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HOW IDEA FAILS FAMILIES WITHOUT MEANS: CAUSES AND CORRECTIONS FROM THE FRONTLINES OF SPECIAL EDUCATION LAWYERING

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INTRODUCTION

As a quintessential civil rights issue, the struggle for equal educational opportunity for students with disabilities whose families have few resources is waged daily from the parapets of the Individuals with Disabilities Education Act (IDEA),² a complex entitlement statute. Dissimilar to the progress made under the IDEA for their wealthier peers, low-income³ children are not reaping the educational benefits that effective advocacy has achieved for students with disabilities who can afford determined advocates, skilled counsel, and knowledgeable experts to navigate the highly technical mandates of the statute and corresponding

2. See generally 20 U.S.C. §§ 1400-82 (2006) (noting the Act was amended in 2004, after long debate and substantial changes). While consciously dubbed the Individuals with Disabilities Education *Improvement* Act or IDEIA, it continues, with congressional approbation, to be popularly known as IDEA. *Id.* § 1400(a).

3. See COLIN ONG-DEAN, DISTINGUISHING DISABILITY: PARENTS, PRIVILEGE, AND SPECIAL EDUCATION 5 (2009); David C. Vladeck, In Re Arons: *The Plight of the "Unrich" in Obtaining Legal Services*, in LEGAL ETHICS STORIES 260 (Deborah L. Rhode & David Luban eds., 2006) (explaining that neither "low income" nor "poor" capture the socio-economic status of these families perhaps as well as "privileged" or "unrich").

regulations.⁴ Among others, these benefits include identification and certification under the IDEA and Section 504 of the Rehabilitation Act (Section 504);⁵ development of an enforceable Individualized Education Program (IEP),⁶ with a continuum of services calibrated to the precise needs of each eligible child; rich compensatory services for the failure of school systems to comply with the requirements of a Free Appropriate Public Education (FAPE);⁷ the provision of a focused private education, in a residential setting if appropriate; protections from school discipline, including continuing educational services following more than ten days of out-of-school suspension, and the formulation of a staged transition plan to ensure meaningful opportunities upon a student's departure from the school system.⁸

The data is mounting to support the thesis that students from families without resources are systematically deprived of educational outcomes that would allow them to pursue gainful employment or further educational opportunities.⁹ The links between poverty, race, and disability are "well-documented."¹⁰ Low-income students with disabilities are more frequently pushed out of public education through punitive discipline, sheer neglect, or other more subtle strategies.¹¹ Low-income students of color with

4. See generally COLIN ONG-DEAN, *supra* note 3; Vladeck, *supra* note 3, at 258-61.

5. See generally § 1400 (2006); 29 U.S.C. § 794.

6. See 20 U.S.C. § 1401(14) (explaining that an Individualized Education Program, or IEP, is "a written statement for each child with a disability that is developed, reviewed, and revised" subject to the conditions section 1414(d)).

7. See *id.* § 1401(9); 34 C.F.R. § 300.13 (2011); Bd. of Educ. v. Rowley, 458 U.S. 176, 3041 (1982) (noting that FAPE is the cornerstone of the IEP. FAPE is defined as special education and related services that: (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d)); see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) (explaining how the failure to provide FAPE gives rise to a claim for compensatory education or services and that although this remedy was not found in the statute itself, it was judicially constructed under the theory of tuition reimbursement).

8. See 20 U.S.C. § 1401(34)(c) (2006); 34 C.F.R. § 300.43 (2006).

9. See generally Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 205, 229 (Jay P. Heubert ed., 1998) (discussing suspicion of special education system by parents of children who could benefit from such opportunities, but do not).

10. See *id.* (describing specific studies that outline the differential rates of special education).

11. See Daniel J. Losen & Kevin G. Welner, *Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 447-48 (2001); Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 272-76 (2008).

unidentified educational disabilities are disproportionately referred for prosecution in juvenile court.¹² If scrupulously observed by school systems, and rigorously enforced, the IDEA has the power to stem this phenomenon.¹³ The paucity of lawyers and advocates who toil to represent disempowered families and children in special education matters keenly know that the unmet legal needs in this arena are prodigious, and the remedies for this often invisible segment of children are elusive. In this unequal netherworld, can an entitlement statute such as the IDEA accomplish more for the very children who need the IDEA's educational services the most?

The obstacles that families without resources face in the IDEA are compounded by the increasingly technical nature of the IDEA and the inability of these families to retain professionals to assist in navigating the intricacies of disability definitions, evaluation processes, the development of IEPs, the complex of procedural safeguards, among other provisions in the statute.¹⁴ Lack of access to attorneys vastly worsens this plight.¹⁵ This Article does not diminish the power of some parents, of whatever means, compellingly to articulate the needs of their children and to advocate for appropriate services and supports. This is a democratizing feature of the IDEA that will and should persist. But in the current landscape of retrenchment—at the school system level, in Congress, and in the courts—

12. See Mark McWilliams & Mark P. Fancher, *Undiagnosed Students With Disabilities Trapped In The School-To-Prison Pipeline*, 89 MICH. B.J. 28, 30 (2010) (recognizing that when students leave education programs they often wind up in the slippery pipeline towards prison); see also DANIEL P. MEARS & LAUDAN Y. ARON, URBAN INST. JUSTICE POLICY CTR., ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATE OF KNOWLEDGE ii (2003), available at http://www.urban.org/UploadedPDF/410885_youth_with_disabilities.pdf.

13. See generally NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 57 (2000) [hereinafter NCD REP. 2000], available at <http://www.ncd.gov/publications/2000/Jan252000> (addressing a letter to the President outlining NCD's independent analyses); CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON-PIPELINE: STRUCTURING LEGAL REFORM 55-56 (2010) (describing the policies and practices that create the "pipeline" with many entry points, including under-resourced schools).

14. Compare David Neal & David Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63 (1985) (discussing how legalization shaped special education policy and the effects of legalization on the institutions into which it is introduced), with Hehir & Gamm, *supra* note 9, and Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 ED. LAW REP. 35 (2005) (arguing that it is beyond the scope of the article to debate whether the claim that the IDEA has "over-legalized" special education is valid or not).

15. See generally *Honig v. Doe*, 484 U.S. 305 (1988) (stating that lawyers on the frontline of representing at-risk children in IDEA disputes value the rights-based rules and regulations embodied in the IDEA, and that a deregulated, less legalistic regime could herald a return to the era when schools possessed unchecked discretion, which operated to the profound detriment of students with disabilities).

the more “smart” corrections that advocates and lawyers can formulate, the greater the likelihood that at least some will be adopted when the IDEA is up for its next reauthorization, or enlightened states, through legislation, regulations, or adoption of best practices, will seek to level the unequal playing field that this Article traverses.

This Article will (1) focus on the most salient architectural features of the IDEA that are theoretically designed to protect and assert the rights of all affected children and parents; (2) analyze how these features disproportionately fail children from families without financial resources; and (3) make modest suggestions for improvements to the legal regime under the IDEA. The full agenda for legislative or court adoption that is proposed in this Article may seem infeasible at this time. But just as the pendulum dramatically swung in 1975 when the IDEA was first enacted, there is hope that, given the country’s increasing focus on improving educational outcomes for all children, humanitarian impulses will inevitably rise again and recognize that all students with disabilities—regardless of their financial status—are entitled to the full benefits of this remarkable remedial law.¹⁶

I. THE UNEQUAL DEMOGRAPHICS OF THE IDEA

There are almost seven million children receiving special education services under the IDEA.¹⁷ Most of these children come from families with limited resources that do not have access to legal services.¹⁸ Of all the disabled children eligible for special education services under the IDEA, one-quarter (approximately 2 million) live below the poverty line and two-thirds (approximately 4.5 million) live in households with incomes of

16. Our ambition is limited. A full-scale re-evaluation of the entire IDEA and, for example, its relationships to important national initiatives such as No Child Left Behind (NCLB), is beyond the scope of this piece.

17. See U.S. Dep’t of Educ., Office of Special Educ. Programs, Data Analysis Sys. (DANS), OMB # 1820-0043: *Children with Disabilities Receiving Special Education Under Part B of the Individuals with Disabilities Education Act, Table 1-1: Children and students served under IDEA, Part B, by age, group, and state: Fall 2008, Table 8-1: Number of infants and toddlers, ages birth through 2 and 3 and older, and percentage of population, receiving early intervention services under IDEA, Part C, by age and state: Fall 2008* (data updated as of Aug. 3, 2009) [hereinafter U.S. Dep’t of Educ., *Tables*], available at https://www.ideadata.org/arc_toc10.asp (describing the most recent count of students available from 2008, which shows that 6,941,838 children are served through Parts B and C of the IDEA). The breakdown is as follows: 342,985 children from birth through age two receive early intervention services, 709,004 children between the ages of three and five receive preschool services, and 5,889,849 children between the ages of six and twenty-one receive school-age special education services. *Id.*

18. See generally Brief for Council of Parent Attorneys and Advocates, Inc. et al. as Amici Curiae Supporting Petitioners, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983), 2006 WL 37403678 (discussing a family, despite being unable to afford an attorney, that nevertheless was able to raise IEP challenges on behalf of their child).

\$50,000 or less.¹⁹ Almost 20% of children receiving special education services are living in households with a yearly income of \$15,000 or less, compared to 12.5% in general education households; and 36% of children receiving special education services live in households with an income of \$25,000 or less, compared with 24% of children in the general population.²⁰ School systems, moreover, spend disproportionate sums on private school tuition, which predominantly benefits families with the means to hire a lawyer and litigate when necessary.²¹

Access to attorneys in the special education realm is relatively rare.²² This reality is consistent with recent studies documenting the unmet legal needs of Americans.²³ A recent study by the American Bar Association found that 60 to 70% of all Americans cannot afford lawyers to meet their non-routine legal needs.²⁴ For the poorest parents, legal services are simply not affordable, and limited resources restrict free legal aid to a fortunate few.²⁵

Under the IDEA, due process hearings and mediation are underutilized and are used mostly by wealthy families with financial means for a private school funding remedy. This phenomenon largely explains the increase in

19. See generally MARY WAGNER ET AL., U.S. DEP'T OF EDUC., *THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS* 29 (2002), available at <http://www.eric.ed.gov/PDFS/ED475794.pdf>.

20. See NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, *WHO ARE THE CHILDREN RECEIVING SPECIAL EDUCATION SERVICES* 6 (2003), available at <http://nichcy.org/wp-content/uploads/docs/rb2.pdf>.

21. See Emily Blumberg, *Forest Grove School District v. T.A.*, 45 HARV. C.R.-C.L. L. REV. 163, 164 (2010) (discussing that although the decision in *Forest Grove School District v. T.A.* strengthens IDEA, it does not improve special education provided to low income students); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 172-73 (2004-05) (emphasizing the uneven distribution of special education services); Juan Gonzalez, *Education Department's Special-Ed Help Mostly Goes to the City's Rich*, N.Y. DAILY NEWS, Dec. 15, 2010, http://articles.nydailynews.com/2010-12-15/local/27084320_1_special-education-pupils-private-school-tuition (stating that \$140 million is spent in New York City on private school tuition).

22. See generally COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, <http://www.copaa.org> (last visited June 17, 2011) (stating that the national special education bar is small, largely composed of solo practitioners, small firms, legal services and nonprofit firms, and a handful of pro bono lawyers from large law firms). The Council of Parent Attorneys and Advocates (COPAA) serves as a clearinghouse of assistance to this specialized bar. *Id.*

23. See M. Brendan Flynn, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 IND. L.J. 881, 892 (2005) (emphasizing that parents should be allowed to proceed pro se to enforce both procedural violations and substantive claims).

24. Vladeck, *supra* note 3, at 259.

25. See LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 4 (2005), available at <http://www.lsc.gov/justicegap.pdf>.

the number of special education court decisions.²⁶ As can be expected families with attorneys prevail more frequently in due process hearings than those who proceed pro se.²⁷ The canard that IDEA litigation in federal courts is over-utilized by families has been refuted by a recent empirical analysis of federal court filings, which found that, relative to the number of due process filings,²⁸ there is little IDEA litigation in the federal courts, and the courts' role in implementing the statute has been notably constrained.²⁹

The IDEA's remedial scheme and procedural provisions are also designed to operate in a system where there is overall compliance with the statutory scheme. Many states, however, are not in compliance with the IDEA.³⁰ The Department of Education recently determined that only twenty-eight states were found to have met the IDEA compliance standards.³¹

When a district is out of compliance with the statute, many of the provisions designed to protect parents' and children's rights are not effective because the procedural protections and due process provisions presume compliance.³² For example, the IDEA presumes that children are

26. See generally Christina Samuels, *Special Education Court Decisions on the Rise*, EDUC. WEEK (Jan. 28, 2011, 9:24 AM), http://blogs.edweek.org/edweek/speced/2011/01/special_education_court_decisi.html (interviewing Perry A. Zirkel about his forthcoming article in the *West Education Law Reporter* and stating that from 2000 to 2010 there were approximately 8,000 reported IDEA decisions in both state and federal courts).

27. See MELANIE ARCHER, *ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS, 1997-2002* 7-9 (2002), available at <http://www.dueprocessillinois.org/Access.pdf> (discussing how attorney representation in due process hearings increases parents' chances of prevailing equal to that of school districts); Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. Disability Pol'y Stud. 3 (2010) (discussing that between 2000 and 2010, 65% of due process hearings were won by school districts).

28. Zirkel & Scala, *supra* note 27, at 4-6 (2010) (providing that during 2008-09 there were 2,033 adjudicated due process hearings, with four states—New York, California, New Jersey, and Pennsylvania—and the District of Columbia accounting for 85% of these cases and noting that the number of adjudicated due process hearings decreased in the last decade).

29. See Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION, 121, 122 (Joshua M. Dunn & Marvin R. West eds., 2009) [hereinafter Bagenstos, *Judiciary's Role*] (arguing that courts have made "little direct difference in the treatment of students with disabilities").

30. See generally U.S. DEP'T OF EDUC., *DETERMINATION LETTERS ON STATE IMPLEMENTATION OF IDEA 1 (2009)* [hereinafter DEP'T OF EDUC. IMPLEMENTATION LETTERS], available at <http://www2.ed.gov/policy/speced/guid/idea/monitor/factsheet-2009.pdf> (outlining states' performances in fulfilling the IDEA's mandates).

31. See *id.* at 2 (noting which states require further assistance to comply with the IDEA).

32. See Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y. 263, 263-64 (2008) (describing the failure of enforcement on federal and state levels).

thoroughly and accurately evaluated in every area of suspected disability in a non-discriminatory fashion, and that the professionals conducting the evaluations will not have their hands tied by restrictions on what can be recommended.³³ Instead, in some districts, children do not receive thorough and adequate evaluations, and district employees are bound by blanket policies and even moratoria.³⁴ Thus, the entire process breaks down.³⁵ Poor families suffer most from this phenomenon.³⁶

II. EQUITABLE AND STATUTORY IDEA REMEDIES HAVE LIMITED EFFICACY FOR FAMILIES WITHOUT FINANCIAL RESOURCES

A. Overview of the IDEA

1. The Basic Requirements as Envisioned in 1975: A Free and Appropriate Public Education

A complete discussion of the IDEA is beyond the scope of this Article. The following overview, however, sets the context for a discussion of violations and remedies that are at the heart of this undertaking's critique.

The IDEA, first enacted as the Education for All Handicapped Children Act (EAHCA),³⁷ was originally adopted to rectify deficiencies in the educational opportunities afforded to students with disabilities.³⁸ Congress recognized that without federal pressure school districts frequently did not serve disabled children properly, but instead excluded them from school, warehoused them in segregated special education classes, or left them in regular classes with no services to ensure that they could learn.³⁹ The

33. 20 U.S.C. § 1400(c)-(d) (2006).

34. See McWilliams & Fancher, *supra* note 12, at 30 (discussing the failure of school systems to comply with their obligation to identify all children with potential educational disabilities, called "Child Find" under IDEA). The restrictions referred to in the text are well-known to special education lawyers through member-restricted listservs.

35. See generally Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802 (2008) (providing a keen analysis of why the intended system under IDEA fails in its promise).

36. See Caruso, *supra* note 21, at 178-79 (explaining that disempowered families, who do not possess the "bargaining power" of families with access to resources, fare worse under the IDEA).

37. See generally The Education for all Handicapped Children Act, Pub. L. 94-142, 89 Stat. 77 (1975). Fifteen years after the EACHA became law, the Act was amended and renamed the Individuals with Disabilities Education Act Amendments of 1991 and for purposes of this Article, all references are to IDEA. See Individuals with Disabilities Education Act Amendments of 1991, Pub. L. 102-119, 105 Stat. 587 (1991).

38. See Jeffrey J. Zettel, PUBLIC LAW 94-142 THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT: AN OVERVIEW OF THE FEDERAL LAW 4-5 (1977), available at <http://www.eric.ed.gov/PDFS/ED140554.pdf>.

