

ILLITERACY IS THE DISABILITY¹⁵: EQUAL PROTECTION FOR THE DEAF IN

TENNESSEE CLASSROOMS

by

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She is five years old and does not know her own name. She is headed to kindergarten but cannot tell her mom that she does not like peanut butter.

Meet Molly, this five-year-old little girl. She loves horses and the color purple. She has spunk and curiosity, but she is labeled as a behavior problem. Molly is not disabled or learning challenged. She simply has been deprived of language.

Molly is deaf.

Molly's parents are hard-working, average-wage earners. They love their daughter and want to do what is best for her. They took the doctor's advice and agreed to two cochlear implants for Molly. They enrolled her in an oral preschool program to develop her speech and listening skills with other children like her. School rules do not allow Molly to learn sign language. The cochlear implants do not work for her.

Molly is headed to kindergarten but cannot communicate in any language.

The most critical period of language acquisition is between birth and five years of age. For Molly, this time has passed. She starts kindergarten and begins to learn American Sign Language from a teacher in a mainstream school. She is the only deaf child in her school. The teacher is itinerant and meets with her for thirty minutes, three times a week.

Molly has an interpreter in her regular education classroom which Molly cannot understand. Her classroom teacher uses phonics to teach reading. She provides writing prompts about Goldilocks, a story that Molly has never heard. Molly is always playing catch-up.

The teacher is not to blame. She has never been trained to teach a deaf child. In fact, even deaf education teachers are not required to learn sign language in many college programs.

Unsurprisingly, half of the deaf children in the United States are graduating below 4th grade reading level.¹

This shocking story is neither isolated nor far-fetched in Tennessee. It raises many questions. How does this happen in the U.S. in 2020? Are there laws about that? Is there someone whose job is to educate the Mollys?

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

How many Mollys are there in the U.S.?

- Depending on how “deaf” is defined, 1-10% of the population is deaf.²
- One in a thousand babies is born deaf.³
- Around 95% of deaf children are born to hearing parents.⁴
- About 73% of those parents never learn to sign.⁵

How many Mollys are there in Tennessee?

No one knows. No one is tracking her.

How does she fair in reading levels compared to the national average?

No one knows. No one is tracking her.

¹ Stephanie Cawthon, *Schools for the Deaf and No Child Left Behind Act*, 149 (4) *American Annals of the Deaf* 314, (2004).

² Marc Marschark, *Raising and Educating a Deaf Child* 28-29 (2nd Ed. Oxford University Press 2007).

³ Barbara Cone-Wesson, *Screening and Assessment of Hearing Loss in Infants* 2003, in *Oxford Handbook of Deaf Studies, Language, and Education* 420-433. (2nd ed. Marc Marschark & Patricia Elizabeth Spencer eds., 2011).

⁴ Ross Mitchel, & Michael Karchmer, *Chasing the Mythical Ten Percent: Parental Hearing Status of Deaf and Hard of Hearing Students in the United States*, 4 *Sign Language Studies* 138, 2004.

⁵ Marschark, *supra* note 2, at 65.

Often special education students rank lower academically than their regular education peers, but the significant difference for a deaf student is simply a language barrier. That deaf student has every ability that any other child in a state-mandated, public school would have, except the teacher and students in the classroom speak a different language.

This is an issue our nation has faced before in cases like *Plyler v. Doe* and *Lau. v. Nichols* where students who spoke a different language were denied an equal education because of their differences. Similarly, the discrimination of children with immutable characteristics came to the forefront in *Brown v. Board of Education* whose historical photos are seared onto the memories of every American.

Molly deserves an equal opportunity to receive an education like the children of *Brown*, *Plyler* and *Lau*. Access to language is her only barrier. It is a simple fix and more economically responsible than funding a lifetime of recovery. Equal access to language provides her with an opportunity to be a contributor, not a ward of the state.

The general public assumes that in this modern age, 29 years after the Americans with Disabilities Act (ADA), 29 years after Individuals with Disabilities Education Act (IDEA), 45 years after Family Educational Rights and Privacy Act (FERPA), and 46 years after Free Appropriate Public Education (FAPE) were passed that children with a “disability” were being looked after. There are a few issues to address with that assumption.

First, most counties do not have administrators who are qualified to supervise the education of deaf children. They have never been trained to educate deaf children. So, most administrators decide what is best for deaf children using the same assessments as special education children. That means if a single deaf child moves into a county, he is placed in a

special education classroom because he falls under the special education umbrella. The needs of those children vary greatly, and the academic potential of those children could vary greatly.

Second, being deaf does not mean a person is disabled. It means a person communicates differently. Imagine a hearing person who does not know sign language takes a tour on the campus of Gallaudet University (the first Deaf university) led by a Deaf student. The tour guide communicates only in American Sign Language (ASL). All others on the tour are Deaf and sign. The receptionists in the various buildings are Deaf and sign. The cafeteria workers are Deaf and sign. The garbage man is Deaf and signs. Who needs the accommodation? Who is disabled?

Lawrence Siegel in his book states:

Deaf and hard of hearing children who are denied access to communication itself are denied everything. The flow of information in a classroom, which represents our participation in our democracy, hovers about every child but the deaf child. The lack of access to a language-rich environment deprives the deaf or hard of hearing child of the linguistic tools necessary to participate in the classroom and, accordingly, our democracy.⁶

The decisions of these county administrators have lifelong consequences for the deaf student and the communities where they live.

