

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE UNITED STATES: CREATING A NEW MODEL FOR DISABILITY EDUCATION WORLDWIDE

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INTRODUCTION

According to one national study, only thirty-nine percent of students from ages sixteen to twenty-one who graduated from the special education system in the United States graduated with a regular high school diploma.¹ Even more startling, in 2021, the unemployment rate for individuals ages sixteen to sixty-four was 10.8% for people with disabilities, while it was only 5.2% for people without disabilities.² Despite current disability education laws in the United States, students with disabilities are still struggling to complete an education and achieve gainful employment. Additionally, students with learning disabilities are less likely to attend, and graduate from, college than students without learning disabilities.³ Even with the robust legal scheme the United States has created to further the educational opportunities of students with disabilities, these students continue to struggle, and disability education laws in the United States lack the progressive standards of international disability law.⁴

In response to the inadequacies of disability education law in the United States, some disability rights advocates encouraged the Senate to ratify the Convention on the Rights of Persons with Disabilities (CRPD). This United Nations treaty focuses on the inclusion and integration of people with disabilities into various aspects of society including family life, employment, and education.⁵ As a result of the encouragement of advocates and the Obama Administration, the

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1. Elisa Hyman, Dean Hill Rivkin, & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 136 (2011).

2. *Disability Employment Statistics*, U.S. DEP'T OF LAB. (Jan. 2022), <https://www.dol.gov/agencies/odep/research-evaluation/statistics> [<https://perma.cc/W9LX-CXW8>].

3. Roger D. Wessel, James A. Jones, Larry Markle, & Curt Westfall, *Retention and Graduation of Students with Disabilities: Facilitating Student Success*, 21 J. POSTSECONDARY EDUC. & DISABILITY 116, 117 (2009).

4. *See generally* Hyman, Rivkin, & Rosenbaum, *supra* note 2. *See also* Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 TOURO L. REV. 301 (2019).

5. *See generally* G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

Senate attempted to ratify the CRPD in 2012 and 2014.⁶ However, despite the support for the CRPD, the Senate chose not to ratify the treaty both times due to Republican opposition.⁷ While advocates for ratification of the treaty argued that ratification would provide the United States an opportunity to be a role model to other countries and improve current disability laws, opponents of ratification cited a perceived threat to school choice, excessive abortion rights, states' rights, and other arguments to halt the ratification.⁸ They also argued that current legislation is adequate and does not need to be replaced by the CRPD as the current laws already address disability discrimination, allow for school choice, and provide for individualized education in public school settings.⁹

Still, proponents of the CRPD argue that the basic anti-discrimination framework of current disability education law in the United States is no longer enough to fully integrate people with disabilities into society.¹⁰ In addition, various educational experts cite the need to ratify Article 24 of the CRPD in order to incorporate some of its major themes into law.¹¹ These themes include inclusion, cultural improvements, full potential, and reasonable accommodations.¹² These themes and their importance will be discussed later on in the Note.

This Note will examine the positive and negative aspects of ratification of Article 24 of the CRPD by the United States. Additionally, it will advocate for ratification of Article 24 and related terms of the treaty. Finally, this Note will explain how ratification of Article 24 and related terms of the treaty by the United States could lead to a new model for disability education law that could be followed internationally. Therefore, throughout this Note, several topics related to Article 24 of the CRPD are addressed. Part I will discuss the history and content of the CRPD as well as the reasons given for lack of ratification by the United States Senate. Part II will analyze both arguments for and against ratification of Article 24 of the CRPD as well as expose the fallacies in the arguments against ratification. Finally, Part III will advocate for the ratification of Article 24 of the CRPD by the United States and explain how a combination of the best aspects of Article 24 of the CRPD and current disability education law in the United States, including school choice and special education, can create a new and even more effective model for disability education worldwide.

6. S. REP. NO. 112-6 (2012) (Exec. Rep.); S. REP. NO. 113-12 (2014) (Exec. Rep.).

7. S. REP. NO. 112-6 (2012) (Exec. Rep.); S. REP. NO. 113-12 (2014) (Exec. Rep.).

8. *Id.* at 58, 68, & 83.

9. *Id.*

10. *See generally* Kanter, *supra* note 4.

11. *Id.*

12. *See generally* G.A. Res. 61/106, *supra* note 5.

PART I

I. HISTORY AND CONTENT OF CRPD

In 2006, the United Nations held a conference in New York City in order for member countries to ratify the CRPD. While this treaty is currently ratified by 182 countries, the United States has yet to do so despite coming close to ratification in both 2012 and 2014.¹³ The purpose of the CRPD is to “protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”¹⁴ This treats persons with disabilities as individuals who have long-term physical, mental, intellectual, or sensory impairments and face barriers to equal participation in society as a result.¹⁵ Article 24, which specifically focuses on the right to an education for persons with disabilities, addresses several core themes the drafting committee identified as imperative in overcoming barriers for those with disabilities.¹⁶ The themes of inclusion, reasonable accommodations, reaching one’s full potential, and cultural improvements are discussed below.

A. Inclusion

Despite being mentioned several times in Article 24 of the CRPD, the convention does not contain an explicit definition for inclusion.¹⁷ However, many international scholars note that most educators use inclusion to refer to “placement of students with disabilities in mainstream or general education classrooms for the duration of the school day or a significant portion of it.”¹⁸ Within this general definition of inclusion, there are disagreements on whether inclusion can only occur when children are placed in mainstream settings or if special education settings and alternate environments also count as inclusion.¹⁹ Those who feel that mainstreaming students is the only form of inclusion advocate for universal design for learning and the physical integration of all students into the general classroom.²⁰ Nevertheless, scholars also argue that in order to accommodate the unique cases of persons with disabilities, types of inclusion and education—including the use of special education settings and training and the promotion of autonomy for special education teachers—are

13. S. REP. NO. 112-6; S. REP. NO. 113-12; *see also* G.A. Res. 61/106, *supra* note 5.

14. G.A. Res. 61/106, *supra* note 5, at 4.

15. *Id.*

16. *Id.* at 14-15.

17. Dimitris Anastasiou, Michael Gregory, & James M. Kauffman, *Article 24: Education*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 656, 669 (Ilias Bantekas, Michael Ashley Stein, & Dimitris Anastasiou eds., 2018).

18. *Id.*

19. *Id.*

20. *Id.*

valuable.²¹ Therefore, critics of the CRPD argue that the treaty focuses too heavily on mainstreaming students in the general classroom while ignoring the need for individual autonomy and instruction.²² In response to this critique, scholars provided the Individuals with Disabilities Education Act (IDEA) as an example of law in which specialized educational settings and mainstreaming students can both be utilized and co-exist in order to provide proper education for students with disabilities. Under the IDEA, students with disabilities can do the following:

legally receive—and public agencies are required to provide—education in a spectrum of settings, ranging from mainstream classrooms, to separate classrooms for part of the school day (“resource rooms”) or for all of the school day (“substantially separate classrooms”), to separate day schools (including privately operated schools), separate residential schools, and even hospitals or home-based settings.²³

However, it is important to note that under the IDEA, children will be placed in a mainstreamed, general education setting, unless proof of eligibility shows that the student is in need of an alternative environment and/or an Individualized Education Program (IEP), which is developed by parents of the student in conjunction with school officials following the evaluation of a student’s needs.²⁴ Finally, critics of Article 24 argue that the CRPD’s focus on mainstreaming and general education fails to address issues faced by students with disabilities including low school attendance, high drop-out rates, low completion rates, and school discipline procedures which are often disproportionately used on individuals with behavioral disabilities that might be better solved by promoting autonomy in the education process.²⁵

Another point of contention amongst those who have analyzed Article 24 the CRPD is whether the text establishes an affirmative right to an education for persons with disabilities. Some countries are hesitant to ratify an absolute right to an education for people with disabilities because they do not already recognize a right to an education for citizens as a whole. For instance, the United States Supreme Court has previously held that there is no Constitutional right to an education, and, as a result, citizens of the United States are only guaranteed a right to an education if their state constitution recognizes that right.²⁶ However, the convention does not seem to convey an absolute right in an education. According to scholars, “the legislative intention was not to create a universal (new) right for a free secondary education, especially for PWD. For the same reason, the Chair suggested that the phrase ‘on an equal basis with others’ should

21. *Id.*

22. *Id.*

23. *Id.* at 672.