39. See *Honig v. Doe*, 484 U.S. 305, 606 (1988) (ruling that districts cannot remove a child for more than ten days without making a determination whether the

statute offered funding to states, in exchange for the provision of special education services in compliance with the statute's provisions.⁴⁰

Throughout the years, this law was reauthorized, with eight name changes. The current version of the statute was adopted in 2004.⁴¹ Each time the IDEA was reauthorized, the Department of Education promulgated regulations offering explanatory guidance to the states. Additionally, the statute requires states and districts to adopt laws, regulations, policies, and procedures consistent with the IDEA.⁴² Although the Department of Education, in theory, has the ability to ensure IDEA enforcement through withholding of funding, the Department generally takes a hands-off approach, despite the fact that many states and districts across the country are significantly out of compliance with the law.⁴³

The primary purpose of the IDEA is to ensure that every child with a disability, who is therefore eligible for special education services under the statute, receives a FAPE, regardless of whether the student is in a public or private school, out of school, homeless, or in a hospital, jail, prison, or foster care placement. There is no setting, location, or situation, except for parent refusal, that justifies an eligible child being denied a FAPE. The IDEA stipulates that students may be entitled to special education services until age twenty-one.⁴⁴

With an obligation to provide FAPE to all eligible children, every school district is mandated to engage in a process known as "Child Find," which requires the district to identify, locate, and evaluate all children with disabilities, regardless of the severity of their disabilities, who are in need of special education and related services.⁴⁵ Because the Child Find obligation is an affirmative one, IDEA does not require parents to request that the district evaluate their children.⁴⁶ This duty is triggered when the district "has reason to *suspect* a disability, and reason to suspect that special education services may be needed to address that disability."⁴⁷

behavior constitutes a manifestation of the child's disability).

40. *See id.* at 597; *see also* 20 U.S.C. § 1416(b)(2)(C)(ii)(II) (2006) (mandating that each state must submit a plan to the United States Department of Education establishing compliance with the IDEA's provisions upon which funding is approved).

41. 20 U.S.C. §§ 1400-82.

42. *Id.* § 1415(a).

43. *See, e.g.,* DEP'T OF EDUC. IMPLEMENTATION LETTERS, *supra* note 30, at 2 (acknowledging the individual states that are not meeting the IDEA's mandates and that require assistance and intervention under the IDEA program).

44. § 1412(a)(1)(A).

45. § 1412(a)(3).

46. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) ("School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction.")

47. *See Dep't of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (emphasis added); *see also Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. & Mrs. M. ex*

States and districts must also develop a “continuum” of special education placements, which include delivery of instruction in regular classes, special classes, home, and hospital settings.⁴⁸ All students are entitled to FAPE in the Least Restrictive Environment (LRE). Under the IDEA, this means that children with disabilities should, to the maximum extent practicable, be educated with children who are not disabled.⁴⁹ Once a child is suspected of having a disability, the next step is a referral to the school district for a comprehensive evaluation to assess the child in every area of suspected disability.⁵⁰

After the evaluation, a team of professionals and the parent must meet to determine whether the child is eligible for special education services.⁵¹ To be eligible, children must fit into one of eleven disabling conditions⁵² and require special education to receive a FAPE and to ensure their rights are protected.⁵³

If a child is deemed eligible for special education services, an IEP must be developed.⁵⁴ The IEP is a “blueprint” for the delivery of services.⁵⁵ It must be created by the a multidisciplinary team with several required

rel. M.M., No. 3:07-CV-01484 (WWE), 2009 WL 2514064, at *12 (D. Conn. Aug. 7, 2009) (holding that the student’s hospital stay was a clear sign of a disability that was overlooked by the school); *El Paso Indep. Sch. Dist. v. Richard R. ex rel. C.*, 567 F. Supp. 2d 918, 950-51 (W.D. Tex. 2008) (holding that the student’s repeated failure to progress with the section 504 accommodations provided triggered the “child find” obligation to refer the student to special education services; moreover, the student failing the standardized test along with having difficulties in reading, math, and science were clear signals that an evaluation was necessary); *Williamson Cnty. Bd. of Educ. v. C.K. ex rel. C.*, No. 3:07-0826, 2009 WL 499386, at *18 (M.D. Tenn. Feb. 27, 2009) (quoting 34 C.F.R. § 300.101(c)(1) (2007)) (affirming the holding that FAPE was not provided merely because the child managed to earn average grades and passed to the next grade and that the school “has clearly misapplied or ignored [the regulation]”); *Scott v. District of Columbia*, No. Civ. A. 03-1672 DAR, 2006 WL 1102839, at *9 (D.D.C. Mar. 31, 2006) (declaring that the “child find” obligation is triggered where teachers knew of the student’s ADHD diagnosis as well as the student’s inability to “stay on task academically and complete his assignments”).

48. § 1415(k)(1)(D)(i).

49. *See* § 1412(a)(5)(A) (stating that under the LRE standard, disabled children should only be educated separately from non-disabled children in circumstances where the child’s disability is of such severity that education with his or her non-disabled peers cannot be achieved satisfactorily).

50. § 1414(a)(1)(A)-(B), (D). This referral can be made by a school staff member, parent, doctor, or judge. 34 C.F.R. § 300.527 (2011).

51. 20 U.S.C. § 1414(b)(4)(A).

52. *See id.* § 1401(3)(A) (listing the IDEA qualifying disabling conditions as: (1) intellectual disabilities, (2) hearing impairments, (3) speech or language impairments, (4) visual impairments, (5) serious emotional disturbance, (6) orthopedic impairments, (7) autism, (8) traumatic brain injury, (9) other health impairments, (10) specific learning disabilities, and (11) children who need special education and related services).

53. § 1400(d)(1)(A)-(B).

54. § 1414(d)(2)(A).

55. § 1414(d)(1)(A).

members, including the parent, the child's special education teacher, a general education teacher, an individual who can interpret the instructional implications of the assessments, and the child (if appropriate).⁵⁶ The IEP must contain, among other things, a statement of the child's present levels of academic achievement and functional performance, measurable annual goals, a description of the metrics to be used to measure whether the child is achieving his or her annual goals, and an explanation of the extent to which the child will not be participating in regular classes with non-disabled children.⁵⁷ The IEP must also set forth all of the special education services, related services and supplementary aids and supports the child is to receive.⁵⁸

Following the development of the IEP, the team must decide on the child's placement.⁵⁹ At a minimum, the IEP team should meet annually to assess whether the child is making progress, to make any adjustments to the IEP and placement to ensure progress, and to determine whether the child continues to be eligible for services. Every three years, at a minimum, the district must conduct a reevaluation. Additionally, for students over the age of sixteen, the IEP process must include the development of measurable postsecondary goals to ensure that a careful plan of transition is followed.⁶⁰

2. *Procedural Safeguards*

To further the goal of providing FAPE for all children, the IDEA creates procedural safeguards "to insure the full participation of the parents and proper resolution of substantive disagreements" concerning the delivery of special education services.⁶¹ These safeguards are not simply "procedural" rights; they are the keys to guaranteeing a substantively appropriate education.⁶² School districts that receive IDEA funds are required to "establish and maintain procedures . . . [and] to ensure that children with disabilities and their parents are guaranteed procedural safeguards" with respect to the FAPE provisions of the IDEA.⁶³ The congressional intent

56. See § 1414(d)(1)(B) (mandating that if a child may be suspected of having a learning disability, the team must also include at least one team member, other than the child's regular teacher, to observe the child's academic performance in the regular classroom).

57. § 1414(d)(1)(A)(i)(I)-(V).

58. § 1414(d)(1)(A), (d)(3)(A)-(C).

59. § 1414(e).

60. § 1414(d)(1)(A)(i)(VIII).

61. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). See generally § 1415(b)(6)(A) (setting forth the guaranteed procedural safeguards determined by Congress to protect every child's right to a free appropriate public education).

62. See *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 150-51 (2d Cir. 1992).

63. § 1415(a).

was not to mandate a particular level of service, but instead, to install a set of procedures that should result in an offer of FAPE.⁶⁴

Procedural protections are the core of the IDEA. Those 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.⁶⁵ The due process protections must be viewed within the context of the entire procedural framework.

State complaints, mediation, and litigation are the three mechanisms contained in the IDEA that can be used by individuals to challenge the decisions and actions of districts and other responsible agencies.⁶⁶ Any person, including a parent, may file a complaint with the applicable state agency alleging a violation of the law.⁶⁷ The state agency must investigate and render a decision within a required timeframe.⁶⁸ The IDEA also strongly encourages alternative dispute resolution through mediation.⁶⁹ This process is confidential and the mediation agreement is enforceable in federal court.⁷⁰

Except for class action lawsuits, where administrative remedies have been exhausted or proven futile, litigation in the special education arena typically begins with an administrative due process hearing.⁷¹ Most states adopt a one-tiered hearing system, with appeals filed directly with a federal

64. See § 1400(d)(1)(A) (“The purposes of this chapter are to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”).

65. See § 1415(a)-(b) (outlining procedural safeguards required by the State or educational agency to be put in place).

66. § 1415(b)(6), (e)-(f).

67. § 1415(b)(6).

68. § 1415(c)(2)(B)(i)(I).

69. § 1415(e).

70. § 1415(e)(2)(F)(i), (iii).

71. See, e.g., *Honig v. Doe*, 484 U.S. 305, 327 (1988) (noting that bypassing the administrative process is warranted when exhaustion is futile or inadequate); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002) (holding that plaintiffs must exhaust administrative process under IDEA before seeking purely money damages under § 1983 unless exhaustion would be futile); *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1304 (9th Cir. 1992) (holding that, if plaintiffs wish to waive the IDEA’s exhaustion requirement, they must demonstrate that “the underlying purpose of exhaustion would not be furthered by enforcing the requirement”); *Lester H. ex rel. Octavia P. v. Gilhool*, 916 F. 2d 865, 869 (3d Cir. 1990) (explaining that a student who has failed to receive adequate education is entitled to administrative remedies beginning with a due process hearing); *Ass’n for Retarded Citizens of Ala., Inc. v. Teague*, 830 F.2d 158, 162 (11th Cir. 1987) (affirming the district court’s ruling that, if after a few due process hearings, it becomes clear that the process is overloaded, a federal court action seeking relief after the EHA would then be appropriate).

district or state trial court.⁷² Due process hearings and appeals garner the most attention from policy makers and politicians in terms of the alleged “cost” of due process. Yet, out of almost seven million children receiving special education services through IDEA Parts B and C,⁷³ only 2,033 families participated in hearings that resulted in a final decision.⁷⁴

A parent may initiate an impartial hearing to resolve complaints concerning “any matter relating to the identification, evaluation, or educational placement of the child”⁷⁵ A decision rendered in an impartial hearing is final, absent a timely appeal.⁷⁶ Independent Hearing Officers have the power to order a school system to “take any number of actions in order to correct violations of IDEA . . . including modifying an IEP, implementing an existing IEP it has failed to carry out, providing a particular placement, [or] providing a particular related service.”⁷⁷ Other available remedies include retroactive reimbursement for private placement or services, advance payment for placement or services, and compensatory education. Parents who prevail at an impartial hearing are entitled to enforce hearing officer orders in federal court pursuant to 42 U.S.C. § 1983.⁷⁸ Parents have enforceable rights in the procedural protections of the

72. See Zirkel & Scala, *supra* note 27, at 6-7 (finding that the most recent survey claimed that forty-one states have one-tier systems and ten states have two-tier systems); see also § 1415(g)(1)-(2) (in a two-tier system, parties must first exhaust an appeal to an appeals officer or board before filing in court).

73. See U.S. Dep’t of Educ., *Tables*, *supra* note 17.

74. See Zirkel & Scala, *supra* note 27, at 4-5 (discussing the total number of adjudications in the United States for fiscal year 2008-2009 as well as the breakdown by the highest five jurisdictions by state).

75. § 1415(b)(6), (f).

76. § 1415(i).

77. EILEEN L. ORDOVER & KATHLEEN B. BOUNDY, *EDUCATIONAL RIGHTS OF CHILDREN WITH DISABILITIES; A PRIMER FOR ADVOCATES* 59 (Sharon Schmuck ed., 1991); see § 1415(e)(1), (2)(B) (discussing factors of the mediation process, including the requirement that the hearing officer with whom the State educational agencies or Local educational agencies contract be qualified as “a parent training and information center, . . . community parent resource center in the State, [or] an appropriate alternative dispute resolution entity”).

78. See § 1415(l) (requiring that plaintiffs must exhaust the IDEA’s administrative remedies before bringing claims under other federal statutes, such as §§ 504 and 1983 if the plaintiffs are seeking remedies that are also available under the IDEA); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 115-16 (1st Cir. 2003) (enforcing plaintiffs’ order when the school system neither appealed from, nor complied with, the order); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (granting parents standing to bring a § 1983 action based on IDEA violations); *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, No. CV-03-2489 (DGT), 2004 WL 633222, at *20 (E.D.N.Y. Mar. 30, 2004) (allowing parents to enforce an IDEA claim under § 1983); *R.B. ex rel. L.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 416 (S.D.N.Y. 2000) (asserting jurisdiction over claims when the plaintiff prevailed at the hearing and the hearing officer granted relief that the defendants failed to enforce); *Blackman v. District of Columbia*, 59 F. Supp. 2d 37, 42 (D.D.C. 1999) (stating that plaintiffs had enforceable right to implementation of hearing officers’ determinations and settlement agreements including immediate injunctive relief); see also *Jeremy H. ex rel. W.E. Hunter v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir. 1996) (holding that parents can enforce orders of special

IDEA and need not show particularized injury or prejudice as a result of such violation.⁷⁹

B. The IDEA's Private School Tuition Remedy Constitutes an Inherent Structural Bias that Disproportionately Benefits Wealthy Families

When a public school district fails to provide FAPE, a parent may obtain tuition payment for his or her child to attend a private school under the IDEA as a remedy through an impartial hearing and/or judicial proceeding. Unfortunately, as discussed in greater detail below, this right is limited for families without financial resources. Among other barriers, private schools themselves may require up-front payments, contracts, or deposits, or have admissions policies that have the effect of exclusion.

The right to private school tuition funding in the absence of FAPE was solidified as a remedy by the U.S. Supreme Court in 1985 in the landmark *Burlington* case,⁸⁰ where the Court ruled parents may seek, as a proper remedy, tuition reimbursement for private school when they believe their disabled child is not getting an appropriate education at a public institution.⁸¹ Later, in 1993, in *Florence County School District Four v. Carter*,⁸² the Supreme Court considered whether parents could obtain a similar remedy of tuition reimbursement if they chose to place their child in a private school that was not approved by the state's education department. In *Carter*, the Court held that a parent could seek tuition in a non-approved school as a remedy, finding that the right of a child to FAPE trumped the administrative and procedural aspects of the IDEA.⁸³ Until 2004, the right to tuition payment as a remedy was exclusively one created under the broad equitable powers of courts and hearing officers.⁸⁴

education hearing officers in federal court); *Robinson v. Pinderhughes*, 810 F.2d 1270, 1273-75 (4th Cir. 1987) (same); *A.T. & I.T. ex rel. Z.T. v. N.Y. Educ. Dep't*, No. 98-CV-4166 (JG), 1998 WL 765371, at *7 (E.D.N.Y. Aug. 4, 1998) (same).

79. See *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 157-59 (2d Cir. 1992) (allowing challenges to procedures for assigning hearing officers); *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 80 (D.D.C. 2003) (“[W]hen a plaintiff’s rights to the due process hearing are circumscribed in significant ways, a plaintiff need not show prejudice in order to demonstrate injury.”); *Blackman v. District of Columbia*, 28 ED. LAW. REP. 1053 (D.D.C. June 3, 1998) (stating that the IDEA creates an enforceable right to timely implementation of the determinations of hearing officers and of settlements).

80. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1985).

81. *Id.* at 369-70.

82. 1510 U.S. 7 (1993).

83. *Id.*

84. See, e.g., *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001); *Bd. of Educ. v. Kelly E.*, 207 F.3d 931, 937 (7th Cir. 2000); *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 783 (5th Cir. 1998); *Gadsby v. Grasmick*, 109 F.3d 940, 954 (4th Cir. 1997); *Oliver v. Dallas Indep. Sch. Dist.*, No. 301CV2627N, 2003 WL 22272304, at *4 (N.D. Tex. 2003); *Douglas W. ex rel. Douglas & Susan W. v. Greenfield Pub. Schs.*, 164 F. Supp. 2d 157, 171 (D. Mass.

