive officer of the National Association of the Deaf.

It is a matter dear to my heart as I have done a good many employment cases. Some of them successfully. And consequently, it's an honor to introduce this panel. We will start with Brian East.

[Applause]

BRIAN EAST: All right. Thanks. So we're talking about separate and unequal in employment.

Let me start out with a little bit of background here. Congress has said discrimination against individuals with disabilities persists in critical areas like employment. And Supreme Court said ADA is a broad mandate of sweeping purpose and comprehensive character intended to eliminate discrimination against disabled individuals and integrate them into the economic and social mainstream of American life.

Supreme Court has also said it's a familiar canon of statutory construction that remedial litigation should be construed broadly to effectuate its purpose.

As a result of that, almost every circuit has one case or another saying we construe the ADA broadly.

In addition to all of that, the ADA Amendments Act says that we're doing this to reinstate the broad scope of protection available under the ADA, that liberal Senator Orrin Hatch says this reflects what courts have held about civil rights statutes generally, that they should be broadly construed.

So that's the background we're dealing with. But what I'm going to do here this afternoon just for a few minutes is to compare that language about the breadth and remedial nature of the ADA with the restrictive and sometimes flatly mistaken analysis that I see in recent cases.

So the problems come up in all kinds of areas as to what accommodations are reasonable, what safety qualifications are justified by business necessity, and we don't just see employees losing these cases, but we often see in these opinions really broad sweeping statements restricting the rights generally, not just speaking to the particular issue.

So let me give you a couple examples. Let me go to the topic of leave as a reasonable accommodation. And the worst news here is Severson versus Heartland Woodcraft. Intermittent time off or short leave of absence, even a couple of weeks, may in appropriate circumstances be analogous to part-time or modified work schedule, two of the examples listed in the statute. But a medical leave spanning multiple months does not permit the employee to perform the functions essential to the job removing them from the class protected by the ADA.

So here we have the seventh circuit not just saying the plaintiff there loses for whatever specific facts are in that case, but that multi-month leave is never required.

This is following up on an older seventh circuit case. There's another case that follows this out of the seventh circuit called Golden. There's a petition for cert in both of those and they're set for conference next week in the Supreme Court.

Interesting sort of discussion about whether the disability community wanted to support the petitions for cert there, because obviously those decisions are overly restrictive. But taking any case to the Supreme Court is a little bit daunting.

And so we have Severson saying that in the seventh circuit following up on a case called Wang out of the tenth circuit where then Judge Gorsuch says leave of 6 months is almost never required.

Again, not talking about just the facts in that case. But giving this bright line sort of rule.

And now we have the first circuit saying our recent judicial superior, Justice Gorsuch, when writing for the court said this and he was very cogent in his explanation of it. So there's all this fawning going on about that.

And then so we have these problems developing with regard to leave which is a really common, at least in any experience, a really common accommodation.

And then there's sort of an add on to that. There's a couple of cases that talk about whether you can get a jury instruction that leave might be a reasonable accommodation. There's one case that said, no, you're not entitled to have instruction, at least not in plain error, not to grant it.

The fifth circuit has a case, an ADA case, where they say even though there's substantial authority in support of a particular proposition, if we haven't issued a controlling opinion on it, you don't get it right to a jury instruction, and that's not plain error; that's just not error at all in their view.

So we've got problems going on in leave context. Another example last year says a return data lone doesn't show clear prospect of recovery. So now we're talking about indefinite leave. Okay, get a letter from the doctor saying when I'll be returning. But now they're saying that doesn't necessarily indicate a clear prospect of recovery. Especially when there have been problems with coming back before.

But instead of saying because there have been problems in coming back before, maybe that isn't enough here, they start off with this broad statement. A doctor's letter is not enough. Especially blah, blah, blah.

Another case in the fifth circuit, the court starts off by saying that some jobs can't be performed remotely. Probably nothing too shocking there. Kind of tracks the EEOC guidance on these are some reasons why teleworking may not work. Again, nothing too shocking there.

But then it goes on to say that teleworking is going to be the very rare case, citing no evidence, and relying on cases about indefinite leave. So something different. And then suggesting that the plaintiff's own opinions about how it might work are entitled to no weight at all.

And then it justifies the employer's decision not to allow it that it would be unreasonable to allow it here because that was the employer's policy.

Well, of course it's the employer's policy. Accommodation is about a flex in the policy. The fact that the general policy says no teleworking doesn't really tell us much about that case. But this is a court saying this.

And then they give a specific example. This was a lawyer. And they said, the lawyer's job was to explain to other lawyers and ideas off the other lawyers about their cases and discuss strategy with the chief, and getting written authority to settle cases and that kind of thing. And I'm just thinking to myself, do they not know about telephones? That's exactly what we do in my office. But I might be anywhere and doing that kind of thing. It doesn't necessarily require that I'm in the office.

Then the court says, the plaintiff argued that it couldn't be an unreasonable accommodation because they let other people do it. And the court said, well, yeah, that's true, but you know that nearly identical standard we have when we're trying to see whether this discipline that was not imposed for somebody else but was imposed for you, whether that sort of standard we used in the fifth circuit, not every circuit, but that really nearly identical situation. So the court implies that here. Unless the two people are nearly identical, it has no value, evidentiary value, to the case.

So these really broad propositions.

And one thing I want to point out, this was an opinion by Judge Graves, a relatively new judge, who is really one of the best judges on the fifth circuit. And I mean that not just comparatively, but actually he's a good judge and he does a lot of good things and has issued a lot of good opinions.

That reminded me to look at who wrote what opinion on employment cases in the Supreme Court. And so only Stevens and Breyer deextended. So we have Ginsburg and Sutor. Unanimous vote on General Motors with demanding and major life activity having to be central to daily life which they totally made up.

And then we have Justice Stevens approving seniority systems.

