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## Meeting the Needs of All Students: Amending the Idea to Support Special Education Students from Low-income Households

M. Hannah Koseki

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# MEETING THE NEEDS OF ALL STUDENTS: AMENDING THE IDEA TO SUPPORT SPECIAL EDUCATION STUDENTS FROM LOW-INCOME HOUSEHOLDS

*M. Hannah Koseki\**

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### INTRODUCTION

In 2011, Jonah entered the tenth grade, reading between a first grade and third grade level.<sup>1</sup> He struggled to read simple words like “chicken,” and had never passed a state assessment in reading, math, or science. Although he aspired to join the air force, because of his low reading and math levels, he struggled to obtain qualifying scores on his military aptitude exams.<sup>2</sup> Jonah attended a school that served a low-income population, and nearly seventy percent of his classmates were eligible for a free or reduced lunch.<sup>3</sup> A new special education teacher, who entered her first classroom just one month before meeting Jonah, was in charge of developing and checking on Jonah’s academic and emotional well-being. She taught three out of four periods per day, and during her fourth “free period” she observed her students in their regular education classrooms, updated data to track their progress, drafted Individualized Education Programs (“IEPs”), and ran IEP meetings.

At his IEP meeting, Jonah’s father, exhausted after finishing another night shift, listened to Jonah’s special education teacher rattle away about “benchmarks” and “accommodations.” Unsure about what everything meant, he kept quiet, his eyes staring down at the table or occasionally over to Jonah, who was visibly uncomfortable by the number of teachers talking about his career goals and academic shortcomings. A regular education teacher sat in the corner, politely

1. Jonah’s story is not based on an individual child. Rather, Jonah’s story is based on various students I encountered while working for three years as a special education teacher in a low-income community.

2. The Armed Forces Vocational Aptitude Battery (“ASVAB”) is a standardized test used by the military. All applicants must take the ASVAB in order to enlist. There is no “passing score,” however the test determines whether a candidate has the military aptitude to enlist, and which branch of the military in which the candidate can qualify to enlist. Most branches require a minimum score of thirty-one out of ninety-nine. See Rod Powers, *Minimum Required ASVAB Scores and Education Level*, BALANCE (Sept. 8, 2016), <http://usmilitary.about.com/cs/genjoin/a/asvabminimum.htm> [<https://perma.cc/L2JC-FKXN>].

3. MARION BETSY BOUNDS, WAIANAE SUBGRANTEE LOCATION EVALUATION REPORT (Nov. 10, 2014), <https://www.hawaiipublicschools.org/Reports/21WaianaeEval13-14.pdf> [<https://perma.cc/4RVJ-5B5T>]. In general, eligibility for a free lunch requires an annual income at or below \$15,301. See 7 C.F.R. § 210.2 (2015); Adjustment Notice, 80 Fed. Reg. 17,026 (Mar. 31, 2015).

listening but straining to follow along. Apart from seeing him around campus, she did not know Jonah, and because his reading level was so low, there was little to no chance that he would ever step foot in her classroom.

Before the meeting concluded, Jonah's teacher asked his father if he approved of the proposed accommodations. Although he was not convinced that "extra time to complete assignments," or "frequent breaks" would help Jonah's reading level, he nodded his head. He knew Jonah's reading level was low, but he did not know how else to help him. The vice principal handed Jonah's father a copy of his procedural rights and asked if he would like it read to him. Jonah's father quickly passed, as he had been to several meetings before and did not feel the need to hear these rights again. After the twenty-minute meeting, he made just one comment: "If Jonah isn't doing his homework or isn't passing, call me and I'll make sure it gets done."

Across the country, students like Jonah rely on the Individuals with Disabilities Education Act ("IDEA") for educational assistance and access to the public school system.<sup>4</sup> Originally enacted in 1975 as the Education of All Handicapped Children Act ("EAHCA"), the goal of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for employment and independent living."<sup>5</sup> Today, nearly seven million children<sup>6</sup> receive special education and related services under the IDEA.<sup>7</sup> Although the substantive rights and procedural protections of the IDEA have helped to nearly triple graduation and college entrance rates among students with disabilities,<sup>8</sup> the benefits of the IDEA have not been

4. See Cari Carson, *Rethinking Special Education's "Least Restrictive Environment" Requirement*, 113 MICH. L. REV. 1397, 1402 (2015).

5. See 20 U.S.C. § 1400(d)(1)(A) (2010).

6. The IDEA covers infants and toddlers until age three, as well as students with disabilities until age twenty-one. See NAT'L COUNCIL ON DISABILITY, *BACK TO SCHOOL ON CIVIL RIGHTS* (2000), [http://www.ncd.gov/rawmedia\\_repository/7bfb3c01\\_5c95\\_4d33\\_94b7\\_b80171d0b1bc.pdf](http://www.ncd.gov/rawmedia_repository/7bfb3c01_5c95_4d33_94b7_b80171d0b1bc.pdf) [https://perma.cc/3UUU-PN26] [hereinafter *BACK TO SCHOOL*].

7. See Elisa Hyman, Dean Hill Rivkin, & Stephen Rosenbaum, *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, 113 (2011) (citing U.S. Dep't of Educ., Off. of Special Educ. Programs, Data Analysis Sys. (DANS), OMB #1820-0043: Children with Disabilities Receiving Special Education Under Part B of the Individuals with Disabilities Education Act).

8. *BACK TO SCHOOL*, *supra* note 6.

equally distributed.<sup>9</sup> The extent to which children receive the benefits of the IDEA turns on several factors, including socioeconomic status.<sup>10</sup>

To meet its goals, the IDEA relies on collaboration between parents and schools.<sup>11</sup> Through each step of the IDEA, parents are given the primary responsibility to advocate and negotiate for their child.<sup>12</sup> This begins with helping determine their child's eligibility for special education and related services and continues all the way through the creation and implementation of their child's IEP.<sup>13</sup> Although the IDEA envisions parents as dedicated and vocal team members, parents who do not feel competent to be equal team members either do not understand the procedural and substantive protections available to them under the IDEA or lack the financial means to obtain counsel, and struggle to be effective advocates.<sup>14</sup> In contrast, parents who are not intimidated by the educational or legal systems are more likely to know about the benefits of special education and take advantage of the procedural and substantive protections available under the IDEA.<sup>15</sup> The IDEA's dependence on parental enforcement and construction of rights at an individualized level, coupled with wide agency discretion of a school's ability to propose appropriate services, creates an unbalanced system that substantially disfavors poor families.<sup>16</sup> In low-income communities, students with disabilities often experience inadequate services, low-quality curriculum and instruction, and increased isolation from their nondisabled peers.<sup>17</sup>

To close the gap between the disparities in IDEA implementation between low-income and wealthier communities, this Note argues

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9. DANIEL J. LOSEN & GARY ORFIELD, RACIAL INEQUITY IN SPECIAL EDUCATION xv (2002).

10. 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, 264 (2008); see Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733, 734 (2014).

11. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

12. See MICHAEL L. YELL, *THE LAW AND SPECIAL EDUCATION* 94-95 (2nd ed. 2006).

13. See *id.*

14. Wakelin, *supra* note 10, at 274-75.

15. LAURA F. ROTHSTEIN, *SPECIAL EDUCATION LAW* 51 (3rd ed. 2000).

16. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1436 (2011) (citing Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 172 (2005)).

17. Wakelin, *supra* note 10, at 269-70.

that Congress should amend the IDEA to include a school counselor as a mandatory part of the IEP team. School counselors can help to advocate for students and their families because they are able to spend time with students and get to know them on a level similar to that of their parents.<sup>18</sup> Counselors often have access to student academic records and are knowledgeable in career paths and options available to students after high school.<sup>19</sup> Furthermore, counselors are fully integrated members of school education teams, working closely with teachers and administrators on a daily basis.<sup>20</sup> Mandating that a school counselor be present and part of the special education team will provide support for the parent, child, and school.<sup>21</sup>

This Note examines how low-income and minority students with disabilities are deprived of the benefits promised by the IDEA because its procedural design severely disadvantages poor families. This Note argues that the IDEA can and should be amended to support low-income families and give parents and students the ability to meaningfully engage with the IEP development process. Part I examines the history of special education law, as well as the substantive and procedural aspects of the IDEA that lead to disparities in the way it is enforced. Part II examines the various solutions that have been proposed to meet parents' advocacy needs in IDEA claims, arguing that each solution is inadequate. Part III proposes an amendment to the IDEA, to mandate that a school counselor—an individual with resources to support parental competence and engagement—be present at each IEP team meeting.<sup>22</sup>

### I. OVERVIEW OF THE INDIVIDUALS WITH DISABILITIES ACT

The IDEA is a comprehensive statute that attempts to provide students with disabilities equal access to a public education.<sup>23</sup> Part I of this Note first examines the connection between poverty,

18. See discussion *infra* Sections III.B, III.C.

19. See Reese M. House & Richard L. Hayes, *School Counselors: Becoming Key Players in School Reform* (Apr. 1, 2002), <http://www.biomedsearch.com/article/School-counselors-becoming-key-players/86059885.html> [<https://perma.cc/N6HB-YUHU>].

20. See John Rosales, *With New Roles, School Counselors are More Indispensable than Ever*, NAT'L EDUC. ASS'N (Feb. 1, 2015), <http://neatoday.org/2015/02/01/school-counselors-are-more-indispensable-than-ever/> [<https://perma.cc/WRT2-DTGC>].

21. See discussion *infra* Section III.C.

22. See discussion *infra* Part III.

23. See discussion *infra* Section I.C.

disabilities, and education. Next, it details the history of special education law and the roots of the IDEA. Further, it describes the role parents must play and the barriers that may prevent them from being effective advocates, such as unequal bargaining power or lack of financial resources to obtain counsel. Finally, Part I reviews the consequences of the unequal enforcement of the IDEA for low-income students with disabilities.

### A. Connecting Poverty, Disability, and Education<sup>24</sup>

Jonah's story is not unique. Special education places enormous burdens and obligations on educators and schools,<sup>25</sup> and low-income students are disproportionately located in school systems that lack resources and contain undertrained teachers.<sup>26</sup> Additionally, low-income parents often lack the time, money, or education to vigorously advocate for their children.<sup>27</sup> When parents are unable to play active roles in the development of their child's IEP, schools lack the incentive to expend the time and effort required to provide meaningful accommodations and services.<sup>28</sup> Without meaningful accommodations, students like Jonah fall behind until they either drop out or graduate with low academic abilities and meager job prospects.<sup>29</sup>

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24. It is important to note that the disparities in the enforcement of the IDEA in low-income communities are nested within a larger problem of the overrepresentation of minority students in special education, as well as concerns about inequities in education generally. For example, although fifteen percent of students nationwide are African-American, African-American students make up over twenty percent of the special education population. Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL'Y L. 181, 184 (2009).

