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## School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact

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# School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact

By Debra Chopp\*

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## I. INTRODUCTION

To read the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> is to be impressed with the ambition and promise of special education. The statute guarantees disabled students a “free appropriate public education” (FAPE) in the “least restrictive environment.”<sup>2</sup> At the core of this guarantee lies an entitlement for the parents of a disabled child to collaborate with teachers and school administrators to craft an educational program that is both tailored to the child’s unique needs and designed to help her make progress in her education. This entitlement, and the IDEA generally, represents an enormous advance for children with disabilities—a community that, for generations, passed through school with minimal learning, or worse, were excluded from school altogether.<sup>3</sup>

But as is often true with respect to rights bestowed by law, issues of interpretation and enforcement exist. In the context of the IDEA, these issues relate to what school districts are required to provide to disabled children and how to ensure that the districts are meeting those requirements. For instance, a parent may believe that in order to receive an “appropriate” education, her child needs speech therapy in school, and a school district may believe otherwise; a school district may believe that a child should be placed in a specialized classroom for autistic children, and a parent may disagree; a parent may believe that her child’s progress toward

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<sup>1</sup> 20 U.S.C. §§ 1400–1482 (2006). The Act was originally titled the “Education for All Handicapped Children Act of 1975.” Pub. L. No. 94-142, 89 Stat. 852 (1975). The name was changed to the “Individuals with Disabilities Education Act” (IDEA) in 1990. Pub. L. No. 101-476, 104 Stat. 1141-42 (1990).

<sup>2</sup> 20 U.S.C. § 1412(a)(1), (3) (2006). This means that, to the maximum extent appropriate, disabled children are to be educated with their non-disabled peers.

<sup>3</sup> When federal special education legislation was first enacted in 1975, less than half of the eight million disabled children in the United States were receiving an appropriate education. Nearly two million disabled children were receiving no education at all. See S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432.

certain educational goals is so tenuous that she requires extended school year services to prevent regression, and the school district may regard such services as unnecessary.

The IDEA contemplates extensive parental involvement in the design of an education plan appropriate to each individual child. When disagreements arise between parents and school districts, it also provides parents with access to legal remedies, including the ability for parents to sue to enforce the guarantees of special education.<sup>4</sup> But a variety of structural and economic factors have prevented the fulfillment of the statute's promise, from the development of appropriate individualized education programs for disabled students to the enforcement of the IDEA's educational guarantees. These factors include the limited ability of parents to collaborate effectively with school districts; a judicial construction of "free appropriate public education" that sets an exceedingly low bar for school districts; significant disparities in school districts' and parents' access to legal counsel, which affects both the bargaining power of parents and their ability to win a lawsuit, should they need to enforce the IDEA; and finally, the tension between the IDEA's guarantee of a free appropriate public education and the resource constraints faced by school districts constantly lurks in the background.<sup>5</sup>

This article highlights the myriad forces that impede the realization of the IDEA's goals. Part II gives an overview of the history of special education and the special education process under the IDEA, particularly as it relates to the cooperative development of an individualized education program (IEP) for a disabled child. Part III examines features of the special education process that operate to the systematic detriment of parents, particularly low-income parents, and prevent them from securing an "appropriate education" for their children. I am not the first to note ways in which parents are at a disadvantage both in negotiating with, and litigating against, school districts.<sup>6</sup> What Part III does is assemble these critiques and add one

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<sup>4</sup> 20 U.S.C. § 1415(a)(6) (2006).

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1432 (2011) (describing in detail the barriers that parents, especially low-income parents, face in enforcing the IDEA and urging greater public enforcement of the IDEA); Joanne Karger, *A New*

that has not received attention: the ability of some school districts to obtain insurance to cover their litigation costs should parents sue them under the IDEA, and the effect that this insurance has on the special education process. Part IV concludes with an overview of recent scholarly suggestions for improvement and observations based on my experience practicing special education law.

## II. THE IDEA AND THE IEP PROCESS

### A. Precursors to Enactment

Parents of disabled children played a significant role in the development and advancement of special education law.<sup>7</sup> Between the 1950s and the early 1970s, parents lobbied aggressively to root out entrenched discrimination against children with disabilities.<sup>8</sup> The

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*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, 154 (2008) ("While the intent of IDEA is for parents to become partners with school districts in the development of their child's educational program, research has shown that many parents feel denigrated in their relationships with school personnel, who are in the positions of power."); Erin Phillips, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1833 (2008) ("If the system now requires parents to make smart, consumer-like decisions, those without the requisite material, social, and cultural capital are at a marked disadvantage in their role as advocates for their children."); Mitchell H. Rubinstein, *Parents as Quasi-Therapists Under the Individuals with Disabilities Education Act*, 76 U. CIN. L. REV. 899, 911 (2008) ("[T]he IEP process often involves a tension and conflict between parents who naturally want what is best for their child and school districts who are often looking at the cost of providing special education services."); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 172-73 (2005) ("The current [special education] system yields lower payoffs for needier families, which are on average less endowed with bargaining power and therefore less capable of taking advantage of participation opportunities.").

<sup>7</sup> See Marvin Lazerson, *The Origins of Special Education*, in SPECIAL EDUCATION POLICIES 38 (1983) ("It is hard to overestimate the impact of parental organizations on special education in the 1950s and 1960s: they were successful agitators for the expansion of the system . . . through letter writing campaigns, through lobbying pressures in state legislatures and departments of education, and through the development of national coordinating groups, they forced the transfer of larger portions of educational funds to special education.").

<sup>8</sup> *Id.*

timing of this development was no accident, as there were important points of connection between the movement for disabled children's educational rights and the civil rights movement more generally. First, the rhetoric and practice of segregation (familiar from the battle over racial equality) was central to the experience of families with disabled children. These parents struggled with policies that had the intended effect of keeping "crippled children" away from "normal" children by separating them until the former dropped out of school.<sup>9</sup> Second, many of the children deemed by educators to be "handicapped" were non-white and/or spoke foreign languages.<sup>10</sup> As the racial desegregation movement took hold, middle-class white parents of disabled children and their allies drew upon the rhetoric and leveraged the salience of the fight against racially segregated education to "le[ad] the attack on exclusion from the educational system."<sup>11</sup> Non-white and non-English speaking parents joined in the fight against an education system that was segregating their children under the guise of disability.<sup>12</sup>

Employing a rights-based approach to desegregation in special education, groups representing disabled children took to the courts. In 1972, two watershed education cases were decided, thereby bringing the segregation of children with special needs from "mainstream" public education into the cultural consciousness and into the constitutional rights framework. First, in *Pennsylvania Association of Retarded Children (PARC) v. Commonwealth of Pennsylvania*, a federal district court approved a settlement agreement in a class action, enjoining Pennsylvania from excluding "retarded" children from public education.<sup>13</sup> The state had previously deemed the relevant class of students "uneducable and untrainable."<sup>14</sup> The court found that the plaintiffs had "established a colorable constitutional claim," and that their right to equal protection under the Fourteenth Amendment had been violated when

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<sup>9</sup> *Id.* at 39.

<sup>10</sup> *Id.* at 41.

<sup>11</sup> *Id.*

<sup>12</sup> Lazerson, *supra* note 7, at 41.

<sup>13</sup> 343 F. Supp. 279 (E.D. Pa. 1972). The court noted that an estimated 70,000–80,000 children between the ages of five and twenty-one were denied access to any public education services. *Id.* at 296.

<sup>14</sup> *Id.* at 282.

the state denied public education to children deemed “mentally retarded” while providing public education to non-impaired children.<sup>15</sup> In approving the parties’ settlement, the court explained: “This is a noble and humanitarian end in which the Commonwealth of Pennsylvania has chosen to join. Today, with the following Order, this group of citizens will have new hope in their quest for a life of dignity and self-sufficiency.”<sup>16</sup>

Just three months later, in *Mills v. Board of Education of the District of Columbia*, a federal district court determined that the District of Columbia had violated the due process rights of disabled children by excluding them from school without providing any educational alternative.<sup>17</sup> The court held that the District is obligated to provide each school-aged child a “free and suitable publicly-supported education, regardless of the degree of the child’s . . . disability or impairment.”<sup>18</sup> The court’s highly detailed order regarding the provision of education for children with disabilities laid a blueprint for what would later become federal special education law, complete with a requirement to identify disabled children in need of services, individually tailored education plans, compensatory education, and due process rights.<sup>19</sup>

These court rulings establishing a right to an education were a victory for disabled children, but were insufficient to form the basis of a robust system of special education. Legislative action was necessary to place special education on secure footing, chiefly because without it, special education programs could not be assured of funding.<sup>20</sup> The 1975 enactment of the Education for All

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<sup>15</sup> *Id.* at 288 n. 19.

<sup>16</sup> *Id.* at 302.

<sup>17</sup> 348 F. Supp. 866, 874–75 (D.D.C. 1972). Years earlier, the court had proclaimed that “the equal protection clause in its application to public school education—is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment.” *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967).

<sup>18</sup> *Mills*, 348 F. Supp. at 878.

<sup>19</sup> *Id.* at 878–83.

<sup>20</sup> Jack Tweedie, *The Politics of Legalization in Special Education Reform*, in SPECIAL EDUCATION POLICIES 48, 54 (1983). As we will see, even with legislative action, access to funding for special education programming remains a persistent problem.

Handicapped Children Act<sup>21</sup>—the precursor to the IDEA—promised change. It guaranteed at least some federal funding for special education programming in public schools and mandated that disabled children receive a free appropriate public education in the least restrictive environment;<sup>22</sup> that is, children in need of special education services were to be integrated into the general education system to the maximum extent appropriate.