How have the courts and legislatures addressed these issues?

Nationally:

1. Section 504
2. Americans with Disabilities Act (ADA)

Numbers one and two work together to ensure that the deaf and hard of hearing children are provided equal access to all school activities and programs.

⁶ Lawrence Siegel, *The Human Right to Language: Communication Access for Deaf Children* 49 (2008).

3. Individuals with Disabilities Education Act (IDEA)

Under IDEA, eligible students must be evaluated, labeled, and appropriately placed in the classrooms with accommodations. An Individualized Education Program (IEP) is required for each child to address the student's needs.

Part B of the IDEA focuses on birth to three years of age. This is the most critical language development period as well as the age when identification usually occurs. The National Association of State Directors of Special Education, Inc. (NASDSE) states, "It is imperative that states have an effective method for tracking infants through the screening, referral and diagnostic process."⁷

After birth to three, what then? The IDEA states that the special needs children must be in a Least Restrictive Environment. NASDSE comments on the various interpretations that phrase has spawned:

There is often confusion and misunderstanding about educational placement of students who are deaf or hard of hearing. The concept of educational inclusion, that is, placing every child in a local neighborhood school, is often promoted as a way of achieving equity for students with disabilities. However, that inclusion model may not be the most appropriate for some students with disabilities, including students who are deaf and hard of hearing.

A common interpretation of LRE for a deaf or hard of hearing student is a "language rich environment." To provide this, an appropriate educational placement in the LRE for a deaf or hard of hearing child is one that:

- Ensures full development of language for the child;
- Enhances the child's cognitive, social, and emotional development;
- Is based on the language abilities of the child;
- Offers direct language and communication access to teachers and other professionals;

⁷ National Association of State Directors of Special Education, Inc, *Optimizing Outcomes for Students who are Deaf and Hard of Hearing: Educational Service Guidelines* 14 (3rd ed. 2018).

- Has a sufficient number of age-appropriate and level-appropriate peers who share the child’s language and communication preferences; (...)
- Has an adequate number of role models who are deaf or hard of hearing, including adults;
- Provides full access to support services⁸

County school administrators making decisions about deaf students are unaware of these expert findings.

4. Free Appropriate Public Education (FAPE)

For a brief overview of the current law of Tennessee, and the country, concerning deaf children in public schools, *Board of Education v. Rowley* is the ruling authority. In this case, a young girl, Amy, who was profoundly deaf and used ASL as her means of communication was denied a sign language interpreter in her classroom.⁹ Her parents, who were both Deaf and communicated in sign language, challenged the decision.

In *Rowley* the Court found that 60% of understanding in the classroom was good enough. Amy was passing, showing that the schools were providing her with educational benefit. She, therefore, did not need an interpreter to communicate with teachers or peers.¹⁰

Amy remembers:

The Supreme Court sided with the school district, finding that the school did provide me with adequate services to make sure I was passing from grade to grade. For the Court, a free and appropriate public education did not mean I was entitled to reach my full potential as the gifted child that I was. It just meant that as long as I was passing, I was doing fine.¹¹

This reasoning is contrary to the reasoning in *Brown, Lau, and Plyler* where the children were deemed worthy of receiving an equal opportunity to learn and have access to everything

⁸ *Id.* at 34.

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

¹⁰ *Id.*

¹¹ Amy June Rowley, *Rowley Revisited: A Personal Narrative*, 37 J.L. & Educ. 311, 325–26 (2008).

that the public schools could offer. Why were deaf children deemed unworthy of that Equal Protection? Why was some access to education enough for deaf children but not for the children of *Brown, Lau, and Plyler*?

In fact, Amy Rowley years later shares how she was as successful as she was in school despite the Court's and school's lack of understanding and support:

...after she [Amy's mom] learned I was deaf and began to educate me at home, I progressed normally, like hearing children with hearing parents. Ninety percent of deaf children come from hearing families and are often language delayed because their parents won't, don't or can't learn sign language.⁷ I was not part of that ninety percent majority. As part of the minority population of deaf children from deaf parents, I was lucky to always have access to language. Even though my parents did not sign directly with me until after I was fifteen months old, I watched them using sign language and was able to acquire it through observation.¹²

What did not come to light in the case was that Amy's mother was herself a Deaf educator with a Master's degree. She is the one who taught Amy at home, and she is the reason that Amy was doing so well in school. It was not the school's educational benefit for Amy.¹³

The dissent written by Justice White in the *Rowley* case actually points out that The Act itself announces it will provide a "full educational opportunity to all handicapped children." 20 U.S.C. Sec. 1412(2)(A). He says:

The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom—less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.¹⁴

¹² *Id.* at 315.

¹³ *Rowley Revisited* at 313-16.

¹⁴ *Rowley*, 458 U.S. at 215.

The Court in that same year decided that illegal immigrants' children in Texas had the full protection of the Equal Protection clause. To refuse Spanish-speaking children an education was a discrimination so grievous that it would plague them for the rest of their lives. The state did not have a reason good enough to deny them that right. The *Plyler* court said:

...denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society."

Wisconsin v. Yoder, supra, 406 U.S., at 221.