And then we have a unanimous court coming up with an ex-statutory offense where they're reinforcing the EEOC's regs when it's restrictive but they often don't when it isn't.

We would think that at least in the area of definition of disability we don't have this problem, but that's not true. We continue to see cases where the court just doesn't get the ADAAA. They'll say we have to regard them as substantially limited, not true. And then the same thing comes up in actual disability. Still have to be a substantial limitation of major life activity, true, but then they forget all the details in the ADAAA.

So we've been writing a number of us have been writing amicus briefs whenever we see these cases come up to try to make sure the circuit courts at least don't go wrong on this. So far it's not too bad but in the district court we still see problems even on definition of disability.

Some other areas. Requesting a reasonable accommodation. So one would think that requesting a period of leave is a sufficient request for accommodation. And generally it is. Unless you say FMLA leave. Then in the fifth circuit, that excludes that from protection of the ADA. So even though you say I have this health condition, I need to leave for it and I want to fill out the FMLA paperwork, somehow the employer has no idea they should also consider the possibility of ADA accommodation leave. And there are circuits split on that.

The meaning of reassignment is being restrictively interpreted. It was trending well for a while, now poorly. Again, a circuit split on that.

We have a statute in the regs that say you should consider what the employer thinks the essential job functions are, but we have many circuits that say we give substantial deference or various words like that to it so we're drifting away from either the statutory or regulatory language there.

And then we have sort of forcing everything into the essential job function category. So someone needs an accommodation to take some test. And they say, oh, you know, passing that test is an essential function, they don't have to waive it. It's like, that's really a qualification standard. So we have courts that are sort of misunderstanding the distinction between qualification standards and essential functions, and it makes a big difference because you can get an accommodation of waiving or changing the qualification standard and you don't generally get one for waiving or changing an essential function.

So as you can see, there's just lots of areas where the courts are not -- where the plaintiffs are not just losing but the courts are writing these really broad holdings or dicta that are really messing us up in further opinions.

We have the courts deferring to the employer on what's a business necessity to justify qualification standard. We have courts forcing everything into the McDonnell Douglas analysis even when it has no basis for doing so. We have defenses like honest belief, there's a lot of problems with that, but at least you could make a logical argument for it in the misconduct context.

So I didn't fire you because you're in a protected class; I fired you because I heard you were stealing from the cash drawer. And it turned out that you were not. But I honestly believed and I looked into it and that's what I thought and I only found out later. So that's okay. It wasn't discrimination.

But now that's morphing into, well I had an honest belief that you couldn't do the job or that a reasonable accommodation wouldn't work. Taking it completely outside that context.

And then last case I want to mention here. It's a frustrating case because it was a good decision from a very good panel in the fifth circuit in a case called Caldwell, and this was a person who used crutches to get around. And they did two kinds of work. They edited scripts at this TV station and they also did electronic video editing. And that was the done in this particular room, the latter, where the quarters were tight. The person said, I want to get that work too. And they said, no, it's just too busy in there with your crutches. You just stay out here and do the script editing.

They eventually fire him and the reason they give is, you refused to do the electronic room recording in there. And then they said, well, okay, you didn't refuse to do it but you didn't show any initiative to do it. And it turned out they had actually refused to let the person go into the room and do it. Then the plaintiff actually got some traction.

So the opinion turns out well for the plaintiff, but one of the claims there was that he was being unlawfully segregated. They wouldn't let him do this kind of work in this particular location, and he was compelled to do the other kind of work which was sort of the old school work.

And the court said, segregation? Well, I mean, yeah, it's in title I there's language like that, but who knows what it means. We think it means keeping you away from other people, like Olmstead and stuff like that. We get that, but this is, you know, we don't know... so the district court said because you haven't shown me a case that went like that, I'm not going to do any analysis myself, you lose on that claim. And the fifth circuit basically said, yeah, what they said.

So we have some really restrictive opinions out there. I'm going to say a couple of obvious things probably about maybe what we can do about it.

One is I think we have to be really careful when we're doing our own analysis, and I think sometimes when we're talking among ourselves and to our friends and to our fellow advocates, we just are really exercising this is an outrage, this is crap, we need to do something about it.

But we need to look at how somebody else, a conservative judge for example is going to be looking at it. We need to get voices from outside.

And then we also need help in our cases. So that could be, you know, just someone reviewing your pleadings. It could be someone cocounseling with you. It could be someone doing oral argument for you or writing an amicus brief for you. A lot of things could be done.

There is some reason to believe that getting amicus help makes a difference, just in the cases that I've about looking at. On one of these issues, the EEOC was asked to write an amicus brief, it came out well. In another circuit, there was no EEOC brief. Same issue came out poorly. So maybe it makes a difference.

But in addition to the EEOC, there's also disability advocacy groups that I think can be really helpful.

Making sure you have the evidence in the record that you need. So sometimes it just seems so obvious. You know, this is PTSD and the EEOC regs say that's virtually always a disability, I don't need to put on any evidence about disability. But yeah, you probably do. Unless they say stipulate to it. Because they're going to fight it and the judge isn't going to get it right. So putting on the evidence, thinking about experts.

So what if in that telework case, what if they had an expert that said, you know, it's really not true that telework only works for the rare case. In fact, you know, in the last 10 years, blah, blah, blah hundred million blah, blah, blah, the national alliance of business and the U.S. government, blah, blah, blah. All that stuff. So generally the real thing. You federal judges are among the least diverse of work experience on earth. But I know this. You don't know this. And I've looked into the facts here and it would be easily done and here's how.

It shouldn't be needed, but maybe it is needed because that's what we're dealing with.

And even on the ADAAA, statute very specific and targeted, it answers almost all of the issues we're dealing with, even there you still have to be prepared to do the whole nine yards. So that's my overview of the bad cases I've seen and some of the disconnect between the broad remedial construction and what the judges are saying very broadly to unremediate the ADA and some sort of obvious thoughts on what we might do about it.