### *B. Developing an IEP*

The guarantee of a free appropriate public education (FAPE) for eligible students is the cornerstone of special education law. The IDEA defines FAPE as the following:

[S]pecial 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) of this title.<sup>23</sup>

As becomes immediately apparent, this is a “definition” in name only; it provides no guidance or instruction as to what constitutes an “appropriate education.” It does, however, set up a procedure for the provision of FAPE: the requirement of an “individualized education program” (IEP).<sup>24</sup> The IEP operates like a contract between the school district and the student; it is a document created after negotiations between two parties (the parents and the school district), and the terms written into the IEP are legally enforceable.<sup>25</sup> This

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<sup>21</sup> Pub. L. No. 94-142, 89 Stat. 773 (1975).

<sup>22</sup> The IDEA is “spending clause” legislation—it offers federal funds to states that meet the conditions required for their receipt. 20 U.S.C. § 1412.

<sup>23</sup> 20 U.S.C. § 1401(9) (2006).

<sup>24</sup> 20 U.S.C. § 1414(d) (2006).

<sup>25</sup> Professor Daniela Caruso unpacks this analogy in her article, *Bargaining and Distribution in Special Education*. Caruso, *supra* note 6. Caruso



contract performs several functions: it recognizes the child's eligibility for special education, summarizes the child's present levels of academic achievement and performance, lays out specific and measurable educational goals for the student, and lists any services and accommodations the school district is to provide.<sup>26</sup>

A student's IEP is created at a meeting of his or her "IEP team" and is revised by that team annually.<sup>27</sup> By law, this team must include a general education teacher, a special education teacher, a representative from the school district, and a parent of the child.<sup>28</sup> Often, and depending on the child's disabilities, other professionals, such as speech therapists, social workers, psychologists, and occupational therapists are part of the IEP team.<sup>29</sup> While the law does not mandate parental participation in the IEP process,<sup>30</sup> it does express a strong preference for parental involvement. Parents must be invited to participate in IEP meetings; school districts are required to accommodate parents' schedules in setting meeting times; and an interpreter must be provided in the event that the parent is deaf or not a native English speaker.<sup>31</sup>

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makes clear that the similarities between negotiating an IEP and negotiating a contract are really only present where empowered (educated, informed, wealthy) parents are sitting across the table from the school district. *Id.* at 178. Caruso notes that the "consideration" offered by the parents in an IEP contract negotiation is the implicit promise not to bring a due process hearing against the district for a denial of FAPE. *Id.* at 179–80. Crucially, Caruso notes that parents who are not sufficiently empowered to bring a lawsuit—because they do not know they can or because they do not have the means to hire an attorney—have less consideration to offer and therefore wind up with a less robust IEP. *Id.* at 184. In those instances, and because special education services are actually a legal entitlement for eligible children, the relationship between disempowered parents and the school district is more similar to the relationship between consumers of public benefits and the government agency that provides the benefits. For wealthier parents, however, an IEP (in both its development and the final product) maintains the equivalence of a contract. *Id.* at 176.

<sup>26</sup> 20 U.S.C. § 1414(d)(1)(A)(i) (2006).

<sup>27</sup> 20 U.S.C. § 1414(d)(4)(A)(i) (2006).

<sup>28</sup> 20 U.S.C. § 1414(d)(1)(B) (2006).

<sup>29</sup> *See* 20 U.S.C. § 1414(d)(1)(B)(vi) (2006).

<sup>30</sup> The public agency must take steps to ensure parent participation in an IEP meeting, but is able to conduct an IEP meeting in the absence of a parent. 34 C.F.R. § 300.322(d) (2012).

<sup>31</sup> 34 C.F.R. § 300.322(e) (2012).

As the Supreme Court has recognized, the IEP meeting is intended to be a “cooperative process . . . between parents and schools.”<sup>32</sup> This intention is reflected in the statutory scheme in a variety of ways. First, and most obvious, the statute’s use of the term “team” signals that the participants should work together and are “on the same side”—the side of the disabled student. Second, and more importantly, there are no formal votes in an IEP meeting. No one person or entity bears the burden of persuasion,<sup>33</sup> the team is to make a group decision on the content of the IEP.<sup>34</sup> The goal is for the team to discuss the child’s academic and functional achievements and to develop an individually tailored plan to help that child succeed.<sup>35</sup> The process of determining what constitutes an appropriate education for a given child is meant to be a dynamic one characterized by mutual respect and the sharing of information and ideas between parent and school.

Schools hold IEP team meetings every year, often with little or no discord. The team works its way through the district’s IEP form—a document created by either the department of education in a state or the individual school district<sup>36</sup>—and crafts an education program for the disabled student. At times, however, the IEP collaboration fractures, and parents and school districts find themselves in opposition to one another. When this happens, important disparities between parents and school districts emerge, and these disparities, working in tandem with legal doctrine, resource constraints, and imbalances in parents’ and school districts’ access to legal counsel and insurance coverage, have prevented the IDEA from

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<sup>32</sup> *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (“The core of the statute . . . is the cooperative process that it establishes between parents and schools . . . [t]he central vehicle for this collaboration is the IEP process”).

<sup>33</sup> As I explain below, this ceases to be the case when parents and school districts cannot agree on an IEP and formal dispute resolution processes begin. See *infra* Part III.B.2. Under those conditions, the party challenging the IEP (typically the parent) bears the burden of persuading the hearing officer or the court that the existing plan is legally defective. *Schaffer*, 546 U.S. at 62.

<sup>34</sup> 34 C.F.R. § 300.320 (2012).

<sup>35</sup> *Id.*

<sup>36</sup> The IEP form is a document that lists all of the elements that are required to be written into an IEP (such as specific educational goals for the child, the child’s present levels of academic achievement, and the type of services to be provided to the child) and provides space for the IEP team to record its decisions.

delivering meaningfully on its promise of a free appropriate public education.<sup>37</sup>

### III. SPECIAL EDUCATION IN PRACTICE

In this section, I examine the factors that shape the IEP process as it actually operates. Part III.A focuses on the psychological, professional, and personal dynamics of parent-district relationships that can undermine the collaborative scheme imagined by the IDEA. Part III.B zeroes in on the FAPE standard and examines the legal and economic factors that have made the guarantee of a “free appropriate public education” into something less than it might have been. Part III.C, finally, considers the effect of legal representation and insurance coverage on special education litigation.

#### *A. The Uneasy Collaboration Between Parents and School Districts*

Because a child’s IEP team consists almost entirely of school district personnel, when parents and school districts disagree regarding the services and accommodations a child needs in order to receive an appropriate education, parents may be the lone dissenting voice on the IEP team. Depending on the nature of the child’s disability, IEP meetings may be attended by as few as three, and upwards of ten, representatives of the school district.<sup>38</sup> Even when a parent brings an advocate<sup>39</sup> and/or private experts<sup>40</sup> to the meeting, the parent is almost always outnumbered.

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<sup>37</sup> See *infra* Part III. To be sure, there are parents who make unreasonable demands on school districts, asking for services their children do not need or services that are so extravagant that few would assume that a school district would be responsible for providing them. This paper is not about *those* parents—it is about the reasonable, concerned parents who have an idea and an expectation about what would constitute an “appropriate” education for their disabled child and who butt into the dual reality of a narrow definition of “appropriate” by courts and of limited resources available to school districts.

<sup>38</sup> See *supra* Part II.B.

<sup>39</sup> Special education advocates are professionals, trained in the rules of special education, who advise parents in the special education process. But they are not attorneys and cannot represent parents in legal proceedings. The Counsel of

Under ideal circumstances, the parent is regarded by the IEP team as an expert on her child. The parent presumably knows her child better than anyone else at the meeting and can, therefore, provide important information to the team. But school districts do not always perceive parental input this way. At times, parents are seen by school districts as lacking the emotional distance or education needed to meaningfully assist in the process of devising an education plan for the child.<sup>41</sup> In connection with a study of families navigating the special education system in New York, one commenter explained:

Often, but not always, parents feel that their own observations or requests are given little weight and that decisions are based primarily on the recommendations of the professionals. Their own close relationship with the child is viewed as a liability rather than as an asset—a liability that renders their judgments inherently suspect.<sup>42</sup>

There can be a territorial element at play in these meetings, which may manifest itself in deliberate attempts by educators and school personnel to exclude parents from meaningful participation in developing the IEP.<sup>43</sup> Unsurprisingly, there is “strong resentment by

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Parent Attorneys and Advocates has written a code of conduct for special education advocates, which is available online. *Voluntary Code of Ethics for Special Education Advocates*, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. (COPAA), <http://www.copaa.org/membership/advocates/791-2/>.

<sup>40</sup> Parents sometimes bring their child’s doctor or psychologist or other professional who has conducted an evaluation with the child to the IEP team meeting. These professionals often have valuable insight into the needs of the child.

<sup>41</sup> Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM, 331, 363 (1994) (citing Roland K. Yoshida et al., *Parental Involvement in the Special Education Pupil Planning Process: The School’s Perspective*, 44 EXCEPTIONAL CHILDREN 531, 533 (1978)).

<sup>42</sup> David M. Engel, *Law, Culture, and Children with Disabilities*, 1991 DUKE L.J. 166, 188 (1991).