24. *Id.*

25. *Id.* at 673.

26. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

accompany “the free secondary education.”²⁷

Of all the critiques of the CRPD, a particular area of contention is whether special education settings and services have a place in the inclusive framework of the CRPD. Much of the debate centers around the use of the term “full inclusion” in Paragraph 2(e) of Article 24.²⁸ First and foremost, different countries have different definitions of the term “full inclusion.”²⁹ Many countries recognize this term to mean a framework in which the appropriate setting for persons with disabilities is a mainstream setting.³⁰ However, as will be discussed later in this Note, there is reason to believe that specialized settings have a place in the CRPD’s framework.

B. Reasonable Accommodations

A second major theme in Article 24 of the CRPD is providing reasonable accommodations to students with disabilities. Article 24 recognizes that reasonable accommodations must be awarded on an individualized basis.³¹ Article 2 of the CRPD defines reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise *on an equal basis* with others of all human rights and fundamental freedoms.”³² The CRPD committee additionally clarified that reasonable accommodations should be free to people with disabilities and suggested that countries provide reasonable accommodations to students in both public school and private school settings.³³

C. Full Potential

A third major theme addressed in Article 24 is “the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential.”³⁴ This theme, in particular, has sparked debate because many countries—including the United States—reject that the law should be tailored to help those with disabilities reach their “full potential.”³⁵ The conflict between the standard of meeting one’s full potential and Indiana’s current federal disability laws are discussed in greater depth later in this Note.

27. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 677.

28. G.A. Res. 61/106, *supra* note 5, at 14.

29. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 680.

30. *Id.*

31. *Id.* at 677.

32. *Id.* (emphasis added).

33. *Id.* at 678.

34. *Id.*; G.A. Res. 61/106, *supra* note 5, at 14.

35. *See generally* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

D. Cultural Improvements

The last theme addressed by Article 24 of the CRPD is perhaps the broadest and loftiest: That society can make cultural improvements by empowering people with disabilities and altering the way in which society views disability. Specifically, Article 24 of the CRPD states, “Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.”³⁶ Based on the terminology used in Article 24 and other sections of the CRPD, one expert believes that ratification of the CRPD will enable the United States to transition from the medical and social models of disability to the holistic approach of disability.³⁷ Under the holistic approach:

[P]ersons with disabilities are no longer viewed as “objects” of charity needing medical treatment and social protection; but rather as “subjects” with human rights, who are capable of claiming those human rights, making decisions for their lives based on their free and informed consent, and being active members of society.³⁸

Thus, because the CRPD mandates concepts such as “inclusion, participation, and equal access” rather than focusing exclusively on “accommodation,” its language will help move the United States toward the holistic approach and universal design.³⁹

The CRPD also calls for cultural improvements in the higher education setting. CRPD Article 24(5) requires “[p]arties to provide persons with disabilities access to tertiary education without discrimination and on an equal basis with others.”⁴⁰ This would require many changes to the higher education system including “equality in admissions; universal design, universal design for learning, and reasonable accommodations; access to information and communication technologies; support in extracurricular activities; the hiring of academic and other staff with disabilities; and the facilitation of the transition of students with disabilities to the workplace.”⁴¹ Additionally, by mandating life-long education and promoting the “human potential and sense of dignity and self-worth,” the CRPD recognizes the importance of students with disabilities being able to experience and participate in all aspects of higher education both inside

36. G.A. Res. 61/106, *supra* note 5, at 14.

37. Jason Scott Palmer, *The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities*, 43 SETON HALL L. REV. 551, 578 (2013).

38. *Id.*

39. *Id.* at 587.

40. Paul Harpur & Michael Ashley Stein, *Universities as Disability Rights Change Agents*, 10 NE. U.L. REV. 542, 550 (2018).

41. *Id.*

and outside of the classroom.⁴² Giving students with disabilities who are able to handle the rigor access to higher education will help provide them with the skills they need not only for future employment, but also for the social aspects of society.⁴³

II. ARGUMENTS FOR AND AGAINST RATIFICATION OF THE EDUCATION ARTICLE OF THE CRPD

As with any major treaty, there are both those who are for and against the ratification of the CRPD by the United States for various reasons. Both arguments for and against the ratification of the CRPD by the United States Senate are discussed below.

A. Arguments for Ratification

Besides the belief that ratification will improve disability law in the United States, advocates for the ratification raised two major arguments for ratification of the CRPD: (1) the opportunity for the United States to be a role model to other countries in the field of disability law; and (2) the CRPD is not policed by the United Nations, but rather, overseen by an advisory committee.⁴⁴

1. Role Model for Other Countries

The United States has previously been an international role model in the field of disability law. In 1990, the United States enacted the groundbreaking Americans With Disabilities Act (ADA), revolutionizing not only how disability was viewed in the country, but also around the world.⁴⁵ Therefore, serving as an international role model in the field of disability law is nothing new for the United States. When the Senate was considering ratification of the CRPD in 2012, disability rights advocates, including Judy Heumann, an advocate instrumental in implementing national sit-ins in order to convince the government to sign the regulations for the enforcement of the Rehabilitation Act of 1973, spoke before the Senate as a distinguished witness.⁴⁶ She felt it was time for the United States to be a leader in disability law once again and ratify the convention in order to keep progressing forward in the disability rights movement.⁴⁷

42. Harpur & Stein, *supra* note 40, at 563-64.

43. *Id.* at 581.

44. *See generally* S. REP. NO. 112-6.

45. Ravi Malhotra, *The United Nations Convention on the Rights of Persons with Disabilities in Canadian and American Jurisprudence*, 32 WINDSOR Y.B. ACCESS TO JUST. 1, 7 (2015). Commenting on the connections between the passage of the ADA and disability rights laws in other countries including Australia, the United Kingdom, Brazil, Costa Rica, Chile, Guatemala, Nicaragua, and Peru, *id.*

46. S. REP. NO. 112-6, at 36.

47. *Id.*

2. CRPD is Only Regulated by Feedback/Suggestions from a Supervisory Committee

Another argument that proponents of ratification have made is that, contrary to the beliefs of those who oppose the ratification of the CRPD, the CRPD is overseen by the Committee on the Rights of Persons with Disabilities.⁴⁸ Although opponents of the Convention are afraid that ratification will result in policing by the United Nations and other countries, clients with the CRPD is overseen by the Committee on the Rights of Persons with Disabilities which merely plays an advisory role; therefore, the United Nations cannot force the United States to change any of its laws following ratification.⁴⁹ This allows the United States to ratify the CRPD while preserving principles such as school choice. This will be discussed in greater depth later in the Note.

3. Improvements on Current US Laws

Lastly, those in favor of ratification of the CRPD feel that it will further progress the disability rights movement in the United States and improve current disability laws. Advocates point out that the CRPD would provide the legal framework needed to help combat societal stigma surrounding disability because “under the CRPD, unequal treatment is seen as the result of state action and long-held societal views that require systematic in addition to individual responses.”⁵⁰ Moreover, the differences between the purposes of the CRPD and current disability law in the United States provide insight on how ratification of the convention would better combat societal stereotypes. For example, the purpose of the ADA is to “to provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” while the purpose of the CRPD is to promote the “[f]ull and effective participation and inclusion [of people with disabilities] in society.”⁵¹ Therefore, the purpose of the CRPD represents a holistic approach and full integration of people with disabilities into society.⁵²

B. Arguments Against Ratification

When the Senate attempted to ratify the CRPD in 2012 and 2014, there were two major objections raised: school choice issues and adequacy of current United States disability laws.

