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Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates

Margaret M. Wakelin *

¶1 In 1975, when Congress passed legislation¹ that later became the Individuals with Disabilities Education Act (IDEA),² it intended to create a groundbreaking antidiscrimination law that would open school doors to millions of previously excluded children with disabilities and guarantee each of them an appropriate education.³ Today, more than seven million children with disabilities receive special education services as a result of the IDEA.⁴ The IDEA guarantees these children a free appropriate public education in an educational setting that, to the greatest extent possible, includes children without disabilities.⁵ However, the extent to which children with disabilities experience this guarantee varies greatly across income and racial lines. In low-income and minority communities, children with disabilities are consistently denied appropriate educational services and excluded from an education with their nondisabled peers within the schools.⁶ For many children with disabilities, the IDEA remains an unfulfilled promise.

¶2 The IDEA remains unenforced for many students because inherent problems exist with its three main enforcement mechanisms.⁷ Federal enforcement fails because the mechanism mandated by the IDEA is not utilized with any regularity.⁸ State enforcement is ineffective because it relies too heavily on self-reporting at the local level.⁹ Parental

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¹ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 1 (1975) (current version at 20 U.S.C. § 1400 (2000 & Supp. IV 2004)).

² Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 (2000 & Supp. IV 2004). Although Congress changed the name of the Act during its most recent revision, it remains commonly referred to as the IDEA. Throughout this Comment, I refer to the Individuals with Disabilities Education Improvement Act by its common name, IDEA.

³ Stefan R. Hanson, Buckhannon, *Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 525 (2003).

⁴ *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

⁵ 20 U.S.C. § 1400(d) (2000 & Supp. IV 2004).

⁶ Edward Garcia Fierros & James W. Conroy, *Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, in RACIAL INEQUALITY IN SPECIAL EDUCATION 39, 40 (Daniel J. Losen & Gary Orfield eds., 2002).

⁷ The IDEA authorizes three main levels of enforcement: federal enforcement, state enforcement, and parental enforcement. 20 U.S.C. §§ 1415-1416 (2000 & Supp. IV 2004).

⁸ Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in RACIAL INEQUALITY IN SPECIAL EDUCATION, *supra* note 6, at 219, 221.

⁹ 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, 275 (2005).

enforcement, although a potentially effective mechanism for enforcement, currently is weak because parents do not know their rights under the IDEA, do not feel competent to be equal team members, do not feel confident about bringing due process claims, and do not have the ability to get legal assistance.¹⁰

¶3 Because the enforcement mechanisms are ineffective, the provisions of the IDEA are not being implemented equally across school districts. Lack of enforcement of the IDEA particularly affects low-income and minority communities. As a result of low enforcement, special education programs in these communities experience the highest levels of student isolation and long-term failure. Students languish in inappropriate educational placements where they make little academic progress and have limited long-term opportunities.¹¹ Special education programs become dumping grounds for difficult-to-educate students.¹²

¶4 This educational crisis disproportionately affects minority students and serves as a modern method of segregation.¹³ Minority students are overrepresented in special education programs. Although they make up sixteen percent of the school population, African-American students represent twenty-one percent of students who receive special education services.¹⁴ In some districts, African-American males represent forty-one percent of students in special education.¹⁵ The root of minority overrepresentation is likely found in low-quality instruction, teachers' unconscious cultural biases, and heavy reliance on intelligence tests.¹⁶ Ultimately, once minority students are identified and evaluated for special education, they are more likely than other students with disabilities to be isolated within the school and experience educational disenfranchisement.¹⁷

¶5 Implementation of the IDEA can improve in high-poverty and minority school districts through increased parental enforcement. Scholars, practitioners, and advocacy groups have proposed several approaches to encourage and enable parents to advocate for their children's educational rights. One proposal involves allowing parents to represent themselves pro se in all levels of administrative and judicial decision-making. In May 2007, the Supreme Court held that the Individuals with Disabilities Education Act grants parents rights and, thus, they are entitled to proceed pro se in their civil claims brought under the Act.¹⁸ In *Winkelman ex rel. Winkelman v. Parma City School District*, the Court considered the case of two parents who sought to represent themselves in district court because they could not afford legal representation.¹⁹ The case brought national attention to the difficulty many parents face in obtaining legal representation for their

¹⁰ *Id.* at 278.