<sup>43</sup> In one example, I participated in an IEP meeting in which the parent was urging the school district to place her child in a particular school. The lawyer

educators of the parental right and power under the Act to challenge the educators' professional judgment."<sup>44</sup> Where this dynamic is present, according to the New York study, "[t]he educators' response has often been to seek consciously to circumvent the principle of parental involvement which underlies the Act."<sup>45</sup>

But the problem is not limited to cases involving intentional efforts on the part of educators to exclude parents from true membership on the IEP team. Typically, there are significant asymmetries in the expertise level of parents and school district personnel, and these asymmetries can warp the deliberative process. Thus, while parents may have a deep sense of their child's character, of what challenges her, or what makes her happy or sad, they typically do not have access to the technical language of psycho-educational testing and educational interventions. And this can cause parents to be shunted aside during the IEP process as they are bombarded with professional terminology in which they are not conversant. (When I began practicing special education law, I had the experience of attending IEP meetings and struggling simply to assimilate the jargon, let alone contribute in a meaningful way to advance my clients' interests. To individuals without prior experience or training, it can feel as if IEP teams speak a foreign language.)

Courts have taken heed of this asymmetry, but they do not tend to give it operative weight when deciding cases.<sup>46</sup> The Supreme Court's decision in *Schaffer v. Weast* is illustrative.<sup>47</sup> In *Schaffer*, the Court acknowledged that school districts enjoy a "natural advantage" with respect to educational expertise; but the Court insisted that the right of parents to access information from school districts, together

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for the district responded pointedly: "this is the *district's* IEP." This sentiment, while often present, is not usually made explicit.

<sup>44</sup> Kotler, *supra* note 41, at 366.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (noting that "[i]n practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved in the child's education), and greater overall educational expertise than the parents."). See also *Engel*, *supra* note 42, at 189.

<sup>47</sup> 546 U.S. 49 (2005).

with the IDEA's procedural safeguards, serve to mitigate parents' corresponding disadvantage.<sup>48</sup>

Parents do have significant procedural protections under the IDEA.<sup>49</sup> For example, in making decisions about placement and programming for a disabled child, the IEP team relies on information from the child's most recent evaluations. School districts are obligated to conduct a comprehensive evaluation of a child with a disability every three years.<sup>50</sup> The district typically conducts its own evaluation of the child. However, if a parent disagrees with the results of the school district's evaluation, that parent has the right to request an independent educational evaluation (IEE) at public expense.<sup>51</sup> An outside evaluation can be an important way for parents to challenge the expertise of school districts with independent experts of their own. And, in theory, giving parents access to an expert in their child's disability for free should reduce disparities between wealthy and poor parents. But the Supreme Court's treatment of this right as a counterweight to the expertise<sup>52</sup> is misplaced.

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<sup>48</sup> *Schaffer*, 546 U.S. at 60. The procedural safeguards include the following: the right to request independent evaluations of their child when parents disagree with the school's evaluation, to have access to the schools' records about their child, to participate in meetings, to receive written notice when the district proposes to change the child's placement, and to request a hearing before a neutral adjudicator. See also 20 U.S.C. §1415 (2006) (entitled "Procedural Safeguards").

<sup>49</sup> 20 U.S.C. §1415(a) (2006) (School districts receiving IDEA funds must "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards . . .").

<sup>50</sup> 20 U.S.C. § 1414(a)(2) (2006).

<sup>51</sup> 34 C.F.R. § 300.502(b)(1) (2012).

<sup>52</sup> *Schaffer*, 546 U.S. at 60–61 ("IDEA thus ensures parents access to an expert who can evaluate all the material that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition"). See Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 126–27 (2011) (arguing that it is difficult for parents without means to obtain independent educational evaluations. If a school district delays an evaluation or challenges the need for an IEE, parents who cannot afford an attorney or an independent expert to demonstrate the need for the evaluation will not be able to access the right).

First, many parents do not know they can request an IEE. While school districts must inform parents of this entitlement, they typically do so by handing parents a multi-page document entitled “procedural safeguards,” and the document can be difficult to understand.<sup>53</sup> Second, even if parents are aware of their right to obtain an independent evaluation at public expense and seek to exercise that right, few school districts simply oblige. Instead, districts often move to choose the evaluator themselves or to limit the scope of the evaluation in order to control costs. School districts also have the option of initiating a due process hearing to demonstrate the soundness of their evaluation of the child and thereby to prevent the expenditure of district funds on an IEE.<sup>54</sup>

In the best case scenario for parents, they successfully request an IEE at public expense; the results of the evaluation are aligned with what the parents consider to be educationally appropriate for their child; and the IEP team changes course accordingly. But school districts are obligated by law only to consider the results of the IEE; they are not required to make changes based on those results.<sup>55</sup> This is fair enough; the independence of the evaluator is no guarantee of the value of her work-product. Still, the school district’s authority to flatly reject the results of the IEE, together with the impediments to parents securing an IEE in the first place, suggest that the possibility of such an independent evaluation is no cure-all. It is, at the very least, an imperfect counterweight to the discomfiting dynamics in the IEP process that can come about as a result of the expertise asymmetry between parents and school districts. This is not to say, of course, that the educational expertise of school district representatives should be given little credence in the IEP process. The point is simply that the combination of defensiveness by the school district and uneven expertise in the substance of special education can leave parents without meaningful input in the IEP.

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<sup>53</sup> Julie L. Fitzgerald & Marley W. Watkins, *Parents’ Rights in Special Education: The Readability of Procedural Safeguards*, 72 EXCEPTIONAL CHILDREN 497, 506 (2006) (finding that only 4% to 8% of contemporary Parents’ Rights documents are written at or below the recommended 7th-to-8th grade reading level, making the safeguards too difficult for the average person to understand).

<sup>54</sup> 34 C.F.R. § 300.502(b)(2) (2012).

<sup>55</sup> 34 C.F.R. § 300.502(c)(1) (2012).

Parents may also be reluctant to speak out at IEP meetings for reasons other than an expertise differential. They may dislike conflict or, knowing that resources are limited, may not want to assert the primacy of their child's needs when other children's needs are also not being met. This dynamic has been noted by commentators regarding the special education process.<sup>56</sup> The study of special education process in New York, mentioned earlier,<sup>57</sup> revealed that mothers of disabled children sometimes exhibit a willingness to subordinate their child's rights to the interests of the district in order to avoid taking a position that might be perceived as antagonistic and might harm the family's long-term relationship with the school.<sup>58</sup> The fact that a child must continue to attend a school even when the school's teachers and administrators are engaged in battle with the child's parents makes this sort of conflict complicated for all parties involved.

Finally, the difficulties parents face in IEP meetings are particularly pronounced when parents and school district personnel are separated by language barriers and/or socio-economic or educational divides. Poor parents, uneducated parents, and immigrant parents may feel unable to speak up at an IEP meeting and advocate for their children. They may not understand their children's rights under special education law or have the language needed to advocate effectively. Also, these populations are disproportionately likely to require special education services for their children.<sup>59</sup>

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<sup>56</sup> See, e.g., Engel, *supra* note 42, at 199 (taking note of parents' tendency to work toward compromise with school districts, even when it means failing to fully vindicate their own child's rights).

<sup>57</sup> See *supra* Part III.A.

<sup>58</sup> See Engel, *supra* note 42, at 198–99. Professor Engel attempts to connect this phenomenon to Carol Gilligan's work relating to gender and moral reasoning. *Id.* at 195 (discussing CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982)). Engel observes that it is usually the mother of the child who deals with the school district, and he suggests that, in light of Gilligan's work, we might expect mothers to be reluctant to deploy a "rights analysis" in negotiating with a school district over an IEP; during the course of Engel's research, "[t]here were . . . many instances when mothers drew back from an assertion of rights"). *Id.* at 198.

<sup>59</sup> See Hyman et al., *supra* note 52, at 112–13 (citing 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* (2002), available at



It is difficult enough for parents to participate fully in the IEP process when they have only a limited understanding of special education law, are not conversant in the jargon that is so often tossed around at team meetings, and are worried about jeopardizing their relationship with a school district they must rely on in the long-term for the education of their child. When the dynamics of socio-economic status and language proficiency are added to the mix, parents may be all but silenced. They “describe themselves as terrified and inarticulate [during the IEP meeting]. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decision making as well as their feelings of vulnerability and disempowerment.”<sup>60</sup>

In these instances, when parents do not have the skills or resources to advocate for their children, the IEP team becomes one-sided. Despite courts’ repeated assertion that parental participation at IEP meetings must be “meaningful,” and not amount to “mere form,”<sup>61</sup> school districts make the educational decisions for the disabled child, and the parents—without knowing the alternatives—are left with an IEP into which they had very little input. This may or may not be appropriate for their child.<sup>62</sup>

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[http://www.seels.net/designdocs/SEELS\\_Children\\_We\\_Serve\\_Report.pdf](http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf) (stating that one-quarter of the children eligible for special education live below the poverty line and two-thirds live in households with incomes of \$50,000 or less)). See also Patricia A. Massey and Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model For Serving Youth With Special Education Needs*, 11 CLINICAL L. REV. 271 (2005) (citing a study showing that low-income families are 50% more likely to have a child with a disability than higher income families, and single mothers receiving welfare themselves have a 38% rate of disability); Pasachoff, *supra* note 6, at 1432 (“The wealth disparity in private IDEA enforcement is particularly disturbing because children with disabilities are more likely to live in poverty than children in the general population are.”).

<sup>60</sup> Engel, *supra* note 42, at 188.

<sup>61</sup> Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 858 (6th Cir. 2004) (citing W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) and N.L. v. Knox Cnty. Schs. 315 F.3d 688, 694–95 (6th Cir. 2003)).

<sup>62</sup> Professor Kotler writes, “[p]arents are typically unfamiliar with the technical legal standard [of FAPE]. Thus, they assume frequently that when school officials assert that a certain program is ‘appropriate’ for a given child, it means the ‘best’ for that child or at least roughly comparable to programming which can be obtained privately.” Kotler, *supra* note 41, at 372.