48. *Id.* at 112.

49. *Id.* at 93.

50. Kanter, *supra* note 4, at 318.

51. *Id.*

52. Palmer, *supra* note 37.

1. School Choice

The first of these objections came from Michael Farris, the Chairman and Founder of the Home School Legal Defense Association.⁵³ In his testimony before the Senate, Farris expressed concerns that ratification of the CRPD would lead to too much government oversight in the area of special education.⁵⁴ Specifically, he worried that ratification of the CRPD would lead to the inability of parents of students with disabilities to choose to homeschool their children and would restrict parental rights regarding the development of IEPs under the IDEA.⁵⁵ Farris is not alone in his opinion. Other scholars worry that because of Article 24's focus on full inclusion and mainstreaming, ratification of the CRPD will eliminate special education settings from the education system in the United States.⁵⁶ Furthermore, parents of children with disabilities worry that they will lose their ability to choose the setting of their children's education, including residential schools specializing in addressing certain types of disabilities and homeschooling.⁵⁷ Additionally, some parents also fear that they will lose the ability to participate in their child's education plan, advocate for their child, and advance what they feel is their child's best interest.⁵⁸ This argument largely centers on the tensions between individual rights and government power in the United States, as opponents of CRPD ratification fear that adapting CRPD standards will allow the government to determine the best interests of children with disabilities.⁵⁹

2. Adequacy of Current Laws

When arguing against the ratification of the CRPD, those opposed pointed out that there were already several successful federal disability laws.⁶⁰ These laws include IDEA, ADA, and Section 504 of the Rehabilitation Act of 1973. However, in order to better understand the arguments of those opposing ratification, it is important to explain the various components of these laws.

i. IDEA

When the IDEA was enacted, Congress intended for this legislation to set up a "floor of opportunity" standard for the education that a person with a disability

53. S. REP. NO. 112-6 at 79-83; S. REP. NO. 113-12 at 58-59.

54. *Id.*

55. *Id.* Referencing Article 7 of the CRPD which states that education will be constructed in the best interests of the child. S. REP. NO. 112-6 at 82-83.

56. ANASTASIOU, GREGORY, & KAUFFMAN, *supra* note 17, at 669.

57. *Id.* at 672.

58. *Id.* at 673.

59. S. REP. NO. 112-6, at 83; S. REP. NO. 113-12, at 119-20.

60. S. REP. NO. 112-6, at 83; S. REP. NO. 113-12, at 119-20.

should receive in response to low completion rates and high dropout rates for students with disabilities in school.⁶¹ The IDEA covers children with disabilities who meet certain criteria.⁶² However, in order to even be considered for the eligibility criteria, a student must meet the definition of child with a disability. The term “child with a disability” means a child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.⁶³

The IDEA applies to children ages three to twenty-one in early childhood, primary, and secondary education settings, but does not apply to higher education or other tertiary education settings.⁶⁴ Moreover, the IDEA is only applicable in public school settings, not in private or religious institutions as the language of the IDEA explicitly addresses public school settings.⁶⁵

a. FAPE

One integral component of the IDEA is the concept of FAPE. All students eligible for services under the IDEA are entitled to a FAPE that incorporates “special education” or “related services.”⁶⁶ Special education refers to “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including-- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.”⁶⁷ Similarly, related services are “services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child.”⁶⁸ This includes services such as transportation, speech-language pathology and audiology services, sign language interpreters, psychological services, physical and occupational therapy,

61. Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & EDUC. 95 (2012); see also Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

62. See generally Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1482.

63. 20 U.S.C. § 1401(3)(A).

64. *Id.* § 1401(3)(B), (5).

65. *Id.* § 1401.

66. *Id.* § 1401(26).

67. 20 U.S.C. § 1401(29).

68. *Id.* § 1401(26).

school nurse services, social work assistance, counseling services, and more.⁶⁹ In order to ensure that students with disabilities are receiving a FAPE, these children are to be placed in the least restrictive environment.⁷⁰ According to one scholarly article, “[t]his means that children with disabilities should, to the maximum extent practicable, be educated with children who are not disabled.”⁷¹

Still, despite the access that FAPE provides students with disabilities seeking to complete primary and secondary education, it is a limited concept. In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, when it was creating a judicial standard for whether or not a student with a disability was properly receiving a FAPE, the United States Supreme Court stated that Congress's intent was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”⁷² As a result, the Court held that “personalized instruction[] should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁷³ This standard also gives great deference to school officials in deciding whether the individualized education is indeed “reasonably calculated” to achieve this goal.⁷⁴ Therefore, as long as school officials provide evidence suggesting that the education plan allows the student to pass their classes even if they are capable of achieving higher marks with other assistance, the FAPE is considered adequate.⁷⁵ However, it should be noted that the standard only addressed students who were able to be mainstreamed into a general education classroom. As a result, the Court aimed to create a more universal standard in *Endrew F. v. Douglas County School District*.⁷⁶ In this case, the Court held that FAPE is achieved once school officials can show that “the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”⁷⁷ Therefore, the holding of *Endrew*, requires courts to consider what reasonable progress looks like for students who need to receive their education outside of the traditional classroom.⁷⁸

69. *Id.*

70. Hyman, Rivkin, & Rosenbaum, *supra* note 1, at 117.

71. *Id.*

72. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982).

73. *Rowley*, 458 U.S. 176, 203-04 (1982).

74. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386-387 (2017).

75. *See generally Rowley*, 458 U.S. 176.

76. *See generally Endrew*, 580 U.S. 386.

77. *Endrew*, 580 U.S. at 404.

78. *See id.*

b. Procedural Due Process Under the IDEA

The IDEA mandates several procedural safeguards. According to Hyman, Rivikin, and Rosenbaum, “protections can be divided into a few separate categories: informed parental consent, parental notice, parent participation in the IEP process, mediation, litigation (administrative and court), state complaints, independent evaluations, and protections for children with behavior problems and those who commit disciplinary infractions. . . .”⁷⁹ During the grievance process, litigation typically begins with an administrative due process hearing conducted by school system officials and can progress to the courts if issues are unsettled at the administrative level.⁸⁰ In addition to alterations in a child’s IEP, other possible administrative or litigative remedies include retroactive reimbursement for private placement or services, advance payment for placement or services, and compensatory education.⁸¹ As this information suggests, parents may be able to receive reimbursement for the cost of private school tuition before IEP inadequacies were remedied.⁸² However, courts are split concerning whether the parents of children with disabilities covered by the IDEA may request payment for private school tuition before enrolling their child due to IEP inadequacy, or if he or she can only request reimbursement once they have already enrolled their child into private school pending judgment and improvement of IEP.⁸³ This can put lower income families at a disadvantage because the private schools typically ask for tuition fees upfront, and as a result, only families who can afford to send their child to private school without community resources are able to enroll their child into private school while an IEP was being reviewed by the court.⁸⁴

The IDEA also requires that school systems evaluate students they believe may meet criteria. Specifically, the IDEA requires the school conducts a “full and individual evaluation” and assess those students “in all areas related to the suspected disability.”⁸⁵ In addition, the evaluations used by school officials must use a variety of valid assessments in order to “gather functional, developmental, and academic information.”⁸⁶ The evaluation chosen must also not be designed in a way that is “discriminatory on a racial or cultural basis.”⁸⁷ If a parent is dissatisfied with the results of the evaluation and assessment conducted by school officials, they have a right to request an independent educational evaluation (IEE) by professionals who do not work for the district.⁸⁸ According to the IDEA, the IEE is performed at the public’s expense, not at the expense of the family of the

79. Hyman, Rivikin, & Rosenbaum, *supra* note 1, at 119.

80. *Id.*

81. *Id.* at 120.