[Applause]

MARC MAURER: Thank you, Brian. We'll now talk about disability employment practice and to give us some of that, here is Regina Kline.

[Applause]

REGINA KLINE: Thank you, Dr. Maurer. I feel extremely underqualified for this panel. I offered to read Brian's footnotes and Dr. Maurer said I had to give my speech.

That leads me to why I'm speaking. I also wanted to say that I'm very lucky the last time I was here and I was speaking I was at the federal government civil rights division. And it was about 4-5 years ago and we were speaking that day about Title II of the ADA and Olmstead. And so I wanted to thank Daniel Goldstein, who is in the back of the room, for giving me refuge in the private sector and living another day at a wonderful law firm with brilliant people.

And I'm here to talk about instead of Title II but Title I.

What I wanted to speak about today was the application of Title I of the ADA to subminimum wage segregated employment in sheltered workshops. Many of you I can tell are kind of asking why I would do that, why are we having this conversation? We've been going around for quite some time talking about Title II of the ADA, and the Supreme Court's decision in Olmstead LC and how that applies to state and local government entities as they arrange, administer, fund, and plan their employment system. So what is this thing? You want to talk about Title I in workshops?

I just want to begin by saying nothing that we're going to talk about today is really intended to distract from the fact that Title II still has full force and effect in Olmstead as it applies to employment systems and states, and that includes local education agencies, VR agencies, developmental disabilities services agencies.

But it occurred to a lot of us somewhere along the way that workers with disabilities in sheltered workshops are employees. And it occurred to us at the same time that sheltered workshops are, in fact, are employers. So folks have rights as workers with disabilities.

So for nearly 80 years, 14C of the Fair Labor Standards Act has predicated the wages of workers with disabilities based on time studies. And you know, typically the work in workshops is rote, manual, repetitive, and involves the measurement of your wages based on how fast you are, what your manual dexterity is like, your coordination, your speed, your skill in completing manual tasks within a relatively short period of time.

So in effect, this is about the measurement of time and production and the interrelationship between the two.

And we see workers across the country, there's roughly half a million workers at any given time, both performing in exchange for subminimum wages. We see them performing tasks that are often performed without reasonable accommodations.

And I will go so far as to say in this forum that I would think that the vast majority of folks in sheltered workshops do not receive individualized assessments for reasonable accommodations. So as you can imagine, some questions abound from this. First, would these employees be earning subminimum wages if their time tests were conducted with appropriate reasonable accommodations? Would they have access to greater promotion advancement opportunities within this shop if they were evaluated with the accommodations they needed to be successful? Moreover, when viewed by staff, who make many determinations about individual work assignments within the shop and who should qualify for the types of services and supports to leave the shop, would they be viewed differently if they had access to reasonable accommodations?

Now, this is the point in the presentation where somebody in here rolls their eyes because afterwards somebody in here is going to want to say to me, Gina, we don't do work readiness criteria. We don't need to prove that we're worthy to get a job outside a shop.

And I agree. However, for the last 5-7 years I've been telling everyone I agree and that Olmstead and the right services and the right supports will help anyone who can and does and wants to work to leave the shop. But for those that remain, let's have that conversation. For those that remain, how are their wages being measured?

We know from GAO statistics from a long time ago actually that only 5% of those folks that work in sheltered workshops ever leave for competitive integrated employment.

So as the vast majority of folks in state service systems who continue to receive subminimum wages perform work tasks, we should be asking ourselves what their rights are as employees. Many people around the country live in rural areas that have few job opportunities available outside the shop. They're in manufacturing settings.

Others work in shops that hire nondisabled peers as part of an effort towards reverse integration. So they serve as a job center in the town and people without disabilities come in and work alongside them. However, the people without disabilities earn minimum wage or above, and the people with disabilities continue to earn subminimum wages.

And let me just say, there's a movement afield to swiftly privatize sheltered workshops. And the privatization in part, you can ascribe motives, some of it is because for business model reasons, and others are moving away from the inherent responsibilities that attach to the receipt of public service dollars. So for all these reasons, it's important that we look holistically at efforts to enforce the law both Titles I and II.

So why then do employers that exist only for the purpose of employing people with disabilities and providing them services, why would they not provide reasonable accommodations? And you know, sheltered workshops are part of a system that has existed for almost 80 years under the Fair Labor Standards Act. And only 52 of those years have kind of coexisted with the existence of Title I of the ADA. But you know, even under the Fair Labor Standards Act, FLSA, the employees are recognized as employees within the Fair Labor Standards Act and employers as employers. It is quite clear that they would be recognized the same under the ADA, and the reason for any confusion may well be what some have coined the workshop identity crisis. And this is something that Congress has been talking about for at least 40 years. There's a congresswoman named Pat Schroeder who basically said this is like an identity crisis, that the workshops think that they exist to serve clients and they have forgotten that they may also exist as employers. And you know, I'm paraphrasing but she said to the extent that they don't embrace that they are both, we have a workers' rights problem, and the rights part is left out if we're just talking about the service part.

So we are long overdue, long overdue, for the workers' rights movement that relates to the employee rights of people who work in sheltered workshops. We've covered the service part. We've talked a lot together about the service piece. And I think states for the most part embrace they have obligations. The shops embraced that they have obligations to their employees? That's the question.

The Disability Rights Ohio, Brown, Goldstein & Levy, we have learned in our representation of plaintiffs who work in sheltered workshops, particularly plaintiffs that work in Tiffin, Ohio, in the Seneca case, tried to figure out what are the obligations of the shop in terms of who they designate as their bona fide employees, who gets to go in and receive subminimum wages.