In 2004, the IDEA was amended and the right to tuition reimbursement was expressly codified in the statute in 20 U.S.C. § 1412.⁸⁵ The IDEA now provides that

[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment⁸⁶

The Court had the opportunity to square § 1412 with the holdings of *Burlington* and *Carter* in the third decision in the reimbursement trilogy, *Forest Grove School District v. T.A.*⁸⁷ In *Forest Grove*, the Court reaffirmed the availability of relief under § 1415(i), ruling that there is an independent basis for funding a private school placement beyond the authority granted by 20 U.S.C. § 1412. The *Forest Grove* decision held that *Burlington* and *Carter* authorized reimbursement where FAPE was not provided, “without regard to the child’s prior receipt of services.”⁸⁸ While these decisions were issued in the context of a private school tuition remedy, funding, they apply to all areas of the IDEA and reinforce the general principle that a strict statutory adherence will not be required where a child’s right to FAPE is impaired.

Despite the underlying purpose of the IDEA, the language of the statute and the decisions are framed in terms of “reimbursement,” thus drawing

2001); see also Emily S. Rosenblum, Note, *Interpreting the 1997 Amendment to the IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?*, 77 *FORDHAM L. REV.* 2733, 2748-55 (2009) (discussing the legislative history and agency interpretation of section 1412(a)(10)(C)(ii)). But see *Reese ex rel. Reese v. Bd. of Educ.*, 225 F. Supp. 2d 1149, 1159 (E.D. Mo. 2002) (citing Eighth Circuit precedent regarding tuition reimbursement review, rather than applying a liberal interpretation of the “equitable powers” standard, the court narrowly interpreted the *Burlington* court’s statement that parents “are entitled to reimbursement *only* if a federal court concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act”).

85. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

86. *Id.*

87. 129 S. Ct. 2484 (2009).

88. *Forest Grove*, 129 S. Ct. at 2494 n.10. Section 1412(a)(10)(C)(ii) of the 1997 IDEA amendments generated a split of authority where some courts interpreted the amendment to have created a categorical bar on a parent’s eligibility for tuition reimbursement while other courts upheld the equitable powers granted to courts in the *Burlington* and *Carter* decisions. Compare *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 158 (1st Cir. 2004) (finding the unilateral enrollment of a disabled child in a private school before the public school had the opportunity to provide special education services rendered the parents ineligible for tuition reimbursement), with *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 374 (2d Cir. 2006) (noting that the underlying purpose of the IDEA is to provide disabled children with FAPE, and holding that the 1997 amendments did not limit a court’s equitable power to award tuition reimbursement even though the parents unilaterally enrolled their child in a private school).

into question whether families who cannot afford to pay up front and seek reimbursement may use this self-help remedy. In certain jurisdictions, many parents who can afford to pay private tuition and seek reimbursement are able to take advantage of this remedy in administrative hearings. For example, in New York City and Washington D.C., tuition reimbursement cases account for millions of dollars in special education spending.⁸⁹ Yet, the question of whether a family with limited financial resources may obtain private school tuition as a remedy is still unresolved in terms of the language of the statute and judicial interpretation. School districts still have the ability to challenge low- and middle-income families from successfully obtaining this remedy solely based on income.

A New York federal district court recently issued a decision of first impression, holding squarely that a parent without financial resources may obtain payment for tuition owed to a school, even if that parent does not have financial resources to pay the tuition and seek reimbursement.⁹⁰ In *D.A. v. New York City Department of Education*,⁹¹ the court concluded, first, that the test for tuition funding approved by the U.S. Supreme Court in *Burlington* should be applied to claims of retroactive tuition funding based upon *dicta* in the Court's decision suggesting that a prospective injunction for tuition would be an appropriate remedy.⁹² The court then conducted a review of the other types of cases where courts either awarded prospective relief under the IDEA or deemed it appropriate in *dicta*.⁹³

89. In New York City, in 2007-2008, schools paid "\$89 million in private-school tuition for disabled students whose parents had placed them there, up from \$53 million two years earlier." Tamar Lewin, *Court Affirms Reimbursement for Special Education*, N.Y. TIMES, June 22, 2009, at A16, <http://www.nytimes.com/2009/06/23education/23special.html>. Meanwhile, in Washington D.C., tuition reimbursements "represent fifteen percent of the district's budget." Jay P. Greene & Marcus A. Winters, *Debunking a Special Education Myth*, EDUC. NEXT (Mar. 15, 2007), <http://educationnext.org/debunking-a-special-education-myth/>. In a recent case, a private school in Washington D.C., which had received over \$16 million in tuition reimbursements from the school district and serves a large population of disabled children, came under investigation "for lax security, high rates of truancy and inadequate academic programs." Bill Turque, *District Investigates Special-Ed School*, WASH. POST, Mar. 7, 2011, http://www.washingtonpost.com/local/education/district-investigates-special-ed-school/2011/03/17/ABNsizk_story.html.

90. *Mr. & Mrs. A. ex rel. D.A. v. N.Y.C. Dep't of Educ.*, 769 F. Supp. 2d 403, 406 (S.D.N.Y. 2011).

91. *Id.*

92. *Id.* at 421-23 (quoting *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985) ("[I]t seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.")).

93. *See id.* at 425-27 (reviewing *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1285 (11th Cir. 2008) (prospective funding for compensatory education); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 142 (W.D.N.Y. 1999) (prospective funding for stay-put placement orders); *Connors v. Mills*, 34 F. Supp. 2d 795, 804 (N.D.N.Y. 1998) (*dicta* suggesting prospective tuition funding would be appropriate)).

Finally, the court set forth an analysis of the federal decisions construing 20 U.S.C. § 1415(i)(2)(C)(iii).⁹⁴

Finding no case directly on point, the court in *D.A.* nevertheless concluded that in light of the purpose of the IDEA and the broad discretion courts have to fashion a remedy under 20 U.S.C. § 1415(i)(2)(C)(iii), direct retroactive tuition remedy is available to families without the resources to front the costs of tuition.⁹⁵ In so ruling, the court concluded that a “contrary ruling would be entirely inconsistent with the IDEA’s statutory purpose, including its goal of ensuring a FAPE to the least privileged of the disabled children in our nation” and would be “irreconcilable with decades of case law . . . holding that the exercise of rights under IDEA cannot be made to depend on the financial means of a disabled child’s parents.”⁹⁶

While this decision was encouraging, no circuit court has ruled on the specific question of tuition relief for poor families; and, if decisions in other contexts can be read as barometers, the circuits would likely be split on this question. Two decisions highlight the different approaches of courts on prospective funding in general. In *Draper v. Atlanta Independent School System*,⁹⁷ for example, the Eleventh Circuit rejected the school district’s argument that the parent’s request for prospective payment for compensatory education was tantamount to damages, and found that the school district’s argument would provide wealthy families greater benefits under IDEA than poor families.⁹⁸ The court held that the IDEA “does not relegate families who lack the resources to place their children unilaterally in private schools to shouldering the burden of proving that the public school cannot adequately educate their child before those parents can obtain a placement in a private school.”⁹⁹

In stark contrast, the First Circuit has held that the private school remedy is, effectively, only available for wealthy children.¹⁰⁰ In *Diaz-Fonseca v. Puerto Rico*,¹⁰¹ the First Circuit affirmed the district court’s rejection of a remedy that would have required the school district to pay future educational expenses for the child, finding, under *Burlington*, that the plaintiff was only entitled to “reimbursement” of expenses already incurred.¹⁰²

94. See *D.A.*, 769 F. Supp. at 427.

95. *Id.* at 427-28.

96. *Id.* at 428.

97. 518 F.3d 1275.

98. *Id.* at 1286.

99. *Id.*

100. See, e.g., *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006); *Ms. M. ex rel. K.M. v. Portland Sch. Comm.*, 360 F.3d 267 (1st Cir. 2004).

101. 451 F.3d 13.

102. *Id.* at 35, 39.

Given the purpose of the IDEA, it is unlikely that either the Supreme Court or Congress meant to create a remedy for the lack of FAPE that could not be accessed by families without the financial resources to pay tuition of thousands of dollars and wait for reimbursement. The IDEA's core principle is a guarantee of FAPE to all eligible children.¹⁰³ Throughout the IDEA, Congress has expressed a clear intent to support and protect the interests of families without financial resources.¹⁰⁴ As the Court reiterated in *Winkelman ex rel. Winkleman v. Parma City School District*,¹⁰⁵ parents' rights under the IDEA must be interpreted so as to ensure that some children are not excluded from its protections and benefits: "[w]e find nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parent,' it intended that only some parents would be able to enforce that mandate."¹⁰⁶

Even in a case where hearing officers or judges are open to ordering prospective tuition, parents who cannot pay tuition in advance face huge logistical challenges. A parent without financial resources must first find a private school willing to consider accepting the child without a substantial deposit or tuition in advance. Even if fortunate enough to find a school willing to provisionally accept the child, in order for a parent to become eligible for tuition payment in some jurisdictions, that parent will likely have to incur a substantial debt to the school. Due to the fact that the administrative process is long, and schools are not likely to want to take such a huge financial risk, this is not a realistic option for most parents.

103. 20 U.S.C. § 1400(d)(1)(A) (2006); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993) ("[The] IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free."); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985) ("Congress stated the purpose of the Act in these words: 'to assure that all handicapped children have available to them . . . [and] free appropriate public education'").

104. *See, e.g.*, § 1431(a)(5) ("Congress finds that there is an urgent and substantial need . . . to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, low-income, inner city, and rural children, and infants and toddlers in foster care."); *id.* § 1437(b)(7) (any State "shall provide satisfactory assurance that policies and procedures have been adopted to ensure meaningful involvement of underserved groups, including minority, low-income, homeless, and rural families and children with disabilities who are wards of the State . . ."); *id.* § 1453(b)(8) (states must "describe the steps the State education agency will take to ensure that poor and minority children are not taught at higher rates by teachers who are not highly qualified . . ."); *id.* § 1471(a)(2)(iii) (grants may be awarded to parent organizations "the parent and professional members of which are broadly representative of the population to be served, including low-income parents . . ."); *id.* § 1472(a)(1) ("The Secretary may award grants to, and enter into contracts and cooperative agreements with, local parent organizations to support community parent resource centers that will help ensure that underserved parents of children with disabilities . . . have the training and information the parents need . . ."); *id.* § 1481(d)(3)(C) (providing that in awarding grants and contracts the Secretary may give priority to "projects that address the needs of . . . children from low income families").

105. 550 U.S. 516 (2007).

106. *Id.* at 533.

A family that locates a private school that might consider a child if funding were awarded would be in a similarly disadvantaged position. Such a school would be difficult to find, since that school would have to hold open a seat until funding is resolved. Although hearings are supposed to conclude in seventy-five days, personal experience suggests that, as the result of continuances, they rarely do. A parent who found a school willing to accept a disabled child if funding were awarded would never be able to obtain a timely remedy of funding by using the administrative process.

In addition, courts and hearing officers often want to see that a child made progress in the private placement before finding that placement is appropriate. Moreover, it is particularly difficult to establish that a public placement does not offer FAPE without access to timely independent evaluations or outside experts to support the parent's claim.

C. Independent Educational Evaluations

Under the IDEA, school districts are responsible for conducting evaluations of children suspected of having disabilities. The statute mandates that a "full and individual" evaluation be conducted and children assessed in all areas related to the suspected disability.¹⁰⁷ The evaluation must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information."¹⁰⁸ Such tools and strategies must provide relevant information that directly assists persons in determining that the educational needs of the child are provided.¹⁰⁹ Tests must be "selected and administered so as not to be discriminatory on a racial or cultural basis" and the district is to use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."¹¹⁰

Under the IDEA, parents have the right to an independent educational evaluation (IEE) at public expense when they disagree with an evaluation conducted by the school district.¹¹¹ An IEE is an evaluation or assessment conducted by professionals who do not work for the district and who are supposed to be "independent." The assessment is an important element of due process, as it enables parents to obtain evaluative information as well as suggestions on instructional strategies from professionals who are not beholden to districts or under pressure to minimize education budgets.

If a parent requests an IEE, the district must, without unnecessary

107. § 1414(a)(1)(A), (b)(3)(B); *see also* N.Y. COMP. CODES R. & REGS. tit 8, § 200.4(b)(6)(vii).

108. 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304 (2011).

109. 20 U.S.C. § 1414(a)(3)(C).

110. § 1414(b)(2)(C), (b)(3)(A)(i).

111. § 1415(b)(1); 34 C.F.R. § 300.502.

delay,¹¹² ensure that the IEE is provided or file an administrative due process hearing to show that either its own evaluation is appropriate or the evaluation obtained by the parent as an IEE does not meet the legitimate criteria for evaluations set forth by the school district.¹¹³ The statute itself prescribes only one other way for an IEE to be conducted: a hearing officer can order evaluations as part of a hearing—at the district’s expense. More than two decades ago, the Department of Education’s Office of Special Education Programs (OSEP) issued an opinion letter suggesting that a parent who does not have money to pay for an IEE may first file a hearing before the evaluation is done if funding is needed.¹¹⁴ However, it is clear that the statute was written with the wealthy parent in mind.

Despite the fact that the IEE is supposed to be an important due process right, it is very difficult for a parent without financial resources to exercise this right. A parent with greater financial resources can pay for the evaluation and present it at hearing to rebut the district’s claims that its own testing was adequate. Often times, that parent can afford to have the professional available to testify at the hearing. In fact, that parent can first retain an independent specialist to first review the district’s assessments and then determine whether any further testing is needed.

A parent who cannot afford to pay for an expert and who does not already have an independent evaluation to establish the invalidity of the district’s evaluation has a difficult hurdle to climb in terms of proof, even with legal representation. A parent needs an IEE to prove his or her child’s need for an IEE. Further, even though OSEP has opined that a parent may file a hearing to obtain funding for an IEE, the hearing officer may allow the district to conduct another assessment as a remedy before ordering an IEE, although this right does not appear in the law.¹¹⁵

In some cases in which a parent is seeking prospective payment for an IEE, the hearing officer has allowed the district to defend its own evaluation, even if the district delayed or never responded to the parent’s request. In contrast, in cases where a district has delayed and a parent has

112. One district court, applying the standard set out in 34 C.F.R. § 300.502(b), determined that the school district unnecessarily delayed the IEE when it waited three weeks before asking the student to reiterate the request and then waited another eight weeks to file a due process complaint to prove the appropriateness of its “in house” evaluation, without any explanation. *See Pajaro Valley Unified Sch. Dist. v. J.S.*, No. C 06-0380 PVT, 2006 WL 3734289, at *3 (N.D. Cal. Dec. 15, 2006).

113. 34 C.F.R. § 300.502.

114. Letter from Robert A. Davila, Assistant Secretary, Office of Special Educ. & Rehabilitative Servs., to Honorable Robert F. Smith, Member, U.S. House of Representatives (June 28, 1990) (“It should be noted that a parent may request a hearing . . . or file a complaint with the State educational agency before the IEE is performed if the parent believes that denial of advance funding for the IEE would deny the parent a publicly-funded IEE.”).

115. *Id.*

already obtained an IEE, that parent is typically reimbursed.

Additionally, parents without means have to overcome the fact that the IDEA does not expressly allow a parent to obtain an IEE if the district fails to evaluate—or timely evaluate—or fails to conduct a particular assessment as part of the overall evaluation. Even though at least one court has ruled that a parent is entitled to an IEE if a district fails to evaluate,¹¹⁶ the statute does not expressly allow for that. Once a parent files a hearing asking for an IEE based on an incomplete evaluation, the hearing officer may rule that the parent is not entitled to the assessment because the district has failed to conduct one first. Thus, there is no clear statutory remedy when and if a district fails to evaluate a child or fails to conduct all of the assessments necessary. The inability for parents without means to obtain timely IEEs also affects their ability to request other remedies, such as private school funding, a change in IEP program or placement, and compensatory education.

D. Compensatory Education

Although the remedy of compensatory education is not specified in the IDEA, it has evolved from the general equitable jurisdiction of courts and hearing officers. Compensatory education is, generally, the right to ask for make-up special education or general education instruction and related services when a student has been denied a FAPE. Yet, the remedy varies from jurisdiction to jurisdiction.¹¹⁷ In terms of crafting a compensatory education award, some courts hold that for each hour a student is denied FAPE, the student is entitled to one hour of compensatory education.¹¹⁸

116. *See* Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 823 (C.D. Cal. 2008) (recognizing that hearing officer can use equitable powers to order an IEE even where district fails to evaluate a child).