82. *See Endrew*, 580 U.S. 386.

83. Hyman, Rivikin, & Rosenbaum, *supra* note 1, at 124.

84. *Id.* at 121.

85. *Id.* at 126.

86. *Id.*

87. *Id.*

88. *Id.*

child applying for services.⁸⁹ However, many courts interpreted “at public expense” to mean that the school district only has to reimburse parents who have already paid for an IEE, and as a result, families with a lower socioeconomic status often do not receive an IEE after disagreeing with the school district’s findings.⁹⁰

Moreover, another issue related to procedural safeguards under the IDEA has to do with state compliance with the provisions of the IDEA. This is because the statute itself assumes district compliance and does not contain guidelines or provisions related to penalties for districts in the event of non-compliance.⁹¹ Therefore, the statute does not address instances where students are temporarily pulled out of school due to inadequate services, are not assessed in a timely manner, or are unable to pay for private school tuition upfront in order to receive a better educational placement.⁹²

Lastly, parents of children with disabilities who are struggling to receive services for their child face another roadblock: a statute of limitations. In 2004, Congress amended the IDEA to require that students with disabilities or their parents or guardians file a procedural due process complaint within two years of when they knew or should have known about the IDEA violation, or within the state’s statute of limitations.⁹³ Although the IDEA is supposed to provide minimum requirements for support that states and school districts must provide to children with disabilities, the IDEA’s statute of limitations provision actually allows states to set a shorter statute of limitation period than mentioned in the federal provision.⁹⁴

ii. Section 504

Another major federal law affecting the education of students with disabilities is Section 504 of the Rehabilitation Act of 1973. Unlike the IDEA, Section 504 applies to any school receiving federal funding,⁹⁵ and as a result, can apply to both public and private schools. Nevertheless, while Section 504 does have broader, more encompassing definitions and is applicable to more institutions than the IDEA, the scope of protection it provides students with disabilities is smaller. Under Section 504, the term “individual with a disability” means any individual who “(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation

89. *Id.*

90. *Id.* at 127-28.

91. *Id.* at 131.

92. *Id.*

93. *Id.*

94. *Id.*

95. Wessel, Jones, Markle, & Westfall, *supra* note 3, at 118.

services provided pursuant to subchapter I, III, or VI.”⁹⁶ For those who meet this definition, the United States Government guarantees that they will not:

solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.⁹⁷

Furthermore, under Section 504, schools receiving federal funding must provide reasonable accommodations, as defined in the Americans with Disabilities Act (ADA),⁹⁸ in order to ensure that individuals with disabilities are not “excluded from the participation” in, or “denied the benefits of” education.⁹⁹

However, the requirement of reasonable accommodation is not without its limits. Private schools that receive federal funding have to abide by the reasonable accommodation requirements of Section 504 and ADA, but they are responsible only for providing accommodations that “would not be an ‘undue burden’ on the school and that would not ‘fundamentally alter’ the nature of the its services.”¹⁰⁰ This is because students with disabilities placed in private schools by their parents “do not have an individual entitlement to services they would receive if they were enrolled in a public school.”¹⁰¹ Instead, local education agencies (LEAs), often school boards, set aside money that they believe will be a fair estimate of the cost of providing services to students who have been enrolled in private schools by their parents.¹⁰² However, some students may never receive services despite the money being set aside for such a purpose.¹⁰³ Therefore, based on this information, the services and safeguards of the IDEA do not practically apply to students enrolled in private schools by their parents.

Moreover, scholars in the area of disability education law have stated that private schools really only have three obligations under Section 504: “(1) educate the child in the least restrictive environment; (2) provide the child an equal opportunity to participate in extracurricular activities; and (3) provide ‘minor adjustments’ to accommodate students with disabilities.”¹⁰⁴ Additionally, in

96. 29 U.S.C. § 705.

97. *Id.* § 794.

98. *Id.*

99. *Id.*

100. Amanda Sen, *Limited Choices: How the School-Choice Paradigm Subverts Equal Education for Students with Disabilities*, 78 MD. L. REV. 470, 497 (2019).

101. The Individuals with Disabilities Education Act: Provisions Related to Children With Disabilities Enrolled by Their Parents in Private Schools, U.S. DEPARTMENT OF EDUCATION (Mar. 2011), https://www2.ed.gov/admins/lead/speced/privateschools/report_pg2.html [<https://perma.cc/C2CK-6ZF3>].

102. *Id.*

103. *Id.*

104. Ian Farrella & Chelsea Marx, *The Fallacy of Choice: The Destructive Effect of School Vouchers on Children with Disabilities*, 67 AM. U. L. REV. 1797, 1848-49 (2018).

contrast with public schools that are required to provide a FAPE, “if the private school does enroll a child with a disability and makes accommodations for them, the school is allowed to charge higher tuition for that student than for students without a disability” under section 504.¹⁰⁵ This creates yet another barrier for parents of students with disabilities who wish to enroll their children in private schools.

iii. ADA

The final major piece of federal legislation impacting students with disabilities is the ADA. The ADA has many terms and provisions that are relevant in educational settings. However, the most important of these definitions is reasonable accommodation. Under the ADA, reasonable accommodations include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹⁰⁶

However, employers and schools do not have to provide an accommodation under the ADA if it is considered an undue hardship. An accommodation is considered an undue hardship if it creates great difficulty or expense, which is determined by assessing the following factors:¹⁰⁷

(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.¹⁰⁸

105. *Id.* at 1849.

106. 42 U.S.C. §1211(9)

107. *Id.* §1211(10).

108. *Id.*

The ADA applies to schools because it applies to all places of education deemed to affect commerce.¹⁰⁹ However, religious organizations or entities controlled by religious organizations are exempt from ADA provisions.¹¹⁰ Therefore, religiously affiliated private schools are exempt from ADA requirements, but not Section 504 requirements if they receive funding from the federal government.¹¹¹ The ADA still applies to all public schools under Title II and non-religious private schools under Title III.¹¹² Title II applies to all government entities and Title III applies to public accommodations including restaurants and other types of businesses.¹¹³

Determining what accommodations schools are required to provide students under the ADA can be complicated. It requires knowing whether the individual is eligible for services under the ADA, whether the entity is required to provide accommodations under the ADA, and whether accommodation is considered reasonable.¹¹⁴ In *Halpern v. Wake Forest University Health Sciences*, the plaintiff sued the defendant, Wake Forest University, for terminating his position in their medical school program.¹¹⁵ The plaintiff alleged that the defendant terminated his position in the program without first providing him a reasonable accommodation that he was due under Section 504 and the ADA due to his attention-deficit hyperactivity disorder (ADHD).¹¹⁶ The court began assessing the reasonable accommodation claim by first determining whether the provisions of Section 504 and the ADA were applicable to Wake Forest.¹¹⁷ The court determined that Wake Forest was subject to Section 504 requirements as a recipient of federal funding and subject to Title III of the ADA as a “public accommodation.”¹¹⁸ Under Title III of the ADA, places of public accommodation are prohibited from discriminating against people with disabilities.¹¹⁹ The ADA defines discrimination as “‘a failure to make reasonable modifications’ that are ‘necessary’ to provide a disabled individual with such full and equal enjoyment, ‘unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodation.’”¹²⁰ Furthermore, to prove discrimination under Section 504 and the ADA, the plaintiff does not have to prove that he was “‘excluded ‘solely by reason of’ his disability.’”¹²¹ Rather, a plaintiff only has to

109. Sen, *supra* note 101, at 487.

110. *Id.*

111. *Id.*

112. Farrella & Marx, *supra* note 105, at 1842.

113. *Id.*

114. *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454 (4th Cir. 2012).