What we've learned is the necessary prerequisite to earning subminimum wages is a person is disabled for the work they perform under FLSA, meaning that their disability has been assessed to impair their earning or productive capacity for the work that they're performing. So it is absolutely worth considering whether that's being done, and if given accommodations, would it be the finding of the shop that your disability actually impairs your earning or productive capacity for the work that you're performing?

So what I'm asking is really an existential question. If folks were given the accommodations they're entitled to, would we continue to have subminimum wages?

There's another set of questions. What are the questions we should ask workers as they work in the shops and continue work tasks? What if they're qualified for tasks that are part of the essential functions of the training in the shop but they're not individually assessed to do all of the tasks in the shop? This is a confusing question so let me explain. We've seen around the country, around the country! Remember, these are employers that are set aside to hire people with disabilities. We've seen people who are blind categorically excluded from certain machines because they're, quote/unquote, unsafe for people who are blind to use. This is in the shop!

We've seen people with the most significant disabilities grouped together in a corner of a workshop and not allowed to exercise or operate certain machines, and those very machines are machines that are access to more advanced equipment, technology, training, higher pay, benefits, advancement, and somewhat ironically, because I mentioned machines and technology, the people with the most severe disabilities are excluded from the jobs that have the technological support to rely far less on manual dexterity. Yet they continue to perform jobs on the other side of the shop that is almost wholly reliant on their dexterity and predicating their wages.

And who gets to be a supervisor? The world is flat for some people with disabilities in shops and not for others. There is the embrace of the employer responsibilities and advancement and promotion when it comes to paid supervisory staff who provide support to people with disabilities who work in the shop. But the world is flat for workers with disabilities. They often perform the same repetitive tests for decades at a time and there are no different jobs with different levels of responsibility or qualification.

Take the example of Michael Denoewer, a plaintiff in our recently filed lawsuit in the southern district of Ohio, which has been advanced by the National Federation of the Blind. I recommend that you take a look at the complaint, where Michael sued his former sheltered workshop under Title I of the ADA, Ohio anti-discrimination law, and he also sued the Honda Motor Company for aiding and abetting the employment discrimination.

Michael Denoewer is autistic, nonverbal, epileptic. For nearly 7 and a half years he was employed by this Marysville, Ohio, sheltered workshop as a production associate, paid subminimum wages, on average about $1.38 an hour after taxes for the whole time that he worked there.

But when Michael was in high school, he had a great high school transition program and he was engaged in numerous competitive integrated job opportunities, trial work experiences. But nevertheless, like almost the majority of the kids in his county, he was referred from high school to sheltered workshop where he landed in the shop. And this workshop was divided into two sections. An area known as the tables and an area known as the line. And Michael worked on the tables where he was paid a piece rate based on the number of parts, component parts for Honda, that he could pack during his shift. But he had no wage floor. So depending on his speed and accuracy in his production, his wages could -- there was no floor on how low his wages could be.

Yet the people who worked on the line doing production for Honda were assured to make above minimum wage. And they had access to the kinds of advanced machinery, equipment training, skilled labor that Michael didn't. And but yet they were also producing products for Honda. And the interesting thing about that line is that there were people without disabilities brought in from the community to work on the line. And despite repeated requests to perform other work in this shop for which he was otherwise qualified, the plaintiff, Michael, he remained assigned to those tables for 7 years.

He's claimed in this lawsuit that this is a violation of Title I of the ADA simply because he was deprived of the opportunity to complete the other parts of his job, and he was denied that opportunity based on a stereotype. He alleges based on stereotypic assumptions about what he could do before he was actually given an individualized assessment doing his job.

And interestingly, he claims that this -- we claim in the complaint that this is a violation of the ADA. It's a violation of Ohio anti-discrimination law. I see people from Ohio nodding. And he also claims that it was a violation of the aiding and abetting statute, and he sued Honda Motor Company for aiding and abetting.

So this sparks a very important conversation. Aside from the interesting element of how to claim violation of Title I through the failure to provide an individualized assessment, this has sparked a very important conversation about the responsibility of customers of sheltered workshops. Good corporate governance and the monitoring of supply chains.

So Michael has claimed that Honda, which was this workshop's largest customer, their highest profile partner is what they've said, that Honda aided and abetted its discrimination against Michael based on the way that it had influence, it had significant influence over the labor cost, the workforce composition, the workplace methods and production in the shop. This workshop was a qualified tier 1 supplier for Honda, which was a special contractual relationship with the motor company. And so the allegation here is that Honda contracted both for that line, where people were making above minimum wage, they had access to opportunity, and advanced equipment and machinery, skills training and acquisition. And here was Michael who was also producing Honda products. He was putting the motor vehicle manuals into plastic wrap and other manual tasks. And yet pursuant to the contract with Honda, Michael was making subminimum wages and could not access that other part of the shop, was denied access to the other part of the shop.

So the case was filed this past December. It's proceeding in litigation. But these are very important conversations for us all to have concurrently as we not abandon the legal principles that attach to the responsibility of the state service system and of the state and local service system of the county boards under Olmstead under Title II, which is still very much -- I keep saying this almost defensively, this is still very much good law, but Title I also applies. And challenges of this sort are bringing to light the importance of viewing subminimum wage employees as employees with rights and workshops as employers with responsibilities.

MARC MAURER: Well, thank you, Gina.

Gina didn't tell you all about the dangers of this case. I won't either.

I'm serving as counsel on the case along with Gina, and it is a fascinating effort inasmuch as we have worked on the 14C case in the Seneca area, and we wonder a little bit how the two may intersect by and by. In other words, we're expanding imaginatively the reach that we think is appropriate for the rights of disabled workers. And if you think about it, the employment picture in the United States is one that those of us who are employers know and those of us who are employees know it at least to some degree. And you don't start out and work a while and after a year you work the same job doing the same thing at the same pay and after two years and after ten years you're doing the same job at the same pay and you never get anything different ever.