### *B. The Tension Between “Appropriate” and “Free”*

The process of negotiating an IEP that provides a free appropriate public education (FAPE) takes place within a legal and economic framework that further complicates parents’ efforts to secure educational benefits for their children. As detailed below, the federal courts (including the United States Supreme Court) have declined to put teeth in the FAPE requirement and have thereby permitted school districts to satisfy the IDEA with relatively limited effort. School districts, meanwhile, operating under significant budgetary constraints, face pressure to design IEPs with an eye to the financial burden of providing special education services.

#### 1. Defining “Appropriate”

There are, of course, many parents who have the wherewithal and confidence to ask that specific services or goals be added to their child’s IEP.<sup>63</sup> But school districts may resist these requests, and when they do, the district will set the terms of the child’s education plan—at least as an initial matter—over the objections of the parent. The parent may then choose to file for a due process hearing: a legal proceeding, initiated by the filing of a complaint before an impartial hearing officer.<sup>64</sup> Either party may appeal the outcome of the due process hearing to a state court or to a United States District Court.<sup>65</sup>

These legal proceedings test a parent’s claim that the IEP proposed by the school district fails to provide a free appropriate public education. As noted already, the text of the IDEA tells us little about what, exactly, constitutes a FAPE,<sup>66</sup> and so it is hardly surprising that courts have struggled to determine whether and when an IEP provides an “appropriate” education for a particular child.

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<sup>63</sup> See Caruso, *supra* note 6, at 178–179 (this wherewithal is often connected to socio-economic status).

<sup>64</sup> 34 CFR § 300.511 (2012).

<sup>65</sup> 34 CFR § 300.516 (2012).

<sup>66</sup> See *supra* text accompanying notes 23–26. See also Kotler, *supra* note 41, at 353 (“The Act’s failure to define ‘appropriate’ in educational or substantive terms is one of its major failures and one of the leading causes of litigation under the Act.”).

Moreover, to the extent the cases help to fill in the interpretive blanks, they have fashioned the FAPE requirement into something rather feeble. The most significant of these cases is *Board of Education of Hendrick Hudson Central School District v. Rowley*, in which the Supreme Court explicitly rejected the contention that, through the IDEA, Congress ordered school districts to “maximize each handicapped child’s potential.”<sup>67</sup> The Court took the position that an IEP need only provide “*some educational benefit* upon the handicapped child” in order to pass muster under the IDEA.<sup>68</sup> The Court reasoned that the absence of a substantive definition of FAPE in the Act is evidence that Congress was primarily concerned with providing *access* to education for disabled students rather than a particular educational *outcome*.<sup>69</sup> *Rowley* thus establishes a two-part inquiry for purposes of determining whether a school is providing FAPE. First, the court must ask whether the district has complied with the procedures applicable under the IDEA; and, second, the court must determine whether the resulting IEP is “reasonably calculated to enable the child to receive educational benefits.”<sup>70</sup>

In the *Rowley* case itself, for example, the parents of a deaf child requested a qualified sign language interpreter to accompany her to all of her academic classes.<sup>71</sup> A neutral hearing officer, however, had determined that an interpreter was not needed because the child was “‘achieving educationally, academically, and socially’ without such assistance.”<sup>72</sup> The district court insisted that this was not the relevant question for purposes of FAPE. The question,

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<sup>67</sup> Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 199 (1982). In contrast, the State of Michigan’s special education code expressly requires the board of a local school district to “provide special education programs and services designed to develop the maximum potential of each student with a disability.” MICH. COMP. LAWS § 380.1751(1) (2012). Despite this language, courts applying Michigan law have generally declined to give it teeth. See, e.g., Renner v. Bd. of Educ. of Pub. Sch. of Ann Arbor, 185 F.3d 635, 645 (6th Cir. 1999) (quoting Brimmer v. Traverse City Area Pub. Sch., 872 F. Supp. 447, 454 (W.D. Mich. 1994) (“The term ‘maximum potential’ has not been well-defined in Michigan law. Further, the standard may be more precatory than mandatory; it does not necessarily require the best education possible”)).

<sup>68</sup> *Rowley*, 458 U.S. at 200 (emphasis added).

<sup>69</sup> *Id.* at 193–96.

<sup>70</sup> *Id.* at 206–07.

<sup>71</sup> *Id.* at 184.

<sup>72</sup> *Id.* at 185.

according to the court, was not whether the student was “achieving,” but whether there was a discrepancy between her achievement and her potential.<sup>73</sup> The Supreme Court disagreed, installed the “some educational benefit” standard, and denied relief.<sup>74</sup>

In 1997, fifteen years after *Rowley*, Congress amended the IDEA.<sup>75</sup> In so doing, it shifted attention away from educational access and toward educational achievement. The amendments were motivated by the sense that, while the IDEA had been successful at providing disabled students with access to education, implementation was characterized by low standards and limited benefits.<sup>76</sup> The amendments established a variety of new requirements for school districts in developing IEPs, such as including annual, measurable goals for a disabled child in each IEP and explicit statements about the services and accommodations the child needs to participate in the general education curriculum.<sup>77</sup>

Congress reauthorized and amended the IDEA again in 2004, this time driven by a desire to align the statute with the No Child Left Behind Act.<sup>78</sup> These amendments included a requirement that special education teachers be “highly qualified,”<sup>79</sup> increased accountability through measureable annual goals that contain summaries of the child’s progress and how that progress was measured,<sup>80</sup> and that the selection of special education and related services be based on peer reviewed research to the extent practicable.<sup>81</sup>

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<sup>73</sup> *Rowley*, 458 U.S. at 185–86.

<sup>74</sup> *Id.* at 210.

<sup>75</sup> Pub. L. No. 105-17, 111 Stat. 37 (1997).

<sup>76</sup> 20 U.S.C. § 1400(c)(3)-(5) (2006). See also *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033 (W.D. Wash. Dec. 8, 2006) (discussing the 1997 amendments).

<sup>77</sup> 34 C.F.R. § 300.347 (1999). See generally *Archive of U.S. Department of Education website for the 1997 IDEA amendments*, IDEA’97, <http://www2.ed.gov/offices/OSERS/Policy/IDEA/whatsnew.html> (last updated Mar. 5, 2003).

<sup>78</sup> Pub. L. No. 108-446, 118 Stat. 2647 (2004). See also statement by President George W. Bush upon signing H.R. 1350, 40 WEEKLY COMP. PRES. DOC. 2897 (Dec. 3, 2004).

<sup>79</sup> 20 U.S.C. § 1412(a)(14)(C) (2006).

<sup>80</sup> 20 U.S.C. § 1414(d)(1)(A)(III) (2006).

<sup>81</sup> 20 U.S.C. § 1414(d)(1)(A)(IV) (2006).

At least one commentator has insisted that, in light of these amendments to the IDEA, courts must revise their understanding of what constitutes FAPE and, crucially, abandon the formulation provided in *Rowley*.<sup>82</sup> Because the statutory requirements for IEPs are now considerably more specific, the argument goes that it is appropriate for courts to consider whether school districts comply with *these* requirements, rather than engaging a *Rowley*-style discussion of whether a child will secure “some educational benefit” under an IEP.<sup>83</sup> The response of courts to these amendments, however, has been uneven, and many continue to treat *Rowley* as the operative standard.<sup>84</sup>

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<sup>82</sup> See Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 377–78 (2008).

<sup>83</sup> *Id.* at 378.

<sup>84</sup> The circuits are split and even internally inconsistent in their definition of the extent of the educational benefits that an IEP must confer to provide FAPE. The First Circuit recently explained that while the Supreme Court in *Rowley* only required that an IEP offer “some educational benefit” to its student, 458 U.S. 176, 200, IDEA requires “more than a trivial educational benefit.” *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). The Court stated that an IEP must be “reasonably calculated to confer a *meaningful* educational benefit.” *Id.* (emphasis added). Four other circuits also use the “meaningful benefit” standard by which to judge the adequacy of an IEP. See, e.g., *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 F. App’x 156, 160 (2d Cir. 2009); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556–57 (3d Cir. 2010); *Ruffin v. Houston Indep. Sch. Dist.*, 459 F. App’x 358, 361 (5th Cir. 2012); *Deal v. Hamilton Cnty. Dep’t of Educ.*, 258 F. App’x 863 (6th Cir. 2008).

The Ninth Circuit, however, distanced itself from its previous use of the “meaningful benefit” standard in 2011, rejecting the appellant’s argument that her IEP did not provide a “meaningful benefit” by upholding the district court’s decision that her IEP provided her “some educational benefit.” *K.S. v. Fremont Unified Sch. Dist.*, 426 F. App’x 536, 538 (9th Cir. 2011). Since then, the Ninth Circuit has given up adjectives altogether, requiring “an educational benefit” or “educational benefits” without any substantive qualifier. *K.D. ex rel. C.L. v. Dep’t of Educ., Haw.*, 665 F.3d 1110, 1114 (9th Cir. 2011); *J.W. ex rel. K.K.W. v. Governing Bd. of E. Whittier City Sch. Dist.*, 473 F. App’x 531 (9th Cir. 2012). Three other circuits use the “some educational benefit” standard. See, e.g., *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478 (4th Cir. 2011); *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 765–66 (8th Cir. 2011); *Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008)).

