# ABOLISH THE INTEGRATION PRESUMPTION? NOT YET[*]

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In response to Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006).

As with any social movement, it is impossible to speak simply of "the goals" of the American disability rights movement. The movement embraces an array of different people, with different disabilities, ideologies, and interests. It therefore has a multiplicity of different goals, which are sometimes in tension with each other.[1] But if there is one goal that has achieved near-consensus status among disability rights supporters, the goal of integration is a strong candidate. Disability rights activists have frequently argued against isolating people with disabilities within disability-only institutions; rather, activists wish to ensure that people with disabilities are fully integrated into the nation's economic and civic life. The major disability rights laws—the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA)—reflect this strong support of integration.[2]

When as prominent a scholar and disability rights supporter as Ruth Colker writes an article questioning the IDEA's individualized integration presumption, then, it is a major event.[3] Professor Colker's

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[*] Apologies to John Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973).

[†] Professor of Law and Associate Dean for Research and Faculty Development, Washington University School of Law. Thanks to the *University of Pennsylvania Law Review* for creating such a great forum and inviting me to participate in it. Thanks also to Ruth Colker for writing a provocative and important article, and to Rebecca Hollander-Blumoff and, as always, Margo Schlanger for helpful discussions of these issues. Work on this essay was supported by a summer research grant from Washington University Law.

[1] This point is central to my forthcoming book, SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (forthcoming 2008).

[2] For a discussion of the centrality of integration to the American disability rights movement, with a particular focus on the ADA, see Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991).

[3] Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006); *see id.* at 811 & n.86 (introducing the IDEA's integration presumption rule). To be sure, Professor Colker says that she does not believe the IDEA's integra-

article is admirably driven by the Enlightenment sensibility that facts, and not abstract ideology, should drive policy. She is quite correct, in my view, that the disability rights movement does itself a disservice if it ignores the lessons of experience and clings to ideologically-driven policies that have not succeeded.[4] Professor Colker has begun an important conversation—one that should be engaged critically and vigorously.

Nonetheless, Professor Colker has not convinced me. Her article fails to establish that the IDEA's individualized integration presumption imposes significant costs, and she seems to downplay significant benefits of that presumption. As currently framed, the individualized integration presumption does not prevent a school district from providing a separate placement to a child with a disability when that is truly the best option for her. It merely requires the school district to demonstrate that its chosen course is, in fact, the best option. That burden, it seems to me, is fully justified. Teachers and school officials too often simply find it easier to deal with people who are different by putting them aside in "special" settings rather than implementing the changes necessary to make the regular settings more accessible. This is a recurring problem in disability rights law, and a number of Professor Colker's examples of the supposed failure of integration seem instead to reflect the education system's refusal to provide true integration. In the remainder of this essay, I will elaborate on these points.

## I. THE COSTS OF THE CURRENT SYSTEM: HAS PROFESSOR COLKER MADE HER CASE?

Although she argues against the individualized integration presumption, Professor Colker concedes that many children with disabili-

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tion presumption should be abandoned entirely, but she would reframe the presumption so that it merely requires that school districts provide an array of different settings for students with disabilities generally. *See id.* at 801 ("If a school district is offering a range of educational options to children with disabilities in learning, then an integration presumption is not warranted." (footnote omitted)). Because Professor Colker's proposal would eliminate the presumption that individual students should be placed in the most integrated setting appropriate to their disabilities—which is the essence of the integration presumption as I will defend it—I believe it proper to speak of her proposal as one for abolition of the individualized integration presumption.

[4] I have made a similar point before. *See* Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 558-62 (2004) (arguing that disability rights advocates must confront, rather than deny, the data that suggest that the ADA has not moved many people with disabilities into the workforce).

ties will benefit from being placed in truly integrated settings. *Those* children, she agrees, *should* receive integrated placements. Her concern is for other children, who she believes would benefit from being placed in more segregated environments. In her view, the individualized integration presumption improperly directs the second group of children to the mainstream placements that will disserve them.[5]

In arguing that the individualized integration presumption keeps children from placements they need, Professor Colker has a difficult task. The integration presumption is, after all, just a presumption. The statutory provision creating it requires integration only "[t]o the maximum extent *appropriate*," and it specifically contemplates that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment" will occur when "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved *satisfactorily*."[6] That provision, by its very terms, requires an individualized analysis to determine what placement is "appropriate" for each child with a disability.

Professor Colker's indictment of the integration presumption focuses not on the statutory standard itself but on the cases that have interpreted it. She states that some courts have read the presumption in a way that requires integration even when that is not in the interest of the child with a disability. But her evidence of that phenomenon is thin at best. Professor Colker relies principally on two cases: *Roncker ex rel. Roncker v. Walter*, decided by the Sixth Circuit in 1983; and *Daniel R.R. v. State Board of Education*, decided by the Fifth Circuit in 1989.[7] I doubt that two appellate cases, decided so long ago, can tell us much about the practice on the ground in school districts across the country today. But neither *Roncker* nor *Daniel R.R.* makes Professor Colker's point in any event.