25. ROTHSTEIN, *supra* note 15, at 58.

26. See generally Torin D. Togut, *Symposium: Keeping the Needs of Students with Disabilities on the Agenda: Current Issues in Special Education Advocacy: The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 AM. U.J. GENDER SOC. POL'Y & L. 163, 170 (2011).

27. See Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 FORDHAM URB. L. J. 599, 612-13 (2013) (citing Carolyn Hughes & Selete K. Avoke, *The Elephant in the Room: Poverty, Disability, and Employment*, 35 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 5, 6 (2010)).

28. See *id.*

29. See *id.*

Although poverty rates among public school children in general have increased in recent years,<sup>30</sup> children with disabilities are far more likely to come from low-income households.<sup>31</sup> Of the seven million children covered under the IDEA, approximately two million live below the poverty line, and nearly four and a half million live in households with incomes of \$50,000 or less.<sup>32</sup> A study from the early 2000s revealed that twenty-one percent of elementary and middle school students with disabilities were living in poverty, compared to sixteen percent of children in the general population.<sup>33</sup> Additionally, thirty-seven percent of secondary school students with disabilities were living in households with family incomes of \$25,000 or less, compared to twenty-one percent of children in the general population.<sup>34</sup>

Not only are children from low-income households more likely to require special education services and support,<sup>35</sup> but they are also more likely to be concentrated in school districts that are already struggling to serve low-income populations.<sup>36</sup> In general, schools with higher levels of low-income students tend to have teachers with weaker qualifications in terms of experience, post-baccalaureate coursework, and certification.<sup>37</sup> Additionally, schools in low-income communities often have fewer resources than wealthier districts.<sup>38</sup>

30. A recent study by the Southern Education Foundation found that nearly fifty-one percent of the nation's public school children are considered low-income. See *Low Income Students Now a Majority in the Nation's Public Schools*, SOUTHERN EDUC. FOUND. (Jan. 2015), <http://www.southerneducation.org/getattachment/4ac62e27-5260-47a5-9d02-14896ec3a531/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx> [<https://perma.cc/CE59-4X3E>].

31. See Valverde, *supra* note 27, at 611-12.

32. See generally Mary Wagner et al., Special Education Elementary Longitudinal Survey, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, SRI INT'L 29 (Sept. 2002), <http://www.eric.ed.gov/PDFS/ED475794.pdf> [<https://perma.cc/MGQ6-99TC>].

33. Pasachoff, *supra* note 16, at 1432.

34. *Id.*

35. Alternatively, many critics argue that minority and low-income students are overrepresented in the special education curriculum. See, e.g., Vallas, *supra* note 24.

36. See generally Valverde, *supra* note 27, at 605-06 (finding that eighteen percent of all New Jersey children lived at or below the poverty level, and that fifty percent of children under the age of five in Newark lived in households with incomes at or below the federal poverty level).

37. See Jennifer Presley, Bradford White, & Yugin Gong, *Examining the Distribution and Impact of Teacher Quality in Illinois*, ILL. EDUC. RES. COUNCIL (2005).

38. For example, an analysis by the Department of Education found that in the 2008-09 school year, forty percent of schools receiving Title I funding spent less

Lack of resources requires teachers and administrative staff to take on greater workloads.<sup>39</sup> These issues increase burdens on special education teachers, who already spend a greater amount of time on paperwork compared to general education teachers.<sup>40</sup>

When special education teachers are overburdened and undertrained, they are less likely to dedicate time to creating comprehensive IEP programs or working with individual students to make sure their needs are being met.<sup>41</sup> Although the IDEA envisions that parents will vocalize their frustrations, forcing schools to provide adequate resources and meet the requirements of the IDEA, parents who have a lower level of education or fewer financial resources may not feel comfortable speaking out.<sup>42</sup> Furthermore, they may even fear that pushing school professionals too hard will cause the professionals to treat their children with less care.<sup>43</sup>

Wealth-based disparities are particularly troubling because the IDEA is a universal statute with a focus on providing remedies for traditionally disadvantaged populations.<sup>44</sup> Although the IDEA has been amended numerous times, low-income parents of students with disabilities continue to face difficult odds when challenging school districts for failing to adequately educate their children.<sup>45</sup> An

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money on teachers and other staff than schools that do not receive Title I money. *More than 40% of Low-Income Schools Don't Get a Fair Share of State and Local Funds*, U.S. DEP'T OF EDUC. (Nov. 30, 2011), <http://www.ed.gov/news/press-releases/more-40-low-income-schools-dont-get-fair-share-state-and-local-funds-department-education-research-finds> [<https://perma.cc/4W3Z-ADRD>].

39. Schools from low-income schools experience less support in hiring, mentoring, and curriculum development than those who teach in high-income schools. *The Support Gap*, EDUC. POL'Y ANALYSIS ARCHIVES (Oct. 29, 2004), <http://files.eric.ed.gov/fulltext/EJ853526.pdf> [<https://perma.cc/D9T2-TXGN>].

40. One study found that general education teachers spend about 1.6 hours per week on paperwork, compared to special education teachers who spend an average of 4.7 hours per week on paperwork. Erin Phillips, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1827 (2008) (citing Nancy Lee Jones & Richard N. Apling, *The Individuals with Disabilities Act, in INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES* 99-100 (Nancy Lee Jones, Richard N. Apling, & David P. Smole eds. 2004)).

41. See Alex Meyer, *Disabling Parents: How the Minnesota Supreme Court's Well-Intentioned Decision in Independent School District No. 12 v. Minnesota Department of Education Undermines the Role of Parents on IEP Teams*, 34 HAMLINE L. REV. 623, 635-36 (2011).

42. See Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 438 (2012).

43. Meyer, *supra* note 41, at 631.

44. Pasachoff, *supra* note 16, at 1432.

45. Valverde, *supra* note 27, at 622.

understanding of the structure of the IDEA is therefore crucial to recognizing how it creates barriers that disfavor poor families and compromises the educational outcomes for low-income children.

### B. History and Evolution of Special Education Law

Prior to 1970, of the eight million school-aged children that required special education and related services, 1.75 million students received no educational services at all.<sup>46</sup> Children with disabilities were “either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’”<sup>47</sup> State and federal courts routinely upheld the exclusion of students with disabilities on the basis that such students could not benefit from an education.<sup>48</sup> In fact, in 1965, North Carolina had a statute that made it a misdemeanor for a parent of a disabled child to insist that her child be educated in a public school.<sup>49</sup> Without infrastructure to support students with disabilities, these students were effectively locked out of the public education system.

The development and evolution of special education law began as a byproduct of the civil rights movement.<sup>50</sup> The Supreme Court’s landmark decision in *Brown v. Board of Education*<sup>51</sup> catalyzed efforts to ensure educational rights for students with disabilities.<sup>52</sup> In the wake of *Brown*, advocates for students with disabilities began challenging the exclusion of students with disabilities on equal protection grounds.<sup>53</sup> Two early cases, *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania*<sup>54</sup> and *Mills v. District of*

46. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 191 (1982) (citing 121 CONG. REC. 19486 (1975) (remarks of Sen. Williams)); see also 20 U.S.C. § 1400(c)(2) (2012) (stating that “the educational needs of millions of children” were not being met).

47. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 52 (2005).

48. See *Watson v. City of Cambridge*, 157 Mass. 561 (Mass. 1893) (upholding the exclusion of a student from the public school system “because he was too weak-minded to derive profit from instruction.”); State *ex rel.* Beattie v. Bd. of Educ. of City of Antigo, 172 N.W. 153 (Wis. 1919) (denying a student access to the classroom because his physical paralysis took up an “undue portion of the teacher’s time and attention,” and distracted and depressed other students).

49. 1965 N.C. Sess. Laws 641.

50. See Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129 (2012).

51. 347 U.S. 483 (1954).

52. YELL, *supra* note 12, at 66.

53. See *generally* Pa. Ass’n for Retarded Citizens (PARC) v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ. of the Dist. of Columbia*, 348 F. Supp. 866 (D.D.C. 1972).

54. 343 F. Supp. at 279.

*Columbia Board of Education*<sup>55</sup> changed the landscape of special education.

In 1972, the Pennsylvania Association for Retarded Citizens sued the Commonwealth of Pennsylvania over several state statutes that allowed schools to deny education to children who had not “attained a mental age of five years” or who were classified as uneducable by a psychologist.<sup>56</sup> The plaintiffs alleged that these statutes denied students with disabilities their due process rights, and that all children could benefit from access to education and training.<sup>57</sup> The lawsuit resulted in the approval of a consent agreement that mandated Pennsylvania public schools provide students with disabilities equal access to a public education.<sup>58</sup> The agreement acknowledged that “mentally retarded persons are capable of benefitting from a program of education and training.”<sup>59</sup> Thus, *PARC* represented a significant step in securing equal access to education for disabled students.

Later that same year, the family and friends of Peter Mills, a child who had been excluded from school because of behavioral issues, as well as seven other students with disabilities, brought a class action lawsuit against the District of Columbia.<sup>60</sup> The District of Columbia admitted to failing to provide a publicly supported education to Mills and other “exceptional” children and excluding them through suspension or transferring them from regular education classes.<sup>61</sup> Mills also argued that the denial of public education to students with disabilities violated the Due Process Clause. The court not only held that all children, regardless of disability, were entitled to public education, but also declared that a district’s limited financial resources could not justify the denial of services to a student with a disability.<sup>62</sup> In response to *PARC* and *Mills*, as well as several pending lawsuits,<sup>63</sup> Congress passed the EAHCA, which is today known as the IDEA.<sup>64</sup>

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55. 348 F. Supp. at 866.

56. *PARC*, 343 F. Supp. at 282.

57. *See id.* at 283.

58. *Id.* at 302-04.

59. *Id.* at 296.

60. *Mills*, 348 F. Supp. at 876.

61. *Id.* at 871.

62. *Id.*

63. *See Phillips, supra* note 40, at 1812-13.

64. Since its enactment in 1975, the IDEA has been expanded and amended numerous times. The most recent version of the IDEA was adopted in 2005. 20 U.S.C. § 1400 (2005).

### C. Overview of Individuals with Disabilities Education Act

At the cornerstone of the IDEA is the guarantee that every child with a disability will have access to a free appropriate public education (“FAPE”).<sup>65</sup> The IDEA defines a FAPE as “special education and related services that: (A) have been provided at public expense . . . (B) meet the standards of the State educational agency; (C) include an appropriate . . . school education; and (D) are provided in conformity with the individualized education program.”<sup>66</sup> However, because this definition provides little guidance and instruction as to what constitutes an “appropriate education,” the Supreme Court, in *Board of Education v. Rowley*,<sup>67</sup> held that the standard for an “appropriate education” is satisfied when the state provides a child with “personalized instruction with sufficient support services to permit the disabled child to benefit educationally from that instruction.”<sup>68</sup> In doing so, the Court rejected the argument that an “appropriate education” is the same as the best possible education.<sup>69</sup> Under *Rowley*, schools are only required to provide the “basic floor” of educational opportunities.<sup>70</sup> However, the definition of educational benefit varies significantly from circuit to circuit,<sup>71</sup> and Congress has done little to clarify these discrepancies.<sup>72</sup> Thus, under the current provisions of the IDEA, it is the primary responsibility of states and local educational agencies<sup>73</sup> to partner with parents and

65. 20 U.S.C. § 1412(a)(1)(A).