Recent cases in three other circuits have, like the Ninth Circuit, declined to use any adjective to qualify “educational benefits.” See, e.g., *M.B. ex rel. Berns v. Hamilton Se. Schs.*, 668 F.3d 851, 860 (7th Cir. 2011); *Sch. Bd. of Lee Cnty., Fla. v. M.M. ex rel. M.M.*, 348 F. App’x 504 (11th Cir. 2009); *District of Columbia*

In *J.L. v. Mercer Island School District*, for example, a federal district court in Washington held that the 1997 amendments to the IDEA transformed special education into a more “outcome oriented process,” as opposed to one concerned primarily with access.<sup>85</sup> It went so far as to state that “any citation to pre-1997 case law on special education is suspect.”<sup>86</sup> The Ninth Circuit, however, reversed. It stated explicitly that while “the district court concluded that Congress superseded *Rowley* in the 1997 Individuals with Disabilities Education Act amendment . . . [,] [w]e hold that *Rowley* continues to set the free appropriate public education standard.”<sup>87</sup>

Case law from the Sixth Circuit is more equivocal. A 2004 case provides that “the IDEA requires an IEP to confer a ‘meaningful educational benefit’ *gauged in relation to the potential of the child at issue*.”<sup>88</sup> Establishing the educational potential of the child as the benchmark of a statutorily legitimate IEP carries the possibility of transforming special education law. Under this standard, instead of inquiring (as *Rowley* directs) only whether the IEP carries the promise of securing some benefit above a floor defined by the child’s current educational achievement, courts would measure an IEP by reference to the ceiling marked by the child’s potential.<sup>89</sup>

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*v. Doe*, 611 F.3d 888 (D.C. Cir. 2010). The practical difference between the two standards may be minimal, as circuits occasionally conflate their terminology. For instance, a recent Third Circuit case cited the *Rowley* “some benefit” standard and then immediately stated that an IEP must provide “meaningful benefit” without reconciling the difference. *G.S. v. Cranbury Twp. Bd. of Educ.*, 450 F. App’x 197, 201–02 (3d Cir. 2011). See also Marc C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & EDUC. 95 (2012).

<sup>85</sup> *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033, at \*4 (W.D. Wash. Dec. 8, 2006) *opinion corrected on reconsideration*, No. C06-494P, 2007 WL 505450 (W.D. Wash. Feb. 10, 2007) and *rev’d in part, vacated in part*, 592 F.3d 938 (9th Cir. 2010).

<sup>86</sup> *Id.*

<sup>87</sup> *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 941 (9th Cir. 2010).

<sup>88</sup> *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (emphasis added) (citing *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)).

<sup>89</sup> *Deal*, 392 F.3d at 862.

But a Sixth Circuit decision handed down years before the amendments to the IDEA continues to cast a long shadow over special education practice in the jurisdiction, and it is far less promising for those seeking access to special education services. In the course of rejecting a challenge filed by two parents to their child's IEP, *Doe v. Tullahoma City Schools* reasoned as follows:

The [IDEA] requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use . . . . [W]e hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.<sup>90</sup>

Nineteen years later, and despite the amendments to the IDEA mentioned above, school districts' attorneys routinely cite this passage to hearing officers and federal judges in an effort to justify the denial of benefits to a disabled child, and federal courts continue to cite this passage with approval.<sup>91</sup> There is a lot of distance between a requirement to maximize a disabled child's potential and a requirement simply to provide a disabled child *some* educational benefit. By choosing to construct the rights-creating language of the IDEA closer to the floor of possible options, courts have failed to make the promise of a free appropriate public education anywhere near as robust as it might be.

## 2. The Burden of Persuasion

When a parent turns to the courts in an effort to vindicate his understanding of what is educationally appropriate for his child, it is

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<sup>90</sup> *Doe v. Bd. of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 459–60 (6th Cir. 1993).

<sup>91</sup> *See, e.g., Z.D. v. Niskayuna Cent. Sch. Dist.*, No. 1:06–CV–1190, 2009 WL 1748794, at \*6 (N.D.N.Y. June 19, 2009); *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722, 732 (N.D. Ohio 2005).

the parent who bears the burden of persuasion. In *Schaffer v. Weast*, the Supreme Court rejected the contention that putting the burden of persuasion on school districts would “further IDEA’s purposes”<sup>92</sup> and stated that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed on the party seeking relief.”<sup>93</sup> In a 6-2 decision,<sup>94</sup> the Court noted that it is extremely rare for the entire burden of persuasion to rest with defendants at the outset of a case and that the default rule—placing the burden on the party seeking relief—makes sense, absent any indication from Congress that it intended the reverse.<sup>95</sup> The Court reasoned that to hold otherwise would be tantamount to assuming “that every IEP is invalid until the school district demonstrates that it is not.”<sup>96</sup> The Court asserted that the procedural protections contained in the IDEA “ensure that the school bears no unique informational advantage.”<sup>97</sup>

In her dissent, Justice Ginsburg stated that “‘policy considerations, convenience, and fairness’ call for assigning the burden of proof to the school district . . .” and lamented that the majority’s decision places parents at a further disadvantage vis-à-vis school districts.<sup>98</sup> Justice Ginsburg argued that because the development of education programs lies at the core of school districts’ affirmative obligation and professional competence, it is easier for them to demonstrate the adequacy of an IEP than it is for parents to demonstrate its inadequacy.<sup>99</sup> According to Ginsburg, “the proponent of the IEP . . . is properly called upon to demonstrate its adequacy.”<sup>100</sup>

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<sup>92</sup> *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

<sup>93</sup> *Id.* at 62.

<sup>94</sup> Justice Roberts did not participate, Justice Stevens concurred, and Justices Ginsburg and Breyer dissented.

<sup>95</sup> *Schaffer*, 546 U.S. at 57–58.

<sup>96</sup> *Id.* at 59.

<sup>97</sup> *Id.* at 59–61.

<sup>98</sup> *Id.* at 63.

<sup>99</sup> *Id.* at 64 (Ginsburg, J., dissenting) (quoting *Weast v. Schaffer*, 377 F.3d 449, 458 (4th Cir. 2004) (Luttig, J., dissenting)).

<sup>100</sup> *Id.* The National Council on Disability published a Position Statement on August 9, 2005 and argued exactly that

[p]lacing the burden of proof on parents, and not on school district (sic), to prove inadequacy poses significant roadblocks to



Given the expertise and information asymmetries between parents and school districts – despite the safeguards of the IDEA – Justice Ginsburg’s assessment that this decision makes it easier for districts to provide disabled children the bare minimum in services, without consequence, rings true. And there is no doubt that this decision has a disproportionate effect on indigent families, who cannot afford to hire their own attorneys or experts to help meet the burden and who are less likely than wealthier parents to access independent educational evaluations.<sup>101</sup>

The *Schaffer* majority relies on the text of the IDEA as assurance that parents will be able to work together with school districts and that parents are protected in the process. Justice Ginsburg, however, is a realist. While a simple read of the IDEA is enough to inspire hope for collaboration with the school district toward a positive educational outcome, the IDEA’s promises are not as hardy as they sound. And finally, as one commentator has urged, if parents are unaware of the array of educational options—because they have never been presented with these options—they are simply not in a position to assess the quality of an IEP.<sup>102</sup>

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students with disabilities to obtain appropriate educational services. It is school districts—not parents and children with disabilities—that have the advantage in terms of information and resources. It is school districts—not parents and children with disabilities—that are in a much better position to prove that an IEP is adequate than parents to prove that an IEP is not adequate.

NAT’L COUNCIL ON DISABILITY, INDIVIDUALS WITH DISABILITIES EDUCATION ACT BURDEN OF PROOF: ON PARENTS OR SCHOOLS? 4 (August 9, 2005).

<sup>101</sup> See Hyman et al., *supra* note 52, at 144; Samuel R. Bagenstos, *The Judiciary’s Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 125 (Joshua M. Dunn & Martin R. West eds., 2009) (“Because an IEP is presumably supported by the school district’s expertise, a parent can typically succeed in challenging that IEP only by offering expert testimony. But if parents must pay out of pocket for expert witnesses, they will be less likely to be able to secure the services of these witnesses. At least at the margins, these decisions [*Schaffer* and *Arlington*] are part of a ‘pro-school’ trend that further supports the deference that *Rowley* accords.”).

<sup>102</sup> Kotler, *supra* note 41, at 371.

### 3. The Problem of “Free”

Looming over the question of what constitutes an “appropriate” education is a basic fact about the provision of special education services: it can be extremely expensive, and there is not enough money to go around. Some disabled children require one-on-one nurses while in school; others need specialized transportation to and from school; and some need residential educational facilities. None of these services come cheap. Unsurprisingly, then, financial considerations provide a constant backdrop to battles over what constitutes FAPE for a particular child.<sup>103</sup> Schools have limited resources; and, while courts do not expect them to ignore costs in developing educational programming,<sup>104</sup> there are times when the provision of FAPE will be expensive. There is ample reason that school districts permit cost concerns to dominate the IEP process, overwhelming the question of what, ultimately, is appropriate for the child.<sup>105</sup> And where there are finite resources, these resources will be allocated to those who advocate most forcefully for them, i.e., to the children whose parents have the wherewithal and financial means to enforce their children’s due process rights.<sup>106</sup>

Indeed, it seems likely that the specter of school districts across the country dealing with crushing special education costs has contributed in no small part to courts’ reluctance to construe the rights provided by the IDEA expansively. The population of students

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<sup>103</sup> See *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 864–65 (6th Cir. 2004) (“Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system’s indifference to the child’s individual potential is a greater expense to society as a whole.”).

<sup>104</sup> See, e.g., *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 517 (6th Cir. 1984) (“Our decisions . . . recognize that cost can be a legitimate consideration when devising an appropriate program for individual students. Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an ‘appropriate’ education.”).

<sup>105</sup> See *Kotler*, *supra* note 41, at 368 (“Costs are a major consideration—sometimes the primary consideration—for the educational agency. In fact, agencies knowingly may jeopardize a child’s future well-being by providing inappropriate programming which is less expensive in the short term, even though quite costly in the long term.”).