¹¹ 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. C.R.-C.L. L. REV. 407, 408 (2001).

¹² Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 BYU EDUC. & L.J. 179, 182 (2001).

¹³ *Id.*

¹⁴ DANIEL J. LOSEN & GARY ORFIELD, RACIAL INEQUITY IN SPECIAL EDUCATION xv (2002).

¹⁵ Rosa A. Smith, *Building a Positive Future for Black Boys*, AM. SCH. BOARD J., Sept. 2005, at 26.

¹⁶ LOSEN & ORFIELD, *supra* note 14, at xvi.

¹⁷ *Id.* at xv.

¹⁸ *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2007 (2007). Eventually, after the Sixth Circuit Court of Appeals dismissed their pro se appeal before any hearing on the merits, the Winkelmans obtained counsel to appeal the dismissal. *Id.*

¹⁹ *Id.* at 1998; Petition for a Writ of Certiorari at i, *Winkelman*, 127 S.Ct. 1994 (No. 05-983) [hereinafter *Winkelman Certiorari Petition*].

claims under the IDEA.²⁰ Although parents must proceed pro se for lack of money,²¹ the likelihood of success in a pro se claim for educational services is not high for parents who are inhibited by low levels of education, limited language proficiency, and limited knowledge of the law.²² Allowing pro se representation is not a realistic plan to increase parental advocacy in high-poverty and minority school districts. In addition, proposals to encourage parental advocacy of IDEA rights involving self-advocacy initiatives and expansion of attorneys' fees provisions are equally flawed.

¶6

This Comment examines how the IDEA makes unfulfilled promises to minority parents and students in high-poverty school districts who do not have access to avenues for challenging the educational decisions made about their children. Part One discusses the evolution of special education law and the inequities of special education. Part Two outlines the enforcement mechanisms for the IDEA and the ways in which the enforcement fails. Part Three examines solutions that have been proposed to meet parents' advocacy needs in IDEA claims. Part Four proposes a revision to the IDEA that will establish district-based special education advocates for all parents. This national plan will encourage all parents, regardless of race or wealth, to become active advocates for the IDEA rights of their children with disabilities.

I. PART ONE: THE EVOLUTION AND INEQUITY OF SPECIAL EDUCATION LAW

A. *An Evolution of Special Education Law*

¶7

As the administrative structure created by federal special education law has evolved, parents have gained more avenues for challenging inappropriate special education services. However, access to these avenues varies along wealth and race lines. The law's evolution indicates Congress's growing desire for parent involvement in all levels of IDEA enforcement.

¶8

The initial federal legislative commitment to the education of children with disabilities came as an outgrowth of the civil rights movements of the 1950s and 1960s.²³ Before 1970, schools appropriately educated only one in five children with disabilities.²⁴ In order to redress this problem, Congress sought to learn more about the exclusion of children with disabilities from the nation's public schools. In the course of its investigation, Congress found that "of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving a free and appropriate education. 1.75 million . . . are receiving no educational services at all. . . ."²⁵ It also found that children with disabilities were substantially more likely to be excluded from schools in low-income, minority, or rural communities.²⁶ As a result of this glaring disparity of educational access, Congress passed the Education for All Handicapped

²⁰ Winkelman Certiorari Petition, *supra* note 19, at 10.

²¹ *Id.*

²² Hanson, *supra* note 3, at 548-49.

²³ Hanson, *supra* note 3, at 523.

²⁴ 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, 528 (2006).

²⁵ S. REP. NO. 94-168, at 8 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1432.

²⁶ NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 6 (2000).

Children Act of 1975 (EAHCA) which guaranteed all children with disabilities a “free appropriate public education,” or FAPE.²⁷

¶9 When Congress passed the EAHCA, it feared infringing on the traditional primacy of local control over education and thus included elements to protect the rights of states and parents.²⁸ Local control is a cornerstone of the American public education system that is pedagogically, politically, and ethically justified.²⁹ However, Congress justified its intrusion on local control by citing the widespread inadequacy of education and exclusion of children with disabilities.³⁰ With the EAHCA, it sought to balance the state interest in local control with the national interest in the education of students with disabilities.³¹ It did so by allowing states to develop the substantive and qualitative components under the EAHCA.³² At the time Congress passed the EAHCA, no federal substantive definition of FAPE existed. The EAHCA left states with the task of defining educational standards.³³ In order for a state to receive funding under the EAHCA, it needed to follow the federal policies and ensure that children with disabilities received a FAPE.³⁴