Professor Colker states that "[t]he integration presumption appears to have been irrebuttable in *Roncker*."[8] That seems to me a massive overreading of the case. The Sixth Circuit expressly refrained from deciding whether Neill Roncker was entitled to a more integrated placement. It decided *only* that the district court had erred by

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[5] *See* Colker, *supra* note 3, at 796 (arguing that the individualized integration presumption prevents appropriate education "for some children").

[6] 20 U.S.C. § 1412(a)(5)(A) (2000) (emphasis added).

[7] *See* Colker, *supra* note 3, at 811-12, 814-21 (discussing Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) and Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989)).

[8] *Id.* at 816.

reviewing the school district's actions under an abuse of discretion standard; the court then remanded "in order to allow the district court to re-examine the mainstreaming issue in light of the proper standard of review."[9] In its one-page discussion of the legal standards to be applied on remand, the Sixth Circuit expressly contemplated "that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, [or] because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting."[10] This is hardly the stuff of an "irrebuttable" presumption.

Professor Colker notes the Sixth Circuit's statement that Neill Roncker's apparent lack of progress in the more integrated setting was "not dispositive."[11] Considered in context, however, the court's point seems to me entirely sensible:

> Although Neill's progress, or lack thereof, at Pleasant Ridge is a relevant factor in determining the maximum appropriate extent to which he can be mainstreamed, it is not dispositive since the district court must determine whether Neill could have been provided with additional services, such as those provided at the [segregated] county schools, which would have improved his performance at Pleasant Ridge.[12]

In determining whether a more integrated placement is appropriate for a particular child, it certainly makes sense to consider that child's past experience in integrated settings. But it also makes sense to ask whether a child's poor past experience reflected not anything inherent in those settings, but simply the school district's failure to adequately support the child once she was placed there. And that's all the Sixth Circuit said. I don't see how *Roncker* reflects an "irrebuttable" presumption of integration.

*Daniel R.R.* lends even less support to Professor Colker's argument. After all, in that case the Fifth Circuit held that the more segregated placement was the proper one for Daniel.[13] In other words, after considering all the facts, the court concluded that the integration presumption was rebutted. Nonetheless, Professor Colker asserts

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[9] *Roncker*, 700 F.2d at 1062.

[10] *Id.* at 1063.

[11] Colker, *supra* note 3, at 815 (internal quotation marks omitted) (quoting *Roncker*, 700 F.2d at 1063).

[12] *Roncker*, 700 F.2d at 1063.

[13] Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989).

that the court adopted a standard that would make it too hard to overcome the presumption in *other* cases, by "requir[ing] that the school district demonstrate that Daniel could attain *no* educational benefit in the more integrated environment."[14] But *Daniel R.R.* imposed no such requirement, and Professor Colker does not point, in any event, to any subsequent cases that applied that precedent to demand that a child be placed in an inappropriate integrated setting. The *Daniel R.R.* court merely required the school district to prove, on the basis of "an individualized, fact-specific inquiry,"[15] "that education in the regular classroom cannot be achieved *satisfactorily*."[16] That inquiry, the court held, must not just look to "whether the child will receive an educational benefit from regular education," but must also "examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child."[17] That standard hardly suggests any particular "skepticism about the value of special education"—much less a "profound" skepticism.[18]

Professor Colker is persuasive that not every child with a disability is best served in the most integrated setting possible. But the integration presumption recognizes that point and requires nothing more than the most integrated setting *appropriate* to the individual child. Although mistakes will inevitably occur—in both directions—in interpreting and applying such a fact-specific legal standard, Professor Colker has not demonstrated that the standard has in practice systematically pushed children with disabilities into inappropriate settings.

## II. THE BENEFITS OF THE CURRENT SYSTEM: WHAT PROFESSOR COLKER UNDERSTATES

Professor Colker has not established that the individualized integration presumption has the costs she attributes to it. Equally important, she significantly understates the benefits of the presumption. Professor Colker argues that the integration presumption's initial purpose was a systematic one—to end the use of separate, disability-only institutions as the only option for children with disabilities.[19] That point is fine as far as it goes, but the individualized integration

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[14] Colker, *supra* note 3, at 820 (citing *Daniel R.R.*, 874 F.2d at 1050).
[15] *Daniel R.R.*, 874 F.2d at 1048.
[16] *Id.* at 1050 (emphasis added).
[17] *Id.* at 1049.
[18] Colker, *supra* note 3, at 820.
[19] *Id.* at 795.

presumption continues to have value even in school districts that have an array of different placements for children with disabilities.