115. *Id.* at 456.

116. *Id.* at 456-60.

117. *Id.* at 460.

118. *Id.*

119. *Id.* at 461.

120. *Id.*

121. *Id.* at 461-62.

prove that the disability was “‘a motivating cause’ of the exclusion.”¹²²

However, before determining whether Wake Forest violated Section 504 and the ADA by failing to provide reasonable accommodations, the court needed to determine whether the plaintiff met the definition of a “qualified individual” and was therefore entitled to reasonable accommodations.¹²³ A qualified individual is “one ‘who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements’ for participation in a program or activity.”¹²⁴ Because individuals with disabilities are entitled to reasonable accommodations, they must also be qualified individuals, and there are certain “essential eligibility requirements” for education and employment that these individuals must be able to perform without accommodations.¹²⁵ Ultimately, the court determined that because professionalism was one of these essential requirements, the plaintiff was not a qualified individual entitled to reasonable accommodations due to his inability to coordinate and cooperate with other students and faculty in his program.¹²⁶ Therefore, the court determined that because the plaintiff was not a qualified individual, Wake Forest was not required to provide him reasonable accommodations.¹²⁷ As this case illustrates, these cases can be complicated due to the large number of standards and definitions considered when making a reasonable accommodations determination.

PART II

III. CRITIQUES OF ARGUMENTS AGAINST RATIFICATION

Despite the concerns grounding ratification of Article 24 of the CRPD, including the adequacy of current US law, incompatibility of the CRPD with current law, and loss of school choice, counterarguments exist that expose the fallacies of these concerns. In addition, these counterarguments illustrate how Article 24 of the CRPD can actually improve current United States education law while preserving the principle of choice.

A. Potential Loss of School Choice

Opponents of CRPD ratification fear that it would result in the loss of school choice because educational setting would be determined in the “best interests of the child”¹²⁸ rather than exclusively by the child’s parents, and the CRPD fails to mention special education explicitly. However, the principle of school choice can be retained while still adopting Article 24 of the CRPD. This can be

122. *Id.*

123. *Id.* at 462.

124. *Id.*

125. *Id.*

126. *Id.* at 463.

127. *Id.* at 467.

128. G.A. Res. 61/106, *supra* note 6, at 7.

accomplished in a couple of ways.

1. Compatibility with School Choice

The CRPD is compatible with school choice. Following the creation of CRPD, the World Federation of the Deaf (WDF) stated, “both effective individualized support and full inclusion interpreted as totally supportive environments could mean the right to an appropriate, high-quality education, including where appropriate the provision of specialized services and/or placement in specialized settings.”¹²⁹ As a result, the WDF has concluded that “effective individualized support and full inclusion” includes placement in special schools for the blind, deaf, and individuals with other types of disabilities.¹³⁰ Despite the WDF taking the stance, the ad hoc committee in charge of building the CRPD never released a statement to the contrary.¹³¹ Additionally, there is evidence suggesting that the committee was “comfortable with” the increase in private schools across the world.¹³² Therefore, the text and goals of the CRPD seem to be compatible with school choice and special education settings.

2. Reservations

Furthermore, the United States Senate can ensure that school choice is preserved by passing the CRPD with a reservation. A reservation is a statement made by governments when ratifying a treaty which expresses the government’s intent “to exclude or to modify the legal effect of certain provisions of the treaty in their application.”¹³³ According to legal scholars, such a reservation is compatible with the CRPD.¹³⁴ Furthermore, legal experts suggest a reservation should be encouraged with the ratification of CRPD because while the ratification of the CRPD would not significantly alter domestic law, providing a reservation preserving school choice and the right of a parent to make decisions about the educational needs of the children would help guide courts on how to apply the CRPD to disability discrimination cases in the education setting.¹³⁵

The enforcement of the CRPD will also not create obstacles to school choice in the United States. Although opponents of the ratification of Article 24 and the rest of the CRPD fear that ratification of the treaty would result in excessive influence from outside entities, this is not likely to be the case. While the United Nations did orchestrate the development of the CRPD, the Committee on the

129. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 681.

130. *Id.*

131. *Id.* at 682.

132. *Id.* at 684.

133. Candace Farmer, Note, *Can the U.S. Use A Reservation to Alleviate Sovereignty Concerns Regarding the Convention on The Rights of Persons with Disabilities?*, 43 GA. J. INT'L & COMP. L. 249, 271 (2014).

134. *Id.* at 278.

135. *Id.* at 279.

Rights of Persons with Disabilities, a body established by the UN, implemented its enforcement.¹³⁶ This committee operates by reviewing the laws and protocols of countries that have ratified the CRPD and providing them with advice and feedback on how they can improve those policies to be more compatible with the protocols and policies in the CRPD.¹³⁷ Therefore, worries of undue interference and policing from the United Nations are unfounded.

3. Harmful Effects of School Choice

When addressing the argument that the CRPD will threaten school choice, it is important to point out that school choice can actually negatively impact students with disabilities in some instances. Relying on charter and private schools as the primary source of primary and secondary education can have negative consequences for students with disabilities. For example, many students with disabilities will often struggle to get admitted into charter and other choice schools because many charter and other private schools primarily receive funding based on overall standardized test scores.¹³⁸ As a result, charter schools and other private schools are less likely to admit students with disabilities as the standardized test scores of these students are generally lower than other students.¹³⁹ Furthermore, private and religious schools are not required to implement any of the IDEA provisions; however, they can receive reimbursement by the state for providing services to students with disabilities, regardless of whether the standards are equivalent to IDEA provisions.¹⁴⁰ This allows private and religious schools to take funds meant for public schools by admitting students with disabilities, despite not having to provide the students with a FAPE and other individualized education services that these students could receive in public schools.

Similarly, religious entities, including religious private schools, are exempt from the ADA's requirements.¹⁴¹ This allows a large portion of schools in the United States to claim exemption from the country's most comprehensive disability anti-discrimination law. In fact, according to a 2014 survey conducted by the department of education, sixty-nine percent of private schools in the United States are exempt from ADA requirements as religious institutions.¹⁴²

Another area of concern for students with disabilities is the growing number of voucher programs in which states provide students with vouchers to help them pay for private school in an effort to promote school choice. Private schools are

136. S. REP. NO. 112-6; *see also* *Convention on the Rights of Persons with Disabilities (CRPD)*, *supra* note 5.

137. *Id.*

138. Sen, *supra* note 101, at 493.

139. *Id.*

140. *Id.* at 496.

141. Farrella & Marx, *supra* note 105, at 1822.

142. *Id.*

free to establish their own admission criteria as long as they do not discriminate against students on the basis of race, color, or national origin.¹⁴³ As a result, private schools are free to turn away students with disabilities while taking money that could be used to assist students with disabilities in the public-school setting by accepting other voucher students without disabilities.¹⁴⁴ Additionally, even the students with disabilities that are accepted into private schools as part of voucher programs are negatively impacted by these programs. For instance, researchers from Notre Dame and the University of Kentucky found that the reading and writing skills of students with disabilities who received a voucher and attended private school through the Indiana Choice Program decreased significantly after they attended private school.¹⁴⁵

Researchers and critics of voucher programs suggest that changes must be made to existing disability education laws for voucher programs to be successful for students with disabilities. For example, critics of voucher programs argue that all schools receiving federal or state government funding, including private and religious schools, should be obligated to comply with the requirements of the IDEA.¹⁴⁶ Moreover, although some private schools receiving vouchers offer services catered towards students with certain types of disabilities such as autism, the tuition rates of these schools are often too expensive even with vouchers.¹⁴⁷ Therefore, for more students with disabilities to enroll in the schools, schools either need to reduce tuition rates or states need to raise voucher values.¹⁴⁸

B. Critiques of Current Laws

1. IDEA

Despite the progress that the IDEA has made toward the goal of ensuring every student with a disability has access to primary and secondary education, it also has several weaknesses. As mentioned above, private and religious schools are not required to comply with the IDEA; because of this, students with disabilities can only access federally-funded vouchers if they waive all of the procedural safeguards and disciplinary protections set forth in the IDEA.¹⁴⁹ As a result of these circumstances, private and religious schools can avoid having to comply with federal disability education law despite accepting federal funds. Furthermore, unlike students with disabilities in public schools, students with disabilities in private schools cannot seek to use the court to enforce IDEA when

143. Sen, *supra* note 101, at 496-97.

144. *Id.* at 500.