Illiteracy is an enduring disability. *The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.*¹⁵

Ironically, the Court stated the Texas law forbidding children from attending school "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. *The stigma of illiteracy will mark them for the rest of their lives.*"¹⁶

Additionally, in the concurrence, the Court observed

...the Texas scheme inevitably will create "a subclass of illiterate persons," *post*, at 2408 (POWELL, J., concurring); see *post*, at 2408, 2414 (BURGER, C.J., dissenting)...

In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and

¹⁵ *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982). (emphasis added)

¹⁶ *Id.* at 223–24. (emphasis added)

insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass. . . . classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. Cf. *Rodriguez*, 411 U.S., at 115, n. 74, 93 S.Ct., at 1338, n. 74 (MARSHALL, J., dissenting).¹⁷

The Court in 1982 ruled in support of the *Plyler* children saying that to deny them the Equal Protection Clause would make them an underclass and then in *Rowley* said that for schools to provide *any* educational benefit was sufficient.

A more recent Supreme Court case, *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, seemingly clarified *Rowley* to be more supportive of special education students. Endrew is a young man with autism. His progress in school through fourth grade seemed to stall. His parents were not pleased with his lack of progress nor the school system's plan for his fifth grade IEP. They enrolled him in a private school where he improved immensely. The parents then went back to the school IEP team meeting with the results and the private school's plan. The IEP team did not accept it. The case progressed through the hierarchy of courts with each court ruling in favor of the school district and their interpretation of *Rowley* that any educational benefit was acceptable.

The Supreme Court did not accept the low bar that the lower courts had set for the special education students, but they would not go so far as to say that the students were worthy of equal educational standards:

This Court went on to reject the “equal opportunity” standard adopted by the lower courts, concluding that “free appropriate public education” was a phrase “too complex to be captured by the word ‘equal’ whether

¹⁷ *Id.* at 234.

one is speaking of opportunities or services.”¹⁸

Andrew's parents argue that the Act goes even further. In their view, a FAPE is “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”¹⁹

Chief Justice Roberts responds for the court:

But the majority rejected any such standard in clear terms. *Id.*, at 198, 102 S.Ct. 3034 (“The requirement that States provide ‘equal’ educational opportunities would ... seem to present an entirely unworkable standard requiring impossible measurements and comparisons”). Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case.²⁰

He submits that the change must come from Congress. However, Congress’s attempts to improve the effect of FAPE thus far have been ineffective. Then he says, “At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child.”²¹

Chief Justice Roberts seems to point to the state’s authority on [deaf] education and say, ‘You have the authority and ability to make improvements where Congress has not.’

Why the unequal protection between African-American, Hispanic, Chinese, and Deaf children? Why is the immutable characteristics of one group deemed worthy of protection while the immutable characteristics of another not deemed worthy? The ethnic origin of the *Plyler*

¹⁸ *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 995 (2017).

¹⁹ *Id.* 1001.

²⁰ *Id.*

²¹ *Id.*

children is indeed a protected class to be held under strict scrutiny. Deaf children fall under special education, so they fall under the rational basis test. So a deaf child with ethnic background is at an advantage because the courts will recognize him as deserving of equal protection. A deaf child of an unprotected ethnic heritage then is doubly disabled. Equal protection will never come to him.

Consider these.

The greatest of Equal Protection cases is a significant statement on the issue at point:

Brown v. Board of Education, “a right which must be made available to all on equal terms.”²²

As the principle applies to Deaf children, Siegel says in his book:

...the lack of support and funding for linguistic services and placement creates a powerful barrier to their education. Providing an interpreter who cannot sign bars a deaf child from an equal education in ways not dissimilar to the way African-American children were barred from an equal education in the pre-*Brown* days.²³

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

Today it [an education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²⁴

²² *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493, (1954), *supplemented sub. nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294(1955).

²³ Lawrence Siegel, *The Human Right to Language: Communication Access for Deaf Children* 97 (2008).

²⁴ *Brown*, 347 U.S. at 493.

Siegel points out that no state or federal law requires schools to provide language development. To assume that these children will become literate without language is counterintuitive.²⁵

Siegel says, “Language and communication become secondary to the LRE and the FAPE requirements under the IDEA, increasing the need for protection from other legal sources.”²⁶ Additionally, “The IDEA requires that the IEP “consider” the communication and language needs of a deaf child.”²⁷ He continues, “For something so fundamental as communication and language and their relationship to the free flow of information, one must question whether such a need and right should be subject to the whim of an adversarial process.”²⁸ Continuing, “...parents have the burden of showing why an ostensibly more restrictive environment...meets the LRE requirements of the IDEA. Many language-rich environments that would ensure the First Amendment rights of the deaf and hard of hearing children are presumptively disfavored under the IDEA.”²⁹

One of the most relevant cases on point comes from the California 1974 *Lau* case where a group of Chinese students who did not know English were placed in mainstream classes without access to the language. The Court says, “Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; *for students who do not understand English are effectively foreclosed from any meaningful education.*”³⁰ They continue, “*We know that those who do not understand English*

²⁵ Lawrence Siegel, *The Human Right to Language: Communication Access for Deaf Children* 40 (2008).

²⁶ *Id.* at 56.

²⁷ *Id.*

²⁸ *Id.* at 57.