66. 20 U.S.C. § 1401(9).

67. 458 U.S. 176 (2005). Amy Rowley was an elementary school student with a hearing deficiency and used an FM transmitter linked to a hearing aid. Although she passed easily from grade to grade, her parents believed she had the potential to do much better, and requested that the school district provide her with a sign language interpreter instead of the FM transmitter. *See id.* at 184-86.

68. *Id.* at 203.

69. *Id.* at 200.

70. *Id.* at 215.

71. Ben Conway, *Judicial Approaches to Special Education: Residential Placements for Children with Mental Illness Under IDEA*, 5 U.C. IRVINE L. REV. 49, 61 (2015).

72. In *Rowley*, the Court described the “basic floor of opportunity” provided under the IDEA as access to specialized instruction and services that are individually designed and provide education benefit to the student. *See Rowley*, 458 U.S. at 201; *see also* Amy J. Goetz, Tammy L. Pust, & Atlee Reilly, *The Devolution of the Rowley Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLIN L. REV. 503, 508-09 (2011).

73. The IDEA defines a local educational agency as:

[A] public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform

determine the educational methods most suitable for the child's needs.<sup>74</sup>

In addition to a FAPE, the IDEA requires that each child be educated in the least restrictive environment ("LRE").<sup>75</sup> The LRE refers to a continuum of placements, starting with full-time placement in a general education setting, progressing to hospitals and separate institutions.<sup>76</sup> The IDEA mandates that, "to the maximum extent appropriate," students with disabilities be placed in an educational setting with their nondisabled peers,<sup>77</sup> and that students be removed from the general education population only "when the nature or severity of the disability" is such that the student cannot access an education.<sup>78</sup> The purpose of the LRE mandate is to ensure that students with disabilities are guaranteed access to a general education if appropriate.<sup>79</sup>

The IEP is the means by which a student gains access to a FAPE in the LRE.<sup>80</sup> An IEP is a written description of a student's unique program of special education and related services.<sup>81</sup> An IEP must be written by the school after an initial determination that a student has a disability, and is therefore eligible for special education services under the IDEA.<sup>82</sup> Each IEP must contain the student's present level of performance, measurable academic and functional goals, and accommodations and modifications required by the student's disability.<sup>83</sup> The IEP is revised on an annual basis,<sup>84</sup> or whenever "the

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a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools. 20 U.S.C. § 1401(19).

74. See Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley has Been Interpreted*, 247 EDUC. LAW REP. 1, 6 (2009).

75. 20 U.S.C. § 1412(a)(5) (2005).

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.*

80. 20 U.S.C. § 1401(9); see also Conway, *supra* note 71, at 54.

81. 20 U.S.C. § 1414(d)(1)(A).

82. The IDEA defines a "child with a disability" as a child "with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C. § 1401(3)(a).

83. *Id.* at § 1414(d)(1)(A).

84. *Id.* at § 1414(d)(4).

education or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation.”<sup>85</sup> For example, a student may require a reevaluation in the middle of the school year if she is progressing in the special education classroom and seeks to enroll fulltime in a general education room.<sup>86</sup>

An IEP team develops, revises, and implements every IEP.<sup>87</sup> Although several different individuals may be part of the IEP development process, the IDEA only requires the IEP team include, at minimum, one parent, one special education teacher, one regular education teacher, and a “local educational agency” representative.<sup>88</sup> Therefore, depending on the nature of the student’s disability, IEP meetings may be attended by as few as three or upwards of ten representatives from the school district.<sup>89</sup>

Additionally, the Supreme Court’s decision in *Rowley* broadened a school district’s discretion in determining what educational services to provide.<sup>90</sup> Further, different school districts conduct IEP conferences in vastly different ways.<sup>91</sup> For example, although some schools draft an IEP before the meeting and before obtaining a parent’s input, others prepare for meetings with extensive parent conferences.<sup>92</sup>

85. *Id.* at § 1414(a)(2)(A)(i).

86. *See id.*

87. The IEP team may consist of:

- (i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency . . . ; (v) an individual who can interpret the instructional implications of evaluation results . . . ; (vi) at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability. 20 U.S.C. § 1414(d)(1)(B).

88. *Id.*; *see also* Meyer, *supra* note 41.

89. *See* 20 U.S.C. § 1414(d)(1)(B); *see also* Chopp, *supra* note 42, at 432.

90. Phillips, *supra* note 40, at 1818. The IDEA also mandates that an appropriate education also include, when necessary for the student to benefit from her education, mental health and related services. *See* 20 U.S.C. § 1401(26)(A). Additionally, “federally mandated services include: counseling services by social workers, psychologists, counselors, and other qualified personnel; medication services for assessment and evaluation; parent counseling and training; psychological services; planning and case management; and rehabilitation counseling.” Conway, *supra* note at 71, at 59.

91. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188-89 (1991).

92. *Id.*

Thus, whether a school district decides to provide a particular service depends significantly on the amount of funding it has available.<sup>93</sup>

When Congress created the IDEA, it recognized the need to provide funding for special education and related services.<sup>94</sup> On average, special education costs about twice as much per pupil as regular education,<sup>95</sup> and the number of students classified under the IDEA has grown at nearly twice the rate of the general education population.<sup>96</sup> To qualify for federal funds, a state educational agency<sup>97</sup> must submit an annual program plan that delineates how it will provide free appropriate special education services to students with disabilities between the ages of three and twenty-one.<sup>98</sup> This plan must include procedural safeguards for parents and specify culturally nondiscriminatory testing and evaluation materials.<sup>99</sup> Additionally, states must set up a system for the allocation of funds to local education providers.<sup>100</sup>

Although the IDEA is the second largest federal program in education, providing states and districts with approximately twelve billion dollars each year,<sup>101</sup> Congress' funds have only amounted to eight to ten percent of a state's total special education

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93. The amount of funding each state receives from the IDEA is obtained by multiplying the number of eligible children by forty percent of the average per-pupil expenditure in public elementary and secondary schools in the United States. 20 U.S.C. § 1411(a)(2). Under this calculation, the amount of federal grants each state receives is directly correlated to the number of identified disabilities in each state, and should therefore increase proportionally when more children require the provision of special education services.

94. *Students with Disabilities*, NEW AM. (Mar. 26, 2012), <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/students-disabilities/> [https://perma.cc/QVR6-956E].

95. Antonis Katsiyannis, Mitchell L. Yell, & Renee Bradley, *Reflections on the 25<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL EDUC. 324, 328-29 (2000) [hereinafter *Reflections on the IDEA*].

96. Between 1980 and 2005, the IDEA population increased by thirty-seven percent, compared to the general education population, which increased by only twenty percent. *Id.*

97. The IDEA defines a "state educational agency" as "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or if there is no such officer or agency, an officer or agency designed by the Governor or by State law." 20 U.S.C. § 1401(32).

98. YELL, *supra* note 12, at 111.

99. Wakelin, *supra* note 10, at 272.

100. *Id.*

101. Clare McCann, *Federal Funding for Students with Disabilities: The Evolution of Federal Special Education Finance in the United States*, NEW AM. (2014), [https://www.newamerica.org/downloads/IDEA\\_6\\_25\\_2014\\_FINAL.pdf](https://www.newamerica.org/downloads/IDEA_6_25_2014_FINAL.pdf) [https://perma.cc/K8JL-TSKT].

expenditures.<sup>102</sup> As states do not receive nearly enough funding from the federal government to subsidize special education expenditures, the burden of financing special education falls on individual school districts.<sup>103</sup> School districts are therefore obligated to provide special education services to children along the IDEA's guidelines and to meet the FAPE standard by funding all of the services recommended by the IEPs.<sup>104</sup>

At the federal level, the Office of Special Education Programs ("OSEP")<sup>105</sup> oversees the IDEA.<sup>106</sup> The OSEP disburses funds to the states, approves and monitors state performances, and can take enforcement action against states through cutting off their IDEA funds or referring the state to the Department of Justice.<sup>107</sup> States in turn are responsible for the supervision of all educational programs and for monitoring the implementation of the IDEA within individual school districts.<sup>108</sup> Thus, the IDEA represents "a model of cooperative federalism," providing requirements and guidelines for states to follow but ultimately leaving them with the primary responsibility of creating educational programs for disabled students.<sup>109</sup>

#### **D. The Role of Parents in the Individuals with Disabilities Education Act**

Since *PARC* and *Mills*, parents have played a fundamental role as advocates in the educational decision-making process for students

102. *Reflections on the IDEA*, *supra* note 95, at 329.

103. Czapanskiy, *supra* note 10, at 734.

104. *Id.*

105. The OSEP is administered by the Department of Education. Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in RACIAL INEQUALITY IN SPECIAL EDUCATION 219, 221 (Daniel J. Losen & Gary Orfield eds. 2002).

106. *See* 20 U.S.C. § 1402 (2005).

107. *Id.* If a state is found to be in gross violation of the policies of the IDEA, OSEP has the authority to withhold funds for special education programs. *Id.* However, although the National Council on Disability has found that all states are in some form of noncompliance with the IDEA, the OSEP has only suspended state funds once. In 1994 the OSEP withheld funds from the Virginia Department of Education because Virginia submitted a discipline plan that was in direct violation of OSEP policies. Under the plan, the state would stop providing educational services for students with disabilities who were expelled, violating the OSEP's policy to provide FAPE to all school-aged children. *See* Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 28 (2006).

108. *See* 20 U.S.C. § 1412.

109. *See* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 54 (2005).

with disabilities.<sup>110</sup> Congress' choice to involve parents in the decision making process reflected its belief that collaboration between school officials and parents would best protect educational opportunities and rights of students with disabilities.<sup>111</sup> Furthermore, not only do our legal and social systems recognize that parents are the most effective representatives of their children's best interests, but, because of the varieties in disabilities and needs of individual students, it would not be feasible to have universally applicable standards under the IDEA.<sup>112</sup>

In light of these challenges, the IDEA contains "extensive procedural" protections for parents and students, and relies heavily on those procedures to ensure that students with disabilities are receiving a FAPE.<sup>113</sup> These protections are in place at every step of the process, including identification, evaluation, placement decision making, and implementation.<sup>114</sup> Thus, parents are provided with the right to challenge a decision or withdraw consent at each stage. For example, the IDEA requires written notice<sup>115</sup> whenever a school wants to conduct a pre-placement evaluation or make an initial placement in a special education program.<sup>116</sup>

In addition to consent to evaluate a student for special education services, parents play a central role in the development, revision, and implementation of their child's IEP.<sup>117</sup> The IDEA mandates notice and consent before the educational agency proposes or refuses to change the "identification, evaluation, or educational placement of

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110. Phillips, *supra* note 40, at 1818 (citing Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 341-42, n.20 (1999)).

111. Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 7 (2000). The Supreme Court also recognized that the IEP meeting is intended to be a "cooperative process . . . between parents and schools," with parents receiving a significant say in the development and tailoring of their child's education program and supports. See *Schaffer*, 546 U.S. at 53.

112. Phillips, *supra* note 40, at 1818-19.

113. *Id.*

114. 20 U.S.C. § 1414 (2005).

115. The IDEA specifies not only when notice is required, but also the form of the notice and its content. For example, notice must be in writing and must be in a form understandable to the general public. It must be in the native language of the parents or other mode of communication if that is not feasible. ROTHSTEIN, *supra* note 15, at 237.

116. 20 U.S.C. § 1414.

117. *See id.*

the child or the provision of an appropriate public education.”<sup>118</sup> Although the IDEA makes no mention of contracts,<sup>119</sup> the IEP drafting and negotiation process has many similarities with the creation of a contract.<sup>120</sup> If the parent objects to the change in placement and seeks administrative or judicial review of the proposed change, the change may not occur until the resolution of the complaint, unless both sides agree otherwise.<sup>121</sup>

Finally, built into the IDEA are several enforcement mechanisms for parents to access. These enforcement mechanisms include mediation, administrative and judicial review, and state complaints.<sup>122</sup> When the process of notice and consent breaks down and the parent<sup>123</sup> no longer believes that her child is receiving a FAPE or that the school has violated a procedural protection,<sup>124</sup> the parent has the

118. 20 U.S.C. § 1415(a). If a parent objects to an evaluation or placement, within ten days of receiving a parent’s objection, the school district must send to the parent (1) an explanation of why the agency proposed or refused to take the action raised by the complaint; (2) a description of other options that the IEP team considered and the reasons why those options were rejected; (3) a description of each evaluation procedure, assessment, record, or report the school district used as the basis for the proposed or refused action; and (4) a description of the factors relevant to the school district’s proposal or refusal. *Id.*

119. Under 20 U.S.C. § 1414(d)(1)(A)(iv), an Individualized Education Program is simply a “written statement for each child with a disability.”

120. Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 PENN. ST. L. REV. 485, 501 (2014). For example, parental consent is required to conduct an initial evaluation and a reevaluation. 20 U.S.C. § 1414. However, the IDEA has made an exception to this rule if “the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child’s parent has failed to respond.” 20 U.S.C. § 1414.

121. This is known as the IDEA’s “stay put” provision, which requires the student to remain in the educational setting during the appeals process. *See* 20 U.S.C. § 1415(j).

122. *See* Wakelin, *supra* note 10, at 266-67, 286.

123. Under the IDEA, a student at the age of maturity, not just a parent, may also bring a due process claim. YELL, *supra* note 12, at 346.

124. Although parents may challenge the sufficiency of their child’s educational program and attain relief for violations of procedural process, procedural flaws alone are not dispositive of the question of whether their child was deprived of a FAPE. Procedural errors only result in denial of a FAPE if they (1) impede the right to a FAPE; (2) significantly impede parental participation; or (3) cause a deprivation of educational benefit. A failure to have a formal written offer of a FAPE at the beginning of the academic school year is a procedural violation of IDEA, but does not cause a denial of FAPE if it does not cause harm. If however there was a failure to disclose testing results, and because without the knowledge of those results, a child could not participate in the IEP process, then a FAPE has been denied. Conway, *supra* note 71, at 56-57; *see also* Doe v. Defendant I, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (finding that the IEP of a disabled student complied with the IDEA because parents were involved in its formation, even though it lacked several state requirements).

right to file for an impartial due process hearing.<sup>125</sup> Under *Rowley*, courts apply a two-pronged analysis to determine whether school districts are providing a FAPE under the IDEA.<sup>126</sup> This analysis looks at (1) whether the school complied with the procedures set forth in IDEA, and (2) whether the IEP was uniquely tailored and calculated to provide the child with some educational benefit.<sup>127</sup>

In practice, once a parent expresses dissatisfaction with her child's IEP,<sup>128</sup> the school or district must then provide the parent with an explanation of why they took a particular course of action or position.<sup>129</sup> Upon receiving this notice, a parent may challenge the school's recommendations by filing a due process complaint.<sup>130</sup> The filing of this complaint gives the parent an opportunity to resolve the dispute through a meeting with the school district or through mediation.<sup>131</sup> If this attempt at voluntary resolution is unsuccessful, the parent is entitled to a due process hearing before an impartial hearing officer.<sup>132</sup> If the parent is not happy with the administrative remedy under the due process hearing, the parent may appeal to federal or state trial courts.<sup>133</sup>

#### E. Barriers that Prevent Parents from Effectively Advocating for Their Children

No public actors are tasked with reviewing the initiatives and substance of children's IEP programs.<sup>134</sup> Therefore, with the exception of federal enforcement mechanisms, parents play a central role in challenging the decisions and actions of school personnel.<sup>135</sup> This creates an adversarial atmosphere between parents and school staff.<sup>136</sup> Furthermore, parents who are uncomfortable questioning

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125. 20 U.S.C. § 1415 (2005).

126. *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (2005).

127. *Id.*

128. Under the IDEA, a parent must consent to both the initial evaluation and the services provided to her child. 20 U.S.C. § 1414(a)(1)(D).

129. 20 U.S.C. § 1415(c)(2)(B)(i)(I).

130. *See* Wakelin, *supra* note 10, at 273-79.

131. 20 U.S.C. § 1415(f)(1)(B)(i); *see* Kotler, *supra* note 120, at 512, 533.

132. *See* Kotler, *supra* note 120, at 493-94.

133. 20 U.S.C. § 1415(i)(2).

134. Pasachoff, *supra* note 16, at 1422. Moreover, the National Council on Disability has found that all states are in some form of noncompliance with the IDEA. *See* BACK TO SCHOOL, *supra* note 6, at 125.

135. *See* 20 U.S.C. § 1415(b)(1); *see also* Phillips, *supra* note 40, at 1820.

136. Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 438 (2011).

their child's IEP must then rely on school systems to provide their child with a substantively appropriate education.<sup>137</sup> Critics of this enforcement structure believe that it has created an unbalanced system, reducing the IDEA's procedural protections to an "empty ritual for all but the most educated and wealthy."<sup>138</sup>

1. *Development of the Individualized Education Program and Unequal Bargaining Power of Parents Compared to Schools*

Imbalances that arise from the bargaining structure of the IDEA can hinder effective parental advocacy. The IDEA assumes that a parent knows her child best and thus is the most qualified individual to pursue the child's best interests.<sup>139</sup> Teachers and administrators then fill the role of educational expert.<sup>140</sup> Although the IDEA imagines parents as vocal advocates for their children, lack of familiarity with disabilities and educational options, compounded with issues such as educational or language barriers, leave many parents either unable to advocate effectively or uncomfortable vocalizing their concerns.<sup>141</sup> Research has also shown that parents of children with disabilities have lower levels of educational attainment than the general population and are also more likely to have only basic literacy skills.<sup>142</sup> Subsequent amendments to the IDEA have attempted to increase the amount of information available to parents,<sup>143</sup> however the value of this information is dependent on a parent's ability to understand it.

Although parents may have a strong understanding of their child, they typically have a weak understanding of the technical language of

137. See ROTHSTEIN, *supra* note 15, at 58.

138. Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 341 (1994).

139. Phillips, *supra* note 40, at 1814-15 (arguing that parents have a "strong emotional attachment to their children" and will therefore pursue their child's best interests in most circumstances. For example, in the general education setting, parents retain the right to intervene when a school makes a mistake in a child's education, such as refusing to allow a child to enroll in Advanced Placement classes.).

140. *Id.*

141. Further, teachers and administrators have full knowledge of the range of services a school is able to offer to a disabled student. Thus, even if a parent requests additional services the school will only provide those it is capable of, or willing to, provide. See David Fester, *Broken Promises: When does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 97 (2010).

142. Carmen Gomez Mandic et al., *Readability of Special Education Procedural Safeguards*, 45 J. SPECIAL EDUC. 195, 200 (2012).

143. See RUTH COLKER, *DISABLED EDUCATION* 103-07 (2013).

educational interventions.<sup>144</sup> Although the IDEA envisions that parents will be fully engaged in the development of their child's IEP, it is difficult for most parents to understand exactly what an IEP is.<sup>145</sup> As special education involves complex and specialized services, parents are at a disadvantage when it comes to knowing the types of services to ask for, let alone those that would be the most beneficial for their child.<sup>146</sup> Additionally, IEP proceedings are confidential and individualized. Due to privacy concerns, courts have routinely denied parents access to other students' IEP services, finding that this knowledge is not relevant for the FAPE determination of an individual child.<sup>147</sup>

Lack of public information about available services therefore requires parents to use their own information networks to determine what services to ask for,<sup>148</sup> or to seek out a specialist to counter the school's informational advantages.<sup>149</sup> When parents lack adequate social networks or income to hire a specialist, they will most likely fall back on the expertise of educators and administrators.<sup>150</sup> Parents who lack the means, education, or language abilities to question their child's educational determinations may simply agree to an IEP without questions or demands.<sup>151</sup> Although the resulting IEP will be enforceable, the school and district run no real risk of ever breaching

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144. In *Schaffer ex rel. Schaffer v. West*, the court acknowledged that school districts enjoy a "natural advantage" when it comes to educational expertise, but nonetheless concluded that parental access to information from school districts, as well as IDEA's procedural safeguards, serve to mitigate parents' disadvantages. See 546 U.S. 49, 60-61 (2005).

145. Caruso, *supra* note 16, at 172-75.

146. Fester, *supra* note 141; see also Phillips, *supra* note 40, at 1830. For example, students may receive related services such as speech-language pathology and audiology services, psychological services, and physical therapy. 20 U.S.C. § 1401 (26)(A) (2005).

147. See *Hupp v. Switzerland of Ohio Loc. Sch. Dist.*, No 2:07-CV-628, 2008 WL 2323783, at \*2-3 (S.D. Ohio June 2, 2008).

148. Pasachoff, *supra* note 16, at 1437.

149. Although the law attempts to counterbalance this asymmetry, by allowing attorneys to collect their fees from the school district if they attend a meeting that is scheduled as a result of a successful due process hearing, this rule only benefits those parents who manage to get through due process. See Jessica Butler-Arkow, *The Individuals with Disabilities Education Improvement Act of 2004: Shifting School Districts' Attorneys' Fees to Parents of Children with Disabilities and Counsel*, 42 WILLAMETTE L. REV. 527, 531-33 (2006).