¶10 In addition, the Act maintained local control by granting parents procedural safeguards. Parents gained the right to review educational records, request independent evaluations, participate in decisions made about their children’s educational placement, and make complaints to the school district about educational concerns.³⁵ Most significantly, the EAHCA granted parents a private right of action to enforce the statutory provisions of the EAHCA through impartial due process hearings.³⁶ With these procedural safeguards, Congress intended the EAHCA to be a compromise between local control over education and federally-mandated education for all children with disabilities.

¶11 The EAHCA prohibited discrimination against children with disabilities and guaranteed each child FAPE. The law mandated the services that the state needed to provide children with disabilities to ensure that they received FAPE. In *Board of Education v. Rowley*, the Supreme Court determined that Congress intended the law to guarantee all students equivalent access to education, but did not intend to guarantee equivalent educational achievement under FAPE.³⁷ The Court found that the state fulfilled its requirement under the law when it provided services for children that would confer at least “some educational benefit.”³⁸ Today, FAPE remains the weak standard by

²⁷ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 1 (1975) (current version at 20 U.S.C. § 1400 (2000 & Supp. IV 2004)).

²⁸ Robert S. Garda, *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 452 (2004).

²⁹ *Id.*

³⁰ *Id.* at 454.

³¹ *Id.* at 453.

³² *Id.*

³³ *Id.* at 454 (citing Jane K. Babin, *Adequate Special Education: Do California Schools Meet the Test?*, 37 SAN DIEGO L. REV. 211, 236 (2000)).

³⁴ Hanson, *supra* note 3, at 526.

³⁵ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 615(b)(1) (1975).

³⁶ Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 11 (2006).

³⁷ 458 U.S. 176, 203 (1982).

³⁸ *Id.* at 200.

which the federal government guarantees all children with disabilities access to public educational services that confer “some educational benefit.”³⁹

¶12 When Congress structurally amended the EAHCA in 1991 and renamed it the Individuals with Disabilities Education Act, it created an unusual model for the delivery of governmental services. The IDEA mandates that a collaborative team consisting of teachers, parents, school administrators, psychologists, and other professionals work together to determine appropriate educational services for the child.⁴⁰ After reviewing evaluations and recommendations, the team develops a specialized course of instruction for the child that is written out in the Individualized Education Program (IEP).⁴¹ The IEP must contain the child’s present level of performance, measurable academic goals, accommodations, modifications, and related services.⁴² Each year, the team reviews the IEP and the child’s most recent evaluations to plan for the educational services to be delivered during the following year.⁴³ The cooperative process that develops between parents and schools is central to the success of the IDEA.⁴⁴ Although the law brings parents and educational professionals together to determine children’s educational services, it does not give them guidance on how they are to work together to determine the terms of an appropriate education.⁴⁵ Therefore, the quality and substance of an IEP varies greatly depending on the willingness of the IEP team to work together to create an appropriate educational program.

¶13 When Congress revised the IDEA in 1997, it expanded the opportunities for parties to enforce the provisions of the IDEA and increased the rights of parents and children.⁴⁶ First, the revised Act added mediation to the possible procedures for resolution of disagreements.⁴⁷ Mediation offered a voluntary alternative remedy to the due process hearing.⁴⁸ The IDEA included provisions that the mediation would be conducted by a certified mediator, it would not be used to delay the due process hearing, the decisions would be in writing, and the state had to bear the cost of the mediation.⁴⁹ Second, the revision preserved due process protections by requiring parental consent for initial evaluation and placement in special education.⁵⁰ Under the revision, parents retained the right to challenge educational decisions through impartial due process hearings.

¶14 Congress revised the IDEA again in 2004 and expanded it to include new provisions for the determination of special education eligibility with a particular

³⁹ See *id.*

⁴⁰ 20 U.S.C. § 1414(d)(2) (2000 & Supp. IV 2004).

⁴¹ § 1414(d)(1)(A).

⁴² *Id.*

⁴³ § 1412(a)(5).