<sup>106</sup> See generally *Caruso*, *supra* note 6; *Pasachoff*, *supra* note 6; *supra* note 25 and accompanying text.

receiving special education under the IDEA has grown at nearly twice the rate of the general education population. Between 1980 and 2005, the IDEA population increased by 37%, while the general education population increased by only 20%.<sup>107</sup> Congress, meanwhile, has not done enough to help. Congress's first major intervention into special education policy was accompanied by a pledge to provide up to 40% of the excess cost of educating children with disabilities.<sup>108</sup> But funding has never reached even half that amount. Funding under the IDEA hovers around 17% of these costs, and states and local school districts are left to bridge the gap.<sup>109</sup>

According to the National Educational Association, the cost to educate a general education student is \$7,552 per year.<sup>110</sup> The average cost to educate a special education student is an additional \$9,369 per student, or \$16,921 in total.<sup>111</sup> Especially during times of economic recession, with tax revenues in school districts falling throughout the country,<sup>112</sup> resource-deprived school districts are left shouldering a large burden and special education programming

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<sup>107</sup> *Federal Education Budget Project*, NEW AMERICA FOUNDATION (Mar. 26, 2012), <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-cost-impact-local-school-districts>.

<sup>108</sup> 20 U.S.C. § 1411(a) (2006); see also Cory Weinberg, *Congress Unlikely to Fully Fund IDEA Act*, POLITIFACT, <http://www.politifact.com/truth-o-meter/promises/obameter/promise/89/fully-fund-the-individuals-with-disabilities-educa/> (last updated Dec. 14, 2011).

<sup>109</sup> *Special Education Funding Languishes Under Democrat Spending Plan*, EDUCATION & THE WORKFORCE COMMITTEE (July 24, 2009), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=172910>; Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 87 (2012).

<sup>110</sup> *Background of Special Education and the Individuals with Disabilities Education Act*, NATIONAL EDUCATION ASSOCIATION (2004), <http://www.nea.org/home/19029.htm>; Kathy A. Gambrell, *Debate Over Special Ed Funding, Meaning*, UPI NEWS (Dec. 22, 2003), [http://www.upi.com/Business\\_News/Security-Industry/2003/12/22/Debate-over-special-ed-funding-meaning/UPI-13151072115845/](http://www.upi.com/Business_News/Security-Industry/2003/12/22/Debate-over-special-ed-funding-meaning/UPI-13151072115845/).

<sup>111</sup> *Supra* note 110.

<sup>112</sup> Nicholas Johnson et al., *An Update on State Budget Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 09, 2011), <http://www.cbpp.org/cms/?fa=view&id=1214>. Michigan cut its Fiscal Year 2010 school aid budget by \$382 million, resulting in a \$165 per-pupil spending reduction. *Id.*

suffers. Were Congress to allocate more money to special education—instead of simply requiring that school districts educate disabled children at no cost to parents—school districts would be better positioned to work collaboratively with parents in setting up education programs and would be able to provide more generous services.<sup>113</sup>

### C. Resource Disparities

The dynamics addressed thus far—relating to the tensions in the IEP process, the courts' permissive construction of FAPE, and school districts' tight budgets—undermine the IEP process itself and ultimately limit the benefits available to children in need of special education. The realities of formal dispute resolution in this context only exacerbate these tendencies.

#### 1. Access to Attorneys

As noted already,<sup>114</sup> the IDEA anticipates that school districts and parents will occasionally disagree, and allows parents to initiate a due process hearing (before a neutral hearing officer) to challenge the content of an IEP or the procedures through which it was crafted.<sup>115</sup>

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<sup>113</sup> This is not to say that all school districts spend what limited money they have wisely. I have heard many parents of disabled children complain about money used to build sports facilities rather than to educate disabled children. I have also seen lawyers for school districts drive fancy cars!

<sup>114</sup> See *supra* notes 64–65 and accompanying text.

<sup>115</sup> 20 U.S.C. § 1415(f)(1)(A) (2006). School districts are also permitted to file due process hearing requests against parents. *Id.* As a matter of practice, however, most requests for hearings are filed by parents. See *Schaffer v. West*, 546 U.S. 49, 53–54 (2005). As an alternative to the due process hearing, parents may file a complaint against a school district before the State Department of Education. 34 C.F.R. § 300.151–.153 (2012). Historically, complaints filed through this process have focused on discrete violations of law: for example, whether a school is following a child's IEP or adhering to the timeline for identifying a child with a disability and developing an IEP for that child. These complaints contain a written assertion of a violation of the law and propose a resolution to the alleged problem. 34 C.F.R. § 300.153 (2012). The Department of Education then investigates the complaint and makes a recommendation to the school district. 34 C.F.R. § 300.152 (2012). The 1997 Amendments to the IDEA

These hearings can be complicated for parents to navigate and difficult for them to afford.<sup>116</sup>

Due process hearings are court proceedings in almost every relevant sense. At a minimum, a parent who wishes to proceed to a hearing must comply with the IDEA's pleading requirements.<sup>117</sup> Once a due process hearing has been successfully filed and the complaint served, a parent will need to assemble and offer appropriate exhibits, including relevant medical records and school records such as past IEPs, report cards, and evaluation reports. The parent will need to understand the law, which is likely to include both federal and state special education statutes as well as relevant case law, and they must be able to apply the law to the particular facts of their case. Finally, the parent must be prepared to present witnesses who can testify to the child's needs, including witnesses with expertise relating to the child's disability.

As discussed above, in a special education due process case, it is the parent who bears the burden of persuasion. Of course, a parent may choose to hire an attorney to help her through the litigation process, but a special education hearing can cost tens of thousands of dollars in legal fees.<sup>118</sup> Even if a parent proceeds *pro se*,<sup>119</sup> she can

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added free, voluntary mediation as a possible method of dispute resolution. 20 U.S.C. § 1415(e)(1) (2006).

<sup>116</sup> To get a general sense of the cost of a due process hearing, the Oklahoma Insurance Group covered school districts up to \$25,000 per hearing. *Solutions and Coverage*, OKLA. SCHS. INS. GROUP, <http://www.osig.org/content.htm?page=solutions.htm>. In *Schaffer*, the Supreme Court noted that due process hearing typically cost school districts \$8,000 to \$12,000. 546 U.S. at 59 (citing JAY G. CHAMBERS ET AL., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000? 8 (Jean Wolman & Jamie Shkolnik eds., 2003), available at <http://www.csefair.org/publications/seep/national/Procedural%20Safeguards.pdf>). A special education mediation brochure published by the Michigan Department of Education lists due process hearings as costing upwards of \$50,000. MICH. SPECIAL EDUC. MEDIATION PROGRAM, FACILITATION AND MEDIATION (Feb. 2010), available at [http://msemp.cenmi.org/sites/default/files/Facilitation\\_Mediation.pdf](http://msemp.cenmi.org/sites/default/files/Facilitation_Mediation.pdf).

<sup>117</sup> 20 U.S.C. § 1415(b)(7)(A) (2006).

<sup>118</sup> For particularly egregious examples of the expense of due process litigation, see generally *Atlanta Law Firm Charges to County Schools Top \$1.7 Million*, THE CHATTANOOGAN (Mar. 14, 2005), <http://www.chattanooga.com/2005/3/14/63675/Atlanta-Law-Firm-Charges-To-County.aspx>; Kari Andren, *School Districts Spend Thousands on Litigation Over Special Education*, THE PATRIOT NEWS (Jan. 27, 2010),

expect to incur substantial expenses in the form of expert witnesses (whose fees she cannot recover, even if she wins) and lost wages as a result of work missed in order to prepare for and attend the hearing.<sup>120</sup>

It should come as no surprise that having an attorney is strongly correlated with successful outcomes at trial.<sup>121</sup> Wealthier parents, who have the means to obtain legal representation, are therefore more likely to sue school districts in the first instance<sup>122</sup> and are more likely to successfully vindicate their children's educational rights.<sup>123</sup> For lower-income families, who comprise the bulk of special education recipients,<sup>124</sup> it is far more difficult to secure legal representation.<sup>125</sup>

The difficulty in securing counsel is exacerbated by the fact that the IDEA does not provide damages to a prevailing party in a

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[http://www.pennlive.com/midstate/index.ssf/2010/01/school\\_districts\\_spend\\_thousan.html](http://www.pennlive.com/midstate/index.ssf/2010/01/school_districts_spend_thousan.html). See also *supra* note 116 and accompanying text.

<sup>119</sup> The right of a parent to bring suit under the IDEA without an attorney in a due process hearing was established in 2007. See *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (holding that parents have substantive rights at stake in special education and are, therefore, representing themselves in a due process hearing as opposed to practicing law without a license).

<sup>120</sup> The IDEA permits prevailing parents to recoup attorneys' fees, 20 U.S.C. § 1415(i)(3)(B) (2006), but not expert witness fees, *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 323 (2006). Even with the promise of fee-shifting in the event of successful litigation, the prospect of paying out of pocket as litigation proceeds is prohibitive in many cases. Legislation has been proposed to allow parents to recoup expert witness fees. See IDEA Fairness Restoration Act, S. 613, 112th Cong. (2011).

<sup>121</sup> Hyman et al., *supra* note 52, at 141.

<sup>122</sup> Pasachoff, *supra* note 6, at 1426–27 (discussing the federally funded national study, JAY G. CHAMBERS ET AL., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000? 8 (Jean Wolman & Jamie Shkolnik eds., 2003), available at <http://www.csef-air.org/publications/seep/national/Procedural%20Safeguards.pdf>).

<sup>123</sup> Pasachoff, *supra* note 6, at 1426–27 (reviewing various studies that have found as much to be true).

<sup>124</sup> See Hyman et al., *supra* note 52 and accompanying text.