150. See Kotler, *supra* note 120, at 534-35.

151. See Chopp, *supra* note 42, at 437; see also Engel, *supra* note 91. For example, Engel notes that "[m]ost parents describe themselves as terrified and inarticulate. Some liken themselves to prisoners awaiting their sentence." Engel, *supra* note 91, at 188.

it.<sup>152</sup> Moreover, parents often feel as though educators and professionals treat their relationship with their children as a liability, not an asset.<sup>153</sup> Educators may feel that parental input is misinformed, erroneous, or that parents are not competent to deal with the substance of their child's needs.<sup>154</sup> Thus, they may resist parental involvement or carry out decisions without listening to a parent's opinion.<sup>155</sup>

Although the IDEA imagines a collaborative team, parents and educators work very much on the basis of conflicting subtexts.<sup>156</sup> Parents will try to pursue the best education for their child; however, optimal services can be extremely costly for the school to implement.<sup>157</sup> As federal funding has fallen short of its promise to cover forty percent of special education services, states and school districts are left to cover the costs.<sup>158</sup> In low-income schools, budgetary constraints may be compounded by higher numbers of poorly trained, unaccredited teachers, overcrowded classrooms, resource inadequacies,<sup>159</sup> and high educator turnover rates.<sup>160</sup> Thus, the IDEA's attempt to place parents as the central decision maker for their child's education may not be realized in many schools across the country and may disproportionately fail students in low-income schools.<sup>161</sup>

When a state or school district is faced with financial difficulties, an individual student's needs may be far less pressing to address than the needs of the school as a whole.<sup>162</sup> This in turn leads to less emphasis

152. See Meyer, *supra* note 41, at 634-36; Wakelin, *supra* note 10, at 272-74.

153. See Engel, *supra* note 91, at 167; Phillips, *supra* note 40, at 1831.

154. Phillips, *supra* note 40, at 1831.

155. For example, Engel notes that "[b]ecause the professionals base their interpretations and their decisions on a language and knowledge system that parents do not usually understand, they tend to assume that parents input will be misinformed or erroneous." Engel, *supra* note 91, at 189; see also Romberg, *supra* note 136, at 438.

156. Caruso, *supra* note 16, at 174.

157. The National Education Association places the cost to educate a general education student at \$7552 per year. On the other hand, the average cost to educate a special education student is more than double, at \$16,921 in total. Joel E. Cohen, *Goals of Universal Basic and Secondary Education*, PROSPECTS (Sept. 2006); see also Marvin Lazerson, *The Origins of Special Education*, in SPECIAL EDUCATION POLICIES 110 (1983).

158. Chopp, *supra* note 42, at 448.

159. LOSEN & ORFIELD, *supra* note 9.

160. THOMAS G. CARROLL ET AL., FIFTY YEARS AFTER BROWN V. BOARD OF EDUCATION: A TWO-TIERED EDUCATION SYSTEM 14-15 (2004).

161. See Caruso, *supra* note 16, at 178-79.

162. *Id.* at 178-180.

on individual IEPs and students and creates an incentive to develop IEPs that satisfy only minimum requirements.<sup>163</sup> Furthermore, when schools lack resources, they are more likely to appropriate what little they have to parents who are the most vocal, out of fear that they may end up paying for attorney fees or private school enrollment.<sup>164</sup> Parents with financial resources are often equipped with legal counsel, specialists' reports, and private evaluations of their children, all recommending a complex and expensive set of services.<sup>165</sup> These parents are more likely to have firm opinions about what qualifies as appropriate education for their child and have no intention to settle for anything less than the best educational setting available.<sup>166</sup> Thus, the school will have greater incentives to provide additional educational benefits for those children.<sup>167</sup> Their IEPs are likely to be better written, to contain more clearly measurable goals, and to be more easily enforceable against non-compliant districts.<sup>168</sup>

## 2. *Financial Inability to Retain Council*

As noted above, the IDEA relies heavily on procedural protections to ensure that students with disabilities are receiving a FAPE.<sup>169</sup> Although there are several mechanisms available to parents, due process hearings remain the primary mechanism through which parents receive a final decision.<sup>170</sup> Additionally, these due process hearings are rarely used.<sup>171</sup> Further, although the IDEA mandates

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163. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-08 (2005).

164. Parents who contest their children's FAPE and subsequently enroll them in private school may be reimbursed for the costs of private school education "if the court or hearing officer finds that the agency had not made appropriate public education available to the child in a timely manner" prior to the child's enrollment in private school. 20 U.S.C. § 1412(a)(10)(v)(C)(ii) (2005).

165. Caruso, *supra* note 16, at 179.

166. *Id.* at 179-80.

167. *Id.*

168. Valverde argues, based on personal experience, that "in some low-income communities, school districts factor into the cost-benefit-risk analysis the likelihood they will get caught or taken to task for denying children with disabilities desperately needed programming and services to which they are entitled. *See* Valverde, *supra* note 28, at 623.

169. *See* discussion *supra* Section I.D.

170. Under the IDEA, parents are allowed to initiate due process hearings, before a neutral hearing officer, to challenge the content of an IEP or the procedures through which it was created. 20 U.S.C. § 1415.

171. Between 3000 and 7000 due process hearings are held each year, with about 300 to 400 that proceed to litigation. Pasachoff, *supra* note 16, at 1423; *see also* Jay G. Chambers et al., *What are We Spending on Procedural Safeguards in Special*

that parents receive explanations of procedural safeguards, only four to eight percent of these explanatory documents are written at a reading level accessible to parents of special education students.<sup>172</sup> In preparation for a due process hearing, the parent must assemble and offer “appropriate exhibits, including relevant medical records and school records such as past IEPs, report cards, and evaluation reports.”<sup>173</sup> To be successful, the parent needs to understand both federal and state special education statutes, any relevant case law, and must also be able to apply the pertinent law to her particular case.<sup>174</sup> Furthermore, the parent must be prepared to produce witnesses who can testify to the child’s needs, including witnesses with expertise relating to the child’s disability.<sup>175</sup>

Without an attorney, this process is not only complex, but it is also time consuming.<sup>176</sup> If a parent chooses to hire an attorney, a special education hearing alone may cost that parent tens of thousands of dollars in legal fees.<sup>177</sup> Even if a parent proceeds pro se,<sup>178</sup> she will not only incur expenses from expert witnesses,<sup>179</sup> whose fees cannot be recovered, but also lost wages from missed work.<sup>180</sup> The difficulty in securing knowledgeable and affordable counsel is further

*Education, 1999-2000?*, CTR. FOR SPECIAL EDUC. FIN. 8-9 (2003), <http://files.eric.ed.gov/fulltext/ED480760.pdf> [<https://perma.cc/GN3H-NNV3>].

172. The recommended reading level of procedural safeguard explanations is a seventh to eighth grade reading level. Research has shown that only thirteen percent of Americans are deemed “proficient” when it comes to literacy skills. *Nat’l Ass’n of Adult Literacy*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/naal/kf\\_demographics.asp](https://nces.ed.gov/naal/kf_demographics.asp) [<https://perma.cc/3WM9-JWPJ>]; see also Julie L. Fitzgerald & Marley W. Watkins, *Parents’ Rights in Special Education: The Readability of Procedural Safeguards*, 72 *EXCEPTIONAL CHILD*. 497, 506 (2006).

173. Chopp, *supra* note 42, at 434.

174. *Id.*

175. If a parent is not satisfied or disagrees with the results of a school district’s evaluation, that parent has the right to request an independent educational evaluation (“IEE”) at the public expense. 34 C.F.R. § 300.502(b)(1) (2006). This outside evaluation, in theory, gives parents access to an expert in their child’s disability for free, thereby reducing the disparities between wealthy and poor parents. See Chopp, *supra* note 42, at 435.

176. See Chopp, *supra* note 42, at 434.

177. See *id.*, at 450.

178. In *Winkelman v. Parma City School District*, the Supreme Court held that parents have their own substantive rights under the IDEA, and therefore can sue on their own behalf without representation from an attorney. See 550 U.S. 516 (2007).

179. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 323 (2006). Expert witnesses play an essential role in helping to counter the expertise often enjoyed by the school system. Without expert witnesses who can speak to the child and the child’s disability, parents are at a distinct disadvantage. See Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 141.

180. Chopp, *supra* note 42, at 450-51.

exacerbated because prevailing families are not awarded damages under the IDEA.<sup>181</sup> The IDEA due process hearing also strongly favors school districts and can discourage parents.<sup>182</sup> For example, parents bear the burden of persuasion at due process meetings,<sup>183</sup> and under the current provisions of the Act, if a parent's claim is found to be "frivolous, unreasonable, or without foundation" a court can award attorney fees to the school district.<sup>184</sup>

Without legal or knowledgeable counsel, it is difficult for a parent to prevail in a due process hearing.<sup>185</sup> In fact, one study from Illinois found that, when represented by a lawyer, parents won roughly fifty percent of special education due process hearings, compared to sixteen percent without legal representation.<sup>186</sup> These numbers are discouraging because school districts are represented in ninety-four percent of all due process hearings.<sup>187</sup> In contrast, parents are only represented approximately forty-four percent of the time.<sup>188</sup> Thus, parents with more time or money are at a substantial advantage.<sup>189</sup> Due to the opposing disadvantages, due process systems are not only underutilized by families,<sup>190</sup> but are also disproportionately used by

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181. Although the IDEA was amended to allow for fee shifting provisions for parents who are victorious at a due process hearing, critics argue that attorney fees alone are not sufficient incentive for attorneys to take on special education cases. See Chopp, *supra* note 42, at 452.

182. See Fester, *supra* note 141, at 97-99.

183. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 49 (2005).

184. 20 U.S.C. § 1415(i)(3)(B)(i)(II).

185. See Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 114 (citing Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 23 J. DISABILITY POL'Y STUD. 3 (2010)).

186. See MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS 1997-2002, 7 (2002), <http://www.dueprocessillinois.org/Access.pdf> [<https://perma.cc/AN87-A7KT>].

187. *See id.*

188. *See id.*

189. A 1999-2000 study found that only four percent of the lowest income and ten percent of middle-income districts had due process hearings, compared to fifty-two percent of the highest income districts. Similarly, only nine percent of the lowest income and five percent of the middle-income districts had any mediations, compared to forty-three percent of the highest income districts. See Pasachoff, *supra* note 16, at 1426-27 (citing Jay G. Chambers et al., *Report 4: What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, CTR. FOR SPECIAL EDUC. FIN. 8-9 (2003)).