⁴⁴ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

⁴⁵ David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188 (1991).

⁴⁶ Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997); Judith E. Heumann & Tom Hehir, *Believing in Children – A Great IDEA for the Future*, EXCEPTIONAL PARENT, Sept. 1997, at 38, 38, available at <http://www.ed.gov/offices/OSERS/Policy/IDEA/article2.html> (last visited on Aug. 6, 2008).

⁴⁷ Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. § 1415(e)(1) (2000 & Supp. IV 2004)).

⁴⁸ Hanson, *supra* note 3, at 530.

⁴⁹ *Id.* (citing 20 U.S.C. § 1415(e)(2)(A), (D), (F), (G) (1997)).

⁵⁰ Heumann & Hehir, *supra* note 46, at 38.

emphasis on early intervention services.⁵¹ The revised Act also allows for school districts and states that prevail at due process hearings to recover attorneys' fees against parents when the complaints are "frivolous, unreasonable, or without foundation."⁵² Critics predicted that this change would have a chilling effect on parents and advocates who sought to bring due process hearings to remedy a denial of FAPE.⁵³ Additionally, Congress added two mechanisms to encourage settlement of due process claims before hearing.⁵⁴ First, Congress made mediation available for all issues arising under the IDEA.⁵⁵ Second, for claims that were not mediated, Congress added a mandatory "resolution session" for all parties bringing due process claims.⁵⁶ Before claims can proceed to a hearing, the parties must conduct a resolution session, which is an unmediated, legally binding settlement conference.⁵⁷ These mechanisms aim to decrease the amount of claims decided in due process hearings.

¶15 Although special education law has expanded to include more avenues for remedies for a denial of FAPE, parents have limited access to these avenues. A parent's degree of limitation depends on wealth, knowledge of rights, and education level. These barriers limit parents' ability to enforce the provisions of the IDEA.

B. *Inequities in Special Education*

¶16 Across the country, special education programs vary greatly due to unequal implementation of the IDEA. The IDEA requires all states to develop policies for distributing federal funds to local school districts, which must use the funds to design and administer compliant special education programs.⁵⁸ Because local school districts control special education programs, the breadth of services implemented often reflect the demographics of the community. As a result, deficiencies in special education programs are particularly egregious in high-poverty school districts where minority students are concentrated.⁵⁹

¶17 Schools in low-income and minority communities have problems that impair student achievement in both general and special education programs. These schools have high numbers of poorly-trained, uncredentialed teachers, overcrowded classrooms, resource inadequacies, and teachers with low expectations for students.⁶⁰ In addition, these schools have high turnover rates for teachers and high rates of unfilled teacher vacancies.⁶¹ These problems are not found to such a consistent degree at schools in

⁵¹ Weber, *supra* note 36, at 11, 22.

⁵² *Id.* at 29 (quoting 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III) (2000 & Supp. IV 2004)). This revision is interesting given that the topic of improper parental due process hearing litigation was not raised in the congressional hearing. *Id.* at 30 n.131.

⁵³ *Id.* at 30.

⁵⁴ *Id.*

⁵⁵ 20 U.S.C. § 1415(e)(1) (2000 & Supp. IV 2004).

⁵⁶ §§ 1415(f)(1)(B)(i)(I)-(II).

⁵⁷ Weber, *supra* note 36, at 31.

⁵⁸ NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 8.

⁵⁹ Robert A. Garda, *The New Idea: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1084 (2005).

⁶⁰ LOSEN & ORFIELD, *supra* note 14, at xxv.

⁶¹ NAT'L COMM'N ON TEACHING AND AMERICA'S FUTURE, FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION*: A TWO-TIERED EDUCATION SYSTEM 14-15 (2004). In New York, forty-three percent of teachers in high-risk schools said their schools do not fill long-term vacancies or must hire substitutes, as

higher income communities.⁶² In a study of California schools, teachers in low-risk schools reported only four percent of their schools had high numbers of uncredentialed teachers,⁶³ in contrast to forty-eight percent of teachers in high-risk schools who reported uncredentialed teachers.⁶⁴ Further, only sixty-six percent of teachers in high-risk schools reported feeling prepared to teach the state standards, as opposed to eighty-six percent of teachers in low-risk schools.⁶⁵ The effects on students are long-term. Students in elementary grades with ineffective teachers for an entire year test fully one year behind their peers who were instructed by effective teachers.⁶⁶ Student achievement in low-income schools is inhibited because of these substantial problems.