I mean, I suppose you could find somebody like that, but the number is so small that the very difference of the way that the disabled find themselves faced with decisions about their lives in these sheltered shops and the way that employment works is strikingly different.

So I was invited to say a word and I couldn't help myself.

The third person to present this afternoon is going to talk about employment in cases involving Deaf employees. Here is the chief executive officer of the National Association of the Deaf, Howard Rosenblum.

[Applause]

HOWARD ROSENBLUM: Thank you very much. Appreciate your comments.

A little audio description for those of you who can't currently see. Even though there's a very sophisticated Australian voice at the current moment, what you really can see is a short bald guy at the front of the room.

[Laughter]

Nonetheless, I shall proceed.

[Laughter]

And I will say, it's a hard act to follow from the two amazing presenters we have just had. The only thing that's holding you back from food and drink and refreshments this evening is myself, so I shall try myself to entertain you for the next few minutes.

I would actually like -- actually, I digress. First I would like to thank Marc and Lou Ann for allowing us to have the Deaf Law Day yesterday kindly hosted in this building. We are very much appreciative of that.

And Marc, I would like to make sure that we have recognition for John Waldo and Caitlin Parton in that effort as well.

I now will proceed with my official remarks. I am going to be focusing on the efforts that impede Deaf and hard of hearing people and people with other disabilities as well in terms of one part of Title I of the ADA. I think you're probably in agreement that some 30 years ago, when this was established employment rates have not particularly improved much for our constituents. I know statistics and research come up with slightly different numbers there, but there's a very high percentage, some as high as 70%, that is a people with disabilities are either un or underemployed. 70%. And that's not something that we can fix with small incremental changes and individual lawsuits. It absolutely requires systemic change.

So we need to relook at our approach and fix this absolutely broken system.

So now let's look at the Deaf and hard of hearing community in particular. A lot of them are also either un or underemployed and also face significant communication barriers. We've been looking at a few things come up lately helping us with some work arounds or ways to approach systemic change. I would like to first recognize the office of federal contract compliance program, the OFCCP under the Department of Labor for their work on section 503 compliance. With those regulations, they now mandate as of 2013 that 7% of all entities working as contractors with the federal government must have 7% of their workforce be people with disabilities. So if you look at the numbers again, 20% of private business enterprise in the United States has a contract of some kind with the federal government. So of all of those companies, if 7% of each of their employee base has a disability, that's a pretty good start.

Now we recognize that's a system of affirmative action in a sense, but it actually does seem to be the way to go where that's concerned.

And there's also a couple of different paragraphs when we look at the EEOC's approach to section 501 for employment, as many of you are probably aware, they released their rules a year ago, January 3, 2017. After the rulemaking procedures, the NPRM, etc., public comments, was released with an effective date of January 3, 2018. So there are a lot of good changes in that. But I don't feel it went far enough. So I'm going to look at some of those regulations in that regard.

In the rules that were released, there was a mandate that all federal agencies must have 12% of their workforce be people with disabilities. 12%. All of that workforce, 2% must be people with targeted disabilities. Now let talk about targeted disabilities, because they put some definitions in their regulation.

So it's a subset of a larger group of disabilities. They have referenced targeted disabilities as those that are manifest disabilities that face significant barriers in employment. And they have a fairly extensive list of disabilities that are automatically recognized as targeted. So those with developmental disabilities, those who have had traumatic brain injury, Deaf people, blind people, those who are missing extremities such as an arm or a leg, those with significant mobility issues, those who are partially or fully paralyzed, those who have epilepsy or serious seizure disorder, those who have intellectual disabilities, those with significant psychological issues, and I didn't say this, this is the EEOC's term, dwarfism. Don't know if that's still the current term, but they said that. And also those with significant disfigurement. Those are all the categories currently already recognized as targeted. 2% of federal hires must be people who fit those categories.

Now one of the nice things in the requirement, it recognized those at the higher level positions and those lower. This number applies to both. Typically we've seen people with disabilities hired at lower levels and stagnate. But this rule demands both upper and lower levels of employment have 12%. In both of those GS levels and categories, 12% of targeted disabilities.

So I think that's an improvement. However, there are some problems with the rules. Because what happens if a particular agency does not comply? What punitive measures exist? Are they fined? Nope. Absolutely nothing currently happens. The EEOC has not said there is anything it will do other than to work with those federal agencies and help them improve the statistics.

Goodness. 30 years after the ADA and the EEOC will help federal agencies improve? Brilliant.

Now, each agency is required to post their plan for affirmative action on their respective websites. I haven't seen any yet, so if any of you have, please do let me know.

I think the main thing that bothers me, or actually before I go into that, let me talk about another improvement in the rulemaking for section 501. They have now additionally required PSAs, personal assistant services. PAS. Excuse me. So for those with targeted disabilities who need additional assistance for personal assistants in order to get to work, to enter the building, to use the restrooms for physical mobility or a variety of other reasons, the government agencies must provide PAS. That's the first time we've seen that referenced. So I think that was a good mandate.

But there are some other parts that NAD and other organizations have some difficulties with where EEOC is concerned. There's one thing that we recommend that the EEOC elected not to adopt. We looked at the number of Deaf employees hired in federal employment and in private sector and found that where the critical mass of employees are for Deaf is in the federal government.

So then we looked within the federal government in which agencies and divisions are they working. The Office of Personnel Management is actually an entity we talked with, and they broke down where Deaf people typically work in terms of the federal government. And also with people with other disabilities. And I can give you those statistics. We looked at the numbers that they had and we found that several federal agencies in particular had quite high numbers of Deaf people employed there and other federal agencies had practically none. We wondered why. We tried to look for the commonalities in those agencies with high Deaf employee percentages and high percentages of people with other disabilities as well.