190. Out of seven million children covered under the IDEA, only 2033 families participated in hearings that resulted in a final decision. See Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 120 (citing Perry Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 23 J. DISABILITY POL'Y STUD. 3, 4-5 (2010)). Furthermore, it is unlikely that these numbers reflect a high rate of state and school level compliance with IDEA as the Department of Education

wealthy families with financial means to secure remedies.<sup>191</sup> At the district level, when one parent is able to obtain services for her child, less money becomes available for other children.<sup>192</sup> Furthermore, when choosing among possible programs for a wealthy child versus a poor child, districts have a greater incentive to provide less expensive options to the poor child, since the risk of private enforcement is greater with wealthier families.<sup>193</sup> A small minority of low-income parents may be able to pursue legal representation through a legal aid office, a state protection and advocacy organization, or a law school clinical program that works on special education cases.<sup>194</sup> However, these instances are few and far between.<sup>195</sup> As a result of this inability to retain legal counsel, many parents may simply choose to allow the school district to continue to provide inadequate services for their child.<sup>196</sup>

As access to attorneys is quite rare,<sup>197</sup> especially in the context of special education, Congress' most recent amendments to the IDEA have emphasized the need for alternative dispute resolution options.<sup>198</sup> Under the IDEA, parents may voluntarily resolve conflicts<sup>199</sup> through either mediation or a resolution session.<sup>200</sup> Each

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determined that only twenty-eight states have met the IDEA compliance standards. See Hyman, Rivkin, & Rosenbaum, *supra* note 7, at n.31; see generally 20 U.S.C. §§ 1400-82 (2006).

191. See Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 113.

192. See Pasachoff, *supra* note 16, at 1440.

193. See *id.* at 1442.

194. Chopp, *supra* note 42, at 452 (citing 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)); Meyer, *supra* note 41, at 635; see Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 113. Additionally, absent specific state law providing authorization, IDEA regulations do not allow non-attorney advocates to represent parents. Emily Blumberg, *Forest Grove School District v. T.A.*, 45 HARV. C.R.-C.L. L. REV. 163, 178 (2010) (citing 34 C.F.R. § 300.512(a)(1) (2008)).

195. Chopp, *supra* note 42, at 452.

196. See Blumberg, *supra* note 194.

197. Overall, access to attorneys in general is very rare. As demonstrated by a recent report by the American Bar Association, sixty to seventy percent of Americans cannot afford lawyers capable of meeting their legal needs. See Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 113 (citing David C. Valdeck, *In Re Arons: The Plight of the "Unrich" in Obtaining Legal Services*, in LEGAL ETHICS STORES 260 (Deborah L. Rhode & David Luban eds., 2006)).

198. COLKER, *supra* note 143, at 101-02.

199. Procedural violations might involve problems such as the wrong people being involved in meetings or parents not receiving information in a timely manner. Substantive violations might involve issues like an appropriate IEP or an incorrect disability classification. See *id.* at 138.

state is required not only to make mediation available, but also to bear the cost of it.<sup>201</sup> Although mediation and remediation sessions are completely voluntary,<sup>202</sup> because of Congress' increased emphasis on the process,<sup>203</sup> most cases are now resolved through mediation.

However, because mediation is a confidential process, there is no way to collect adequate and reliable data on mediation results. It remains uncertain whether the increased focus on mediation proceedings has helped parents.<sup>204</sup> Furthermore, unlike the fee shifting provisions in due process hearings, if a parent wishes to have an attorney present at the mediation process, the parent cannot get reimbursed for attorney fees, no matter the outcome.<sup>205</sup> Thus, mediation proceedings are likely to create the same power imbalances between parents and schools as found in the IEP meetings. Since Congress did not allow for fee shifting in the context of mediation, and most parents are unable to afford an attorney, mandated mediation does little to resolve the parental access constraints to the IDEA's enforcement mechanisms.<sup>206</sup>

#### F. Consequences of Unequal Enforcement

As a result of unequal enforcement under the IDEA, students in minority and low-income school districts often experience higher levels of isolation and failure.<sup>207</sup> Low-income and minority students with disabilities are often pushed out of public education through punitive discipline or educational neglect.<sup>208</sup> Research has found that students with disabilities, even with special education services, “lag

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200. A resolution is similar to an IEP meeting in that it does not involve the presence of a neutral third party. Furthermore, the school district is allowed to bring an attorney to a resolution session, but only if an attorney is also present for the parent. *See id.* at 104.

201. *Id.* at 101-03.

202. *See* 20 U.S.C. § 1415 (2005).

203. For example, between 2008 and 2009, roughly 2033 families participated in hearing that resulted in a final decision. *See* Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 120 (citing Zirkel & Scala, *supra* note 190, at 4-5).

204. COLKER, *supra* note 143, at 101-03.

205. *Id.*

206. *Id.*

207. Wakelin, *supra* note 10, at 264.

208. Furthermore, data reveals that minority students with disabilities are less likely to find employment after high school. A 1999 study revealed that, “among high school youth with disabilities, about 75% of African American students, as compared to 47% of white students, are not employed two years out of school.” Mary Wagner et al., *What happens next? Trends in postschool outcomes of youth with disabilities*, SRI INT'L (1992) <http://files.eric.ed.gov/fulltext/ED356603.pdf> [<https://perma.cc/LP7X-3YXP>].

behind their nondisabled peers in education achievements, are often held to lower expectations, are less likely to take the full academic curriculum in high school, and are more likely to drop out of school.”<sup>209</sup> For example, an average of thirty percent of students with learning disabilities, and an alarming fifty to sixty percent of students classified as having emotional or behavioral disabilities, do not finish high school, compared to eleven percent of nondisabled high school students.<sup>210</sup> Students with disabilities are also fifty percent less likely to attend college than are nondisabled individuals.<sup>211</sup>

The longer a student with a disability fails to receive an adequate and proper education, the more likely the disability will become ingrained, and the student less responsive to treatment.<sup>212</sup> Moreover, the failure to properly educate students with disabilities leaves them unable to pursue meaningful employment after high school.<sup>213</sup> In light of this evidence, it is clear that under its current construction, the IDEA is not providing low-income students with disabilities the proper tools to become successful and independent. As the IDEA relies heavily on parental involvement, it should be amended to make the bargaining system more accessible to parents from low-income communities.

## II. PROPOSALS TO ADDRESS THE SHORTCOMINGS OF THE INDIVIDUALS WITH DISABILITIES ACT

Since its inception in 1975, critics of the IDEA have argued that it is in dire need of reform.<sup>214</sup> In response to the stark challenges that low-income parents face, several scholars have proposed various amendments and supplements to address the shortcomings of the IDEA’s implementation in low-income communities.<sup>215</sup> These proposals recognize that because Congress did not contemplate that the due process protections of the IDEA would inadequately protect the interests of low-income families, Congress must now begin to take steps to rectify and correct this inequality in the law.<sup>216</sup> Part II

209. Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 *FUTURE OF CHILD*. 97 (2012).

210. See Valverde, *supra* note 27, at 616 (citing Suzanne E. Kemp, *Dropout Policies and Trends for Students With and Without Disabilities*, 41 *ADOLESCENCE* 235, 236 (2006)).

211. 149 *CONG. REC.* E644-02 (2003).

212. Valverde, *supra* note 27, at 616.

213. See Wagner et al., *supra* note 208.

214. See, e.g., Pasachoff, *supra* note 16.

215. See, e.g., Valverde, *supra* note 27.

216. See Wakelin, *supra* note 10, at 277-78.

examines the proposals of shifting the burden of persuasion to school districts, putting parents in touch with each other, and providing a legal advocate to parents at each IEP meeting. Such proposals seek to provide parents with additional information about the IDEA, as well as means to access the procedural protections available under the Act.

#### A. Burden Shifting Prior to Individualized Education Program Implementation

In *Schaffer v. Weast*,<sup>217</sup> the Supreme Court held that the burden of persuasion rests on “the party seeking relief.”<sup>218</sup> Thus, under the current provisions of the IDEA, parents have the burden to prove that their child was not receiving a FAPE.<sup>219</sup> The Court reasoned that placing the burden on the school would essentially mean “that every IEP is invalid until the school district demonstrates that it is not.”<sup>220</sup> However, the *Schaffer* decision left open the possibility that states could override the default rule, placing the burden of proof on the school district.<sup>221</sup>

The primary concern of the *Schaffer* decision is that it unfairly disadvantages parents from low-income families. In her dissent, Justice Ginsburg noted “policy considerations, convenience, and fairness call for assigning the burden of proof to the school district.”<sup>222</sup> In the wake of *Schaffer*, dozens of articles were written regarding the appropriate place for the burden of proof.<sup>223</sup> Some states changed their statutes to be more in line with *Schaffer*, while others kept their statutes to place the burden on the school district.<sup>224</sup>

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217. 546 U.S. 49 (2005).

218. *Id.* at 62.

219. In *Schaffer*, the Supreme Court reasoned that because Congress was silent on the burden of proof, the burden should be allocated to the party seeking relief. See *Schaffer*, 546 U.S. at 536; see also Kevin Pendergast, *Schaffer's Reminder: IDEA Needs Another Improvement*, 56 CASE W. RES. L. REV. 875, 884 (2006).

220. *Schaffer*, 546 U.S. at 61.

221. *Id.*

222. *Id.* at 63 (internal quotation marks omitted).

223. See, e.g., Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?*, 13 CONN. PUB. INT. L.J. 1 (2013); Lara Gelbwasser Freed, *Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education*, CORNELL L. FAC. PUBL'NS (2009); Joanne Karger, *A New Perspective on Schaffer v. Weast: Using a Social-Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings*, 133 U.C. DAVIS J. JUV. L.P. 12 (2008).

224. William D. White, *Where to Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 N.C. L. REV. 1013, 1045 (2006).

Congress exacerbated the burden of persuasion complications when it remained silent on the issue during the 2004 reauthorization.<sup>225</sup>

One proposal argued that in light of Congress' silence and lack of legislative history, the burden of proof should be on the school system prior to the completion of the IEP.<sup>226</sup> However, once the parent consents to the IEP, the burden should shift to the parent challenging its implementation.<sup>227</sup> Under this model, throughout the initial IEP evaluation and drafting process, the school system retains its initial duties that are central to compliance with the IDEA.<sup>228</sup> Thus, rather than completely shifting the burden to schools and educators, as was rejected in *Schaffer*,<sup>229</sup> the burden of proof would rest on the school solely during the development stage of the IEP.

One advantage of this proposal is that placing the burden on the school when a parent challenges an initial IEP provides additional procedural safeguards for parents by "ensuring the school system will put in the necessary work toward fulfilling its substantive obligations."<sup>230</sup> Schools have a greater incentive to follow adequate procedures and will work to produce a plan that both the school and parent agree on.<sup>231</sup> Without parental consent, a school should not be entitled to the assumption that it followed proper procedures.<sup>232</sup> If a parent is unhappy with the initial IEP, this proposal makes it much easier for that parent to challenge any decisions made by the school, giving her greater bargaining power in the initial IEP creation.

Placing the burden of persuasion on the school, prior to the first IEP, may help create a stronger IEP in the first instance. However, if the burden shifts back to the parent, the school may thereafter lack the incentive to continue to provide adequate services. Even though the initial evaluation and placement of a student is a crucial component to the provision of a FAPE, the central goal of the IDEA would not be met if the IEP is not also updated on an annual basis.<sup>233</sup> As a child grows, the IDEA envisions that her education will grow

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225. *Id.*

226. *See* Karger, *supra* note 223.