¶18

Special education programs in low-income and minority schools suffer from even greater difficulties than general education programs in these schools. Research shows that special education placement can reduce the education quality that a student receives significantly, independent of the socioeconomic status of the student.⁶⁷ Results have been conflicting as to whether special education placements, especially for children with mild disabilities, provide *any* educational benefit.⁶⁸ Critics also claim that the curricular limits imposed by certain IEPs significantly water down the educational content that children with disabilities receive, thereby limiting their annual achievement.⁶⁹ Students with disabilities in elementary and middle schools are less likely than their regular education peers to participate in extracurricular activities, elective courses, or community-sponsored activities.⁷⁰ Furthermore, students in special education programs have lower graduation rates,⁷¹ higher dropout rates, and lower academic achievement rates than their general education peers.⁷² As students with disabilities progress in school, they experience increasingly higher levels of isolation from their regular education peers.⁷³ Strikingly, students with disabilities drop out of school at twice the

compared to eighteen percent of those in the low-risk schools. *Id.* at 15.

⁶² *Id.* at 12-13. The study created an Index of Risk based on the percentage of students in each school who were receiving free or reduced-price lunches, the number of students who could be classified as a racial or ethnic minority, and the socioeconomic distribution of the students in each school. It then classified the bottom fifty-one percent of those schools as low-risk schools and the top twenty percent as high-risk schools. *Id.* at 38.

⁶³ “High numbers” are defined as twenty percent or more. *Id.* at 12.

⁶⁴ *Id.*

⁶⁵ *Id.* at 13.

⁶⁶ *Id.* at 12.

⁶⁷ Linehan, *supra* note 12, at 187.

⁶⁸ *Id.* (citing Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate*, 27 J. SPECIAL EDUC. 410, 417-18 (1994)).

⁶⁹ James H. Lytle, *Is Special Education Serving Minority Students? A Response to Singer and Butler*, in SPECIAL EDUCATION AT THE CENTURY’S END: EVOLUTION OF THEORY AND PRACTICE SINCE 1970, at 191, 192 (Thomas Hehir & Thomas Latus eds., 1992).

⁷⁰ OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP’T. OF EDUC., TWENTY-FIFTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUC. ACT 38 (2005).

⁷¹ Students in special education programs often complete high school without receiving a diploma. These students may receive certificates of attendance or lower-tiered, alternative diplomas. Students who leave school without typical diplomas are not included in the graduation rates for school. Additionally, they are not included in the dropout rates for the school. Thus, graduation rates and dropout rates are separate measures that illuminate different problems with high school completion for students with disabilities. Susan Saulny, *Study on Special Education Finds Low Graduation Rates*, N.Y. TIMES, June 3, 2005, at B5.

⁷² Lytle, *supra* note 69, at 195.

⁷³ OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., *supra* note 70, at 48. In elementary school, 55.9%

rate of their regular education peers.⁷⁴ During the 2000-2001 school year, a total of forty-one percent of children with disabilities above the age of thirteen dropped out of school.⁷⁵ In addition, only one in four students with disabilities over the age of seventeen receive diplomas each year.⁷⁶ These disturbing statistics compare all special education programs and are not disaggregated for students from low-income and minority schools. Thus, children with disabilities are at substantial risk of not receiving FAPE in low-income and minority schools.

¶19 Minority students are more likely than white students to have poor experiences in special education for several reasons. Minority students in general, and African-Americans in particular, are harmed because of improper identification.⁷⁷ In integrated schools, although African-American students were fourteen percent of the resident population aged six to twenty-one, they represented twenty percent of the population of students with disabilities.⁷⁸ In contrast, white students were sixty-four percent of the resident population, yet sixty-three percent of the population of students with disabilities.⁷⁹ The percentage of African-American students with mental retardation and emotional disturbance disabilities is considerably higher than any other racial or ethnic group.⁸⁰ African-American students represent twenty-five percent of those classified as having an emotional or behavioral disturbance.⁸¹ As these statistics indicate, African-American students are overrepresented in special education programs. Although race does correlate with poverty, these disparities cannot be explained by poverty alone.⁸² Scholars suggest many reasons for the disproportionate representation of minority students in special education programs, including misidentification, misuse of testing protocols, inadequate regular education programs, under-resourced classrooms, and teacher bias.⁸³ Once improperly identified for special education, minority students suffer greatly because special education programs restrict access to “high-quality educational programs and opportunities” and limit long-term educational prospects.⁸⁴