145. Farrella & Marx, *supra* note 105, at 1861.

146. Sen, *supra* note 101, at 508.

147. Farrella & Marx, *supra* note 102, at 1865.

148. *Id.* Noting that even when these special schools are available to students, they can also harm students with disabilities by taking them out of inclusive environments with other students, segregating and isolating them. *Id.* at 1866.

149. Farrella & Marx, *supra* note 102, at 1865.

students or parents feel the school is not adequately meeting the student's needs.

Moreover, the cost of litigation has also created a disparity between wealthier families and poor families when it comes to seeking remedies through the IDEA. Most of the families who utilize IDEA are wealthy families who have a means of financing their child's private school education as well as the legal proceedings.¹⁵⁰ This is especially troubling given that a study found that only twenty-eight states fully comply with the IDEA compliance standards.¹⁵¹ Therefore, many students with disabilities are not being given access to adequate education if only wealthy students are able to challenge noncompliance. Students with disabilities who come from economically disadvantaged families are further marginalized due to their inability to gain access to the same level of educational resources as students from wealthier families.

Additionally, understanding the processes that underlie IDEA concepts such as FAPE, IEP, and due process can be difficult for parents and students without a legal background or conflict resolution skills. To begin, IDEA procedural protections and due process provisions presume compliance.¹⁵² Therefore, students and parents who feel that their school system is not in compliance with IDEA will have to be prepared to initiate hearings and IEP negotiations. In addition, the Supreme Court held in *Schaffer v. Weast* that the burden of proof in an administrative hearing challenging an IEP is "properly placed upon the party seeking relief."¹⁵³ Parents and families must either be able to understand how to produce evidence needed to satisfy the burden of proof, or they need the legal assistance to do so. However, this is no easy task as parents need to be knowledgeable about their child's disability and individual needs.¹⁵⁴ Moreover, parents and their children must be able to advocate by seeking clarification, voicing disagreement, and properly understanding the purpose and proceedings of IEP meetings.¹⁵⁵ Parents and students without the proper educational backgrounds or experiences will often struggle to advocate properly in these proceedings.¹⁵⁶

The IDEA also has several shortcomings for students who are still in the secondary education system but have reached the age of majority. A major principle underlying the IDEA is the premise that parents should have the final say in the education of their children.¹⁵⁷ For this reason, there is a debate concerning whether students who have reached the age of majority have standing to file for hearings on matters regarding their own educational rights; there is doubt that students who are legal adults have standing to file for hearings with

150. Hyman, Rivikin, & Rosenbaum, *supra* note 1, at 113.

151. *Id.* at 114.

152. *Id.*

153. *Schaffer v. Weast*, 546 U.S. 49, 61 (2005).

154. *Id.* at 135.

155. *Id.*

156. *Id.*

157. S. REP. NO. 112-6; S. REP. NO. 113-12.

respect to their own educational rights, a concept at odds with the general premise of all state laws.¹⁵⁸ Furthermore, even in states which guarantee that educational rights under the IDEA are transferred to the student upon reaching the age of majority, provisions regarding enforcement and oversight cause significant problems.¹⁵⁹ The IDEA fails to mandate that all students be provided notice of their rights until just prior to, or at the age of majority, and many states lack provisions that ensure students who reach the age of majority receive adequate support and resources while navigating the IEP process as the chief advocate for their educational needs.¹⁶⁰

2. Section 504

Although Section 504 triggers obligations for private schools that participate in a federally funded voucher program, these obligations are not nearly as comprehensive as the obligations that the IDEA mandates.¹⁶¹ Section 504 mandates only three obligations for private schools receiving federal funding: “(1) educate the child in the least restrictive environment; (2) provide the child an equal opportunity to participate in extracurricular activities; and (3) provide ‘minor adjustments’ to accommodate students with disabilities.”¹⁶² The “minor adjustments” standard is also deferential toward private schools and, as the term suggests, does not require nearly as strong of accommodations or resources as FAPE or an IEP.¹⁶³ Ultimately, while Section 504 does provide some protection for students with disabilities, it is much more difficult for students with disabilities and their parents to require schools to provide a requested service or resource through Section 504.

3. ADA

Despite being a comprehensive non-discrimination statute, the ADA still has its shortcomings. The first of the shortcomings applies to private and religious schools. Private schools that do not have to abide by the IDEA still have to abide by the ADA.¹⁶⁴ However, under the ADA, such schools are only required to provide accommodations that would not be an “undue burden” on the school and that would not “fundamentally alter” the nature of its services.¹⁶⁵ Private schools do not have to provide accommodations and services that would cause too much of an effort in terms of physical or financial hardship.¹⁶⁶ As a result, for example,

158. Hyman, Rivikin, & Rosenbaum, *supra* note 1, at 141.

159. *Id.*

160. *Id.* at 140.

161. Farrella & Marx, *supra* note 105, at 1848.

162. *Id.* at 1848-49.

163. *Id.*

164. Sen, *supra* note 101, at 497.

165. *Id.*

166. *Id.*

the ADA may not require a private school to provide a special education classroom for individuals with profound intellectual and/or developmental disabilities as the school can argue that this would place a financial burden on the school in order to hire the teacher and assistants needed for this classroom.¹⁶⁷ Moreover, religious schools are exempt from the ADA and not required to provide students with any accommodations whatsoever unless they receive federal funding and must abide by Section 504.¹⁶⁸

Moreover, the underlying purpose of the ADA fails to properly advance the potential of people with disabilities in the United States. The purpose of the ADA and the ADA Amendments Act of 2008 (ADAAA) is to “provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁶⁹ However, the ADA falls short of promoting full integration of people with disabilities into society. In contrast, the purpose of the CRPD “is to promote the ‘[f]ull and effective participation and inclusion [of people with disabilities] in society.’”¹⁷⁰ Therefore, CRPD focuses not only on prohibiting negative acts towards people with disabilities, but also allowing people with disabilities to contribute to society in positive ways in order to help society grow as a whole.

Another shortcoming of the ADA is that, in a sense, it places responsibility for determining reasonable modifications and accommodations for people with disabilities on the employer or owner of “a place of public accommodation” because individuals with disabilities must first request the modification or accommodation, and employers and owners of businesses are allowed to reject the request if they can argue that it is “undue burden” on them or their business.¹⁷¹ As a result, an accommodation is permissible as long as it is reasonable.¹⁷² Unfortunately, however, the reasonable accommodation or modification does not necessarily have to be the accommodation or modification that the person with the disability requested or the one the person believes will be the most effective for them.¹⁷³ Unlike the ADA, the CRPD calls on the government to determine which accommodations must be provided by employers and businesses.¹⁷⁴ This leaves much less discretion to individual businesses and

167. *See id.* (applying the rule from the source).

168. Farrella & Marx, *supra* note 102, at 1821-22.

169. Kanter, *supra* note 5, at 318.

170. *Id.*

171. *Id.* at 321.

