

# Empowerment

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## **50th Anniversary of *Brown vs. Board of Education*: What does it have to do with the Disability Movement?**

Prior to 1954 schools in this country were segregated along color lines, and many children were not permitted to attend area schools or be included in integrated educational programs because of their racial status. This year marks the 50th Anniversary of the landmark legal decision *Brown vs. Board of Education*, which changed the face of education. It was the ruling in this case, delivered by Justice Earl Warren (Thurgood Marshall, who was the chief counsel, later became the first African American Supreme Court Justice), concluded that widely accepted school policies actually denied equal protection to citizens of the United States. Previously accepted views of “separate but equal” educational programs had perpetuated the ongoing racial segregation of educational programs. As a result of *Brown vs. Board of Education*, these practices were deemed a violation of the 14th Amendment because segregated pro-

grams were not equal. The Supreme Court ordered the federal courts to desegregate all public schools. The ruling was met with a wide range of reactions from the public and school officials. In some parts of the country riots, violence, delay tactics, or ignoring the issues served to delay integration until the Civil Rights Act of 1964 prohibited discrimination in programs receiving federal funds, thus allowing the government to cut funding for public programs that refused to integrate their programs.

What does this have to do with children or adults with disabilities? In the first place, the rulings resulted in other changes affecting more than school attendance and participation

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for racial minorities. Job opportunities, voting, transportation, and higher education were just a few of the areas in which change occurred regarding increasing racial equality, but these changes also stimulated increased activism among other underserved or neglected groups including people with disabilities.

Individuals with disabilities were eventually impacted by this legislation when disability advocates, parents, and individuals used it as the premise for increasing inclusiveness for students with disabilities. Those of us who have been in the disability field for several decades may recall that prior to 1975, schools frequently excluded children with disabilities not only from mainstreamed classes but from entrance to school at all. These decisions were frequently arbitrary decisions made by a single representative of the school/district and on the basis of a single test measure or opinion with no recourse for parents. Every major college textbook used in professional preparation of special education personnel today cites *Brown vs. Board of Education* among the most critical landmark civil rights decisions that propelled disability rights forward. This would be followed by other landmark disability cases like *PARC vs. Commonwealth of Pennsylvania* (1972) in which a group of parents sued the State of Pennsylvania for depriving their children with mental retardation

of a free, appropriate, public education or Section 504 of the Rehabilitation Act (1973) prohibiting discrimination against individuals with disabilities in programs receiving federal funding.

In 1975, PL 94-142, the **Education for All Handicapped Children Act** mandated federal guidelines for provision of special education services, definitions for disability categories and types of services available, and also introduced the concept of “least restrictive environment” in the education of children with disabilities. The key provisions of this act outlined the concepts of free, appropriate public education (FAPE), least restrictive environment (LRE), individualized education, non-discriminatory evaluation, due process, and zero reject. In 1986, PL 99-457 extended the provisions of the previous special education laws to include children from birth to Age 5. The reauthorization of PL 94-142 in 1990 became the **Individuals with Disabilities Education Act** (PL 101-476) and changed the term “handicap” to “disability,” added autism and traumatic brain injury to the list of disability categories, and also added the concept of “transition” to the act. (Transition refers to planning for outcomes beyond school completion.) This Act has gone through additional revisions, each one adding additional features designed to continually assure appropriate services and positive outcomes.

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*Brown vs. Board of Education*, a civil rights case about racial segregation in U.S. schools, had a far-reaching impact that has extended beyond race issues to other populations searching for “equal protection” in the form of inclusion. This is a case that on its 50th Anniversary deserves some reflection in looking at not only how far we have come, but also how far we have yet to go. For teachers who are discussing civil rights in their classrooms, the Spring 2004 issue of **Teaching Tolerance** ([www.teachingtolerance.org](http://www.teachingtolerance.org)) contains the full text articles and excellent coverage of this issue including classroom activities and web, text, and video resources.

See full articles in Spring Issue of Teaching Tolerance, Willoughby, B. (2004) *An American Legacy*, p. 40-56. Orfield, G. & Frankenberg, E. (2004) *Where Are We Now?* p. 57-59.

### **Tennessee v. Lane: The Legal Issues and the Implications for People with Disabilities**

*Summary of the Policy Brief by the National Council on Disability*

#### Background:

George Lane and Beverly Jones brought a lawsuit against the State of Tennessee under Title II of the Americans with Disabilities Act (ADA), alleging that various courthouses in the state are inaccessible to people who use wheelchairs. Both plaintiffs are paraplegics who use wheelchairs.

Jones is a court reporter, but because many of the courthouses are inaccessible to her, work opportunities have been limited to her. At the time of her complaint, she had identified 25 counties with courthouses that were inaccessible. She has requested modification in four of these counties, but none have made the modifications. In 1996, George Lane was charged with two misdemeanor offenses and was summoned to appear in court. The Polk County Courthouse had no elevator, and all the proceedings in that courthouse took place on the second floor. During his first appearance, he dragged himself up the stairs to get to the courtroom; he was arraigned and ordered to appear at a later date. When he returned to his hearing, he refused to climb to the courtroom and refused to be carried. He failed to appear, was arrested and jailed. In subsequent proceedings, he remained on the ground floor while his attorney went back and forth from the second floor courtroom to his client.