¶20 Minority students with disabilities are far less likely than white students with disabilities to be educated in a general education classroom and far more likely to be educated in highly separate settings.⁸⁵ African-American and Latino students are twice

of students with disabilities are outside of the regular education classroom for less than 21% of the school day. In contrast, only 32.1% of students with disabilities in high school are outside of the regular education classroom for that relatively small amount of time. *Id.*

⁷⁴ AM. YOUTH POLICY FORUM & CTR. ON EDUC. POLICY, TWENTY-FIVE YEARS OF EDUCATING CHILDREN WITH DISABILITIES: THE GOOD NEWS AND THE WORK AHEAD 50 (2002).

⁷⁵ OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., *supra* note, 70 at xvi.

⁷⁶ AM. YOUTH POLICY FORUM & CTR. ON EDUC. POLICY, *supra* note 74, at 34 (based on graduation data from the 1997-1998 school year).

⁷⁷ Garda, *supra* note 28, at 1084.

⁷⁸ THE ADVOCACY INST., STUDENTS WITH LEARNING DISABILITIES: A NATIONAL REVIEW 2 (2002), available at http://www.advocacyinstitute.org/resources/LD_Review02.pdf (last visited Aug. 6, 2008).

⁷⁹ *Id.*

⁸⁰ OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., *supra* note 70, at 29.

⁸¹ Losen & Welner, *supra* note 11, at 419.

⁸² Garda, *supra* note 28, at 1084.

⁸³ 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).

⁸⁴ Garda, *supra* note 28, at 1084 (quoting Alfredo J. Artiles, *Special Education's Changing Identity: Paradoxes and Dilemmas in Views of Culture and Space*, 73 HARV. EDUC. REV. 247, 247 (2003)).

⁸⁵ Fierros & Conroy, *supra* note 6, at 40.

as likely as white students to be educated in substantially separate educational settings.⁸⁶ This isolation phenomenon, which is not uncommon in urban schools, is in direct violation of the IDEA provision that students be educated in the least restrictive environment to the maximum extent possible.⁸⁷ Additionally, it runs contrary to Congress's finding that children are best educated in the least restrictive environment.⁸⁸ As a result of unnecessary isolation, minority students with disabilities "experience inadequate services, low-quality curriculum and instruction."⁸⁹ After becoming eligible for special education programs, only ten percent of identified African-American boys return to and remain in the mainstream classroom, and only twenty-seven percent graduate.⁹⁰

¶21 In conjunction with the high isolation and low quality of special education programs in high-poverty and minority schools, in these schools parent advocacy is less likely to occur and parents are more likely to feel intimidated by the IDEA's due process system.⁹¹ When disagreements arise among the IEP teams about what constitutes appropriate educational services, parents in these communities are generally not exercising their rights to enforce the provisions of the IDEA.⁹² In contrast, parents in wealthy, majority-white school districts use special education laws to gain additional resources, accommodations, and assistance for their children with disabilities.⁹³ As a result, the schools with the greatest amount of academic distress concurrently have the least amount of accountability to parents. In order to ensure that high poverty schools provide children FAPE, the IDEA must have strong enforcement mechanisms beyond parental advocacy.

II. PART TWO: THE FAILURE OF IDEA ENFORCEMENT

A. *Enforcement of the IDEA*

¶22 A law is meaningless if it is not enforced. Appropriately, Congress created three mechanisms for enforcement to ensure that all children with disabilities would be provided FAPE: federal enforcement through the Department of Education, state enforcement through state educational agencies, and parental enforcement through the due process complaint system.⁹⁴ These levels of enforcement each have barriers that prevent the universal implementation of the IDEA across the country.