172. *See id.*

173. *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/Y8XY-Z38W>]. Stating, “If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective.”

174. *Id.*

allows people with disabilities to advocate to the government regarding which accommodations they feel would be best in various situations.

Furthermore, the concept of reasonable accommodation itself differs in the ADA and CRPD. Under the CRPD, a “reasonable accommodation is an obligation on an individual basis and activated by demand of an individual.”¹⁷⁵ Moreover, it is a “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹⁷⁶ Additionally, unlike the ADA, the reasonable accommodation provision of the CRPD applies to both public and private schools, and all such schools cannot charge students with disabilities for the accommodations.¹⁷⁷ This provision of the CRPD actually moves toward even greater school choice than is currently available in the United States because students will be able to receive necessary accommodations in both private and public-school settings.

PART III

IV. COMBINING ASPECTS OF THE CRPD AND CURRENT UNITED STATES EDUCATION LAWS TO CREATE A MODEL SYSTEM OF DISABILITY EDUCATION LAWS

While disability law in the United States has its strengths, it still has many weaknesses that inhibit the full inclusion and choice of people with disabilities. Based on its provisions and underlying principles, the CRPD would enhance the strengths of current United States disability law while still correcting the weaknesses. Therefore, the best model of disability education law in the United States and worldwide would be a law which combines both the positive aspects of the CRPD and current United States disability education law. This proposed model is discussed below.

A. Positive Aspects of the CRPD

There are several positive aspects of the CRPD. Many of these positive aspects have to do with the concepts that the CRPD incorporates into law. Concepts such as disability, reasonable accommodation, full potential, inclusion and inclusive environment are all defined by the CRPD in a way which promotes the full acceptance and growth of people with disabilities.¹⁷⁸ The CRPD also improves the integration of people with disabilities into society by ratifying universal design principles into law. These principles, which should be discussed in more detail in the proposed new model, advocate for the underlying principle that by making the environment accommodating to people with disabilities, the

175. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 682.

176. G.A. Res. 61/106, *supra* note 5, at 5.

177. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 684.

178. *See generally* G.A. Res. 61/106, *supra* note 5.

environment is easier for all people to use and enjoy.¹⁷⁹ By incorporating these concepts into law, the United States will move closer toward allowing more people with disabilities to contribute to society and fully thrive.

*B. Positive Aspects of United States Disability Education Law
Omitted from the CRPD*

One major positive aspect of current disability education law in the United States that is not currently explicitly mentioned in the CRPD is the use of special education settings and special environments for students. While the CRPD advocates for full inclusion of students with disabilities, full inclusion is not optimal for every student. Indeed, if the provisions of the CRPD are interpreted narrowly rather than broadly, specialized settings such as the life skills and resource classrooms provided in the United States would not be allowed.¹⁸⁰ Educational experts and reviewers of the CRPD argue that both individualized environments and full inclusion can be interpreted as fully supportive environments when describing the “right to an appropriate, high-quality education” depending on a specific student’s needs.¹⁸¹ Disability rights organizations also advocate for an interpretation of CRPD that would allow for both full inclusion and individualized settings. The WDF, for example, issued a statement that full inclusion for a deaf learner means a “totally supportive, signing, and student-centred environment.”¹⁸² Moreover, the drafters of the CRPD stated that the intent of the CRPD is to “provide the right to choose inclusive and accessible education,”¹⁸³ and students are not obligated “to attend general schools where their needs may not be adequately met.”¹⁸⁴

Similarly, the proposed new model should incorporate the principle of school choice. Choice, including school choice, is a principle strongly rooted in the United States political system. As a result, if the United States is to adopt CRPD, the United States law will still have to allow parents to play a major role in the education of their students and choose whether to enroll their students in private, public, religious or home school.¹⁸⁵

179. *Id.*

180. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 680.

181. *Id.* at 689.

182. *Id.* at 693. The World Federation of the Deaf also stated that the best environment for the learner also helps develop the student to his or her “full educational, social, and emotional potential,” and this is an important objective of the CRPD, *id.* at 693.

183. *Id.* at 695.

184. *Id.*

185. *See generally* S. REP. NO. 112-6) at 79-83. *See also* S. REP. NO. 113-12 at 58-59.

V. PROPOSED NEW MODEL

A. Ratification and Reservation

Based on the strengths of both the CRPD and current United States disability education law, the proposed model is ratification of the Article 24 of the CRPD and associated terms and concepts, as well as a law that will replace all other national disability education laws in the United States. When ratifying, the Senate can attach a reservation stating that the United States will continue to provide special environments and school choice to students and parents who currently utilize these provisions.¹⁸⁶ This will allow the United States to preserve school choice while still embracing the more progressive terms of the CRPD. Ratification with reservation, along with the comprehensive law discussed below, is an important aspect of the proposed new model. Ratification will make Article 24 of the CRPD “the law of the land” and require the United States to comply with the CRPD as this will be required by the Supremacy Clause of the Constitution.¹⁸⁷

B. Comprehensive New Law

As part of this proposed new model, the United States Congress should pass a new comprehensive education law. This law would combine the best aspects of both current disability education law and the CRPD. In creating this law, the United States legislature can preserve the fundamental American values, such as choice and individualism, while still improving the educational experiences of students with disabilities.

1. Structure of the Law and the Influence of the CRPD

The law will stand on its own, meaning that an individual will not need to look to other laws in order to interpret it. This is currently needed, as one must look to the ADA to properly interpret some of the terms in Section 504 and the IDEA. Additionally, in order to fully embrace the full potentials of people with disabilities and further integrate individuals with disabilities into their communities, the new law will include anti-discrimination language from the CRPD, including, but not limited to: (1) “the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential,” (2) “persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live,” (3) “reasonable accommodation of the individual’s requirements is provided,” (4) “Persons with disabilities receive the support required, within the general education system, to facilitate their effective education,” and (5) “Effective individualized support measures are provided in environments that maximize

186. See Candace Farmer, *supra* note 122, at 279.

187. S. REP. NO. 112-6 at 91; S. REP. NO. 113-12 at 54.

academic and social development, consistent with the goal of full inclusion.”¹⁸⁸

The new law would also incorporate the CRPD’s definitions of reasonable accommodation and disability rather than the ADA’s definitions.¹⁸⁹ Incorporating these provisions from the CRPD will transform current United States disability education law into laws that promote full inclusion and contribution to society rather than just anti-discrimination.

2. Influence of Current US Disability Education Law

However, the law would also incorporate positive aspects of the current disability education system in the United States as well as new definitions to correct the weaknesses of the treaty. For example, “effective individualized support measures” could be defined to incorporate specialized private schools and other forms of special edition special education when needed.¹⁹⁰ Even though it is not mentioned in the treaty, this type of schooling could be best for people with certain kinds of disabilities. A suggested definition for this would be “the right to an appropriate, high-quality education.”¹⁹¹ As the most appropriate setting for a certain student could be a private or religious school, the provisions and procedural due process safeguards of the new law should apply to public, private, and religious school settings. The law would also define fullest potential for primary and secondary schooling as a factor test considering parental wishes, the student's wishes, various test results, and the typical prognosis for someone with a certain diagnosis, while keeping in mind that inclusive environments are always the first choice if they can work for the student. While this method of defining fullest potential contains some elements of subjectivity and may require more time and effort than a straightforward rule, it is a useful definition because it considers the unique abilities and circumstances of each student with a disability.

3. Voucher Programs

The new law should address voucher programs as they are becoming more and more common across the United States. Specifically, the new law should contain a provision stating that by accepting a federally or state funded voucher, the student is not waiving their procedural due process rights under the statute. This would be a positive contrast to the current provision under the IDEA.¹⁹² The law should also contain a provision stating that special schools for people with disabilities should negotiate voucher prices with state governments, so that students do not have to pay more money than the voucher amount if they qualify

188. G.A. Res. 61/106, *supra* note 5, at 14-15 & 17.

189. *See id.* at 7.