#### Procedural History:

Both plaintiffs filed a suit against the State of Tennessee alleging that the inaccessibility of the courthouses violated Title II of the ADA. In district court the State argued that, under the 11th Amendment, Congress did not have the authority to abrogate the State’s immunity from damage claims

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in federal court. The court denied the State's motion to dismiss, and the Court of Appeals affirmed the decision and upheld the constitutionality of Title II. Tennessee sought review by the Supreme Court, and the plaintiffs, along with the U.S. Department of Justice, supported the review.

### Importance of Title II:

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." It applies to states when a state court, state agency, or state official commits the discrimination, and the conduct denies state benefits or restricts participation in any public program or activity. It includes participation in social service programs, judicial proceedings, and use of public transportation. Title II can serve as an incentive for states to comply with legislation because of the threat of liability for damages.

### Constitutional Issues Involved:

The heart of the issue involves the power of Congress to regulate the states. When Congress regulates the states, it relies on three clauses in the Constitution: the Commerce Clause, the Spending Clause, or Section 5 of the 14th Amendment. On the other hand, the 10th Amendment and the 11th Amendment limit its power. The

most prominent one in cases involving remedies against the states is the 11th Amendment, which embodies the doctrine of state sovereignty, which protects states from being sued over their objection.

### Section 5 of the 14th Amendment:

Section 5 of the 14th Amendment gives Congress the power to enforce the Equal Protection and Due Process protections in Section 1 of the amendment. Congress can do so by imposing sanctions for constitutional violations and by prohibiting behavior that is otherwise constitutional, as a means to prevent unconstitutional results. Valid legislation under this clause can authorize a private individual to bring suit against the states, including for damages. Congress cited Section 5 in enacting the ADA and expressly stated that the legislation was intended to abrogate the state's sovereign immunity.

### Issue in Lane:

Did Congress properly exercise its power, under Section 5 of the 14th Amendment, to abrogate state's immunity by authorizing individuals to sue states for damages under Title II of the ADA?

### Case Law Reviewing Section 5:

Beginning in 1997, the Supreme Court decided a series of cases that has made it more difficult for Congress to use Section 5 to regulate the states. Such cases, limiting Congress' power to act under Section 5, set the stage for the consideration of Title 1 in Board of

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Trustees v. Garrett. In Garrett, two state employees sued the State of Alabama alleging discrimination and that they were denied reasonable accommodations. They sued the state for damages. The Court concluded that Congress had not validly abrogated the state's immunity when enacting Title I of the ADA. As a result, the employees' claims were dismissed. The Court made this decision based on the outcome of a three-step analysis. *First*, the constitutional right at issue was identified. In Garrett, it was freedom from employment discrimination based on disability status. Under constitutional standards, such actions are constitutional if they satisfy a "rational basis review." Under such standard, all the state has to show is that there is "some plausible legitimate basis for the discrimination." *Second*, there must be a history of state discrimination or constitutional violations in this area. *Finally*, if there is a pattern of such violations, the remedy selected by Congress must be "congruent and proportional" to the record of state misconduct.

After reviewing the legislative history of Title I, the Court concluded that there was very little evidence of employment discrimination of people with disabilities by the states, and any discrimination identified was supported by some rational basis. It held that a refusal to provide a reasonable accommodation did not constitute a constitu-

tional violation. Even if there was some constitution violations by the states in the employment area, the remedy of reasonable accommodations was not appropriate, the Court stated, "[T]he accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."

Lane and Title II:

Title II applies to situations beyond employment and addresses conduct in more situations than Title I. Thus, it is possible that the Court will focus on particular categories of Title II claims, instead of Title II as a whole. Discrimination based on disability receives a low-level "rational basis" review. The higher the level of scrutiny a classification receives, the easier it is to show a pattern of state constitutional violations. Hence, evidence of state violations in Garrett were found to be inadequate in part because the states are given great deference under a "rational basis" review. But, when the states interfere with fundamental rights, such as access to judicial proceedings and the right to vote, these laws or policies are evaluated under a stricter, more demanding standard. Thus, in Lane the Court may find that the laws are subject to a more demanding standard than plain rational re-

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view because the plaintiffs here are alleging that their fundamental right of access to a courtroom was denied. With a higher standard of review, it is easier to show that states have engaged in constitutional violations; and therefore, the damages remedy may be deemed reasonable.

The Court of Appeals has taken different approaches in determining when Congress may abrogate the state's sovereign immunity under Title II. In three other circuits the courts have held that individuals can sue the state for money damages but only under very limited circumstances. If the Supreme Court upholds the Title II damages remedy, it is possible that it will do so only for certain applications. But if the Court refuses to uphold the validity of Title II in relation to state sovereign immunity, it would result in further restrictions on the ability of Congress to protect people with disabilities from discrimination by the states.