117. *See* Reid *ex rel.* Reid v. District of Columbia, 401 F.3d 516, 527 (D.C. Cir. 2005) (“When a school district deprives a disabled child of [FAPE] in violation of the [IDEA], a court fashioning ‘appropriate’ relief, may order compensatory education, i.e., replacement of educational services child should have received in the first place.”); Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ., 79 F.3d 654, 660 (7th Cir. 1996) (noting that relief in the form of reimbursement for out-of-pocket educational expenses, or “compensatory education” as it is formally called, is “indeed exceptional and nowhere expressly authorized by the statute”); Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1496-97 (9th Cir. 1994) (stating that while compensatory education services can be awarded as appropriate equitable relief, courts have discretion on how to craft the relief, and “[t]here is no obligation to provide a day-for-day compensation for time missed”); Sandhya Gopal, *Compensatory Education and the IDEA*, 35 SCH. L. BULL. 14 (2004) (discussing the evolution of compensatory education as a proper remedy by tracking court decisions such as G. v. Fort Bragg Dependent Schs., 343 F.3d 295 (4th Cir. 2003)).

118. *See, e.g.*, M.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 391-92, 396-97 (3d Cir. 1996) (“[A] disabled child is entitled to compensatory education for a period equal to the period of deprivation, [but] excluding . . . the time reasonably required for the school district to rectify the problem.”); Westendorp v. Indep. Sch. Dist. No. 273, 35 F. Supp. 2d 1134, 1138 (D. Minn. 1998) (“[W]here [plaintiff] was denied his IDEA rights

Other courts have held that there is no requirement to provide an hour-for-hour calculation, and require a flexible, individualized analysis of compensation based upon the child's individual needs.¹¹⁹ Some courts have also awarded compensatory education to students who are over twenty-one and past the age of eligibility for FAPE.¹²⁰

Children from families without financial resources are the most likely to require compensatory education, because their parents cannot afford private school tuition, tutoring, and other services if a district is not providing FAPE. Yet, it is often difficult for these parents to present sufficient evidence of the need for compensatory education, owing to some of the same difficulties discussed above in accessing independent experts and private providers who can testify at a hearing. Some courts have ruled that parents can never receive any type of prospective payments for compensatory education. This ruling effectively eliminates compensatory education as an effective remedy for many children.¹²¹

Another problem faced by parents without resources is that a hearing officer who does not have expert reports upon which to rely may, more often than not, simply remand the consideration of a compensatory remedy back to the very school district that denied the child a FAPE. However, some courts have ruled that remanding the creation of a compensatory remedy back to a school district violates parents' rights to an independent fact-finder and impartial hearing.¹²²

Most parents do not know that compensatory education exists as a remedy. Although a district is legally mandated to provide parents with a

for six academic years, the court will presume that he is entitled to six academic years of compensatory relief.”)

119. *See, e.g., Reid*, 401 F.3d at 516 (holding that a flexible approach, instead of hour-for-hour method for calculating compensatory education, is more appropriate for remedying past deprivations); *G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295 (4th Cir. 2003) (“Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.”); *Parents of Student W.*, 31 F.3d at 1497 (“There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.”).

120. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 249 (3d Cir. 1999) (“An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for earlier deprivation of a [FAPE].”); *Mrs. C. ex rel. J.C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) (acknowledging that in order for court to award compensatory education to a student over age twenty-one, there must have been a “gross” violation of the IDEA).

121. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 35, 39 (1st Cir. 2006).

122. *See, e.g., Bd. of Educ. of Fayette v. L.M. ex rel. T.D.* 478 F.3d 307, 317-18 (6th Cir. 2007) (providing that IEP teams cannot be in charge of remedy on remand because it violates principles of impartial hearings); *Reid*, 401 F.3d at 516 (providing IEP teams cannot determine remedy as it violates finality principles of IDEA’s due process procedures).

copy of the IDEA's due process rights and safeguards,¹²³ compensatory education is not a remedy that is listed in the statute and is not required to be included in the safeguards. Thus, parents without resources who do not have access to legal counsel will never know that they have this remedy unless they discover it by chance.

E. The IDEA Does Not Contain Emergency Procedures to Handle Any Issue Other Than Disciplinary Issues for Suspended Children

Once a parent files a hearing under the IDEA, a district has thirty days to try to settle the hearing through a "resolution meeting" before it can commence. After thirty days, the hearing officer has another forty-five days during which to issue a decision.¹²⁴ In some states, there is a second level of administrative review¹²⁵ and a decision may not be issued for months or even years, despite the statutory timeframes.¹²⁶ Given the number of adjournments and scheduling conflicts, hearings are rarely, if ever, decided within the mandatory periods.

Although courts regularly rule that the failure to receive special or regular education constitutes irreparable harm, and thus education delayed is education denied,¹²⁷ the IDEA hearing process does not contain any emergency mechanism for due process, except in those situations where children are subject to suspensions for their behavior.¹²⁸ This is a significant oversight in the due process system.¹²⁹

123. 20 U.S.C. § 1415(d)(1)(A), (d)(2) (2006).

124. 34 C.F.R. § 300.532(b)(2)(ii) (2011).

125. See also Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2011), available at <http://www.directionservice.org/cadre/pdf/Due%20Process%20Hearing%20Systems.pdf>. States with a two-tiered system include Colorado, Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, Oklahoma, and South Carolina. *Id.* at 5 tbl.1.

126. KEVIN L. LANIGAN ET AL., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 213, 219 (Chester E. Finn, Jr. et al. eds., 2001).

127. See, e.g., *Cosgrove ex rel. Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 392-94 (N.D.N.Y. 2001); *Borough of Palmyra, Bd. of Educ. v. F.C. ex rel. R.C.*, 2 F. Supp. 2d 637, 645 (D.N.J. 1998) (holding that the loss of an appropriate education "would constitute irreparable harm"); *A.T. & I.T. ex rel. Z.T. v. N.Y. State Educ. Dep't.*, No. 98-CV-4166 (JG), 1998 WL 765371, at *10 (E.D.N.Y. Aug. 4, 1998); *J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 72 (D. Conn. 1997); *Blazejewski ex rel. Blazejewski v. Bd. of Educ.*, 560 F. Supp. 701, 703 (W.D.N.Y. 1983); *Cox v. Brown*, 498 F. Supp. 823, 828-829 (D.D.C. 1980).

128. 20 U.S.C. § 1415(k)(1)(B).

129. In fact, in some states it appears that administrative hearing officers believe they have jurisdiction to issue interim orders. See, e.g., *E. Penn. Sch. Dist.*, 9743-08-09-LS; 10106-08-09-LS; 00283-09-10-LS, 110 LRP 26544 (Penn. SEA Jan. 7, 2010); *Burlington Pub. Schs.*, SEA-01-4513, 35 IDELR 80 (Mass. SEA June 14, 2001); *East Troy Cmty. Sch. Dist.*, SEA-95-001-A, 24 IDELR 794 (Wis. SEA July 22, 1996); *Chambers Cnty. Bd. of Educ.*, SEA-[no case number], 508 IDELR 34 (Ala. SEA February 27, 1987). In contrast, hearing officers in other jurisdictions assert no authority to issue an interim order other than one for a stay put order. Application of a

Since the IDEA presumes district compliance with its procedures and does not contemplate that children will be out of school, not timely assessed, or not receiving agreed-upon services, perhaps Congress did not see a need to adopt emergency hearing procedures for families that cannot afford private school tuition. Yet, since these situations are all too realistic, the failure of the IDEA to ensure that parents of children who have not committed a disciplinary infraction may seek emergency relief without being forced into an expensive—and generally out of reach—court action, is a significant gap in the procedures.

F. The IDEA Should Contain a Uniform Statute of Limitations Period

In 2004, the IDEA was amended to require a party who files a due process complaint to do so within two years of when the party *knew or should have known* of the alleged violation, or within such timeframe as a state allows.¹³⁰ At this time, two tolling provisions have been adopted in the “Exceptions to the Timeline” provision, which reads, in relevant part:

The timeline shall not apply to a parent if the parent was prevented from requesting the hearing due to—(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency withholding of information from the parent that was required under this part to be provided to the parent under this part.¹³¹

Most of the IDEA’s rights are considered to be a “floor”; states may adopt greater rights for parents but may not reduce parent rights below those afforded by the IDEA.¹³² Yet, for this critically important aspect of due process, the IDEA allows states to shorten the limitations period.¹³³ As a result, some states have elected to significantly reduce the statute of limitations down to one year or less.¹³⁴ It is not equitable for parents’ ability to lodge complaints under a federal statute to have different rights depending on the whims of the state legislatures, particularly when states

Student with a Disability, Appeal No. 10-083, at *1 (N.Y. SEA 2010), *available at* <http://www.sro.nysed.gov/decisionindex/2010/10-083.pdf>.

130. See § 1415(b)(6)(B), (f)(3)(C) (emphasis added). Comments to the IDEA regulations note specifically that “hearing officers will have to make determinations, on a case-by case basis, of factors affecting whether the parent ‘knew or should have known’ about the action that is the basis of the complaint.” Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46,706 (Aug. 14, 2006).

131. See § 1415(f)(3)(D).

132. § 1407(a).

133. § 1415(f)(3)(c); see also Lynn M. Daggett et al., *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717 (2005) (discussing the ways in which courts have grappled with circumstances where more than one statute of limitation may apply).

134. See, e.g., N.C. GEN. STAT. § 115C-109.6(g) (2011); WIS. STAT. ANN. § 115.80 (West 2011).

have significant financial interest in limiting parents' abilities to redress violations. Shortened limitations periods protect districts and states that fail to offer FAPE, and provide a way for districts to receive and maintain IDEA funding with little risk of parent challenge. Thus, districts can count children as receiving special education services for purposes of receiving money and there is little, if any, check on whether those services are actually being provided.

The fact that the IDEA does not require parents to be notified that they have a remedy of compensatory education renders the application of the two year—or in some cases even shorter—limitations period for compensatory education cases particularly egregious.

Further, the IDEA does not contain a specific tolling provision that would enable children to assert their rights at the age of majority, whereas most limitations periods adopted at the state level do allow for tolling for this reason. Lack of tolling for children who reach the age of majority effectively strips away the rights of children who were subject to systemic and long-term denials of FAPE and had parents who were not able or willing to assert their rights.

G. Notice and Safeguards Provisions Do Not Adequately Protect the Rights of Parents and Students Without Access to Lawyers and Advocates

The IDEA requires that districts and public agencies distribute very specific notices to parents as part of the special education process. Prior Written Notice must be provided whenever the district “refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.”¹³⁵ Prior Written Notice must be “written in an easily understandable manner,” defined as “understandable to the general public.”¹³⁶ In the case of evaluations, the “Prior Written Notice” must

135. 20 U.S.C. § 1415(b)(3)(B). Prior Written Notice must contain, at a minimum:

- (a) a description of the action proposed or refused by the agency; (b) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (c) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (d) sources for parents to contact to obtain assistance in understanding the provisions of 20 U.S.C. § 1415; (e) a description of other options considered by the IEP Team and the reason why those options were rejected; and (f) a description of the factors that are relevant to the agency's proposal or refusal.

§ 1415(c)(1).

136. 34 C.F.R. § 300.503(c) (2011). Prior Written Notice is “[o]ne of the most important rights that parents have under the IDEA.” Tara J. Parillo, Comment, *The Individuals with Disabilities Act (IDEA): Parental Involvement and the Surrogate*

include “a description of the proposed evaluation or reevaluation and the uses to be made of the information.”¹³⁷

Districts must also distribute a document detailing the IDEA’s procedural safeguards to parents that contains a full explanation of the procedural safeguards, available under the statute and regulation relating to the due process rights.¹³⁸ Similar to Prior Written Notice, the safeguards must be “written in an easily understandable manner,” meaning “understandable to the general public.”¹³⁹

Although these protections theoretically appear significant, in practice they do not serve to protect and inform the rights of families and young people without financial resources.¹⁴⁰ Further, enforcement is limited. Research has found that districts rarely comply with the requirement to ensure that the safeguards issued are in easy-to-read language accessible to parents who have not attended college.¹⁴¹

1. The IDEA’s Information Access Provisions Should be Strengthened

The IDEA requires that school districts ensure that the information in the notices and safeguards is accessible to parents with limited literacy and those who may have other communication deficits.¹⁴² The 2004 amendments even authorize the Secretary of Education to prescribe and widely disseminate a model notice of safeguards.¹⁴³ However, there are several major gaps with respect to these statutory provisions that make these notice and safeguard provisions virtually meaningless for families that are not highly educated or cannot afford to hire a lawyer for advice.¹⁴⁴

Appointment Process, 74 OR. L. REV. 1339, 1342 (1995).

137. 20 U.S.C. § 1415(c)(1)(A).

138. § 1415(d); 34 C.F.R. § 300.504(a).

139. 34 C.F.R. §§ 300.504, 300.503(c).

140. Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 11-12 (2004) [hereinafter Rosenbaum, *Aligning or Maligning?*] (“Despite all attempts at promoting self-advocacy, the reality is that many individuals will require more intensive support Even the much-vaunted technical assistance parent/student advocates dispense can prove to be ineffectual if the client is unable to translate the advice and coaching into effective advocacy [at the IEP table].”).

141. Julie L. Fitzgerald and Marley W. Watkins, *Parents’ Rights in Special Education: The Readability of Procedural Safeguards*, 72 EXCEPTIONAL CHILD. 497, 498 (2006).

142. *Id.* at 507.

143. 20 U.S.C. § 1417(e)(3).

144. This is a vintage grievance. See, e.g., NAT’L COUNCIL ON DISABILITY, IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: MAKING SCHOOLS WORK FOR ALL OF AMERICA’S CHILDREN (1995), available at <http://www.ncd.gov/publications/1995/09051995> (including a parent’s testimony, “I was one of those parents who left . . . IEPs like someone who has left a foreign movie without the subtitles. I felt a very small and incidental part of this procedure”); see also Fitzgerald & Watkins, *supra* note 141, at 506; Carmen Gomez Mandic et al.,

2. *The IDEA Does Not Ensure Participation of Parents who Have Limited English Language or Literacy Skills*

The IDEA does not ensure that parents whose native language is not English or who are not literate in the English language can access the special education process for their children. Some areas of the country educate significant numbers of students who are English Language Learners (ELLs).¹⁴⁵ Many parents of ELL students are not proficient in understanding, speaking, and reading English. Research has shown that only 13% of Americans are deemed “proficient” when it comes to literacy skills.¹⁴⁶ Only 71% of American students graduate from high school on time and, for certain populations like Latino and African-American students, that number drops significantly.¹⁴⁷

While the IDEA requires that notice and safeguards be provided in a parent’s native language and made accessible for non-readers, the law does not mandate that a child’s educational records and reports are translated into a parent’s native language or made accessible to parents who cannot read or have other communication deficits.¹⁴⁸ Thus, most general

Readability of Special Education Procedural Safeguards, J. SPECIAL EDUC., Mar. 10, 2010, at *4, available at <http://sed.sagepub.com/content/early/2010/03/10/0022466910362774.full.pdf> (finding that 94% of state’s procedural safeguards were written at college or graduate school level).

145. See, e.g., ROSE M. PAYAN & MICHAEL T. NETTLES, EDUC. TESTING SERV., CURRENT STATE OF ENGLISH-LANGUAGE LEARNERS IN THE U.S. K-12 STUDENT POPULATION 2 (2009), available at http://www.ets.org/Media/Conferences_and_Events/pdf/ELLSympisium/ELL_factsheet.pdf (finding that in 2004-05, 5.1 million students, 10.5%, of the United States’ student population, are ELLs and that six states—Arizona, California, Texas, New York, Florida, and Illinois—contain 61% of the ELL population). Large population states are not alone, however, as many states have seen significant growth in their ELL population over a similar period. See, e.g., KATHLEEN FLYNN & JANE HILL, MID-CONTINENT RESEARCH FOR EDUC. & LEARNING, ENGLISH LANGUAGE LEARNERS: A GROWING POPULATION 2-3 (2005), available at http://www.mcrel.org/pdf/policybriefs/5052pi_pbenglishlanguagelearners.pdf (explaining that, for example, Colorado, Nebraska, and South Dakota saw the number of ELL students in their elementary schools grow three-fold between 1990 and 2000).

146. *National Assessment of Adult Literacy*, NAT’L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/naal/kf_demographics.asp (last visited June 17, 2011).

147. See ALLIANCE FOR EXCELLENT EDUC., FACT SHEET: HIGH SCHOOL DROPOUTS IN AMERICA 1 (2009), available at http://www.all4ed.org/files/GraduationRates_FactSheet.pdf (“[B]arely half of African American and Hispanic students earn diplomas with their peers [and i]n many states the difference between white and minority graduation rates [is as much] as 40 or 50 percentage points.”); see also JAY P. GREENE, MANHATTAN INST. FOR POLICY RESEARCH, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES 2 (rev. 2002), http://www.manhattan-institute.org/pdf/cr_baeo.pdf (documenting the substantial difference between African American and Hispanic graduation rates as compared to their regional and school district peers).