The essential problem is that accommodating difference is rarely the easy path for an institution. Professor Colker acknowledges that many children with disabilities will benefit from an integrated school setting. But successful integration may require changes to the regular school environment and additional interventions to support the students with disabilities. As Professor Minow argued some time ago, those changes and interventions can end up improving the education of all children in the classroom—those with disabilities and those without.[20] But absent an individualized integration presumption, that kind of beneficial integration is far less likely to occur. Unless broken out of their inertia, too many school districts will readily conclude that integration is too hard to achieve, and that separate placements are an easy and effective solution. Looking at the regular education setting only as it currently exists, school administrators will conclude that separate placements are better—even when integration (bolstered by changes to the regular setting) would promote more successful outcomes.

The history of disability in America is full of assertions—made by nondisabled parents and medical and educational professionals, among others—that people with disabilities are best served in separate, "special" settings.[21] I believe those assertions were made in good faith. But time and again, they have proven wrong. Too often our failure to appreciate the possibilities of integration, and our inability to break free from the inertia that has kept us from undertaking the necessary changes that could make our mainstream institutions accessible, has led us to believe that segregation is the best way.

The closing of Pennsylvania's Pennhurst State School and Hospital provides one of the more dramatic examples of this phenomenon. As Professor Colker points out, "many parents and guardians" of Pennhurst residents joined the state in opposing deinstitutionaliza-

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[20] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 84-86 (1990) (highlighting, for example, a classroom setting in which course material is conveyed simultaneously by spoken word and sign language, and noting the positive impact this has on both deaf and nondeaf students).

[21] For a great discussion of this issue, see MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 84-115 (2003). At this point, I should note in the interest of full disclosure that I am a nondisabled parent of a child with a disability.

tion.[22] They did so because they thought their children with mental retardation—most of whom were by then adults—could not make it in integrated, community settings. In one important case from Pennhurst, *Youngberg v. Romeo ex rel. Romeo*, the resident's own lawyer conceded that, "in light of the severe character of his retardation," the resident could never be deinstitutionalized.[23] But that concession turned out to be dramatically wrong. Soon after his lawyer made that concession, "Nicholas Romeo moved to a community residence in Philadelphia," where he thrived.[24] Indeed, the closing of Pennhurst is widely considered to be a success, in which people with disabilities who were thought to need a segregated environment in fact did better when they moved to more integrated settings in the community.[25] It is odd that Professor Colker treats the case as a *negative* example.

Many of Professor Colker's reasons for why segregated settings might be better suggest inertia, rather than anything inherently wrong with integrated ones. Professor Colker states, as one reason why separate settings can be better, that children with learning disabilities "are often not accepted by their classroom teacher" in regular classrooms.[26] She also quotes a study that states, "[T]he instructional adaptations that general educators make in response to students' persistent failure to learn are typically oriented to the group, not to the individual, and are relatively minor in substance . . . ."[27] To accept these points as arguments against an integration requirement is simply to acquiesce to resistance to that requirement. If schools and teachers are refusing to accommodate children with disabilities in the regular learning environment, the solution is to make them change. That sort of resistance is a principal target of disability rights laws—it is not an argument for refusing to apply those laws.

To be clear, my point is *not* that every child with every disability should be fully included in the mainstream setting. My point is only that many children with disabilities should be in more integrated settings than school officials think. The individualized integration pre-

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[22] Colker, *supra* note 3, at 792 n.6 (citing Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1211-12 (1982)).

[23] 457 U.S. 307, 317 (1982).

[24] Cook, *supra* note 2, at 443.

[25] For a detailed examination of the aftermath of Pennhurst's closure, see JAMES W. CONROY & VALERIE J. BRADLEY, THE PENNHURST LONGITUDINAL STUDY: COMBINED REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS (1985).

[26] Colker, *supra* note 3, at 834.

[27] *Id.* (internal quotation marks omitted) (quoting Douglas Fuchs & Lynn S. Fuchs, *What's "Special" About Special Education?*, 76 PHI DELTA KAPPAN 522, 528 (1995)).

sumption is an important response to that problem.

## CONCLUSION

Professor Colker has been studying, defending, and enforcing disability rights laws since I was in high school. When a scholar with her prominence and track record begins an important debate like this, it is one that must be engaged. And the sensibility that underlies her argument is exceptionally important: if the IDEA's individualized integration presumption is harming children with disabilities, we need to know that and change our policies accordingly.

Professor Colker is persuasive that not all children with disabilities are best served in the most integrated setting possible. But she has not shown that the IDEA has pushed children into inappropriately integrated settings in significant numbers. Nor has she dispelled the concern that abolishing the individualized integration presumption would drive significant numbers of children with disabilities back to inappropriately *segregated* placements. Unless she and other critics can fill in these gaps in their case against the individualized integration presumption, there is no reason to abolish it.

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