Oral arguments for the case took place on January 14, 2004. It will be a few months before the Court presents its opinion.

*For more information, see:*

[www.bazelon.org/issues/disabilityrights/lane/](http://www.bazelon.org/issues/disabilityrights/lane/)

Tennessee v. Lane: The Legal Issues and the Implications for People with Disabilities. Policy Briefing Paper. September 4, 2003. [www.ncd.gov](http://www.ncd.gov)

## **Open Space Technology Sets the Agenda for Disability Policy**

A recent article from the *Journal of Disability Policy Studies* presents an enlightening article that describes how a state disability agency adapted a meeting strategy called "Open Space Technology" to involve people with disabilities in disability related policy making. Recently, people with disabilities have been given the opportunity to participate in their own planning with regard to state and federally funded programs for job placement, job training, and other educational services. However, they rarely are given the opportunity to have a real impact on the disability related policy that governs their funding. Specifically, Lightfoot, Pappas & Chait (2003) report that, "typically, professionals and state agency personnel have taken the lead in planning, while grass-roots inputs from citizens [with disabilities] has occurred only at public hearings, after the parameters of the plan have been established."

Open Space Technology has been used for a decade or more (at least formally) to involve all people who care about an issue in the planning of future activities. Open Space Technology was conceived as a method to facilitate meetings and conferences with a high degree of informality and self-structure. The approach is unique in its format,

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which involves a community bulletin board, a village marketplace, and no agenda. Its synergy and empowering capabilities have made it extremely successful in taking on projects of enormous scale. "It forces participants to become active in determining the problems and issues to be discussed and promotes interaction among participants." (Lightfoot, Pappas, & Chait, 2003.)

The article describes a study of a Developmental Disabilities Council that was required to develop a new state disability policy. The Council was committed to consumer involvement and used a form of Open Space Technology to recruit citizens in the development of the new policy. The public announcement of invitation, which called for interested citizens to share their ideas about what needs to be addressed in the disabilities community, attracted 274 participants. Sixty-two percent of the participants identified themselves as having a personal experience with a disability. Through the process of Open Space Technology, the participants identified 18 discrete themes for discussion. These discussions resulted in 217 possible action steps that the Council could focus on in the next 3 years. Fourteen of the issues and 162 action steps were reflected in the Council's final plan as priority areas, parts of vision or goal

statements, or objectives and strategies.

The authors identify several advantages to using Open Space Technology as a method of increasing front-end citizen participation: (a) it is non-threatening, (b) it has indirect benefits to participants, and (c) it allows for a broad range of potential issues to be addressed. Lightfoot, Pappas, & Chait (2003) report that, "Open Space Technology seems to be a viable tool not only for generating ideas, but also for increasing citizen influence at the earliest stages of policy development. [Furthermore,] Open Space Technology can be a tool for making policy that more accurately reflects what is important to the citizens affected by the policy."

*For the full article, please see:*

Lightfoot, E., Pappas, V.C., & Chait, J. (2003). Starting off right: Using open space technology to enable citizens to set the agenda for state disability planning. *Journal of Disability Policy Studies*. 14, 1, 7-16.

*For more information about Open Space Technology, visit:*

[http://www.openspaceworld.com/users\\_guide.htm](http://www.openspaceworld.com/users_guide.htm)

## Upcoming Disability Related Conferences

Conference	Dates	Location
Assistive Technology, Disability, and the Arts Forum	5/7	Amherst, MA
American Occupational Therapy Association Annual Conference & Expo	5/20-23	Minneapolis, MN
RESNA 27th Annual Conference on Technology & Disability	6/18-22	Orlando, FL
World of Possibilities Disabilities Expo	6/25-27	Baltimore, MD
Association for Persons in Supported Employment Annual Conf.	7/12-14	Indianapolis, IN
AHEAD 2004 Annual Conference: Leading the Dance	7/13-17	Miami Beach, FL
Society for Disabilities Studies Annual Int'l. Mtg.	7/26-28	Lancaster, U.K.
5th Int'l. Conference on Higher Education & Disability	7/27-30	Innsbruck, Austria
2004 Annual SW Conf. on Disability: Creating Common Ground	9/29-10/01	Albuquerque, NM

For more information about these and other upcoming conferences, contact Marguerita Burke at (516) 465-1605 or e-mail [mburke@ncds.org](mailto:mburke@ncds.org).

### ABOUT EMPOWERMENT

We are pleased to present this eighth issue of Empowerment, the newsletter that focuses on education, employment, technology, and policy for people with disabilities. Our goal is to empower professionals within the disability field with current information on relevant topics. We accomplish this primarily by summarizing current research articles that are relevant to the disabilities field. If you know of any organizations that might be interested in receiving this newsletter, or if you would like to contribute to future issues, please contact the Research and Evaluation Center. Thank you for your continued feedback and support.

Stephen Morabito  
Empowerment Editor

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