190. G.A. Res. 61/106, *supra* note 5, at 15 (only quoted language derived from source).

191. Anastasiou, Gregory, & Kauffman, *supra* note 17, at 689.

192. Farrella & Marx, *supra* note 105, at 1865.

for a voucher.¹⁹³

4. *Rights of Students Who reach the Age of Majority*

In addition, the new law would correct the situation that some students currently face when reaching the age of majority under IDEA.¹⁹⁴ Under the new law, Congress should provide a clear provision stating that upon reaching the age of majority, students with disabilities will have standing to seek compliance with the new law's standards instead of their parents. A provision giving students with disabilities the right to make decisions regarding their educational experience upon reaching adulthood is consistent with the principles underlying the CRPD, including granting students access to the right to education and fully including people with disabilities in the educational experience.¹⁹⁵

5. *Higher Education*

For higher education, in lieu of a factor test, the fullest potential would be defined as the reasonable accommodations that a student could receive as defined under the CRPD without altering the essential functions of a program. Higher education requires a different definition from primary and secondary education because of the merits of the education and the fact that it is not guaranteed like primary and secondary education.

6. *Universal Design*

The new law would codify the universal design principles underlying the CRPD. The principles include: (1) Equitable Use, (2) Flexibility in Use, (3) Simple and Intuitive Use, (4) Perceptible Information, (5) Tolerance for Error, (6) Low Physical Effort, and (7) Size and Space for Approach and Use.¹⁹⁶ By codifying these principles into law, activities in school will be more effective, efficient, and accessible for all students, regardless of ability. In addition, because this law pertains specifically to education, the law should also clarify the three Universal Design in Learning (UDL) into law. The three principles are:

“1) multiple means of representation, which give students a variety of methods for gathering information and knowledge; (2) multiple means of action and expression, which allow students alternative ways to demonstrate what they have learned; and (3) multiple means of engagement, which challenge students appropriately, focus on their interests, and motivate them to learn.”¹⁹⁷

193. *Id.*

194. *See* Hyman, Rivkin, & Rosenbaum, *supra* note 1, at 140-41.

195. *See generally* G.A. Res. 61/106, *supra* note 6.

196. Palmer, *supra* note 37.

197. *Id.*

These principles would motivate all students to learn and enjoying learning, including students with disabilities.

7. Education and Employment

Finally, the new law should require the institutions of secondary and higher education partner with organizations in the community or the state to provide students with disabilities with real-world work experiences.¹⁹⁸ These experiences, in addition to education, help fully integrate students with disabilities into a more inclusive society. This is particularly important given that despite completing secondary or higher education, the unemployment rates of people with disabilities in the United States are much higher than those without disabilities.¹⁹⁹

C. Themes Addressed by the Model

In addition to correcting weaknesses in current United States disability education laws, the new law also addresses a few themes that have been pervasive throughout the history of the United States regarding disability and disability law.

1. Efficiency

The first theme addressed by the new law is efficiency. Because current United States disability education laws often borrow definitions from each other and can be simultaneously applicable to the same situation, these laws can be difficult, inefficient, and confusing to apply. The new model would correct the inefficiency issue by consolidating all disability education law into one law. It would also increase efficiency by applying to all educational settings.

2. Establishing True School Choice for Students with Disabilities

The new law also addresses school choice. Specifically, the new law would be applicable to public, private, and religious schools alike. Therefore, students with disabilities and their parents would have the opportunity to enforce compliance with the law regardless of the type of school a student is enrolled in. As a result, the student with a disability would be able to receive the resources and services they need to be successful in any educational setting.

3. Raising the Education “Floor” for Students with Disabilities

The new law would also address the education “floor” established in

198. *Id.* For an example of such a program for higher education students with physical disabilities in Indianapolis, Indiana, see *The Gregory S. Fehribach Center*, ESKENAZI HEALTH, <https://www.eskenazihealth.edu/programs/fehribach-center> [https://perma.cc/JVJ4-LHXH].

199. See *Disability Employment Statistics*, *supra* note 2.

Rowley.²⁰⁰ When the IDEA was first enacted, the focus was on establishing basic access to education for people with disabilities because that was progress at the time.²⁰¹ However, as disability rights across the world have progressed, people with disabilities are no longer looking for a basic education, but rather, an appropriate and quality education.²⁰² Rather than establishing a “floor”²⁰³ giving access to education for students with disabilities, the new law would focus on “inclusion,”²⁰⁴ “full potential,”²⁰⁵ and the “full enjoyment” of the right to an education.²⁰⁶ These themes and goals are consistent with the CRPD.²⁰⁷

CONCLUSION

When former Senator John McCain was trying to persuade Republican senators to vote for the ratification of the Convention on the Rights of Persons with Disabilities (CRPD), he said, “I am proud to be pro-life. This is a pro-life piece of resolution, in my view, because too often children...with disabilities are never allowed to live.”²⁰⁸ Unfortunately, his argument failed to persuade enough of his Republican colleagues to vote to ratify the CRPD.²⁰⁹ McCain’s argument provides insight into the inadequacy of current disability education law in the United States.

While current disability education law including Section 504, the IDEA, and the ADA address discrimination and inequality in education to a certain extent, those laws do not currently provide students with disabilities enough support to become fully integrated into society and reach their full potential.²¹⁰ Indeed, appropriate and adequate education still seems to be a barrier for people with disabilities despite acknowledgement in *Brown v. Board. of Education*. that “education is perhaps the *most* important function of state and local governments.”²¹¹ Because of this, people with disabilities in the United States continue to struggle to obtain advanced degrees and employment.²¹²

As a disability rights movement has evolved from a medical model to a social model, and even a holistic approach,²¹³ laws that focus solely on anti-

200. See *Rowley*, 458 U.S. 176, 200 (1982)..

201. *Id.* See also Weber, *supra* note 61.

202. See generally Kanter, *supra* note 4. See also Palmer, *supra* note 37.

203. *Rowley*, 458 U.S. at 200.

204. G.A. Res. 61/106, *supra* note 5, at 4.

205. Weber, *supra* note 61.

206. G.A. Res. 61/106, *supra* note 5, at 12 .

207. See *id.*

208. S. REP. NO. 112-6 at 29.

209. *Id.*

210. Kanter, *supra* note 4.

211. *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 493 (1954) (emphasis added).

212. See Wessel, Jones, Markle, & Westfall, *supra* note 3; see also *Disability Employment Statistics*, *supra* note 2.

213. See Palmer, *supra* note 37.

discrimination and establishing a basic level of rights for people with disabilities are no longer adequate. Furthermore, the international community now recognizes that people with disabilities are entitled to the same basic human rights as others, including education.²¹⁴ However, in order for people with disabilities to reach their “full potential”²¹⁵ and “full and equal enjoyment of an education and as members of the community,”²¹⁶ the United States needs to improve its current disability education law scheme and move toward laws which actively promote inclusion and integration of people with disabilities rather than reactively prohibiting discrimination.

In light of the educational struggles still faced by students with disabilities in the United States, as well as the shortcomings of current disability education law, the United States Senate should ratify Article 24 of the CRPD and the terms and concepts associated with it. It should also create a comprehensive law to better serve students with disabilities. Adopting a new law which combines both the positive aspects of the CRPD and United States current disability education law will result in a new and improved model that will better serve students with disabilities. This new model would benefit not only students with disabilities in the United States, but also students with disabilities around the world as other countries follow the lead of the United States and create similar laws.

214. *See generally* G.A. Res. 61/106, *supra* note 5.

215. Weber, *supra* note 61.

216. *See* G.A. Res. 61/106, *supra* note 5, at 7.