²⁹ *Id.*

³⁰ *Lau v. Nichols*, 414 U.S. 563, 566(1974). (emphasis added)

*are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.”*³¹

The Court was discussing students of national origin, but the same principle applies to Deaf children. They admit, “The district must take *affirmative steps to rectify the language deficiency in order to open its instructional program to these students.*”³²

The Court here fully supported the rights of the Chinese students to enjoy Equal Protection under the constitution. The Court’s reasoning in *Lau* and in *Plyler* makes the case for Deaf children. These Deaf children are no less worthy of Equal Protection, full access to communication in a classroom along with every other child.

In *Poolaw v. Bishop*, the Court addressed the education of a deaf child again, this time focusing on the student’s ability to communicate in the classroom as a factor to consider:

...all parties agree that Lionel's disability has created a great deficit in his ability to communicate with and understand others. Because Lionel is at a critical stage for developing these communicative skills, the district court found that he requires immediate intensive instruction in ASL so he may comprehend and understand the instruction being offered in the regular classroom.³³

Unfortunately for Lionel, he was already in middle school. The foundational years of literacy were behind him. A child’s need to communicate begins on day one. A child who struggles to communicate often becomes labeled as a behavior problem. When sign language is introduced, behavior problems lessen because the child no longer “misbehaves” to be understood. Adults are no different. Conflict resolution seminars and even court itself is set-up so that the Plaintiff and Defendant have an opportunity *to be heard*.

³¹ *Id.* (emphasis added)

³² *Id.* at 568. (emphasis added)

³³ *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995).

Chief Justice Roberts said that the states have the authority to remedy the inequities that Congress has not addressed.³⁴ So, what is this state doing?

How does this affect Molly in Tennessee?

Consider these eleven laws that Tennessee addressed in the 2019 session concerning Deaf children in Tennessee schools.

- a. T. C. A. § 49-10-901: Classification of the School for the Deaf. Repealed.
- b. T. C. A. § 49-10-902: Removing the school for the deaf from the campus of the school for the blind.
- c. T. C. A. § 49-10-903: Scholarships for School for the Deaf. Repealed.
- d. T. C. A. § 49-10-904: Deaf Mentor (more below)
- e. T. C. A. § 49-50-1001: State Special Schools.

The statute is not new legislation, but language was revised so that it is more clear and concise.

- f. T. C. A. § 49-50-1002: Budgetary, accounting, and financial reporting procedures, carry-over of appropriated funds.

The statute is not new legislation, but language was revised so that it is more clear and concise.

- g. T. C. A. § 49-50-1003: Operation and Maintenance Budgets; Scholarships; Capital Improvements; Salaries.

The statute is not new legislation, but language was revised so that it is more clear and concise.

- h. T. C. A. § 49-50-1005: Tennessee School for the Deaf and West Tennessee School

³⁴ *Endrew*, *supra* note 20, at 1001.

for the Deaf classification.

- i. T. C. A. § 49-50-1006: Two branches of the schools for the deaf to be located in Madison County and Davidson County
- j. T. C. A. § 49-50-1007: Special schools shall have separate leadership.
- k. T. C. A. § 49-10-904: Deaf Mentor

This legislation is encouraging. It is a positive indicator when legislators commit budget items to deaf education. However, the modest request for a two-year pilot and \$300,000 was cut in half.

What are the qualifications of those who are structuring the assessment tool for the program? The rubric used for hearing students' successes in reaching benchmarks are not the same for deaf children. Did those creating the rubric know that? Will the success of the program be measured by the standards of hearing children who learn by phonics?

The Deaf Mentor law is the one law that was passed which actually affects Molly's ability to communicate. It is piloted in the Eastern part of the state where there are two universities who train teachers and interpreters and the only residential school for the deaf in the state. Is it a good indicator for challenges that Memphis families face? Is it a good test for Smith County where they may have one deaf student in the whole county? Is this a message that Tennessee is committed to equal education of deaf children?

Problem:

Molly is starting school without language. Her parents do not know where to go or who to ask because there is no one with the right knowledge and authority leading the charge in

Tennessee. Research is available, and has been for over twenty years, but no one in Tennessee is implementing it with intention and uniformity. Tennessee's doctors are ill-informed. The Tennessee Early Intervention System is undergoing transitions now, but have historically been ill-equipped to serve families with sign language resources.

Research that has been in use across the country for over a decade is just reaching Tennessee schools. Counties are refusing to allow parents to send their children to a school for the deaf where they can be taught in a language rich environment, instead mainstreaming them where they sit alone at lunch and play alone on the playground.

Counties with one deaf student do not know what to do with him. The child is often assigned to a special needs classroom with children who have severe special needs. Many deaf children simply speak another language.

Who in Tennessee is held accountable for the education of deaf children? Who knows how many deaf we have in Tennessee? Who can say whether or not the deaf children are below or higher than the national average of reading levels?

Since *Rowley*, courts have wrongly decided that if Molly can barely get by, that is enough. Molly is not disabled because of her deafness. She is able of everything any other child would be. She simply communicates differently.

Solutions from other states:

Thankfully, other states have been taking advantage of research and statutory developments to improve deaf education. Tennessee is at the advantage of being able to glean the best from those experiments and implement a "best practices" across the departments of this great state to benefit deaf children and their families.