<sup>125</sup> See generally LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), available at <http://www.lsc.gov/justicegap.pdf> (stating that only a small fraction of legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer).

due process hearing. Parents are entitled to reasonable attorneys' fees if they prevail (though not if they reach a private settlement<sup>126</sup>), but attorneys' fees alone are not a sufficient incentive for private attorneys to take on special education cases. Without the possibility of a damages award, private attorneys are reluctant to take on the risks of this type of litigation.<sup>127</sup> A further barrier to obtaining legal representation is the risk of being assessed the school districts' attorneys' fees should the parents' claim be found to be "frivolous, unreasonable, or without foundation."<sup>128</sup>

A small minority of low-income parents may be able to secure free legal representation from a local legal aid office, their state's Protection and Advocacy organization,<sup>129</sup> or a law school clinical program that handles special education cases.<sup>130</sup> But there are very few legal aid offices that handle special education cases,<sup>131</sup>

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<sup>126</sup> *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 600 (2001) (requiring a "judicial imprimatur" to be deemed a "prevailing party"); *John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 556–57 (3d Cir. 2003) (explicitly applying *Buckhannon* to cases arising under the IDEA).

<sup>127</sup> Pasachoff, *supra* note 6, at 1453 (citing Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1458–59 (1998)). There are actually very few private attorneys who even take special education cases in which they represent parents. The Council of Parent Attorneys and Advocates (COPAA) website lists only five attorneys in the State of Michigan who represent parents in special education proceedings. *Find an Attorney / Advocate*, COPAA, <http://www.copaa.org/find-a-resource/find-an-attorney/> (last visited Jan. 11, 2013).

<sup>128</sup> 20 U.S.C. § 1415(i)(3)(B)(i) (2006).

<sup>129</sup> Congress has mandated that every state have a Protection and Advocacy (P&A) organization to provide legal services, education, and advocacy to people with disabilities. *See generally* NAT'L DISABILITY RTS. NETWORK, <http://www.napas.org>.

<sup>130</sup> Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 285 (2005) (urging the development of law school clinics that focus on special education law to address the dearth of this type of representation for low-income parents and to provide students with valuable legal training).

<sup>131</sup> Special education litigation does not fall under restricted Legal Services Corporation (LSC) categories. Yet, few offices handle these cases. In 2010, LSC closed 932,406 cases. Of these, 0.7% (6,978) were education cases, and 0.2% (1,916) were special education cases. *See* LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION 2010 FACT BOOK 17-24 (2011), *available at*

and there are also few of these clinics throughout the country.<sup>132</sup> As a result, many parents have no choice but to represent themselves—a prospect which is particularly daunting for those parents who themselves have only minimal education.<sup>133</sup>

School districts, in contrast, are rarely in the position of navigating special education litigation on their own; they typically contract with a law firm or lawyer that specializes in education law. This arrangement pays off: nationally, school districts win roughly sixty-five percent of special education lawsuits.<sup>134</sup> The expense of a due process hearing as well as barriers to access to legal

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[http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC\\_2010\\_Fact\\_Book.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC_2010_Fact_Book.pdf). See also Lauren Roth, *Florida Parents Seek Help from Special-Education Advocates*, ORLANDO SENTINEL (Jan. 2, 2012), [http://articles.orlandosentinel.com/2012-01-02/business/os-florida-special-education-advocacy-20111225\\_1\\_special-education-advocates-special-education-individualized-education-program](http://articles.orlandosentinel.com/2012-01-02/business/os-florida-special-education-advocacy-20111225_1_special-education-advocates-special-education-individualized-education-program).

<sup>132</sup> There are very few law school clinics that handle special education cases, and even fewer exclusively devoted to education cases. The 2010 Center for the Study of Applied Legal Education survey, which had an 84% response rate, asked clinicians to identify the type of clinic in which they teach; not one clinic identified itself as an “education law clinic.” Of the respondents, however, 4.6% identified their clinics as “Children in the Law” clinics. Presumably some of these clinics handle special education cases. See CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., 2010-11 CSALE SURVEY OF APPLIED LEGAL EDUCATION (May 16, 2012), available at <http://www.csale.org/files/CSALE.Report.on.2010-11.Survey.5.16.12.Revised.pdf>. The Wrightslaw website, which is a special education resource for parents, attorneys, and advocates, identifies fifteen law school clinics in the country that handle special education cases. See *So You Want to Go to Law School?*, WRIGHTSLAW, <http://www.wrightslaw.com/lawschool/index.htm>.

<sup>133</sup> Massey, *supra* note 130, at 281 (“[O]ne-third of special education parents are low-income, and one-third of the mothers of children with disabilities have not completed high school.”); see also Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 112–13 (2011) (“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 \$50,000 or less.”); Phillips, *supra* note 6, at 1836 (“Evidence suggests that during the 1980s and 1990s, the prevalence of disability in the United States increased, but only among families living below the poverty line.”).

<sup>134</sup> Christina Samuels, *Special Education Court Decisions on the Rise*, EDUCATION WEEK (Jan. 28, 2011, 9:24 AM), [http://blogs.edweek.org/edweek/speced/2011/01/special\\_education\\_court\\_decisi.html](http://blogs.edweek.org/edweek/speced/2011/01/special_education_court_decisi.html).



representation creates further parent-school district asymmetry and makes it still more difficult for low-income families to enforce the rights conferred by the IDEA.<sup>135</sup>

## 2. Access to Insurance

The expense of litigating a special education case is not borne exclusively by the parents: school districts also bear financial hardship when they go to a due process hearing. It is the prospect of this financial hardship that gives parents leverage when negotiating a child's IEP with the school district. School districts must pay for both their attorneys and experts, and bear certain costs incidental to the hearing, such as paying the court reporter and hiring substitute teachers while other teachers testify. Moreover, if a parent prevails, the school district must pay the parent's attorneys' fees.<sup>136</sup> Parents with the financial means to hire—or the good fortune to have obtained free—legal counsel should therefore have decent bargaining power against a school district,<sup>137</sup> unless, of course, the school district has insurance that covers the costs of defending a due process hearing. If a school district has such insurance, it significantly alters the risk-reward analysis of going to a hearing.

Let us take a step back: insurance coverage for school districts is common and not restricted to the special education context. School districts operate in a highly regulated environment and are accustomed to integrating the demands of the legal system into daily operations.<sup>138</sup> Because school districts may be faced with

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<sup>135</sup> The dearth of special education due process filings nationally, and significantly fewer cases of judicial review of the administrative decisions, lends support to the claim that the procedural safeguards of the IDEA are insufficient for low-income families. See generally Bagenstos, *supra* note 101, at 126–29.

<sup>136</sup> 20 U.S.C. § 1415(i)(3)(B) (2006).

<sup>137</sup> Caruso, *supra* note 6; 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 836 (Gary Sykes et al. eds., 2009) (noting that “[r]esearch on the implementation of due process has shown that school administrators are quite attentive to parents who file, or even threaten to file for due process hearings. Directors often change programs in order to avoid these contentious, and often expensive, adversarial proceedings.”).

<sup>138</sup> Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & EDUC. 73 (1998) (studying the relationship between

employment claims or negligence claims, many purchase liability insurance. But, while it is typical for school districts to be insured against liability generally, it is a recent—and uncommon—phenomenon for such coverage to extend to the defense of special education proceedings.<sup>139</sup>

In Michigan, for example, roughly eighty percent of school districts purchase insurance from the Michigan Association of School Boards (MASB).<sup>140</sup> The MASB created a property/casualty pool in 1985 for districts that belong to MASB; and, according to MASB, it is the nation's largest property/casualty pool serving school districts exclusively.<sup>141</sup> Beginning in late 2007, MASB added coverage for

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school districts and attorneys in Arizona); *see also* Sarah E. Redfield, *The Convergence of Education and Law: A New Class of Educators and Lawyers*, 36 IND. L. REV. 609, 618–19 (2003) (discussing the explosion of laws that affect education since *Brown v. Board of Education* was decided and calling for better informed educators and lawyers to deal with this new reality) (“[I]t is increasingly the case that neither lawyers nor educators can do their work independently.”); Perry A. Zirkel, *Paralyzing Fear: Avoiding Distorted Assessments of the Effect of Law on Education*, 35 J.L. & EDUC. 461 (2006) (challenging the perception that educators are overwhelmed with litigation but noting the importance of increased collaboration between lawyers and educators to create a preventative law approach).

<sup>139</sup> In 2010, at my request, the University of Michigan Law School library staff did an online search for insurance companies throughout the country that provide special education coverage to school districts. Of the thirty-five insurance companies surveyed, only five indicate that they provide coverage for special education litigation. E-mail from Kincaid C. Brown, Head of Electronic and Systems Services, University of Michigan Law Library, to author (August 5, 2010) (on file with the author.) For example, the Southwest Washington Risk Management Insurance Cooperative in the state of Washington provides coverage of \$35,000 per special education hearing and \$200,000 for the all lawsuits in the coverage period. EDUC. SERV. DIST. 112, RISK MANAGEMENT MATTERS (2012), available at [http://web3.esd112.org/docs/risk-management-matters/riskmgmtmatters\\_fall\\_2012.pdf?sfvrsn=0](http://web3.esd112.org/docs/risk-management-matters/riskmgmtmatters_fall_2012.pdf?sfvrsn=0). The Oklahoma School Insurance Group provides \$25,000 coverage per special education hearing. *Solutions and Coverage*, OKLA. SCH. INS. GROUP, <http://www.osig.org/content.htm?page=solutions.htm>. Perhaps unsurprisingly, I could not persuade representatives from any of the insurance companies to answer my specific questions as to how the special education litigation coverage works.