148. 20 U.S.C. § 1415(b)(4), (d)(2) (requiring that notices of placement decisions and procedural safeguards be provided in parents’ native language unless “clearly . . . not feasible”); see also 34 C.F.R. § 300.345(e) (requiring interpreter at IEP meetings).

education records, evaluations, and IEPs are not translated for parents or made accessible or explained to parents who cannot read English. Those families are effectively excluded from having meaningful involvement in the special education process for their children.¹⁴⁹

3. *The IDEA Does Not Mandate a Written Explanation of the Special Education Process*

The IDEA does not require districts to provide written information to parents that explains the special education process in plain language. Thus, parents receive complicated notices and descriptions of procedural and due process rights without having a basic understanding of how the underlying special education system functions. Therefore, in practice families without attorneys or access to advocates, who can explain the special education process, cannot meaningfully invoke due process rights because they are generally not able to identify that something has gone wrong in the special education process. According to one commentary, “To be successful, . . . parents must be knowledgeable about their child and his disability. They must also be able to understand the proceedings of the IEP meetings, voice disagreement and seek clarification and be willing to utilize the [conflict resolution] processes. Successful decision-making and implementation require skills and knowledge beyond the reach of many.”¹⁵⁰

4. *The IDEA Should Require Individualized Notices When Students Leave School Without a Diploma*

One of the most significant gaps in the IDEA’s due process system is that the statute fails to take account of the fact that so many children leave school without a diploma because of inadequate special education services. Although states have not yet been able to develop a uniform way of reporting graduates with IEPs, a review of student exit data published by the Department of Education demonstrates that the majority of students

Even in California, with its longstanding experience in providing interpretation and translation for monolingual Spanish-speaking parents, the theory may be better than the reality; *see, e.g.*, Pajaro Valley Unified Sch. Dist. v. J.S., No. C 06-0380 PVT, 2006 WL 3734289, at *2 (N.D. Cal. Dec. 15, 2006) (stating that the school district gave Spanish-speaking parent only English language version of assessment).

149. *See, e.g.*, Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Model for Serving Youth with Special Education Needs*, CLINICAL L. REV. Spring 2005, at 271, 281-82 (2005) (discussing advocacy barriers faced by parents who speak limited English, and are low-income and lacking formal education).

150. *See id.* at 279-80 (2005) (internal citations omitted) (“Other characteristics of parents that may interfere with their ability to advocate for FAPE for their children include: fear of retaliation against the student; a desire to maintain good relations with the school; cultural norms that place educators in positions of unquestioned authority; feelings of shame about having a child with a disability; and a sense of powerlessness.”).

with IEPs leave school without a diploma.¹⁵¹ Across the United States, only 39% of students with disabilities ages sixteen to twenty-one who exited the special education system earn a regular diploma.¹⁵² The outcomes are far worse for certain classifications of children, as well as in some states and cities throughout the country.¹⁵³ For example, only 24% of students classified as “emotionally disturbed” who exited special education earned a regular diploma.¹⁵⁴ Black students are twice as likely as white students to be labeled emotionally disturbed.¹⁵⁵ Dropout rates are deemed twice as high for special education students than for general education students.¹⁵⁶ A significant number of organizations have recognized students with disabilities drop out of school; national advocacy, policy, and research groups focus heavily on improving graduation rates and transition outcomes for children with disabilities.¹⁵⁷

Despite this, the IDEA only recognizes that graduation with a regular

151. *Individuals with Disabilities Education Act (IDEA)*, DATA ACCOUNTABILITY CTR., <https://www.ideadata.org/PartBExiting.asp> (last visited June 17, 2011).

152. *See id.* (requiring states to collect data on exiting students ages fourteen to twenty-one) (percentage calculated by authors). The exit categories are: (1) Graduated with regular high school diploma, (2) Received a certificate, (3) Reached maximum age, (4) Transferred to regular education, (5) Died, (6) Moved, Known to be continuing, (7) Dropped out, (8) Total Exited Special Education. *Id.* (follow link “2009-10 (csv)”). There has been significant controversy over the “Moved, Known to be continuing” category, as this figure arguably masks students who should more properly be considered dropouts and/or “moved to juvenile and adult detention, jails and prisons.” *See id.* For purposes of this Article, those students were kept in the pool. To obtain the 39% figure, exiting students ages fourteen and fifteen, who are too young to graduate, were eliminated from the data. The 39% figure was then obtained by subtracting from the total number of students who exited special education by those who returned to general education or died and then dividing that figure by the students who earned regular diplomas. *See id.*

153. *See Individuals with Disabilities Education Act (IDEA)*, *supra* note 151 (noting that in New York City, for example, 50% of all of the students who receive special education receive services in special education classes and yet, according to the City’s statistics, the graduation rate for children in special education classes in the city is only 4.4%). *See generally* ARISE COAL., EDUCATE! INCLUDE! RESPECT! A CALL FOR SCHOOL SYSTEM REFORM TO IMPROVE THE EDUCATIONAL EXPERIENCES OF STUDENTS WITH DISABILITIES, (2009), <http://www.arisecoalition.org/Include!%20%20Educate!%20%20Respect!.pdf>.

154. *See Individuals with Disabilities Education Act (IDEA)*, *supra* note 151 (percentage calculated by authors by subtracting from the total number of students who exited special education by those who returned to general education or died and then dividing that figure by the students who earned regular diplomas).

155. 1 U.S. DEP’T OF EDUC., 28TH ANNUAL REPORT TO CONG. ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2006 48 tbl. 1-9 (2006) (noting that black students had a risk ratio of being classified as emotionally disturbed at 2.24, compared to white students at 0.85).

156. *See* Martha L. Thurlow et al., *Students with Disabilities who Drop Out of School—Implications for Policy and Practice*, NAT’L CTR. ON SECONDARY EDUC. & TRANSITION, June 2002, available at <http://www.ncset.org/publications/printresource.asp?id=425> (citing Blackorby & Wagner (citation omitted)).

157. *See, e.g., id.*

diploma constitutes a “change of placement” that requires Prior Written Notice and triggers the IDEA’s procedural safeguards.¹⁵⁸ Further, before a student graduates, a district must provide the parent with “a summary of the child’s academic achievement and functional performance, which shall include recommendations on how to assist child in meeting the child’s postsecondary goals.”¹⁵⁹

Yet, despite the fact that so many children leave school without a diploma—whether due to a lack of progress, dropping out, being discharged or transferred to alternative programs, or ending up incarcerated—the IDEA does not provide any specific notices or procedural protections for those students or their parents, who are presumably in far greater need of specific protections than those students who earn diplomas.

H. Due Process Protections Should be Clarified to Include Truancy Within the Scope of Protected Behavior

As noted above, one of the underlying purposes of the original special education statute was to prevent the exclusion of students with disabilities from school.¹⁶⁰ Section 504 provides a basic level of protection in that a student with a disability cannot be subject to any discrimination based upon conduct that is a manifestation of his or her disability.¹⁶¹ Early decisions under Section 504 and the IDEA held that children who exhibit behavioral difficulties must have certain protections in place to ensure they are not excluded or punished based upon disability-related behavior.¹⁶² Eventually the specific substantive and procedural protections for disabled students exhibiting behavioral problems in school were written into the IDEA.¹⁶³

158. 34 C.F.R. § 300.102 (a)(3)(iii) (2011).

159. 20 U.S.C. § 1414(c)(5)(B)(ii) (2006).

160. *See supra* notes 34-36, 39 and accompanying text; *Honig v. Doe*, 484 U.S. 305, 308 (1988).

161. *See* 29 U.S.C. § 794(a) (2006) (Section 504 and its regulations provide that “[n]o otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of his or her disability . . . be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

162. S-1 *ex rel.* P-1 v. Turlington, 635 F.2d 342, 350 (5th Cir. 1981) (holding that before disabled students could be expelled from school a “qualified group of individuals” must determine “that no relationship existed between [the plaintiffs’] handicap and their misconduct,” and that this group must be composed of the same experts that determined the child’s placement and handicap under the IDEA); *see Honig*, 484 U.S. at 308 (under both Section 504 and the IDEA, team of experts must evaluate child and determine whether behavior was a manifestation of child’s disability before disciplinarily changing student’s placement); *Doe ex rel. Gonzales v. Maher*, 793 F.2d 1470, 1480 (9th Cir. 1986); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982).

163. *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/504faq.html#interrelationship> (last visited June 17, 2011) (noting the interrelationship between Section 504 and the IDEA provide

Since the initial inclusion of the disciplinary protections, these protections were expanded and strengthened in 1997 and then amended in 2004 to afford schools greater leeway in excluding students and making law enforcement referrals.¹⁶⁴ These provisions have been the subject of much controversy.¹⁶⁵

The current version of the IDEA's disciplinary protections incorporates several elements: a Manifestation Determination Review,¹⁶⁶ a Functional Behavior Assessment,¹⁶⁷ a Behavioral Intervention Plan,¹⁶⁸ and a guarantee of FAPE for children even when they are subject to suspension for more than ten days in any school year.¹⁶⁹ Certain guidelines were also established for services for students in longer-term removals who commit more serious disciplinary infractions.¹⁷⁰

In addition to the due process provisions of 20 U.S.C. § 1415, the IDEA requires all IEP teams to include "positive behavioral supports" using research based methods for children whose behavior interferes with their own learning or the education of other children.¹⁷¹ Even with the provisions in the statute, students with disabilities are subject to much higher rates of student suspensions, with significant over-representation of African-American and Latino males being suspended in many

students with a network of protections that are intended to preserve the disabled student's right and ability to FAPE: "Section 504 prohibits discrimination on the basis of disability in programs or activities that receive Federal financial assistance from the U.S. Department of Education. Title II [of the ADA] prohibits discrimination on the basis of disability by state and local governments. . . . [The IDEA is] a statute which funds special education programs. Each state educational agency is responsible for administering IDEA within the state and distributing the funds for special education programs. IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds. Section 504 and the ADA are antidiscrimination laws and do not provide any type of funding.")

164. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

165. For articles prior to the 2004 IDEA reauthorization, see, for example, Philip T.K. Daniel, *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*, 142 EDUC. L. REP. 591 (2000); Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1 (2000); Lauren Zykorie, *Reauthorizing Discipline for the Disabled Student: Will Congress Create a Better Balance in the Individuals with Disabilities Education Act (IDEA)?*, 3 CONN. PUB. INT. L.J. 101 (2003). Since the 2004 IDEA reauthorization, these provisions remain controversial. See, e.g., Randy Chapman, *The Discipline Process for Students with Disabilities Under the IDEA*, COLO. LAW. July 2007, at 63; Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. L. REP. 445 (2007).

166. 20 U.S.C. § 1415(k)(1)(E).

167. § 1415(k)(1)(D), (F).

168. § 1415(k)(1)(F).

169. § 1412(a)(1).

170. § 1415(k)(1)(B).

171. § 1414(d)(3)(B)(i).

jurisdictions.¹⁷²

As noted above, approximately 40% of students with IEPs appear to leave school without a diploma.¹⁷³ Further, truancy among special education high school students is widespread.¹⁷⁴ In many states, children who are truant are actually prosecuted in juvenile or family courts and may be incarcerated if they fail to attend school regularly after a judicial “intervention.”¹⁷⁵

While the IDEA requires significant due process procedures and protections from a child who hits another child or curses at a teacher, it contains no express protections for truant students. Many school districts and courts do not treat truancy as a “behavior” subject to protection under the IDEA. The treatment of truancy as if it were separate from the concept of “behavior that demonstrates a lack of progress” is more often than not a manifestation of the child’s disability exacerbated and triggered by “warehousing” children in inappropriate educational settings. This is yet another major gap in the statute’s protections. Vulnerable students who end up with attendance difficulties after years of failure and defeat are blamed instead of helped.¹⁷⁶ While advocates and lawyers can make arguments on a child-by-child basis that truancy has to be properly addressed by the IEP team, this strategy, standing alone, is insufficient to tackle this significant issue.

By mandating that school districts were responsible for the education of students with behavioral difficulties, districts had to develop strategies, based on research, to educate students they could no longer exclude based on disciplinary infractions. The same pressure should be brought to bear to address truancy; until districts are held fully accountable for those students, they will not be forced to develop better programs for failing high school age students.

I. Students’ IDEA Rights Should be Clarified and Strengthened

The question of whether, and to what extent, children and young people have or should have rights in the special education process is important, but complex. Thus, a full discussion of these issues is not attempted here. However, given the importance of the issues, particularly for students from low-income families, children whose parents are not native English speakers, children whose parents are sick or unavailable, and children who

172. See *supra* notes 11-12 and accompanying text.

173. See *supra* note 152 and accompanying text.

174. See Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE F. FOR L. & SOC. CHANGE (forthcoming 2011).

175. *Id.*

176. *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1120 (10th Cir. 2008).

are in the foster care or juvenile and adult education systems, some of the overarching issues bear mentioning.

States may transfer rights from parents to any student who reaches the age of majority in that state, except for a child who has been determined to be incompetent under state law.¹⁷⁷ If a transfer is made, notice must be provided to both the student and the parent, all other rights accorded to the parents are transferred to the child, and the agency must notify the student and the parent of the transfer of rights.¹⁷⁸ If a state adopts a transfer of rights provision and a student is not able to provide informed consent—even if the student has not been declared legally “incompetent”—the state can adopt procedures by which a parent can be appointed as an educational decision-maker.¹⁷⁹ No later than one year before a student reaches the age of majority, the IEP must include a statement documenting that the student has been advised of the fact that rights will transfer when the student reaches the age of majority.¹⁸⁰ Juxtaposed against the reality faced by most older students who receive special education services, these provisions do not come close to serving the interests of most students.

It is a serious flaw in the statutory scheme that the IDEA fails to mandate that all students be provided notice of their rights until just prior to, or at the age of majority. This is particularly disturbing in light of the fact that so many students age seventeen and over leave school without a diploma. Regardless of the federal statute, in almost every state, once students turn eighteen they have the right to make their own educational decisions, marry, vote, and even join the military. In many states, youth over fifteen are charged as adults if they commit a crime.

The fact that students in states where rights do not transfer seem to be virtually excluded from the process, and are not clearly mandated to receive certain notices, are omissions that should be addressed through an IDEA amendment.¹⁸¹ This is particularly true since school districts are required to appoint a surrogate parent in cases where the parent cannot, or will not, participate in the special education process. Many young people simply stop attending high school because their educational needs are not being met. Yet, when they are awarded different programs and services that meet their needs through a hearing, they will diligently attend and succeed. Students who leave school discouraged and disengaged do not know that

177. 20 U.S.C. § 1415 (m)(1) (2006).

178. *Id.*

179. § 1415 (m)(2).

180. § 1414 (d)(1)(A)(i)(VIII)(cc).

181. The Second Circuit ruled years ago that students over the age of eighteen, and their parents, are required to have sufficient notices prior to a termination of special education services even in a state where rights are not transferred. *Mrs. C. ex rel. J.C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990).

their parents can take steps to change their educational program and placement.

Further, this provision casts doubt on whether students who are legal adults have standing to file for hearings with respect to their own educational rights, a concept at odds with the general thrust of all state laws. For states in which rights are transferred, enforcement and oversight appear to be significant problems.

J. Limitations On Attorneys' Fees And Expert Witness Fees Have Effectively Eviscerated the Ability of Families Without Means to Access the IDEA Due Process System

The incentive of attorney-fee shifting was incorporated into the IDEA in 1986, eight years after the landmark enactment of the Civil Rights Attorney's Fees Award Statute.¹⁸² This reversal of the longstanding rule that parties' should bear their own fees in litigation recognized that the availability of fees to prevailing parties in civil rights and other cases where private parties were enforcing public mandates was essential to attract lawyers to this genre of litigation, where parties typically could not afford the costs and fees of often protracted litigation, and for the deterrent—compliance-generating—effects that fee-shifting should have on government bodies. The shifting of expert witness fees to losing school systems was also an indispensable component of ensuring access to the due process hearing system and beyond.

Lawyers in IDEA cases play crucial roles in understanding the often obscure requirements in the IDEA and, perhaps most importantly, knowing what remedies are available through the courts. As noted above, parents with lawyers prevail at higher rates than those without.¹⁸³ The necessity of expert testimony in most IDEA cases also cannot be disputed. Without skilled experts to counter the expertise enjoyed by school systems, parents are at a distinct disadvantage.

Thus, the erosion of the availability of statutory fees under the civil rights laws and the IDEA has been decried by commentators who view this trend as a stark display of hostility by the United States Supreme Court and lower courts to the assertion of progressive statutory and constitutional claims in the federal courts.¹⁸⁴ The elimination of the so-called catalyst

182. Compare 20 U.S.C. § 1415 (i)(3)(B), with 42 U.S.C. § 1988(b) (allowing the court to grant reasonable attorneys' fees as part of costs to the prevailing party who is the parent of a disabled child in the former, but also allowing the court to grant fees to a successful local or state educational agency under severely limited circumstances).