These are a few of the improvements other states have seen:

1. Deaf Mentor: Fully funded program with support of the legislature and the Department of Education.
2. LEAD-K: Reading-ready by kindergarten with tracking for deaf children. This program will be a co-operative effort between the Department of Health and the Department of Education.
3. Language Rich Environment. The Department of Education has a vital role in this initiative in that each county will have differing needs concerning an environment for the deaf children. Partnering with local community groups and Deaf Centers will be paramount.
4. Deaf Education Bureau. Real change will begin in leadership. There is no cookie-cutter answer for deaf children's education. Those making life-altering decisions for deaf children need to be informed and judicious. One person cannot hope to hold all the experience and education required for such a challenge. A team, however, can join forces to supply needed pieces to accomplish the task at hand.

Proposal for Tennessee:

These approaches are a starting point and have been successful in other states. Tennessee can glean insight from their experiences to help Molly.

1. Deaf Mentor Law in TN:

The pilot project must consist of one (1) program to be implemented at the Tennessee School for the Deaf, Knoxville campus.

Tenn. Code Ann. § 49-10-904 (West)

During the 2019 legislative session, a group of stakeholders were finally successful in acquiring support for a state Deaf Mentor program. Trained, paid Deaf people go into homes with newly identified deaf children, providing options for their children and educating the family in sign language. The legislators graciously funded half of the money needed for the program. The pilot is being conducted around Knoxville for one year.

While the stakeholders are grateful for the show of support, Tennessee needs more. Tennessee needs to gather data and assess needs across rural and urban areas. The pilot program should be for at least three years and cover rural and urban Tennessee. As a data gathering tool, the Deaf Mentor program needs all possible resources designated to accurately assess the state of deaf education.

Georgia has been working hard on renovating Deaf education. Their Deaf Mentor legislation can serve as a model for Tennessee.

GA: <http://www.legis.ga.gov/Legislation/20172018/176967.pdf>

In an article arguing for a change in international law on this subject, the author argues that the State's obligation to provide education for parents and deaf children in sign language is a human right. She also makes an argument for a deaf child not to be classified as English as a Second Language (ESL) learner either because deafness is often one generation thick. In that way, it differs from Mexican or Chinese families whose cultures are passed down from parents along with its language. Deaf children do have a culture and history, but it is usually learned from the Deaf Community itself.³⁵

This is a strong argument for a Deaf Mentor program. Deaf children can learn that they are not alone, and that they have a rich history. They, too, have a heritage with significant

³⁵ Anna-Miria Mühlke, *The Right to Language and Linguistics Development*. 40 Va. J. Int'l L. 705 (2000).

historical figures who have worked to improve the lives of Deaf people. This knowledge provides self-worth and pride for growing adults.

2. LEAD-K

LEAD-K is a campaign to raise awareness of the challenges facing deaf children's acquisition of language and literacy. LEAD-K works with partners to change policy concerning deaf education. The legislation that empowers parents to ensure their children are reading ready by kindergarten works hand in hand with Deaf Mentor programs. It has been successful in a number of states, with the most impressive changes coming from California. Locally, Georgia is the most recent legislation passed. They have instituted programs like Center for Literacy and Deafness (CLAD) <https://clad.education.gsu.edu/>, which as the name shows, focuses specifically on deafness and literacy programs to implement research. In addition, Georgia PINES (Parent Infant Network for Educational Services) was established to be a one-stop-shop, helping families when their babies are first identified with hearing loss

<https://sites.google.com/site/mychildisdeaf/resources/georgia-pines>.

South Dakota in this 2020 session has passed their version of LEAD-K which tracks the deaf children's progress, "13-33B-10. Reporting criteria specific to language and literacy development."³⁶ In an article from Loyola University, LEAD-K is discussed as its influence spreads across the country, "The LEAD-K campaign has developed model legislation for adoption by states. Since 2016, twelve states have adopted a form of the LEAD-K model bill.

³⁶ H.R. 1228, 95th Leg., (S.D. 2020).

There are approximately fifteen more states with LEAD-K teams in various stages of development.”³⁷

Of those twelve states, a few hold persuasive influence with Tennessee, including Texas and Georgia. It is an initiative that is embraced by the National Association of the Deaf (NAD), Gallaudet University, as well as A.G. Bell.

- a. GA: <http://www.legis.ga.gov/Legislation/20172018/176967.pdf>
- b. LA: <https://www.deaffocus.org/lead-k>
- c. CA: <http://www.cad1906.org/wp-content/uploads/2017/10/CAD-Language-Policy-for-Deaf-Children-Ages-0-5.pdf> This was used as the model bill for LEAD-K.³⁸
- d. TX: <https://capitol.texas.gov/tlodocs/86R/billtext/html/HB00548F.html>
- e. OK: <https://trackbill.com/s3/bills/OK/2019/SB/154/amendments/sb154-20pcs.pdf>

Interestingly for Tennessee, which will be discussed more with Proposal 4, “[T]he Connecticut LEAD-K bill requires the Department of Education to establish a working group to ‘develop guidelines concerning appropriate language assessments, practices and programs and the provision of immediate interventions’ for deaf and hard of hearing children.”³⁹

3. Shifting Least Restrictive Environment (LRE) to Language-Rich Environment:

The intent behind the Least Restrictive Environment is admirable: students should be in an environment closely resembling the environment of regular education peers- the environment that provides the least restrictions. For most children in special education classes, that would

³⁷ Christina Payne-Tsoupros, *Lessons from the Lead-K Campaign for Language Equality for Deaf and Hard of Hearing Children*, 51 Loy. U. Chi. L.J. 107 (2019).