227. *Id.*

228. *See* White, *supra* note 224, at 1045-46.

229. *See* *Schaffer*, 546 U.S. at 536.

230. White, *supra* note 224, at 1042.

231. *Id.* at 1045-47.

232. *Id.* at 1046.

233. The IDEA mandates that each IEP must be updated yearly and a complete reevaluation occur once every three years. 20 U.S.C. § 1414 (a)(2)(B) (2005).

and change as well.<sup>234</sup> Thus, the incentive to provide adequate services must remain as long as the child is covered under the IDEA.

### B. Putting Parents in Touch with Each Other

Special education can provide tremendous benefits to students who require additional supports and services; however, many children and parents, regardless of race or socioeconomic status, may feel isolated and stigmatized by the special education label.<sup>235</sup> When a student is categorized with labels such as “emotional disturbance,” “learning disability,” or “attention deficit disorder,” this labeling often comes with the stigma of being different or less capable.<sup>236</sup> For example, Texas College President Billy C. Hawkins, who as a child was incorrectly labeled “mentally retarded,” remarked that this label “tore at his self esteem.”<sup>237</sup> Because of the isolating effects of special education placement, several scholars have advanced parent-oriented reforms that put parents in touch with one another.<sup>238</sup>

For parents, isolation has the potential to drain them emotionally, lead them to make inadvisable choices for their child, or to miss out on chances to improve their child’s situation.<sup>239</sup> Advocates for parent-oriented reforms believe that the creation of parent program centers, which would allow parents to have face-to-face encounters, will help parents develop friendships and alliances, giving them greater opportunities to discuss shared experiences.<sup>240</sup> One advantage of this model is that it could help alleviate the information asymmetries between parents and schools.<sup>241</sup> Since the IDEA does not enumerate every service a school could provide,<sup>242</sup> a system that helps parents get in touch with one another would help provide parents with more information on the various educational remedies available to children with similar disabilities.<sup>243</sup>

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234. This is evidenced by the fact that the IDEA covers students from infancy to age twenty-one. 20 U.S.C. § 1141.

235. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. CIV. RTS. L. REV. 407 (2001).

236. See Engel, *supra* note 91, at 182-84.

237. Losen & Welner, *supra* note 235 (citing *ABC World News Tonight with Peter Jennings* (ABC television broadcast Mar. 2, 2001)).

238. See generally Czapanskiy, *supra* note 10.

239. See *id.* at 757.

240. *Id.*

241. See discussion *supra* Section I.E.1.

242. See Phillips, *supra* note 40, at 1818.

243. Czapanskiy, *supra* note 10, at 760.

Furthermore, advocates of these facilities argue that where physical centers are not feasible, social media and web-based approaches could help solve information access problems.<sup>244</sup> Under this approach, listservs, similar to those available to members of military families, would serve as the model for implementation.<sup>245</sup> Military families access resources through listservs, which help them share information about educational and medical services that exist throughout the country.<sup>246</sup> These listservs are similar to online chat forums, where families that are being reassigned can post a question online and have it answered by other military families who have previously been stationed at that particular location.<sup>247</sup>

Although these facilities and online listservs would provide parents with additional tools to advocate for their children, the information provided through these reform initiatives may not translate into what actual services will look like in real IEPs.<sup>248</sup> In more complicated cases, including those that involve language or cultural barriers, parents will still struggle with advocating for their children.<sup>249</sup> Parents may enter IEP meetings with greater confidence and information, but they will still be outnumbered and likely pressured into agreeing with the school's recommendations. Furthermore, poor families are still less well situated to sift through information provided by parent information centers.<sup>250</sup> Additionally, poor families are less likely to have access to a computer and the Internet,<sup>251</sup> and therefore web-based information systems are less likely to be accessible to individuals from low-income households.<sup>252</sup> However, due to the

244. *Id.* at 757.

245. *Id.*

246. *Id.* at 758-59.

247. Czapanskiy, *supra* note 10, at 758-61.

248. Pasachoff, *supra* note 16, at 1439.

249. *See* Chopp, *supra* note 42, at 437.

250. Pasachoff, *supra* note 16, at 1440.

251. According to a 2012 study by the Pew Research Center, only sixty-two percent of people in households making less than \$30,000 per year used the Internet, compared to ninety percent of households making between \$50,000 and \$74,999 per year. *See* John B. Horrigan, *The Numbers Behind the Broadband 'Homework Gap'*, PEW RES. CTR. (Apr. 20, 2015) <http://www.pewresearch.org/fact-tank/2015/04/20/the-numbers-behind-the-broadband-homework-gap/> [<https://perma.cc/A7A2-PNAZ>].

252. One study found that fifty-two percent of caregivers found that online resources were helpful to cope with the stress of being a caregiver. However, this is dependent on the caregiver having access to the Internet. Czapanskiy, *supra* note 10, at 758-61, n.77 (citing Susanna Fox, Maeve Duggan, & Kristen Purcell, *Family Caregivers are Wired for Health*, PEW INTERNET (June 20, 2013), <http://www.pewinternet.org/Reports/2013/Family-Caregivers/Summary-of-Findings.aspx> [<https://perma.cc/C9TA-55D5>]).

complexity and individual nature of disabilities and special education, the end result of these reforms would still likely be inconsistent parental representation. This method may help to increase parental advocacy, however it does not address the wealth disparities that exist between parents addressed in Part I of this Note.<sup>253</sup>

### C. Addition of a Legal Advocate to the IEP Team

As an alternative, several proposals address the deficiencies in the IDEA's due process mechanism, through the addition of a legal advocate to the IEP team. Legal advocates would not necessarily have to be lawyers and could be recruited from a number of different fields, such as retired educational professionals.<sup>254</sup> Although several different proposals exist regarding qualifications<sup>255</sup> and training courses,<sup>256</sup> the central idea is that a legal advocate would supervise the IEP development process and provide parents with support if they chose to challenge the school's proposals.<sup>257</sup> States could recruit legal advocates to provide public services, similar to pro bono services, or their services could be employed through private sector voucher programs.<sup>258</sup>

The primary advantage of a legal advocate is to universalize parental access to the due process mechanism, granting all parents, regardless of race or income, access to legal services.<sup>259</sup> Parents remain central in the decision making process, and the legal advocate would ensure greater procedural compliance with the IDEA because school districts would have greater incentives to provide special education students appropriate supports and services.<sup>260</sup> Additionally, legal advocates would not only increase a parent's awareness and knowledge of the IDEA's due process mechanism, but they may also help teachers and administrators understand the varying special education procedures.<sup>261</sup>

This proposal's disadvantage is its central focus on the IDEA's due process mechanism. It skips several crucial components to the IEP

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253. See discussion *supra* Section I.E.2.

254. Phillips, *supra* note 40, at 1847-48; see also Wakelin, *supra* note 10, at 284-85.

255. Wakelin, *supra* note 10, at 285.

256. Phillips, *supra* note 40, at 1848.

257. Wakelin, *supra* note 10, at 284.

258. See Pasachoff, *supra* note 16, at 1454-55.

259. Wakelin, *supra* note 10, at 284.

260. Wakelin argues that the addition of the legal advocate would "add knowledge to each parent's passion." *Id.* at 264.

261. See *id.*

process, including evaluation and IEP development.<sup>262</sup> In doing so, it makes several assumptions, namely that the teachers and professionals conducting the evaluations and developing the IEP do not have their hands tied by policy restrictions or budget constraints.<sup>263</sup> Although it helps to solve the bargaining deficiency problem, it does not provide parents with additional knowledge regarding educational services that would best serve their child's individual needs. Furthermore, this proposal would be costly and financially difficult to implement.<sup>264</sup> School districts that already face substantial budget constraints may not be able to hire the advocates necessary to provide each parent with adequate legal services, leaving those that do get hired with the burden of serving more families. This has the potential to exacerbate the gap that already exists between low-income and wealthy school districts addressed in Part I.<sup>265</sup>

Current proposals to provide parents with greater bargaining powers either remain inaccessible to low-income families or fail to increase parental support in meaningful ways. Congress must revise the IDEA to ensure that all students covered under the Act receive an education tailored to their unique needs, regardless of their socioeconomic status.

### III. ADDITION OF A SPECIAL EDUCATION COUNSELOR AS A FAMILY ADVOCATE

As established in Part I, the IDEA relies primarily on parent enforcement to ensure FAPE compliance, but not all parents can do so effectively.<sup>266</sup> Disparities in parental bargaining power, knowledge of education benefits, and financial ability to access the IDEA's procedural safeguards make it difficult for low-income parents to ensure their disabled children receive needed services.<sup>267</sup> Though the IDEA seeks to provide all students with the education necessary to be independent and to pursue meaningful employment, the most vulnerable and disadvantaged students are often excluded from these benefits.<sup>268</sup> The first step in correcting the disparities in special

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262. *See id.* at 286-87.

263. Hyman, Rivkin, & Rosenbaum, *supra* note 7, at 115.

264. Wakelin suggests that advocates, while they need not be lawyers, would be trained in the IDEA and certified. Wakelin, *supra* note 10, at 285. Thus, possible costs associated with this proposal include certification and training for legal advocates, as well as hiring of the advocates by the school or district.

265. *See* discussion *supra* Section I.A.

266. *See* discussion *supra* Sections I.D, I.E.2.

267. *See* discussion *supra* Section I.E.

268. *See* discussion *supra* Section I.A.

education law is to ensure that low-income families have available to them an advocate that understands both the intricacies of the school system and the individualized needs of the student.

Congress should revise section 1414(d)(1)(B) of the IDEA and replace the mandatory general education teacher with a mandatory school counselor. Regular education teachers should still be permitted to participate in the IEP development process, but their participation should not be made mandatory in order for a school to remain in compliance with the IDEA. Although Congress sought to provide educators and parents greater support through the inclusion of a general education teacher, the addition of this team member provides marginal benefit to the IEP development process, and can even create a greater power imbalance against the parent and student.

The inclusion of a mandatory school counselor in the IEP team will be beneficial for several reasons. School counselors are in a unique position to implement parent involvement strategies that can speak to both the child's and the school's needs. Counselors can help provide low-income parents with greater bargaining powers and knowledge about special education systems. They can also provide students with an additional advocate, who knows them on a personal level and has the skills necessary to help them pursue higher education or their career goals after high school. Finally, because counselors are part of a school team, they also have the ability to communicate and work with teachers and school staff in order to provide special education students with the best accommodations available.<sup>269</sup> Part III outlines a proposal to amend the IDEA by eliminating the mandatory regular education teacher, examining the benefits of a school counselor, and proposing the addition of a school counselor to the IEP team to support families of disabled students.