Upon exploration, we found those with high numbers of disabilities in their sectors have a centralized reasonable accommodation fund. And I'm going to talk you through exactly what that means. It means that for a person who applies for a position in any company or government agency who has a centralized fund, what you typically meet is the first hiring entity from that division level of that federal agency. So that hiring entity is the person who is given a budget for their particular division. So now this person has a budget and is looking to hire some people. Maybe they need 10 people, for example. So they've got their first 9 people through the door and they have 1 more position they would like to fill. They look around, they've done some interviews, and a candidate with a disability comes along and the hiring manager says, I could hire you, but ooh, wait a minute, if I hire this person, my budget is not going to cover all 10 people because I'm going to have to provide reasonable accommodations. What's it going to cost me out of my budget. What am I going to have to give up in my line items toward to provide accommodations for this person with disabilities to come work within my organization?

My guess is that that approach and that thought process happens frequently, especially within the federal government, when they don't have centralized resources.

However, if they do have centralized resources and funds, they are hiring the most people with disabilities because the hiring managers don't have to worry about cost. The agency wide system will take care of the costs of reasonable accommodations so the hiring entity is not worried about that departmental level budget when they make those hiring decisions.

So we think the evidence is there when you look at those numbers of who is employed in which federal agencies.

And what does the EEOC say about this? There was a slew of comments submitted during the rulemaking process, and I quote, the EEOC supports the use of centralized reasonable accommodation funds to pay for reasonable accommodations. We think that those centralized funds are one of the best approaches and one of the easiest ways to ensure that requests for reasonable accommodation are not denied based on the potential cost that an individual with a disability would then be excluded from in their employment due to expected or anticipated costs of providing that reasonable accommodation.

And in the next paragraph, they continue. However, the commission is not persuaded that a centralized fund is the only way to achieve this objective. They then go on to say that there are a few different ways they think agencies should be able to select from in terms of finding the funding and staffing and looking at the people doing the hiring, training them, etc., there might be other work arounds, that perhaps they can instead go out to another external resource like the Department of Defense for example has the CAP program which is the computerized electronic accommodation program, although it's called the CAP. That is available from the Department of Defense but to any other federal agency. It's limited to technology, but that program exists.

So even with all of those potential resources, companies, entities who already know this within the federal government are still not hiring people with disabilities. So they're failing on that point. And there's currently no requirement for every agency to have a centralized reasonable accommodation fund. We see that as an ongoing problem.

One of the agencies with the highest number of Deaf employees in the past, not the top, but one of them, is Department of Defense. I think they're second or third on the list. But when we look at the U.S. Department of Agriculture, the USDA, they had a good record. It's a very big agency. They had 17 different divisions under their auspices. And Deaf people worked at most although not all of those 17 divisions. And they had a lovely centralized system for all of their reasonable accommodations, for any person with any disability.

However, one day they decided to change the system. They said we don't think this reasonable accommodation centralization is really very effective. What we're going to do instead is have one contract for interpreting services for all Deaf people with the responsibility on each of those 17 separate divisions for coordination. So every one of those 17 divisions, instead of having the centralized system, had to create their own contracts for interpreting services for their respective Deaf employees. Most of those divisions had no idea what interpreters do, where to find them, etc. No idea at all. They had no idea how to verify a good interpreter, what makes a qualified interpreter, etc. Nonetheless, they went ahead and signed contracts with various companies.

Chaos ensued. And of course me being who I am, the NAD sued.

[Laughter]

It's an ongoing process. We are hopeful that at the end result, they will return to that centralized fund that they did have and that that will therefore influence other federal agencies to look at centralized funding as the premiere way for sorting out reasonable accommodations for their employees, because we believe strongly when you remove barriers to the hiring process, as with a centralized fund, you can make progress.

Attitudes and barriers also exist obviously, but these budgetary barriers have to be removed also for this to be effective.

That as I said hopefully will lead to increased employment. And this is the not solution, the overall panacea, but it is one step in the right direction.

If you look for example at the private sector, it seems that more and more of the Fortune 500 entities are starting to centralize budgets for this. We're seeing more and more people with disabilities working for those larger private companies. USBLN, the U.S. business and leadership network is currently working on some identifications for hiring people with disabilities and helping companies identify the skill sets and compete to be the best company hiring the most talented people with disabilities. That's outstanding! And it's centralized funding that is the key part of what they're suggesting.

So if the private sector is starting to catch on, we definitely need the government at the federal state and local levels to catch on to that as well and to make it a requirement.

Now, we wish it was under the EEOC because they could make it a very strong requirement, centralized funding. We would like to make sure that they do.

Thank you so much.

[Applause]

MARC MAURER: Thank you, Howard, and I observed that you left us a few minutes for questions, which is very good.

You know, if you don't come back and do another law day, I'll be disappointed. And if we don't get some other disability-specific interest in legal protection, I'll be disappointed also.

So I appreciate your leadership in this area.

I wonder if we have questions for the panel.

>> I have one.

MARC MAURER: Yes, sir.

>> This question, Gina talked a lot about reasonable accommodation under Title I, but it seems to me that some of the other provisions of Title I could be extremely powerful in the sheltered workshop context. One that comes to mind is the provision with respect to testing and the test should reflect the aptitude and not the disability, to paraphrase what that test requirement is. And that could be possibly useful in the assessment testing, although it's somewhat contradictory to the idea of assessment testing.

But the other one is methods of administration that tend to discriminate. And anybody who listened to Brian has got to think that just like every other year, we're getting killed on reasonable accommodation. So why aren't we using these other provisions of Title I?

REGINA KLINE: Dan, you weren't aware, but I gave you a shout out so you wouldn't ask a question. I'm not sure you were listening. Just checking. I'm really glad you came in for the event.

MARC MAURER: I can't imagine a law symposium without a question from Dan.