<sup>140</sup> *See* MICH. ASS'N OF SCH. BDS., <http://www.masb.org>.

<sup>141</sup> The property/casualty pool had 465 member districts for the fiscal year ending June 30, 2011. *MASB-SEG Property/Casualty Pool*, SETSEG, <https://www.setseg.org/Content/PropertyCasualty/tabid/116/Default.aspx>.

allegations of wrongful acts arising from the provision of special education under the IDEA.<sup>142</sup> This means that, for example, if a parent requests a due process hearing for a FAPE violation, the school district's insurance will cover the costs of its defense. MASB's policy provides a \$100,000 annual aggregate limit per member to defend a special education hearing request.<sup>143</sup>

Ordinarily, when a party seeks to purchase insurance, the insurer conducts an assessment to make sure the party is insurable, to assess the risk that the potential insured will incur a covered loss, to determine the extent of coverage, and to calculate premiums. What is unique about the special education coverage provided under the MASB policy is that it was provided, at least as an initial matter, with no character or risk assessment.<sup>144</sup> That is, MASB announced that it was adding special education coverage to extant policies at no additional cost to those insured and without regard to individual districts' record of IDEA compliance.<sup>145</sup> While the coverage is incomplete—it does not cover districts' liability for prevailing parents' attorneys' fees, nor does it cover the costs of supplying any special education services mandated by the court—it does pay for the attorneys to defend the school district against this potential loss, which can cost tens of thousands of dollars per hearing.<sup>146</sup>

The availability of this insurance gives rise to a moral hazard problem, because it allows school districts to avoid internalizing all of the costs of litigation under the IDEA. A school district might refuse to provide an expensive benefit to a disabled child, knowing that it can incur up to \$100,000 in legal fees at no marginal cost.<sup>147</sup>

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<sup>142</sup> *MASB Headlines*, MICH. ASS'N OF SCH. BOARDS (August 20, 2007), [www.masb.org](http://www.masb.org). For more on the reasons that the special education due process hearing defense coverage was added to the insurance pool, see podcast on the SETSEG site *Special Education Due Process Defense Coverage*, SETSEG, <https://www.setseg.org/Content/SetSegMainPage/PodcastsVideos/tabid/366/Default.aspx>. According to the podcast, members must use one of three law firms on the "counsel panel." The chosen firms specialize in education cases.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* *See also supra* note 116 and accompanying text.

<sup>147</sup> Presumably, a district that incurred significant litigation costs in special education cases would expect to see its premiums go up. But given MASB's

This is not to say that school districts necessarily end up litigating more because they have insurance. The point is simply that districts are able to negotiate more aggressively because they need not worry about the costs of a hearing. (Parents, of course, are rarely in this position.) School districts are freer to define FAPE narrowly and to write limited IEPs knowing—for the reasons mentioned in Part III.A—that they may never have to face a formal legal challenge and that, if they do, they carry insurance against the costs of litigating. In short, the liability insurance that companies such as MASB provide expands the bargaining power of the school district vis-à-vis an already disadvantaged opponent.

There is, finally, an important collateral consequence of school districts' access to this insurance. It is corrosive of the collaborative process that is supposed to take place between parents and schools in the course of creating an IEP. It is difficult to imagine genuine collaboration taking place between parties with vastly different levels of bargaining power. When members of a school district sit down to draft an IEP in partnership with parents, if the district has insurance to cover some of the costs of a breakdown in the collaboration, the district has less to lose than the parents from a breakdown. And this unspoken reality, in turn, affects the ways in which the district treats the process.

#### IV. SUGGESTIONS FOR CHANGE

Scholars and practitioners have recognized the tendency of the legal process of special education to place parents and school districts in the role of adversaries instead of focusing on the needs of individual children.<sup>148</sup> One commentator believes that the solution to this problem lies in better training for educators in their legal obligations, and in training lawyers to work in the education context (with an emphasis on their negotiation and mediation skills rather than litigation skills).<sup>149</sup> Another argues that the only way to reduce the expertise differential between parents and school districts is to require school districts to present parents with the complete array of

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decision simply to add special education coverage to existing policies, at no apparent additional cost, even this is open to question.

<sup>148</sup> Redfield, *supra* note 138, at 640.

<sup>149</sup> *Id.* at 641.

programming options to give parents a sense of the range of possibilities for their child.<sup>150</sup> Two other commentators would like to codify in the IDEA the appointment of advocates for families as part of the child's IEP team,<sup>151</sup> and another believes that increased class action litigation is warranted so that benefits awarded to children under the IDEA have broader application.<sup>152</sup>

Professor Eloise Pasachoff presents a compelling argument regarding the limits of the IDEA's reliance on private enforcement for the realization of children's special education rights, given the gross disparities between parents and school districts. Pasachoff calls for increased public enforcement and describes various ways this can be done, such as: (1) creating a unified database that collects and disseminates information regarding the demographics of students in special education, the needs of the students, and the services/placements offered to meet those needs (though with sensitivity to privacy concerns) to boost transparency;<sup>153</sup> (2) initiating state investigation and monitoring of FAPE provision to low-income students, which would serve the purpose of reducing disparities among wealthy children and poor children within a state;<sup>154</sup> and (3) offering financial incentives to states to take steps to ensure that poor children are receiving special education services that are comparable to their wealthier peers.<sup>155</sup>

Professor Pasachoff's proposals are innovative, and would undoubtedly be helpful to low-income parents. In my experience representing parents in the special education process, public enforcement as well as expanded access to attorneys for parents is desperately needed. Parents and school districts often have significant trouble communicating and relating. It is clear from the tone of IEP meetings that schools frequently see parents as too emotionally involved to understand their child's educational needs and therefore experience these parents as unreasonable, while parents

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<sup>150</sup> Kotler, *supra* note 41, at 374–75.

<sup>151</sup> Phillips, *supra* note 6, at 1837–38; Margaret M. Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 Nw. J.L. & SOC. POL'Y 263, 284 (2008).

<sup>152</sup> Hehir, *supra* note 137, at 831.

<sup>153</sup> Pasachoff, *supra* note 6, at 1465–72.

<sup>154</sup> *Id.* at 1473–85.

<sup>155</sup> *Id.* at 1485–88.

can barely understand what schools are saying to them. This dynamic, coupled with disparities in bargaining power, undermines the IDEA's purpose and design. Expanded and enhanced public enforcement of the IDEA would mitigate many of these problems. And Professor Pasachoff's proposals—especially the monitoring of the provision of FAPE to low-income students—would take some of the pressure off these individual parent-school district encounters.

Additionally, given the growing availability of insurance to school districts to cover the costs of due process hearings, private enforcement of IDEA's guarantees is less attainable than even Professor Pasachoff realizes. What is interesting and potentially significant here is that insurance for districts threatens relatively wealthy parents who, under normal circumstances, would be able to enforce their due process rights. Most middle-class families cannot out-spend a school district's \$100,000 litigation budget. The effect of special education litigation insurance coverage on well-resourced parents may actually help mobilize these parents to push for increased public enforcement of the IDEA. As became clear in the 1960s and '70s, the mobilization of middle-class and upper-middle-class parents can result in considerable change.<sup>156</sup>

In concert with greater public enforcement of the IDEA, is the need to improve parents' bargaining power against school districts by providing increased access to attorneys. This access can come from more legal services agencies taking special education cases, from medical-legal partnerships,<sup>157</sup> which are an expanding presence in the country, and from law school clinics. There is also (and always) a uniform cry for Congress to allocate additional money to special

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<sup>156</sup> See *supra* Part II.A.

<sup>157</sup> Medical-legal partnerships integrate attorneys into a person's healthcare team to achieve improved health outcomes. For example, a child with asthma needs an asthma medical plan, but also needs her landlord to remove mold from her apartment. So, too, a child with autism requires medical care, but he also requires appropriate accommodations and therapies in school to benefit from his education. For more on medical-legal partnerships, see the National Center For Medical-Legal Partnership website. NATIONAL CENTER FOR MEDICAL-LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org>.

education in an attempt to ease the resource grab in school districts.<sup>158</sup> This paper can rightfully be added to that call.

## V. CONCLUSION

The process of ensuring a free appropriate public education for a disabled child under the IDEA is rife with tensions and asymmetries between parents and school districts. Some of these asymmetries—particularly regarding expertise between parents and school districts—are inherent, and not the product of congressional design. Procedural safeguards in the IDEA, such as the ability of parents to obtain an independent evaluation at public expense, does some work to alleviate this problem. Other imbalances and tensions are the result of court decisions, under-funding for special education, and the fact that parents of special needs children often have limited financial resources. In this world of limited resources, where the provision of special education is expensive but lawyers (to defend school districts from violations of the IDEA) are free for school districts with insurance, it is difficult to conceive how disabled students will receive the full guarantee of FAPE.

At bottom, the problem with effective implementation of the IDEA is the problem of inadequate funding. Assuming that Congress does not decide suddenly to fund fully special education, we are left with a hobbled system dependent on the good will of school personnel and effective advocacy by parents. One of the saddest consequences is the breakdown of trust between parents and educators. Parents *should* be able to trust their children's schools to operate in their best interests. But the tension between "free" and "appropriate" leads many schools to mask denial of services in assertions of inappropriateness. As a result, parents feel dismissed and ignored when they advocate for their children's needs. This tension has eroded the collaborative nature of the IDEA and has turned it into a dishonest process of downplaying parental concerns in an effort to guard the school district's budget.

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<sup>158</sup> See, e.g., IDEA Full Funding Act, S. 1403, 112th Cong. (2011). This bill was introduced by Senator Harkin in July 2011. This bill has been introduced in the past as well. See IDEA Full Funding Act, S. 1652, 111th Cong. (2009).