183. See ARCHER, *supra* note 27, at 7.

184. See, e.g., Catherine R. Albiston, & Laura Beth Nielson, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1091 (2007); Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459 (2007).

theory by the Supreme Court, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*¹⁸⁵—a non-IDEA case—was a significant reversal for litigants seeking access to counsel under fee-shifting statutes. By holding that settlements must have the “imprimatur” of the court,¹⁸⁶ the strategy of government defendants who decide after extensive legal work is performed on a case to offer a decent settlement on the merits of the case—without attorney’s fees—and insist that the settlement not be presented to the court for signing, has created an exquisite conflict for lawyers representing un-rich clients. These clients will likely be strongly inclined to accept the deal, leaving the lawyer without an avenue for filing for fees. The chilling effect of this strategy on access to counsel is evident.

Another recent attorney’s fees case decided by the Supreme Court, *Astrue v. Ratliff*,¹⁸⁷ although decided under the Equal Access to Justice Act,¹⁸⁸ potentially undercuts the ability of impecunious clients to obtain counsel. In *Astrue*, the Court interpreted the prevailing party language of the Equal Access to Justice Act to hold that an award of attorney’s fees was payable to the plaintiff, not to the attorney.¹⁸⁹ This subjected the fee to the government’s administrative offset program for a pre-existing debt, leaving the attorney with either no fee or a vastly reduced one.¹⁹⁰ It is too early to gauge whether the application of *Astrue* in IDEA cases will have a serious adverse effect.

A final restriction on meaningful access for families of limited means occurred in *Arlington Central School District Board of Education v. Murphy*,¹⁹¹ where the Supreme Court held that parties who prevailed in IDEA due process hearings could not recover as part of “costs” outlays for expert witnesses.¹⁹² The practical consequences of this decision are limited because many families with even modest resources cannot afford the upfront costs of expert assistance, which can easily run into the thousands of dollars.

Ironically, the elimination of expert witness fees under the Supreme Court’s decision in *Murphy* did little to impact families without financial resources, since they could not afford to pay expert witness fees to begin with and few experts are willing to work on a contingency fee basis. This

185. 532 U.S. 598, 610 (2001).

186. *Id.* at 610.

187. 130 S. Ct. 2524 (2010).

188. 28 U.S.C. § 2412 (d)(1)(A) (2006); *see also* 130 S. Ct. at 2530 (Sotomayor, J., concurring).

189. 130 S. Ct. at 2528-29.

190. *Id.* at 2532-33.

191. 548 U.S. 291 (2006).

192. *Id.* at 304.

is particularly true in areas in which qualified and knowledgeable experts are in high demand and have waiting lists even for paying clients. Similarly, the Court's ruling in *Winkelman*, establishing that parents can represent their children on a pro se basis in court,¹⁹³ is not going to assist the majority of families who do not have a basic understanding of their IDEA rights.

K. The Supreme Court's Decision to Place the Burden of Proof on Parents Harms All Children

In 2005, the Supreme Court decided *Schaffer v. Weast*,¹⁹⁴ in which the Court held that "the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."¹⁹⁵ The Court in *Schaffer* noted that the "burden of proof" has historically encompassed both the "burden of persuasion"—the party who loses if the evidence is in "equipoise,"—and the "burden of production,"—the party required to come forward with evidence.¹⁹⁶ The *Schaffer* Court restricted its ruling to a determination only on the burden of persuasion, as it was defined in that case; yet, the decision has generally been interpreted to be more far-reaching and to require parents to meet both burdens.¹⁹⁷ The *Schaffer* decision prompted numerous articles taking a variety of positions concerning both the Court's decision and the question of the proper allocation of burden of proof.¹⁹⁸

193. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007) (finding that parents have a basis for representing their children in court due to parental interest in the education of children).

194. 546 U.S. 49 (2005).

195. *Id.* at 56.

196. *Id.*

197. *See id.* at 65. Read closely, the decision in *Schaffer* makes clear that the Court contemplated that, when a district seeks to change an IEP, it would be the *district* that files the hearing. *See id.* However, that finding suggests the Court may have interpreted the IDEA to require a district to file a hearing when it proposes a change in an IEP. *Id.* This is not a generally accepted principle. Typically, districts may change an IEP or placement unless a parent files for due process.

198. *See, e.g.*, Lara Gelbwasser Freed, *Cooperative Federalism Post-Schaffer: The Burden Of Proof And Preemption In Special Education*, 2009 B.Y.U. EDUC. & L.J. 103 (2009); Anne E. Johnson, *Evening The Playing Field: Tailoring The Allocation Of The Burden Of Proof At Idea Due Process Hearings To Balance Children's Rights And Schools' Needs*, 46 B.C. L. REV. 591 (2005); Joanne Karger, *A New Perspective On Schaffer v. Weast: Using A Social-Relations Approach To Determine The Allocation Of The Burden Of Proof In Special Education Due Process Hearings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 133 (2008); Nicole Thompson, *The Great Burden On American Disabled Students: The Aftermath of Schaffer v. Weast*, MOD. AM. Spring 2008, at 21; Jennifer M. Saba, *Undue Deference: Toward A Dual System Of Burdens Under The Individuals With Disabilities Education Act*, 57 DEPAUL L. REV. 133 (2007); William D. White, *Where To Place The Burden: Individuals With Disabilities Education Act Administrative Due Process Hearings*, 84 N.C. L. REV. 1013 (2006); Jordan L. Wilson, *Missing The Big Idea: The Supreme Court Loses Sight Of The Policy Behind The Individuals With Disabilities Education Act in Schaffer v. Weast*, 44 HOUS. L. REV. 161

Leaving aside the questions of statutory construction and congressional intent, the practical implication of this decision on the lives of students without financial resources is undeniable. While this decision has harmed all children, for all of the reasons discussed above, it has a particularly disproportionate impact on families of children without financial resources.¹⁹⁹ Those families cannot pay experts, will not have access to IEEs, and cannot afford to purchase the services on an up-front basis to establish a record of progress and success. In those states where discovery is typically not a part of due process proceedings, all of the documents and evidence required to establish proof will be in the custody and control of the hearing officers. Further, many families without resources have to proceed to due process without an attorney and, more likely than not, cannot obtain attorney's fees unless a case proceeds all the way to a decision. It is extremely difficult for a family in this situation to establish that a district failed to comply with the procedures and the substantive provisions of the IDEA in terms of whether an evaluation has been validly conducted or FAPE provided.

Since most of the litigation under IDEA involves tuition reimbursement claims, districts are extremely concerned with keeping and shifting the burden back to parents. There are few, if any, voices protecting the rights of other families in this dialogue, and the costs for districts are high. In the wake of *Schaffer*, states have enacted legislation placing the burden on school districts,²⁰⁰ and a national legislative correction has been proposed.²⁰¹ However, *Schaffer* remains the current general standard in most jurisdictions.

(2007); Kelly D. Thomason, Note, *The Costs of a "Free" Education: The Impact of Schaffer v. West and Arlington v. Murphy on Litigation Under the IDEA*, 57 DUKE L.J. 457 (2007).

199. See Thomason, *supra* note 198, at 457 (arguing that the Court's decisions in *Schaffer* and *Murphy* disrupted a "prior trend in IDEA litigation . . . that had increased the substantive and procedural rights of children with disabilities").

200. See, e.g., CONN. GEN. STAT. ANN. § 10-76d-e(1) (West 2011); DEL. CODE ANN. tit. 14, § 3140 (2011); 105 ILL. COMP. STAT. ANN. 5/14-8.02a(g) (2009); N.J. STAT. ANN. § 18A:46-1.1 (West 2011); N.Y. EDUC. LAW § 4404(1)(c) (McKinney 2011); see also Karger, *supra* note 198, at 208-15. Even though the New York Legislature adopted the change recently in 2007, New York City Mayor Michael Bloomberg is already trying to take advantage of budget cuts to convince the Governor and Legislature to reverse the burden of proof statute. See Michael Bloomberg, Mayor, New York City, N.Y., State Budget Testimony (Feb. 2, 2011), available at <http://www.wnyc.org/articles/its-free-country/2011/feb/07/transcript-bloombergs-state-budget-testimony/>.

201. See, e.g., IDEA Fairness Restoration Act, H.R. 1208, 112th Cong. (2011); IDEA Fairness Restoration Act, S. 613, 112th Cong. (2011).

L. The IDEA Should Require Parental Consent Prior to a District's Change in IEP, Placement, or FAPE

The IDEA currently requires informed parental consent prior to any initial evaluation, reevaluation, and initial provision of special education services.²⁰² The IDEA allows states to determine whether to require consent for any other activities, such as changes in IEP or placement. Thus, the only way for most parents to stop a school district from making a proposed change in classification, placement, IEP, or FAPE is to file for due process, since such a parent has the right to insist that her child stays put in the child's last agreed upon placement.²⁰³ Given that the balance of power, knowledge, and resources rests heavily with school districts, it should not be up to a parent to file for due process when a district proposes to make a change to a child's last agreed upon educational program. For families and young people without resources who do not have access to counsel, this requirement is extremely burdensome. Although the student outcomes speak for themselves as to whether more than 2,000 parents have or should have a legitimate disagreement about the delivery of special education services, it seems clear that many parents that could or should be filing for due process are not doing so.

III. PRIVATE AND PUBLIC ENFORCEMENT EFFORTS ON BEHALF OF THE POOR MUST CONTINUE

There are two principal paths to IDEA enforcement. The first is private and lawyer-driven. Cases are filed before an administrative agency—and possibly in court, on appeal—on behalf of individual students seeking anything from a change in placement or tuition reimbursement to new or more related services, independent assessment, or compensatory education or services. Cases may also be filed on behalf of a class of students. The most expensive and time consuming litigation is that filed in a trial court; administrative complaints are another alternative. The second path to enforcement is public, and considerably weaker. Its approach is largely regulatory and investigative, conducted by state and federal bureaucrats, with litigation by public attorneys remaining, at best, a theoretical final step in the process.

One answer to equalizing options for unrich families is to give them access to *pro bono* or prepaid private attorneys. While this may be the best

202. 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2006).

203. § 1415(j) (“[D]uring any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.”).

option, it is not a promising one, given the political climate and budget deficits at all levels of government.²⁰⁴ Nevertheless, it is clear from the discussion above that lawyers play a crucial role and are often the key to unlocking obstacles to meaningful placement and services under IDEA. How, then, can private litigation spur positive externalities²⁰⁵ for the benefit of students whose families are unable to file due process complaints or lawsuits?

A. More Attorneys Need to be Recruited Under the Existing Statutory Scheme

The National Council on Disability (NCD) has long urged engaging attorneys not traditionally associated with disability rights, such as those in private bar associations and legal services.²⁰⁶ These lawyers should represent almost exclusively clients without means to pay a retainer. As for private bar involvement, the Illinois protection and advocacy agency,²⁰⁷ for example, has had a particularly successful program training and retaining members of the private bar to handle individual cases on a no-fee or fee recovery basis,²⁰⁸ in addition to their own substantial caseloads. Offices receiving Legal Services Corporation (LSC) funding are also well suited to dedicate staff attorneys to representation of children from low-income families on IDEA matters. These offices are accustomed to handling administrative adjudications. Furthermore, of the many restrictions Congress has placed on LSC civil practice areas over the years, individual special education cases remain on the acceptable docket.²⁰⁹

204. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1455 (2011) (offering a forthright, if pessimistic, assessment of this option: “Given the antilawyer trend of the last few reauthorizations, it is unlikely that a proposal to inject private advocates wholesale would succeed. In addition, given concerns that special education budgets are draining general education budgets, there is likely to be political resistance to the idea of providing a personal advocate to children with disabilities, on top of all of the other individualized extras that some feel these children are already receiving. This proposal is not likely to gain any traction.”).

205. *Id.* at 1437-59 (defining positive externalities, transaction costs).

206. NCD REP. 2000, *supra* note 13.

207. Under 42 U.S.C. § 15043, each state and territory is required to establish a “protection and advocacy” agency “of last resort” to advocate, at no cost, on behalf of the human rights of persons with intellectual, developmental, mental health, physical, sensory and other disabilities. § 15043. Most “P & As” have staff lawyers and/or lay advocates who represent students and parents in an array of special education matters ranging from IEP meetings to mediations and from due process hearings to court appeals and class action litigation.

208. Staff attorneys train, mentor, and oversee cases handled by private counsel who represent clients *pro bono* or recover fees from the school district if the parent and student are the prevailing party. *See Programs & Services*, EQUIP FOR EQUALITY, <http://equipforequality.org/programs> (last visited June 17, 2011).

209. 45 C.F.R. §§ 1610.4(d), 1612 *et seq.*, 1620.3 (2011). Clients of legal services offices must meet financial eligibility guidelines tied to U.S. poverty-level incomes. §

An increasing number of law school clinics are devoting their caseloads to child advocacy or to special education representation in particular.²¹⁰ Most of these clinics are staffed by attorneys with prior practice experience, although not necessarily in special education. The mediation and due process cases are amenable to the clinical model of learning plus service. With an ongoing and adequate supply of student participants, these clinics are able to serve a larger number of clients.

B. Class Actions Should Continue, but Must be Outcome-Oriented and Narrowly Focused

Class action lawsuits are a conventional tool used by public interest lawyers for systemic reform of government institutions²¹¹ and school systems, in particular.²¹² As with any class-wide injunctive order or settlement, the benefit for an individual class member may be hard to measure. With respect to delivery of special education, these cases rarely result in a tailored program of instruction and services for an individual low-income student. Nevertheless, it is possible to obtain some of the relief that would enhance the educational outcomes of low-income youth and eliminate obstacles in some of the areas discussed above, including timeliness and adequacy of notice; timeliness of independent evaluations; prior consent; emergency procedures; and due process for students in disciplinary or truancy proceedings.

A number of district- or state-wide class actions have been litigated under the IDEA, with mixed success.²¹³ While it is beyond the scope of

1611.3.

210. See generally, Massey & Rosenbaum, *supra* note 149, at 295-325 (describing a variety of clinical models and cases handled). A new advocacy textbook, with chapters authored by current clinicians, has just been published: SPECIAL EDUCATION ADVOCACY (Ruth Colker & Julie Waterstone eds., 2011).

211. See, e.g., *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996) (ordering statewide accommodations and modifications for disabled prison inmate); *Knop v. Johnson*, 667 F. Supp. 467 (W.D. Mich. 1987) (requiring prison to provide inmates with adequate winter clothing and access to lavatories); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (challenging treatment of persons with mental illness at state hospital); see also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 444 (2001) (citing cases).

212. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (remediating a school system's failure to provide English language instruction to non-English speaking students); *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990) (challenging statewide school finance scheme); *Williams v. California*, No. 312236 (Sup. Ct. Aug. 14, 2000) (statewide settlement to provide textbooks in K-12 schools and upgrade teacher qualifications and school facilities); see also Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (citing cases).

213. See, e.g., *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900, 918 (N.D. Ill. 1998) (finding Board of Education in violation of the IDEA); *Beth V. ex rel. Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (leaving open possibility of a right of action under IDEA); *Emma C. v. Eastin*, No. C 96-4179 TEH, 2009 WL 482261 (N.D. Cal. Feb. 25, 2009) (providing history of settlement proceedings); N.J. Prot. & Advocacy,

this Article to critique the effectiveness of those efforts and the orders and settlements they produce, recent legal and policy analyses of some of the major cases are instructive for future lawsuits that may be brought on behalf of families without means.²¹⁴

After serving as court monitor in a number of long-running class actions, Education Professor and former OSEP Director Thomas Hehir posits that lawyers need to be guided by five principles in class action litigation: know the research and better educational practices; promote data-based agreements; promote more litigation focused systematically on changing practice; focus intervention; and join states as defendants.²¹⁵

In a recent assessment of the role of courts in implementing IDEA, professor and disability rights litigator Samuel Bagenstos concluded that in fact, not much litigation has been filed under the IDEA,²¹⁶ and direct court intervention has made little *direct* difference in the treatment of students with disabilities.²¹⁷ Bagenstos does agree with commentators and critics who claim there is an excessive focus on process over substance—at least “at the margins.”²¹⁸ That said, school administrators are likely to correctly implement court decisions when the decisions address broad, programmatic questions with clear rules that can be followed by administrators.²¹⁹

Nevertheless, Supreme Court jurisprudence has exacerbated problems

Inc. v. N.J. Dep’t of Educ., 563 F. Supp. 2d 474, 492 (D. N.J. 2008) (allowing claims under the IDEA against Department of Education and Board of Education to progress while denying claims against individual Board members); Jamie S. v. Milwaukee Pub. Schs., 519 F. Supp. 2d 870 (E.D. Wis. 2007) (declaring preference for mutual agreement over litigation); Blackman v. Dist. of Columbia, 454 F. Supp. 2d 1, 15 (D.D.C. 2006) (reaffirming consent decree and noting a “hopeful moment” for the children of District of Columbia); Smith v. L.A. Unified Sch. Dist., No. CV 93-7044-LEW (C.D. Cal. Apr. 26, 1996) (reaffirming consent decree); Jose P. v. Ambach, 557 F. Supp. 1230 (E.D.N.Y. 1983) (discussing slow progress made by the city to enact systems change).