REGINA KLINE: I think the thinking, I think the reasonable accommodation issues are going to be hard, are going to remain hard, and they are especially hard in the Wild Wild West of workshops. Because they exist principally to provide services. So I think there's no question about that.

But as framed in the case about Michael I talked about, it's a threshold question of how if he's treated disparately, other people on the workshop floor, that lives in the background of the case.

The threshold question about him is the individualized assessment, less about the accommodations that he did or did not get but more about was he even assessed for the broad range of jobs that he was hired to do. And when we talk about what are we hired to do in the workshop context, we're hired to have a disability and be open to vocational training. So why on earth would we hire people to do that and then limit the training that they can receive?

So I think that's my response to you, although I think you have some really good ideas. So maybe we should get in touch with each other.

[Laughter]

MARC MAURER: I would like to ask a question because if I don't I'll have to dispute with my cocounsel in public.

You say that the workshops are primarily to provide services. Don't they generally speaking make money for the people who run them? Isn't the idea that they use the employees there to generate wealth that gets sold and distributed here and there, to this one and that one? Have you ever heard of the Honda Motor Company ever engaging in a practice that didn't make some money for the Honda Motor Company? Aren't they just transferring subminimum wage jobs out of countries outside the United States, the Philippines or wherever they were doing them, back to the United States and using disabled workers because they can get away with it?

REGINA KLINE: Are you asking me?

[Laughter]

It's interesting. In Honda's motion to dismiss that was filed, they made no bones about calling themselves good corporate citizens I think was the terminology. They're good corporate citizens because they're giving good people with disabilities jobs. Never mind the wages that are being paid associated with those contracts.

So this is a really important moment for the business community to consider their reach and the effect of their supply chains certainly, but not to sort of detract from the overall message here, which is that these are profit centers. These are businesses. And I mentioned earlier that many of them are actively privatizing. They are moving away from being attached to state systems and they are more saying we are businesses, hey, look, we hire people with disabilities and we hire people without disabilities. Never mind that we might treat those two groups differently when they come in the shop. So absolutely. There's a bottom line principle at play.

MARC MAURER: Well, we agree again.

HOWARD ROSENBLUM: Can I make a comment? Look, it's not my area of expertise, sheltered workshops, but I'm wondering, does anyone plan to sue for reparations?

MARC MAURER: It's not precisely that we should lay out the game plan, but we're going to get what we can. Let's put it that way.

REGINA KLINE: Let's talk a little bit later.

Actually, it is sort of reparations in the Fair Labor Standards Act. There was a different case having to do with folks misclassified that should have never been put in the shop. They were called disabled for the work they were performing and they weren't. So the remedy, the effective remedy under FLSA is that they are owed back wages for all of the time that they were in the shop because they never belonged there. So that to me is reparations under FLSA.

MARC MAURER: Okay. Let's see who is in line by the microphone there.

>> Hi, this is Abby from Brown, Goldstein & Levy, and I have two questions which I apologize for and I'll try to keep them quick. One is for Brian and one is for Howard.

The one for Brian, you talked about MG on board. Is every MG equal? I'm particularly concerned -- and this may just be an impression I've gotten from reading case law. There is a disdain that I think begins at the Supreme Court for the opinions at the EEOC and that may be magnified with the current cadre of judges that are being appointed. And if there might actually be problems of inviting the EEOC into your case because judges may have an antagonistic view of them that I think starts with the Supreme Court saying we don't give their opinions any kind of chevron difference and sort of going out of its way to at times stomp on the EEOC's face.

And my question for Howard is, how sort of privacy concerns interact with the federal government's affirmative action program and the ability to audit the representations of the federal contractors if they have this many people with disabilities and obviously some of those people will have to self-identify if they want accommodations but not everybody are who qualifies may want to and how that's working out.

BRIAN EAST: Yeah, so as to choice of amicus partners, I think that's a really good point. The other place that I see sort of hostility of the EEOC is in the tenth circuit for some reason. I can't quite figure out what's going on.

But in any event, I do think -- I actually think most courts, in most courts, having the EEOC on your side is a good thing. But it should be done -- you should think about it.

But there can be more than one amicus and they shouldn't all be saying the same thing. But the EEOC could join but then there could be another brief from the NFB or, you know, AARP or lots of organizations that are interested. The P&As that can raise other points.

So I do think that is an important thing.

I think there are a lot of possible resources there to think about though.

MARC MAURER: Howard, how about it?

HOWARD ROSENBLUM: So good question. I think that's why the OFCCP rule is more effective as written, but you're right. In the rule, they do emphasize that you cannot require disclosure. So a person who has a disability has to self-identify and the company can encourage but not require the disclosure. So I think that in a sense that's even better when you look on the face of it. Some people won't disclose. So that forces the company to hire even more people who are willing to disclose. And they have more manifest disabilities. So I think the impact actually will be a higher percentage of people with disabilities overall who get hired, because you are right, it's voluntary disclosure, not mandatory.

>> Thank you.

MARC MAURER: Who is next in line there?

>> It's Caroline Jackson from the NAD. I have a question I think for Brian. My area of expertise is not Title I. It's more Title II, Title III, Section 504. But I am seeing in the defenses raised in my cases a lot of similarities with what seems to be going on in yours. Good faith basis for not providing an interpreter for a year while somebody's husband died of cancer, etc., etc.

And so my question is, is there anything that is different about the statute itself, about Title I versus Title II or Title III that you think is giving these cases the Title I cases traction? Or are judges just importing things from other cases or making things up so we really need to be more aggressively capturing these?