#### **A. Elimination of the Mandatory Regular Education Teacher**

When Congress amended the IDEA in 1997 and mandated that a regular education teacher be present at every IEP meeting, it did so based on the belief that a regular education teacher would participate in the IEP discussion by providing creative strategies to help students with disabilities access the general education curriculum.<sup>270</sup> Under the IDEA, if a student with a disability is in just one regular education class, the child's regular education teacher must be present

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269. See discussion *infra* Sections III.B, III.C.

270. Wakelin, *supra* note 10, at 284.

at the meeting.<sup>271</sup> Additionally, because the IDEA sought to encourage the placement of students with disabilities in the regular education classroom, it also mandated that a regular education teacher be present if the child “may be” participating in the regular education curriculum.<sup>272</sup>

Although the benefits of a regular education teacher should not be discounted, these benefits only exist when the regular education teacher plays an active role in the development of the IEP. The regular education teacher may have knowledge about the appropriate curriculum for the child’s grade level and what students in regular education classes are typically expected to do. However, the special education teacher is still the expert in special education supports and services. Regular education teachers with little experience and training with IEPs may therefore defer their judgment to the special education teacher.<sup>273</sup> This issue can be exacerbated when schools, in an effort to remain in compliance with the IDEA, ask regular education teachers to participate in the IEP development process even if they do not know the special education student.<sup>274</sup> Further, because special education classrooms are often used as “dumping grounds” for difficult students,<sup>275</sup> and even the most skilled teachers struggle to handle classrooms with both disabled and nondisabled students, general education teachers may approach the IEP meeting with incentives to keep special education students out of their classrooms.<sup>276</sup> Additionally, scheduling the attendance of a regular education teacher at an IEP meeting often results in added costs, as schools must hire substitute teachers to cover classes.<sup>277</sup>

Although the inclusion of a general education teacher may help keep parents updated on their child’s progress, it does little to increase their bargaining abilities or knowledge of the educational supports that would best help their child. The addition of a general education teacher provides an additional expert in the education system, but when parents are outnumbered by at least two teachers,

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271. See 20 U.S.C. § 1414(B) (2005).

272. *Id.*

273. See Christine Farnsworth, *Regular Education Teachers Formulating Special Education Plans: M.L. v. Federal Way School District and the IDEA*, 2006 BYU EDUC. & L.J. 639, 656 (2006).

274. *See id.*

275. *The Battle Over Special Education*, N.Y. TIMES (Dec. 12, 2001), <http://www.nytimes.com/2001/12/12/opinion/the-battle-over-special-education.html> [<https://perma.cc/W378-E5M>].

276. *Id.*

277. See Farnsworth, *supra* note 273.

they may feel incompetent and inadequate when it comes to recommending accommodations for their children.<sup>278</sup> The requirement of a general education teacher therefore cuts against the original goal of the IDEA to have parents as the central advocate for their children.<sup>279</sup> In contrast, the addition of a school counselor to the team could help increase parents' bargaining power and knowledge because school counselors can serve as advocates for both the school and the student with a disability.

### B. The Benefits of School Counselors

In general, the addition of counselors in low-income schools produces positive results.<sup>280</sup> Counselors utilize their knowledge in child development to pursue relationships with students and parents in helping to increase parent involvement and student success. Moreover, when counselors are available to provide services to families, they can be highly effective in helping students access education opportunities, particularly post-secondary opportunities.<sup>281</sup> Counselors are a vital part of the academic team, working with teachers and parents to help students in the areas of academic, career, and personal achievement.<sup>282</sup> Unlike the regular education teacher, whose participation in the IEP team would only speak to a student's performance in the regular education curriculum, counselors can help both the child and parent in the IEP development process.<sup>283</sup> Furthermore, counselors often have extensive knowledge about secondary education and the financial aid application process and can help more special education students pursue education after high school.<sup>284</sup>

Additionally, counselors are highly qualified individuals. All fifty states already have specific qualifications for school counselors.<sup>285</sup> For example, each state requires school counselors to hold counseling certificates, and thirty-nine states require counselors to have a

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278. See Engel, *supra* note 91.

279. See discussion *supra* Section I.D.

280. House & Hayes, *supra* note 19.

281. Rosales, *supra* note 20.

282. See House & Hayes, *supra* note 19.

283. See discussion *infra* Section III.C.

284. *Guidance and School Counseling*, N.Y.C. DEP'T OF EDUC. (2016), <http://schools.nyc.gov/StudentSupport/GuidanceandCounseling/default.htm> [<https://perma.cc/NW8W-UN74>].

285. See *State Certification Requirements*, AM. SCH. COUNSELOR ASS'N (2017), <https://www.schoolcounselor.org/school-counselors-members/careers-roles/state-certification-requirements> [<https://perma.cc/XE2N-34CE>].

master's degree and two to five years of teaching experience.<sup>286</sup> Moreover, Congress has already defined a school counselor as:

[An individual] who has documented competence in counseling children and adolescents in a school setting and who:

(A) is licensed by the State or certified by an independent professional regulatory authority;

(B) in the absence of such State licensure or certification, possesses national certification in school counseling or a specialty of counseling granted by an independent professional organization; or

(C) holds a minimum of a master's degree in school counseling from a program accredited by the Council for Accreditation of Counseling and Related Educational Programs or the equivalent.<sup>287</sup>

Thus, because counselors are required to have expertise in the best practices of how to work with children and families, counselors can play a key role in the overall success of special education students.

### C. School Counselors as Family Advocates

Similar to the basic goals of the IDEA, counselors help foster stronger school-family alliances, which are crucial to a student's academic success. A counselor can utilize her knowledge of the school system, student records, and the student's personal interests to work with students, parents, and teachers.<sup>288</sup> This collaboration helps maximize the student's efforts to grow educationally. Greater knowledge of the family unit can help counselors to move the focus of the IEP meeting away from just the academic needs of the student and toward the needs of the family. This is particularly beneficial, and provisions within the IDEA that have focused on families and stronger parental involvement have already seen positive results. For example, the 1990 amendments to the IDEA established early intervention programs called Individual Family Service Plans ("IFSP") for children under the age of three.<sup>289</sup> The IFSP was largely developed to mimic the IEP,<sup>290</sup> with the core difference being that the

286. *Id.*

287. 20 U.S.C.A. § 1078-11(8) (West 2016).

288. House & Hayes, *supra* note 19.

289. 20 U.S.C. § 1436 (1991).

290. Under the IDEA, the IFSP provides each infant and toddler with a disability with:

- (1) a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs; (2) a family directed assessment of resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the families capacity to meet the developmental needs of the infant

IFSP focuses on the child, family, and the services needed by the family unit, whereas the IEP solely focuses on the needs of the child.<sup>291</sup> Although only available to infants and toddlers, this process appears to work better than the traditional IEP because it coordinates the needs of the child with the needs of the family unit.<sup>292</sup>

Additionally, the inclusion of a mandatory counselor to the IEP team would help to solve several of the bargaining power problems addressed earlier in this Note.<sup>293</sup> Since counselors would work with multiple students, they could provide parents with examples of accommodations and supports that have been effective for other students with similar disabilities. Furthermore, although counselors will have the interests and constraints of the school system in mind, their knowledge of the school, individual child and family, and surrounding community, can help them better balance the needs of the parent and child with the needs of the school system than other school district representatives could. Further, because counselors provide students with personal and academic guidance, students may view them as being less adversarial than teachers. To provide this guidance, counselors must often seek outside help from parents, allowing them to form strong relationships with the family unit rather than just the individual student. Finally, if a parent is unable to be present at the IEP meeting or is unable to advocate for her child because of an education or language barrier, the school counselor can fill such a role.<sup>294</sup>

The addition of a special education counselor could also help alleviate some of the heavy workloads that special education teachers face.<sup>295</sup> Counselors could help gather data and information about

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or toddler; and (3) a written individualized family service plan developed by a multidisciplinary team, including the parents.

20 U.S.C. § 1436(a).

291. *See generally* 20 U.S.C. § 1414.

292. For example, a small-scale study of IFSP programs in one northeastern state showed that the IFSP provides positive results overall. In this case, the service coordinator-to-family ration was low, and the person providing family intervention services also acted as the service coordinator. Other studies have found that this model leads to high levels of coordinator contact with families, and correlates with positive outcomes. *See* COLKER, *supra* note 143, at 92-93.

293. *See* discussion *supra* Section I.E.1.

294. The IDEA stipulates that members of the IEP team may be excused from attending the meeting if “if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary.” 20 U.S.C. § 1414(d)(1)(C). Thus, presumably parents do not need to attend the meeting as long as the local educational agency agrees that attendance is not necessary.

295. Nicole S. Simon & Susan Moore Johnson, *Teacher Turnover in High-Poverty Schools: What We Know and Can Do* (Harv. Graduate Sch. Of Educ., Working

each individual student, and, using their expertise, help the IEP team draft a more comprehensive document. Furthermore, special education teachers often lack the knowledge in guidance and counseling, which would otherwise help them understand how to best support the needs of the student and family unit.<sup>296</sup> The counselor can therefore fill this void, by supporting special education teachers and providing individualized counseling and guidance to students and parents. Finally, as most counselors do not teach regularly, schools can save money by not having to hire substitutes to cover classes, as they must do for general education teachers.

### CONCLUSION

Although the IDEA seeks to provide special education students with access to an education that will prepare them for independence and employment, these goals are not being realized in low-income communities. A low-income parent faces issues such as lack of knowledge about the special education due process mechanism and lack of financial means to hire knowledgeable experts. Without proper support mechanisms, the IDEA's reliance on parental advocacy is unrealistic, and students who lack strong parental advocates will continue to struggle and receive less than adequate special education services. Congress can correct these issues through the inclusion of a mandatory school counselor. Counselors often know the student on an individual level, and can therefore speak to the student's unique needs, providing the student with an advocate similar to the envisioned role of the parent. Although imbalances in the unequal implementation of special education services may not be completely eliminated, the mandatory inclusion of a school counselor will help to level the playing field, gradually helping to close the gap in the IDEA's implementation between low-income and wealthier schools.

Imagine that next year a school counselor is placed on Jonah's IEP team. She carries a composition book with her around campus, recording Jonah's progress in his classes. She gradually builds a relationship with Jonah, and he often visits her to talk about issues he is having with certain classes or with his family. At Jonah's IEP meeting she sits next to him, encouraging him to become more involved with advocating for his accommodations. She suggests that

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Paper, 2013), <http://dosen.narotama.ac.id/wp-content/uploads/2014/11/Teacher-Turnover-in-High-Poverty-Schools-What-We-Know-and-Can-Do.pdf> [<https://perma.cc/F74V-A85J>].

296. See discussion *supra* Section III.B.

interventions such as after school programs be put in place to help Jonah increase his reading levels. She meets with teachers to discuss challenges they may have with Jonah's accommodations and regularly contacts Jonah's father to update him on Jonah's progress. Although Jonah's reading levels will never reach that of a twelfth-grade student, with stronger supports in school, he may become more comfortable in class, and in turn have a more positive outlook towards the education system.