214. See, e.g., Thomas Hehir, *Looking Forward: Toward A New Role in Promoting Educational Equity for Students with Disabilities from Low-Income Backgrounds*, in HANDBOOK OF EDUCATION POLICY RESEARCH 831, 836-37 (Gary Sykes et al. eds., 2009); Bagenstos, *Judiciary’s Role*, supra note 29, at 126. See generally Pasachoff, supra, note 204 (noting difficulties inherent in class actions).

215. Hehir, supra note 214, at 837-39. Professor Hehir also advocates more free counsel for low-income families in due process hearings. *Id.* at 837. He believes this “utopian” proposal could be accomplished by funding more protection and agency staff to selectively represent clients with more significant disabilities in LRE cases. *Id.*

216. Fewer than one hundred class actions with IDEA claims have been certified and these involve only one percent of the nation’s school districts. Bagenstos, *Judiciary’s Role*, supra note 29 at 126. Not surprisingly, most of these cases are filed in high income districts. See Pasachoff, supra note 204, at 1426 (citing a 1999-2000 national study).

217. Pasachoff, supra note 204, at 1414.

218. Compare Hehir, supra note 214, at 837 (finding that focus on procedural elements leads to oversight and enforcement), with Bagenstos, *Judiciary’s Role*, supra note 29 at 124-26.

219. Bagenstos, *Judiciary’s Role*, supra note 29, at 124.

experienced by poor children. We have already discussed the lack of expert cost recovery due to *Murphy*²²⁰ and the burden of proof obstacles posed by *Schaffer*.²²¹ Three other Supreme Court cases discussed above, *Burlington*, *Carter*, and *Forest Grove*, have opened the door for nonpublic school tuition reimbursement.²²² While we noted the difficulties this creates for families who cannot pay the tuition up front, we have not addressed the fact that this placement, if and when obtained, has spawned a two-tiered school system: those who can get a private school education at public expense and those who cannot.²²³

The Supreme Court is also the author—or enabler—of the procedurally-oriented interpretation of IDEA, as first announced in *Rowley*.²²⁴ It is true that the IDEA legislation was largely promoted by parent advocates who crafted built-in protections for themselves and their children with disabilities—in the form of the procedural safeguards discussed above.²²⁵ Nonetheless, the Supreme Court may have relied too heavily on the IDEA’s procedural terms and the alleged “ardent advocacy” that would be pursued by parents²²⁶ to the detriment of a substantive standard. *Rowley* gives school districts a strong disincentive to focus on substance; hence, administrators can follow well the rules on process.²²⁷ As noted above, poor children and their families are not likely to advocate with ardor, and they will be among those who fail when challenging a particular program placement or related services.

Class action cases that result in mandating more process or greater resource allocations for special education students do not necessarily advance overall educational equity for the rich or unrich.²²⁸

220. See *supra* note 187 and accompanying text.

221. See *supra* notes 187-95 and accompanying text.

222. See *supra* notes 76-79, 83-85 and accompanying text.

223. Bagenstos, *Judiciary’s Role*, *supra* note 29, at 126. This underscores the argument that there are no positive externalities that flow from one student’s filing for due process where the student who prevails may exit the public schools in favor of a private placement. See Pasachoff, *supra* note 204, at 1435.

224. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209 (1982).

225. See *supra* notes 58-75 and accompanying text.

226. See *Rowley*, 458 U.S. at 209 (recognizing the importance of parental involvement in the planning of students’ educational programs and observing that parents and guardians will “not lack ardor” in ensuring that their children receive all the educational benefits to which they are entitled under IDEA); Rosenbaum, *Aligning or Maligning?*, *supra* note 140, at 10.

227. Bagenstos, *Judiciary’s Role*, *supra* note 29, at 124. Furthermore, as *Rowley*’s more recent federal court progeny show deference to school administrators in educational decision-making, those decisions are harder for parents to undo through litigation. *Id.* at 125-26.

228. The long-running *Jose P. v. Ambach* litigation caused one writer to quip that New York City’s regular education program resembles “a parking lot full of 1968 cars, while special ed is like a handful of shiny Cadillacs.” Kay S. Hymowitz, *Special Ed: Kids Go In, But They Don’t Come out*, CITY J., Summer 1996, available at

Notwithstanding the negative externalities for students without disabilities—or other *disabled* students—who may be the by-product of class litigation victories, experts agree that focused special education litigation with outcome-based objectives is more successful than process-oriented, broad-based “totality” litigation,²²⁹ even if the positive consent decrees and injunctions owe more to lawyers’ strategic decisions than anything inherent in IDEA.

C. Systemic Administrative Compliance Complaints are a Cost-Effective and Delay-Reducing Tool

One underutilized vehicle for IDEA dispute resolution is the administrative compliance complaint.²³⁰ Like a class action lawsuit, it is lawyer-dependent, but can potentially bring broad-based relief without the cost and delays of civil litigation. Its affordability and accessibility offer more incentives for attorneys to challenge systemic processes that harm low-income students and families as much as, or more than, special education students in general.

Each state education agency (SEA) is required to have written procedures that provide for the filing of a complaint against a school district or local education agency (LEA), another public agency or against the SEA, asserting violations of IDEA’s statutory or regulatory mandates.²³¹ Complaints can address both individual and systemic issues. Like due process hearings, complaints can be used to resolve any matter

http://www.city-journal.org/html/6_3_special_ed.html. The irony of the auto metaphor is that it was infamously used by one court to hold that under the IDEA, students are entitled to a Chevy-like education, but *not* a Cadillac. *Doe ex rel. Doe v. Bd. of Educ.*, 9 F.3d 455, 459-60 (6th Cir. 1993) (“[The board of education] is not required to provide a Cadillac [to a disabled pupil, but the] educational equivalent of a serviceable Chevrolet.”). The argument has been made elsewhere that the line separating disabled youngsters from those needing (non-disability) remediation or interventions is not a bright one, and that perhaps *all* students should be entitled to the benefits and protections afforded under the IDEA. See, e.g., Stephen A. Rosenbaum, *Full Sp[ee]d Ahead: Expanding the IDEA to Let All Children Ride the Same Bus*, 4 STAN. J. C.R. & C.L. 373, 384-92 (2008).

229. Bagenstos, *Judiciary’s Role*, *supra* note 29, at 130; see also, Hehir, *supra* note 214, at 838-39.

230. The Southern Disability Law Center and Southern Poverty Law Center through the efforts of Attorneys Jim Comstock-Galagan and Ronald K. Lospennato are to be credited with promoting the theory and practice of filing effective administrative complaints. See S. DISABILITY LAW CTR., <http://www.sdlcenter.org> (last visited Sept. 3, 2011); S. POVERTY LAW CTR., <http://www.splcenter.org> (last visited Sept. 3, 2011).

231. 34 C.F.R. § 300.151 (2011). The violation must have occurred within one year of the date the complaint is received, as compared to the two-year period for requesting due process; states may allow for a longer period. Letter from Kenneth R. Warlick, Director, Office of Special Educ. Programs, to Chief State School Officers, at 3 (July 17, 2000), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osep002071700safeguardssec.pdf>; see also 71 Fed. Reg. 46,589, 46,601, 46,605 (Aug. 14, 2006).

related to the identification, evaluation, educational placement, related services or compensatory education of the child.²³² Complaints also can be used to resolve the provision of FAPE to the child, as well as any other allegation that a public agency has violated IDEA provisions governing assessment, program planning and outcomes and procedural safeguards.²³³

Just as in class litigation relief, a corrective action can lead to changes in policies and procedures, additional or different services, compensatory education, reimbursement, or the provision of future educational services.²³⁴ Special masters, monitors, or consultants can conceivably be appointed to oversee or assist with implementing a corrective action plan. Parents may use the complaint procedures or due process to resolve any disagreement with the school district. Issues in the complaint that are not the subject of due process must be investigated by SEA within sixty days.²³⁵

The complaint may be filed by anyone, including an organization, an individual student, a protection and advocacy organization, an interested community, or an out-of-state person.²³⁶ The SEA must issue written decisions that address each allegation, including findings of fact and conclusions and reasons for its decision.²³⁷ States are encouraged to offer mediation prior to resolution, but it must be voluntary and the SEA must bear the cost.²³⁸ The SEA must provide for “effective implementation” of its final decision, including the provision of technical assistance, negotiations, and corrective action necessary to achieve compliance.²³⁹

232. See Letter from Kenneth R. Warlick, *supra* note 231, at 4; see also 71 Fed. Reg. 46,601, 46,605.

233. See Letter from Kenneth R. Warlick, *supra* note 231, at 4; see also 71 Fed. Reg. 46,601, 46,605.

234. 34 C.F.R. §§ 300.151(b), 300.152(a)(5); 71 Fed. Reg. 46,602; see Letter from William W. Knudsen, Acting Director, Office of Special Educ. Programs, to Dr. John Copenhaver, Director, Mountain Plains Reg'l Res. Ctr. (Oct. 31, 2008), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2008-4/copenhaver103108correction-noncompliance4q2008.pdf>

235. § 300.152(c); see Letter from Kenneth R. Warlick, *supra* note 231, at 3-5; see also 71 Fed. Reg. 46,604-05. The SEA has sixty calendar days from receipt to complete an investigation—conducting an on-site investigation, if necessary. § 300.152(a). The complainant must be able to submit additional information, orally or in writing and the public agency must be able to respond to complaint. *Id.*; see Letter from Kenneth R. Warlick, *supra* note 231, at 8; see also 71 Fed. Reg. 46,602. The timeline can be extended for exceptional circumstances (e.g., systemic complaint). § 300.152 (b). The complainant and LEA can agree to extend timeline for purposes of mediation. *Id.*

236. See § 300.151(a)(1) (stating the agency must adopt procedures for “[r]esolving any complaint, including a complaint filed by an organization or individual from another State”).

237. § 300.152(a)(5).

238. § 300.152(b)(1)(ii); see Letter from Kenneth R. Warlick, *supra* note 231, at 7; see also 71 Fed. Reg. 46,603-04.

239. § 300.153(b)(2).

The state agency may itself be the object of a compliance complaint, in which case the SEA may contract with an independent third party for the investigation and decision-rendering, while still complying with all procedural and remediation steps.²⁴⁰ Although there is no guarantee that the SEA will conduct the investigation with the intended vigor and rigor, its failure to do so can be the basis of a second administrative complaint or lawsuit, with a considerable evidentiary record already laid out. The failure to conduct an adequate investigation, to devise an adequate remedy²⁴¹ or to investigate or remediate contrary to federal regulations²⁴² have been the subjects of successful litigation.

Compliance complaint remedies have included: (1) school- or district-wide positive behavior interventions, with training for all staff; (2) improvements in transition services and vocational training programs; (3) intensive reading and math remediation for students more than two years behind their chronological grade level; (4) elimination of policies and practices, such as a shortened school day, that result in students receiving less services than they need; (5) strategies for moving students from more restrictive to less restrictive placements; and (6) significant increase in the frequency and duration of related services.²⁴³

This administrative procedure, when skillfully negotiated, can yield systemic reforms, including those that target poor children and youth, in such areas as failure to provide appropriate related services, failure to develop behavioral intervention programs, failure to timely evaluate students, inadequate levels of social work and counseling services, and lack of mental health services. The negotiating will likely need attorney expertise and a lot of *chutzpah*, but at a fraction of the time and cost of class action litigation.²⁴⁴ Of course, this approach may need to be used with complementary community organizing and media strategies and co-counseling with some of the established public interest law firms and

240. § 300.153(b)(1); see Letter from Kenneth R. Warlick, *supra* note 231, at 9; see also 71 Fed. Reg. 46,602-03.

241. See, e.g., *Chavez v. Bd. of Educ.*, 614 F. Supp. 2d 1184, 1208 (D. N.M. 2009) (recognizing that courts may require SEA to provide services directly to disabled children when LEA has failed to do so); see also, *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900, 904-05 (N.D. Ill. 1998) (noting that the SEA made no effort to take corrective action with respect to district violations of LRE regulations).

242. See, e.g., *Beth V. ex rel. Yvonne V. v. Carroll*, 87 F.3d 80, 88 (3d Cir. 1996) (alleging that the SEA consistently failed to investigate and timely resolve IDEA complaints).

243. For sample systemic compliance complaints, responses, and settlements from school districts in Florida, Louisiana, and Mississippi see *Case Docket*, S. POVERTY LAW CTR., <http://splcenter.org/get-informed/case-docket/> (last visited June 17, 2011).

244. In particular, the standing is liberally construed and there is no need to pay court costs, to certify a class, propound or respond to discovery, or engage in law and motion practice. There may be expert or consultant costs, however.

private counsel.²⁴⁵

D. The U.S. Department of Education Has Authority to Aggressively Monitor Districts and States

In her thoughtful analysis, relying in part on a market paradigm, Professor Eloise Pasachoff writes:

In the absence of a viable private enforcement strategy for low-income children, the question becomes whether the public enforcement system can do better. It can. While there are theoretical concerns with public enforcement in general, and practical concerns with public enforcement of the IDEA as a historical matter, there is nonetheless a need for government interventions that focus on low-income children; that have a broad geographical reach; that avoid the need for individuals to raise claims on their own behalf; that create positive externalities beyond the scope of any particular intervention; and that incentivize the relevant parties to provide appropriate special education services for low-income children.²⁴⁶

Professor Pasachoff notes that the state complaint system attempts to counter the problem of “externalities.”²⁴⁷ As discussed above, any time an SEA resolves a complaint by finding a failure to provide appropriate services, the written decision must address corrective action as to the particular child as well as “appropriate future provision of services for all children with disabilities.”²⁴⁸

In a sweeping departure from the existing law, Congress established a detailed scheme in 2004 for monitoring compliance and enforcement.²⁴⁹ The centerpiece was “focused monitoring.”²⁵⁰ Its aim was to improve “educational results and functional outcomes,” with particular attention to providing FAPE in the least restrictive environment, transition services, state supervision of complaint resolution, and overrepresentation of racial and ethnic minorities through inappropriate policies and practices.²⁵¹ In her

245. There are also disadvantages to this strategy, for example, almost certainly no attorney fees. *But see* *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000); *Upper Valley Assoc. for Handicapped Citizens v. Mills*, 928 F. Supp. 429 (D. Vt. 1996). Moreover, there is less control by plaintiffs—and their lawyers—over the process and school districts may file individual due process complaints to stay the compliance investigation. Under 34 C.F.R. § 300.152(c), the State must set aside a complaint if due process is requested on the same issue. 34 C.F.R. § 300.152(c) (2006). Finally, the quality of state monitors and administrators cannot be overestimated. If dissatisfied with results of the investigation, plaintiffs will most likely still need to exhaust due process procedures.

246. Pasachoff, *supra* note 204, at 1461.

247. *Id.* at 1440-41.

248. § 300.151(b)(2).

249. 20 U.S.C. §§ 1416-17 (2006).

250. *Id.*

251. §§ 1402, 1416(a)(3), (b).

review, the Secretary of Education is supposed to rely primarily on student performance on state assessments—including alternate assessments, dropout rates and graduation rates, and local and state compliance plans developed by the states.²⁵²

In theory, there is a complex scheme of graduated sanctions, based on standards such as “lack of satisfactory progress” for two consecutive years, “substantial noncompliance,” and “egregious noncompliance.” Early stages of noncompliance typically result in corrective action plans. When a school district fails to correct, additional actions are available, for example, fund recovery, withholding funds, and suspension of payments and referral to the Department of Justice (DOJ).²⁵³ In practice, the monitoring and enforcement have proven to be weak and disappointing. With the proper bureaucratic initiative, this mechanism has potential to directly or indirectly target districts with high levels of students from poor families.

The National Council on Disability (NCD) addressed the subject of oversight extensively in one of its special education reports. The 2004 reauthorization offered a more explicit means of enforcement than the 1997 IDEA amendments. The Department of Education’s previous practice of placing “special conditions” on new state grants had been criticized as politicizing.²⁵⁴ While seemingly limited to certain performance indicators, the new provisions have the potential to remedy some of the NCD criticisms about lack of focus and unclear standards for determining whether noncompliance is systemic, particularly in low-income districts. The NCD also recommended more collaboration between the parent training centers and the protection and advocacy agencies in developing a statewide special education advocacy strategy.²⁵⁵ The strength and vitality of publicly funded—but *nongovernmental*—actors can be more easily predicted and controlled for securing broad-based IDEA compliance than that of public sector officials and their political overseers whose job might be to accomplish the very same thing.