³⁸ *Id.* at 143.

³⁹ *Id.*

mean a mainstreamed classroom. It is a presumption that LRE means mainstreaming.⁴⁰ For a deaf child who signs, that definition could be the exact opposite.

With a nation's psyche branded with the understanding that separate is not equal, most people are appalled at the thought of separating deaf children into a separate space for education. However, if the intent of a *least* restrictive environment is for the children to be as normal and free as any child in a regular classroom, then an environment where the children cannot communicate with friends and teachers, sit by themselves at lunch and play by themselves on the playground is indeed *most* restrictive. 20 U.S.C. § 1412(5)(B) requires states to establish:

...procedures to assure that, to the maximum extent appropriate, handicapped children ... are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁴¹

Much of the tension between county school administrators and parents of deaf children stems from this. For a Deaf child to have full access to every teacher, student, and class activity, they require a Language Rich Environment. These can be found in Tennessee:

- a. Tennessee Schools for the Deaf in Knoxville, Nashville, and Jackson.
- b. Deaf Hub: In some counties, all deaf children are housed at the same set of schools so that they create a peer group of signers. There is a caveat for a Deaf Hub. There must be enough age appropriate language peers - not kindergarteners and seniors in the same classroom.
- c. Sign Clubs, K-12: A third option, which is becoming more of a possibility since the

⁴⁰ Thornack v. Boise Independent School District No. 1, 115 Idaho 466 (1984); Board of Education v. Holland, 786 F. Supp. 874 (E.D. California 1992).

⁴¹ Poolaw v. Bishop, 67 F.3d 830, 832-34 (1995).

passage of ASL as a foreign language, is to create within public schools ASL classes and Sign Clubs of fluent signers around the Deaf students. Programs like Sign Club Co. establish Sign Clubs in public elementary schools to teach sign language and Deaf culture to hearing children around the deaf children. The deaf child becomes the expert and teaches the class. Deaf adults are brought in to connect and teach. A community is formed around the children so that as they grow, they are just normal children.

Amy Rowley shares her experience which proves the need for full access:

My interpreter, Fran Miller, had deaf parents so she grew up communicating in sign language. Not only was she fluent in signing, she was also a skilled interpreter and fully understood how to be a language mediator. She did just that, mediating exchanges among the other students, the teacher and me. I felt friendships blossoming, and I could communicate and follow group conversations. Because I was fluent in sign language, the interpreter opened up a new avenue of complete accessibility for me. I enjoyed school now. I looked forward to recess. The interpreter would follow me out and help me and other children figure out what we wanted to do. Before Fran Miller became my interpreter I had always followed the other children outside. They usually wanted to play kickball, but I was often not included. I would go to the playground and play alone or with a few other children. Now, when other children were in a group discussing what they wanted to do, I could be a part of the group. My interpreter also interpreted those conversations. I finally felt I had a voice because I could say I wanted to play kickball, and they would make sure I was involved. An added bonus of having an interpreter in the classroom meant that, when I got home from school, I only had to do my homework. I no longer had to work with my mother when I got home to relearn everything I was supposed to have learned in class that day. Now I really had a lot more time to play and “just be a kid.” Third grade was a really good year.⁴²

Later, I entered fourth grade and things changed again. I still had an interpreter because the school had not yet appealed the Court of Appeals decision,

⁴² *Rowley Revisited*, 37 J.L. & Educ. at 321–22.

but Fran Miller was not there anymore.¹⁴

Technically I didn't have an interpreter. I had Beth Freed, a teacher of the deaf who served in the role of interpreter. The school argued that I still needed to be pulled out of class for some "one on one time" to make sure I was following everything from the classroom. Their rationale was that my teacher for the deaf could "interpret" what was being said in the classroom. Ms. Freed was very nice, but I missed Fran Miller. Ms. Freed was a teacher and only told me what the teacher said. I did not know what my classmates were saying, and I was left to fend for myself at recess. I went outside with my FM system, but of course, I hated the FM. I couldn't play with that big bulky thing wrapped all over my body. One afternoon at recess I was on the swings. Instead of swinging in the direction of the playground, I decided to swing toward the marsh behind the fence. I swung and swung as high as I could. My FM was loose. I never wore it tightly against my body because it was already uncomfortable. The FM swung right off and pulled the earplugs right out of my ears. I laughed in delight when it went over the fence and landed in the cattails. I was quite a monkey back then. I could have scaled the fence easily and jumped in the water and mud and picked up my FM. But why would I ever want to do that? No one else knew how miserable that thing made me. I was perfectly happy with my hearing aids and even happier with an interpreter, a real one. I didn't even have that anymore.⁴³

To create welcoming environments for these initiatives requires open and decisive resolutions from knowledgeable school administrators.