BRIAN EAST: I don't know the answer to that exactly. What I would say is listening to the presentations from yesterday and today, I several times thought about how the work that Title II and Title III advocates are doing, the arguments they're making would help inform Title I advocates and vice versa, because we see similar things. Not necessarily the same. And in some ways the statute is different between Title I and Title II and there's some different specifics. But I do think there is overlap. And it made me think that a good project would be to try to sort of actually think about and list all of those areas because I think there is a lot of work being done in this field that would help this and in this field that would help that. Just like in employment cases where we're talking about motive and intent, we could get help from criminal cases and things where the court is talking about having to prove these amorphous concepts and we won't throw them out too quickly. They don't do that often for plaintiffs in Title I cases.

So your exact question, I don't know the answer to. But I do think there's a lot we could do to help each other.

I also think that I've been thinking for a while that I want all the advocates in this room to consider doing Title I work because you are all so great and brilliant, but my sense is that there are more of the Title II Title III folks in the room than not. I may be wrong about that, which is fine. I'm often wrong. But yes. So I want more P&As to do employment work. I want more litigators who do this really high level Title II and Title III work that everybody is doing to consider this.

MARC MAURER: Emily?

>> Yes. Emily White, currently in private practice formerly of Disability Rights Ohio.

I had some thoughts about sheltered workshops. I really think that work is so important. It's really about valuing people's time and their humanity in like real tangible ways as human beings, that we all want to be paid for our time. As long as sheltered workshops are allowed to pay less than minimum wage, they will. They will value people less and people will not be in jobs to support themselves.

But I love the connection between Title I and FLSA because I do not believe it is possible to comply with both. The first part of FLSA is examining someone's disability and putting them at a job they are worse at because of their disability. I love the focus on reasonable accommodations. In the Seneca case, we asked every single witness, not only did you think of accommodations, but asked them did you do this, did you do that, specific accommodations.

The other piece I loved that the judge appreciated was I also flipped the script to put the focus on mismanagement by the employer. So as Dan had mentioned, measuring what you're supposed to measure rather than just a person's disability. Although interesting, you were supposed to be measuring a person's disability, but what we're actually capturing is poor management practices and quite honestly bad math. These are folks that they hire off the street who can't operate a stopwatch let alone do a complex piece of algebra with three different factors. So those are my comments. Thank you for continuing to do the work. If people's time were actually valued, there would be an immediate push to put people in jobs they were actually good at. Or crazy thought solicit input from people about which jobs they want to do and make sure they have the supports to do that because people are actually productive, not with stopwatches and time studies. Those ideas died in the 1950s. It's crazy that we're still working on them today.

REGINA KLINE: I think we're done.

MARC MAURER: No, Eve has to ask a question or make a speech. I don't know which. Go ahead, Eve. I want to hear what you have to say.

>> I'm Eve Hill from Brown, Goldstein & Levy and Brian East is the smartest employment lawyer I know and every time I call him and I give him what I think is a hard question, he has a creative answer and that was the most depressing speech I ever heard. So what's the answer, Brian?

BRIAN EAST: Yeah. So I don't normally do depressing speeches. So I'm mostly looking in the cases for the good stuff and I'm letting the bad stuff just go out as just too bad. But this was the topic.

>> Was that the topic? Give us all the bad stuff?

BRIAN EAST: Separate and unequal employment. And it is still separate and unequal still. It is depressing. But there is good stuff happening for each of these cases, there are other cases where because of amicus briefs, because of development of the evidence, because of experts, because of a different way of framing it, because of, you know, as the last commenter said, focusing on the bad acts of the employer and not on the plaintiff, there are ways to win these cases, but it is, yeah, it's work.

>> Good. Because as I said to the NFB a month ago, I think we need a priority called take back employment law. Because it's like...

I had one question about the federal employment. Federal employment has traditionally been a way of equalizing employment access for a variety of underserved and underrepresented groups, including people with disabilities or so we had hoped.

It seems to me I'm hearing more and more that the schedule A hiring authority is ending up being used as a discrimination tool and that makes me worry about the section 501 implementation which is soft already. But I'm hearing that schedule A is being used either to hire a person into a job, keep them on for 2 years for their probationary period and then fire them. Or explicitly as an internship program where at the end of the 2 years you automatically get fired unless you apply for some other job which doesn't seem at all to me what schedule A was intended to do.

What can we do about that? Not that I don't have my own ideas...

HOWARD ROSENBLUM: Goodness. So you're right in that that does seem to be happening a lot. And there are people who are going in through schedule A at entry level and maintaining entry level positions. They're not able to promote. They're staying in basically the same job. That's also not equal opportunity.

We're hoping that at least with the EEOC mandate with this 12% or above in the higher echelons of the government GS levels that they will have to start increasing the incentives for promotion. Now, that's where I'm hopeful.

Schedule A is a broken mechanism other than that, though. It needs to be revisited. There are a lot of benefits potentially when students graduate from college and don't have a lot of options in the private sector, they often go to federal government because government will hire them under schedule A. So it's a pathway from schedule A but doesn't get you down to schedule Z. So we need to get down into all the aspects of that.

Thanks for your question.

MARC MAURER: Well, I think we could take more time on it, but the reception does await and I appreciate the presentations of my colleagues.

One of the things that I worry about, I look at the cases that have had to do with employment at the Supreme Court, and very often you find how it is that charity is a major concern of the court in thinking about disability. And when they start thinking about charity, I know they're about to sell me down the tubes. So I want us to find a way to get charity out of the equation. We have something to sell, which is our labor, and it is worth having.

Be that as it may, I appreciate it from my three panelists here. It is an area of considerable interest to so many of us, and we are going to continue to pursue it until we find some way to find a crack in the facade that has faced us all these years.

Thank you very much, members of the panel.

[Applause]

David Ferleger has graciously sponsored the reception tonight. Lou Ann, where is the reception? Customary location, where you found your lunch and your breakfast and where you'll find your breakfast tomorrow. The breakfast is at 7:45, and we start at 8:30, but we have the reception now.

[Applause]

[5:36 p.m.]