E. The Department of Education Can Collect and Disclose Data

We have discussed the problems poor families face in obtaining adequate and comprehensible information about special education processes. These kinds of “informational asymmetries” among parents and between parents and schools, as well as imperfect overall information about types of services that might be available and useful, warrant reliance on

252. § 1416(b).

253. § 1416(e).

254. NCD REP. 2000, *supra* note 13 at 35, 37.

255. *Id.* at 71.

public enforcement and implementation mechanisms.²⁵⁶

The United States Department of Education, as noted earlier, does collect special education data on such things as racial disproportionality, state implementation of IDEA, and student dropouts.²⁵⁷ The Department is also required to annually collect data from SEAs concerning the number and percentage of disabled students (by race, ethnicity, limited English proficiency status, gender, and disability category) who are: receiving FAPE, participating in regular and separate classes, being disciplined, have completed or terminated special education services, and have filed for a due process hearing, among other remedies.²⁵⁸

While useful for planning and some forms of monitoring and enforcement, there is no data that directly focuses on the needs of children from families without means, and there is no explicit mandate to disseminate this information. If the information disclosure requirement is to be expanded, we must also ensure that parents are sufficiently informed about their rights and services options through agents who are independent of the federal, state, and local educational bureaucracies. If ardent advocacy is to be the norm for *all* parents, irrespective of socio-economic class, it will require creative and community-based outreach strategies and the distribution of many “advo-kits.”²⁵⁹

IV. LEGISLATIVE AGENDA FOR CONGRESS

The following proposals all follow from the above discussion of the plight of families without the means to negotiate special education processes. Most of these are obvious to education advocates and policymakers. What is chiefly lacking at the present time is political will, immobilized by both ideology and budgetary constraints. Although even modest federal legislation²⁶⁰ can be a target for fiscal slings or political arrows, we are compelled to record the following legislative objectives for future consideration.

256. Pasachoff, *supra* note 204, at 1439.

257. *See supra* notes 145-47 and accompanying text.

258. § 1418(a)(1)(A); *see* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37, 101-02 (1997); *see also* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, § 101, 118 Stat. 2647, 2738-40 (2004).

259. *See* Rosenbaum, *Aligning or Maligning?*, *supra* note 140, at 10 (noting that when the IDEA was last considered for reauthorization, a group of San Francisco Bay Area lawyers and self-help providers suggested, only half in jest, that parents be furnished “advo-kits” as part of a massive grassroots educational campaign).

260. Many of the same political and budgetary factors are also at play at the state and local governmental levels. However, there may be opportunities for some of these legislative initiatives to be considered by state legislatures and boards of education.

A. Clarify That Prospective Funding for Tuition and Services is Available as a Self-Help Remedy

It is important for Congress to clarify that the remedy of private school tuition in the absence of FAPE is not a remedy only available for wealthy families. The statute and regulations should clarify that both prospective tuition funding and satisfaction of a debt—or retroactive direct payment to a school—are valid remedies. Further, the IDEA should be amended to include that private funding for services, and not just private school tuition, is appropriate where FAPE has been denied.

B. Expand IEE Provisions to Improve Access for Families

Congress should consider expanding the right of an IEE to parents and students who have not been timely evaluated or have been denied an evaluation, or where there has been a “child find” violation, which has forced the parents to seek an IEE.

Further, the IDEA should be clarified to avoid a narrow interpretation of the concept of “evaluation.” If a district conducts an evaluation but fails to include an assessment in one particular area that would be obviously required in any particular case, such as speech and language or assistive technology, a parent should have the right to an IEE.

C. Incorporate the Compensatory Education Remedy into the Statute

An amendment to incorporate the remedy of compensatory education for a denial of FAPE into the statute is extremely important to ensure that the rights of children without financial resources are protected. As it stands now, most parents whose children are being denied FAPE do not realize they have any remedy. Including compensatory education in the statute would not only address this problem, but would ensure equity across the states.

D. Create Emergency and Interim Hearing Procedures

As noted above, the IDEA’s due process procedures are supposed to function in an environment that is in compliance with the statute. However, the reality is different. Thus, emergencies outside of the disciplinary context frequently arise, for example, unenforced IEPs, the need for an IEE, and the right to prospective tuition funding. These situations cannot be addressed effectively through the current due process system.

E. Strengthen the Notice and Safeguard Provisions

The IDEA should be amended to ensure that the notice and safeguard provisions actually serve to protect the rights of parents with limited

literacy or English language abilities and allow them to participate in the process. Toward that end, the IDEA should include a provision granting parents the right to receive educational records translated into their own language and making these records accessible to parents who lack sufficient literacy skills. Further, the IDEA should be amended to require districts to provide a written description of the special education process in addition to procedural safeguards. Moreover, the regulations should be amended to expressly prohibit boilerplate language for notices.

F. Expand and Clarify Students' Rights

The topic of students' rights and the IDEA, is an extensive one that goes beyond the scope of this Article. The IDEA's provisions concerning transfer of rights, notices, and safeguards for youth ages sixteen to twenty-one should be completely revisited in light of the realities of student outcomes. At a minimum, the IDEA should be amended to ensure that regardless of transfer of rights, both parents and students over sixteen should receive annual notices of rights and safeguards.

G. Expand Disciplinary Protections, Right to FAPE and Services to Expressly Include Truant Students

Adoption of specific provisions concerning truancy and absenteeism are critical to ensuring more effective outcomes for students with disabilities. The IDEA and its regulations should be amended to clarify that truant students, like those who are suspended, are still entitled to FAPE. Additionally, the law should be clarified to expressly indicate that truancy or absenteeism that interferes with learning is both a "lack of progress" that must be addressed as part of an annual review or that may trigger a review, and is also a "behavior" justifying a functional behavior assessment and positive behavioral supports. Further, truant students should have the same procedural requirements as those subject to discipline. The IDEA should also be clarified to prohibit schools from using family courts to address truancy, since those issues should be addressed under the IDEA.

H. Reinstate the Right to Expert Witness Fees for Prevailing Parties

Organizations representing families of children with disabilities are currently working to correct the Supreme Court's decision in *Murphy*.²⁶¹ Congress and state legislatures have addressed the Court's decisions

261. See, e.g., COUNCIL OF PARENT ATTORNEYS & ADVOCATES, INC., AN INCREASINGLY UNEVEN PLAYING FIELD: SUPREME COURT DECISIONS AND IDEA 2004 CONCERNS (2007), available at http://www.copaa.org/wp-content/uploads/2010/04/Leveling-Playing-Field_Bullets_112807.pdf.

individually.²⁶²

I. Shift the Burden of Meeting IDEA Requirements to School Districts and Require Informed Consent for a Change in IEP, Placement, or FAPE

As discussed, it is extremely difficult for families without financial resources to bear the burden of proof of the IDEA's requirements, obtain attorneys, IEEs, expert witnesses, or generate a track record of success in a private placement. It makes sense that a student's family must prove that any private services they seek are appropriate if those services have not been previously agreed to by the IEP team. However, it seems inconsistent with the intent of the due process provisions to place on parents the burden of proving non-compliance with the statute, particularly when the evidence of compliance is within full control of the district and discovery is rarely permitted.

Further, allowing school districts to change IEPs and placements unless parents invoke due process has a disproportionate impact on families who cannot afford lawyers, or who do not understand and cannot navigate the system, and whose children are at greater risk of educational segregation, discipline and dropping out. Requiring parental consent for non-disciplinary IEP and placement changes would be a critical step in balancing the power between districts and unrich families. As noted, some states have already adopted statutes placing the burden of proof on the school district.²⁶³ Federal legislation should be enacted to do the same for all students across the nation.

J. Reinstate the Catalyst Theory for Attorney's Fees

The *Buckhannon* holding²⁶⁴ must be reversed by Congress, allowing litigants to shift attorney's fees to defendants, including school districts who are parties to settlements that lack a court's imprimatur.

K. Increase the Number of Publicly Funded Attorneys

When the IDEA was last amended, the Senate bill contained language designed to ensure that states spend funds to support the state protection and advocacy systems in advising and assisting parents in the areas of

262. *See supra* notes 200-01 and accompanying text. A bill to amend the IDEA to permit a prevailing party to recover expert fees has been introduced twice in the House of Representatives, IDEA Fairness Restoration Act, H.R. 2740, 111th Cong. § 2 (2009); IDEA Fairness Restoration Act, H.R. 4188, 110th Cong. 2d Sess. (2007), and there is currently a bill before the House of Representatives, IDEA Fairness Restoration Act, H.R. 1208, 112th Cong. (2011), and before the Senate, IDEA Fairness Restoration Act, S. 613, 112th Cong. (2011).

263. *See supra* note 188.

264. *See supra* note 179 and accompanying text.

dispute resolution,²⁶⁵ which arguably could include training on procedural safeguards involving notice, consent, assessment, rights to particular services, and placement.

A more ambitious technical assistance and self-advocacy scheme was recommended by the NCD in its major review of IDEA.²⁶⁶ It called for the Department of Education to fund more lawyers to counsel clients, a national back-up center, and self-advocacy training programs for students with disabilities and their parents.²⁶⁷ The NCD found that the programs and services in most states were inadequate and called for funding a lawyer at every parent training center,²⁶⁸ a protection and advocacy agency, and an independent living center “to provide competent legal advice”²⁶⁹

M. Conduct More Aggressive Investigations and Justice Department Litigation

The NCD has long lamented the lack of a federal complaint system, which distinguishes IDEA from every other U.S. civil rights law.²⁷⁰ Furthermore, the NCD found that under the current system, parents and other stakeholders were not adequately involved in the Department of Education’s on-site investigations or monitoring.²⁷¹

The Department of Education should not be the sole enforcement

265. S. 1248, 108th Cong. § 611(e)(2)(B) (2003). This would have provided the protection and advocacy agencies (P&As) with additional resources targeted specifically to handle the IDEA issues. *See id.* The P&As also publish a number of self-help special education materials. *See generally* DISABILITY RIGHTS CAL. & COMMUNITY ALLIANCE ON SPECIAL EDUCATION, SPECIAL EDUCATION RIGHTS & RESPONSIBILITIES (rev. 2011), available at <http://www.disabilityrightsca.org/pubs/504001.pdf>.

266. NCD REP. 2000, *supra* note 13.

267. *Id.*; *see also* Monica Costello, Note, *Systemic Compliance Complaints: Making IDEA’s Enforcement Provisions a Reality*, 41 U. MICH. L. REFORM 507, 523 (2008); Phillips, *supra* note 35, at 1842-52; Wakelin, *supra* note 32, at 283.

268. *See* NCD REP. 2000, *supra* note 13; *see also* 20 U.S.C. §§ 1482-84 (2006). “Parent training and information centers” are funded, in part, to meet the particular training and information needs of underserved parents and to assist them in understanding the availability of, and how to effectively use, procedural safeguards under IDEA, including alternative methods of dispute resolution. § 1482(b). Similarly “community parent resource centers” were created to give training and information to the “underserved parents of children with disabilities,” including those who are low-income, have limited English proficiency or are themselves disabled. § 1483(a). Clients of legal services offices must meet financial eligibility guidelines. 45 C.F.R. §1611.1 *et seq.* (2011).

269. *See* NAT’L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS (2000), available at <http://www.ncd.gov/publications/2000/Jan252000>. In 2000, the the National Council on Disability called for the establishment and funding of a protection and advocacy system specific to IDEA to be administered through the Department of Education. *Id.* at recommendation VII.7; *see also* Hehir, *supra* note 214, at 837 (calling for strategic litigation by P&A attorneys).

270. NCD REP. 2000, *supra* note 13, at 35, 37.

271. *Id.*

agency. The Department of Education has longstanding and collaborative relationships with state education administrators. This is an important relationship that is jeopardized when the Department of Education threatens sanctions. Partial solutions were included in the last reauthorization when enforcement authority was also given to the DOJ, but only following referral of cases from the Department of Education. “This has not worked for there have been no referrals to DOJ since that authority was added to the IDEA.”²⁷² In 2002, the NCD recommended an expansive role for DOJ: “Congress should authorize and fund the [DOJ] to independently investigate and litigate IDEA cases, as well as administer a federal system for handling pattern and practice complaints filed by individuals.”²⁷³ This is consistent with the nation’s approach to discrimination in housing and employment, and would surely give leverage to students from poor families.²⁷⁴ The NCD also recommends adequate funding for enforcement, complaint handling, and technical assistance infrastructures, enabling the DOJ and Department of Education to support improvements in state compliance and ensure better outcomes for children.²⁷⁵

The Fordham Foundation/Progressive Policy Institute also made recommendations in a report containing a detailed critique of the Department of Education status quo.²⁷⁶ The report charged that the traditional compliance-based model, with the 1997 amendments’ new regime of results-based accountability, was “merely grafted” onto the pre-existing approach.²⁷⁷

Monitoring is not only key to equalizing the leverage of parents without financial means, but “[s]trong monitoring and enforcement provisions are key to keeping states and school districts out of court.”²⁷⁸

272. NAT’L COUNCIL ON DISABILITY, INDIVIDUALS WITH DISABILITIES EDUCATION ACT REAUTHORIZATION: WHERE DO WE REALLY STAND? (2002) [hereinafter NCD REP. 2002], available at <http://www.ncd.gov/publications/2002/July52002>.

273. NCD REP. 2002, *supra* note 273.

274. See Pasachoff, *supra* note 204, at 1422.

275. NCD REP. 2002, *supra* note 273, at recommendation 2.

276. Bryan C. Hassel & Patrick J. Wolf, *Effectiveness and Accountability (Part 2): Alternatives to the Compliance Model*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, 309 (Chester E. Finn, Jr., et al. eds., 2001), available at http://www.dlc.org/documents/SpecialEd_ch14.pdf.

277. *Id.* One of the more modest compliance alternatives recommended is “smart regulation.” *Id.* at 311. While regulators can still verify that parties are following basic norms of behavior and impose sanctions where necessary under this alternative, they may “deploy a broader range of tools” that have a free market tinge. *Id.* at 311-12. This might include, “forging voluntary agreements; . . . using information to spur good behavior; addressing underlying causes of noncompliance; and replacing procedural controls with after-the-fact checks.” *Id.* at 312-17.

278. H.R. Rep. No. 108-77, at 380 (2003). The House Minority recognized this when considering H.R. 1350, the last IDEA reauthorization bill: “We know that few, if any, states and school districts deliberately flout IDEA. Unfortunately, often the only

N. More Data Disclosures May be Useful

A truly modest, but less costly proposal is to mandate more data collection—and dissemination—by the Department of Education, with an emphasis on factors that will help pinpoint the gaps in the specialized education of students from families without means. According to regulatory policy theory, “[m]andating disclosure can be both less expensive and more efficient than command-and-control mechanisms, by giving people the information they need to make decisions rather than by requiring particular means or ends.”²⁷⁹ As discussed above, this will only be successful when the data is artfully exposed by organizations and advocates who can use it for the betterment of their clients.

O. Congressional Mandates Affecting Children from Poor Families Should Be Linked to Federal Expenditures

A final tool in the legislative toolbox is the congressional spending clause authority. Congress can impose more conditions on the states in exchange for providing IDEA funding, *viz.* improvement of services to poor children. The Department of Education’s Office of Special Education Programs has the authority to target the funds it wishes to withhold from LEAs that are not compliant, rather than withholding funds from the state as a whole.²⁸⁰ Congress could mandate that a state providing (or permitting its districts to provide) worse special education services to poor children than to wealthier children would not be in compliance with the law, and the federal government could therefore withhold funding.²⁸¹

CONCLUSION

This Article has canvassed pressing issues of educational and social equity. Without diminishing the gains that the IDEA has generated for students with disabilities, a new phase in this perennially passionate civil and human rights struggle must soon be faced. The chief goal of this Article’s sketch of the salient issues, ones that will be confronted by

way a school district’s lack of compliance is discovered is when a parent pursues litigation.” *Id.*

279. Pasachoff, *supra* note 204 at 1465 (citing Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 146 U. PA. L. REV. 613, 624 (1999)).

280. 20 U.S.C. § 1416(e)(6) (2006); *see also* Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in *RACIAL INEQUITY IN SPECIAL EDUCATION* 219, 229 (Daniel J. Losen & Gary Orfield eds., 2002).

281. For a detailed explanation of this proposal see Pasachoff, *supra* note 204, at 1474-75. The mandate could either “require the same degree of excellence in special education services in every district around the state” or “provide a weaker mandate, requiring only that individual districts would not be permitted to provide better services to wealthier children than to poor children.” *Id.* at 1486.

parents, advocates, legislatures, policy-makers, and, inevitably, the courts, is to move the discourse forward. We have presented several options, a number of which depend on legislative will, a better fiscal climate, or both. Ameliorating the disparities that currently exist will require strategic thinking, sustained advocacy, and a fearless commitment to equal educational opportunity.