⁴³ *Id.*

Siegel notes this in his book *The Human Right to Language*, "...what most deaf children lack is not engagement with the hearing world, but engagement with competent peer visual language producers."⁴⁴ This disconnect with peers leads to deeper psychological issues.⁴⁵

4. Deaf Education Bureau

A wealth of research and progress has been made in the past two decades in deaf education which is conspicuously absent in Tennessee. This is not from willful intent to harm deaf children, but simply that no educational authority had knowledge of deaf education or language deprivation.

From a National Deaf Education Project Statement, Siegel writes:

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

The law must formally recognize that communication assessment, development, and access are central to such programs and are the foundation for the actual delivery system.⁴⁶

For this reason, establishing a body of decision-makers who are knowledgeable of developments in deaf education to serve as administrators would be the wisest first step in true systemic progress.

⁴⁴ Elizabeth Keating & Gene Mirus, *Examining Interactions across Language Modalities: Deaf Children and Hearing Peers at School*, 134 *Anthropology & Education Quarterly* 131 (2003).

⁴⁵ Robert Brubaker, *Acculturative Stress: A Useful Framework for Understanding the Experience of Deaf Americans*, 1 *JADARA* 28, 1-16 (1994). *Cited in* *The Human Right to Language: Communication Access for Deaf Children*, 36-37 (Lawrence Siegel, 2008).

⁴⁶ Lawrence Siegel, *The Educational and Communication Needs of Deaf and Hard of Hearing Children: A Statement of Principle Regarding Fundamental Systemic Educational Changes*, 145 (2) *American Annals of the Deaf* 33 (2001).

Another state's model:

In New Mexico they have established a Board of Regents of stakeholders who answers only to the governor. The key components are outlined:

N. M. Stat. Ann. § 21-6-1:

- i. Appointed by governor and state senate
- ii. 6 year term
- iii. 5 members who have control and management of Deaf ed. in the state
- iv. One member must be deaf
- v. One member must be a parent of a deaf child
- vi. Not more than 3 from the same political party
- vii. Elect its own officers
- viii. Full power and authority to employ
 1. Superintendent
 2. Teachers
 3. Staff of NMSD⁴⁷

Proposal for Tennessee: Deaf Education Bureau

The most impactful- and fiscally responsible- change that Tennessee could make in deaf education is to glean the insight of New Mexico's work with the Board of Regents and establish a Deaf Education Bureau. This Bureau could comprehensively institute proven, effective policies for educators across the state. The board could include seven stakeholders, equally representing the varied facets of deaf education: signing, oral, Deaf community, parents, educators, speech

⁴⁷ N.M. Stat. Ann. § 21-6-1 (West 2020).

language pathologists. The Superintendent of the Tennessee Schools for the Deaf would report to the Bureau as the CEO of Deaf Education across the state, whether mainstreamed or a school for the deaf. The Bureau would work intimately with the six deaf centers already established across the state, working with the Department of Human Services. They could serve as regional resources for smaller counties.

Siegel crafted recommendations for policy, legislation and organization concerning Deaf Education. These guidelines can be found in *The Educational and Communication Needs of Deaf and Hard of Hearing Children: A Statement of Principle Regarding Fundamental Systemic Educational Changes* (a National Deaf Education Project). His emphasis is based on access to communication:

1. The educational delivery system for deaf and hard of hearing children is communication-driven to ensure that programs and services provided for those children address their unique communication needs.
2. A communication-driven educational deliver system will ensure that communication assessment, development, and access and the various programmatic and other components described herein are fundamental to any educational delivery system for deaf and hard of hearing children.
- ...
- (3.) a deaf or hard of hearing child is entitled to an education which provides
 - a. Appropriate early and on-going communication **assessment**;
 - b. Early and on-going communication **development**, which includes specific educational programs and services to ensure that he child has age-appropriate communication (expressive and receptive) and other academic skills; and
 - c. Appropriate early and on-going communication **access**, including a critical mass of age and language peers, staff proficient in the child's communication mode, and direct and appropriate communication access to all school activities.
- ...
- (4.) there is a provision of programs and program components that are communication-accessible with professional staff appropriately trained, fully proficient in the child's individual communication mode and language, and who understand the unique needs of deaf and hard of hearing students.⁴⁸

⁴⁸ *Id.* at 34-36.

Siegel's systemic change proposal points to the justification of a Bureau, appropriately trained staff, intradepartmental collaboration, and most importantly, acquisition of language from birth:

It is, therefore, imperative that any effective educational delivery model include a strong, statewide program to help parents of deaf and hard of hearing children in early identification of a hearing loss and in accessing services and programs that provide families with assistance in developing appropriate communication for their children. The model should also assist parents in assessing other agencies that provide support for families with children with a hearing loss, as well as infant and early childhood educational programs that provide communication assessment, development, and access.

The need for parents to have full information about hearing loss and oral and visual communication options, including the difference between "receiving" language and understanding and effectively "using" language, is of singular importance. With the increased use of cochlear implants, such information is absolutely necessary.⁴⁹

The Department of Education and the Tennessee Early Intervention Services (TEIS) have a grand opportunity to make a huge impact on the lives of these children and their parents by providing these resources from day one.

Opposition:

As with most progress in legislation and politics, cost is the biggest challenge. Deaf education is no different. The cost of interpreters, FM systems, and visual alarms are all examples of extra costs associated with Deaf students. Schools already provide ADA required wheelchair ramps and service dogs. Interpreters and qualified teachers are no different.

The U.S. Supreme Court addressed the issue of cost as it related to the Equal Protection of immigrant children in Texas schools, quoting *Shapiro*, "a State may "not ... reduce

⁴⁹ *Id.* at 40.

expenditures for education by barring [some arbitrarily chosen class of] children from its schools.”⁵⁰

For truly important causes, the State finds funding. Cost is not a determining factor to provide for children’s fundamental needs. In this case, it is the fundamental need for language.

In addition, fiscally responsible spending for a child will reap a savings when she reaches adulthood as she will become a contributor to the tax base and not a recipient of it.

Unemployment rate: in 2014,

- 48% of deaf people were employed, compared to 72% of hearing people.
- 47% of deaf people were not in the labor force compared to 23% of hearing people.⁵¹

The courts have said, “Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.”⁵²

Logically it follows that if children cannot communicate with their families, peers, teachers, and potential employers then mental health issues will arise. The NASDSE states:

When adults do not provide a rich language and communication environment...that is accessible to the child during this critical period of development, children are more likely to fall behind in the development of their speech and language skills, sign language development, social skills, academic performance and their future career options.⁵³

The State pours money into social services and medical expenses for drug and alcohol abuse, physical and sexual abuse, prison, and a myriad of mental health issues which are significantly higher among deaf people. The State could avoid much of these costs by providing access to

⁵⁰ Shapiro v. Thompson, 394 U.S. 618, 633(1969), Plyler v. Doe, 457 U.S. 202, 229(1982).

⁵¹ Carrie Garberoglio, Stephanie Cawthon, and Mark Bond, *Deaf People and Employment in the United States: 2016*. National Deaf Center on Postsecondary Outcomes.

⁵² Serrano v. Priest, 5 Cal. 3d 584, 606 (1971).

⁵³ *Optimizing Outcomes for Students* at 14.

language from birth so that deaf children receive the guidance and nurturing that is provided to hearing children in public schools.

Justice Blackmun in *Lau* hints at another argument against change in deaf education. The Chinese students in San Francisco could not learn in class because they did not understand English. The Court held that the students had a right to an equal education in a language that they could understand. Justice Blackmun concurred with the opinion, yet says he would have changed his position if the numbers were smaller:

I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. . . . I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.⁵⁴

School administrators justify unequal treatment of deaf children because of fewer numbers. However, Justice Blackmun cannot truly mean equal protection if it is indeed not equal. To one or to one million, equal protection does not mean preferential treatment to the majority. It is either equal protection for all, or it is not equal.

Many counties in Tennessee have claimed only one deaf student and lack of available resources to properly accommodate that student. Does this mean a deaf child is expendable?

⁵⁴ *Lau*, 414 U.S. at 571–72.

Indeed, the numbers are bigger than we think. This great state of Tennessee is not identifying and tracking the actual number of deaf and hard of hearing children. Statistically, Tennessee should have a much higher number of children who need to be served. They could very well be labeled behavior problems, drop-outs, in-school-suspension, delinquents, or special needs with learning disabilities. In truth, they could have an unidentified hearing loss.

Even if the number of deaf children in a county is only one, does he not deserve the equal treatment in the classroom? Would any district dare place any other minority student in a special education classroom, justifying it because of the low incident numbers? No! If the children of *Brown*, *Lau*, and *Plyler* deserve equal protection even with their minority status, Deaf children with their minority status deserve equal protection as well or the term equal is meaningless.

The greatest reason to improve Molly's situation is because Molly is one of at least 50% of deaf children who experience sexual abuse.⁵⁵ The outrageous statistic is similar for all people with disabilities, but again, the difference for Molly is the language barrier. She is a perfect victim because she cannot tell anyone what is happening to her. No one around her can communicate with her. In Abraham Maslow's hierarchy of needs (something every education major studies in college), he expounds on the basic needs of the human condition: Until a child is safe, warm, and fed, she cannot learn about commas and semicolons. For a deaf child, that begins with the ability to communicate fear:

...education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.⁵⁶

⁵⁵ National Child Traumatic Stress Network, *Deaf children have higher rates of sexual abuse and inadequate treatment: White paper seeks to bridge gaps*. www.nctsnet.org (Oct. 2006).

⁵⁶ *Plyler*, 457 U.S. at 221.

Molly's ability to communicate is her first line of defense. Before she ever tackles commas and semicolons, she must be able to get help when she needs it.

Conclusion

There is a movie called *And Your Name is Jonah* about a little boy who is deaf whose parents do not know what to do because they cannot communicate with him. He is misdiagnosed as learning disabled. He starts school and does not know his name.⁵⁷

The movie came out in 1979. Forty years later in Tennessee, the story is unchanged.

The time has come to change deaf education in Tennessee. The Mollys of Grundy County and Stewart County, Shelby County and Hamilton County deserve the Equal Protection Clause to apply to them just as it did for the children of *Brown, Lau, and Plyler*.

Molly's story could be the American story if she had access to language from day one: Deaf Mentors, LEAD-K's early intervention and tracking, a language-rich environment, and a team of informed decision-makers providing her education. It begins at birth with access to language.

⁵⁷ *And Your Name is Jonah* (MGM 1979).