⁸⁶ THE CIVIL RIGHTS PROJECT, RACIAL INEQUITY IN SPECIAL EDUCATION: EXECUTIVE SUMMARY FOR FEDERAL POLICYMAKERS (2002). Thirty-one percent of African-American students were outside the regular education classroom for more than sixty percent of the school day, as compared to only fifteen percent of white students. OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., *supra* note 70, at 49.

⁸⁷ Garcia Fierros & Conroy, *supra* note 6, at 40; see 20 U.S.C. § 1412(a)(5) (2000 & Supp. IV 2004).

⁸⁸ THE CIVIL RIGHTS PROJECT, *supra* note 86.

⁸⁹ LOSEN & ORFIELD, *supra* note 14.

⁹⁰ E. Bernard Francis, *African-American Boys: The Cries of a Crisis*, KANSAS CITY STAR, Jan. 28, 2006, at 9.

⁹¹ Garda, *supra* note 28, at 1084 (citing COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC. OF THE NAT'L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 1-2, 18 (2002)).

⁹² *Id.*

⁹³ Losen & Welner, *supra* note 11, at 419.

⁹⁴ 20 U.S.C. §§ 1413-1416 (2000 & Supp. IV 2004).

B. Federal Enforcement

¶23 The IDEA is a grants-to-states program and, accordingly, the primary form of enforcement at the federal level is through the administration of funds by the Office of Special Education Programs (OSEP).⁹⁵ The IDEA authorizes federal financial assistance to state and local education agencies.⁹⁶ In order to qualify for funding, the state needs to meet five requirements: (1) it must have a policy ensuring that all children with disabilities between the ages of three to twenty-one have a right to FAPE, (2) it must have a plan to spend the money from OSEP in a way that is consistent with the IDEA, (3) its plan must include procedural safeguards for parents, (4) all children must be educated in the least restrictive environment,⁹⁷ and (5) testing and evaluation materials must be selected and administered so as to be racially or culturally nondiscriminatory.⁹⁸ When a state is in gross violation of the policies of the IDEA, OSEP has the authority to withhold funds for special education programs.⁹⁹

¶24 Federal enforcement is ineffective because it is rarely implemented. Although the National Council on Disability has found that all states are in some form of noncompliance with the IDEA, OSEP has suspended funds from a state only once since the creation of the IDEA.¹⁰⁰ In 1994, OSEP moved to withhold funds from the Virginia Department of Education because the state submitted a discipline plan that was in direct violation with OSEP policies.¹⁰¹ Virginia's plan allowed for the state to stop providing educational services for children with disabilities who were expelled. This plan violated the OSEP policy to continue to provide FAPE to all children until the child graduates or turns twenty-one.¹⁰² OSEP suspended the state's funds because Virginia refused to amend the plan.¹⁰³ This is the only instance where OSEP withheld funds from a state. Although the Department of Education repeatedly advises states to make changes, it is not enforcing consequences, even when states do not rectify problems year after year.¹⁰⁴ Federal enforcement of the IDEA is ineffective to ensure that all children with disabilities receive FAPE.

C. State Educational Agency Enforcement

¶25 In addition to federal enforcement through OSEP, the IDEA authorizes the state to monitor local compliance by school districts.¹⁰⁵ Under the IDEA, a local educational agency (LEA) must develop policies to ensure that children with disabilities are

⁹⁵ Hehir, *supra* note 8, at 221. OSEP is administered by the U.S. Department of Education.

⁹⁶ 20 U.S.C. § 1413 (2000 & Supp. IV 2004).

⁹⁷ Children are educated in the least restrictive environment when they "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5) (2000 & Supp. IV 2004).

⁹⁸ NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 256.

⁹⁹ 20 U.S.C. § 1416(a) (2000 & Supp. IV 2004); Massey & Rosenbaum, *supra* note 9, at 275.

¹⁰⁰ NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 355-56.

¹⁰¹ Va. Dep't. of Educ. v. Riley, 23 F.3d 80, 82-83 (4th Cir. 1994).

¹⁰² *Id.* at 83.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (reporting that in 2000 all states were in some level of noncompliance with the IDEA).

¹⁰⁵ 20 U.S.C. §§ 1416(a)(3)(A)-(C) (2000 & Supp. IV 2004).

identified, evaluated, and educated in the least restrictive environment so as to provide FAPE to all students.¹⁰⁶ The IDEA requires states to monitor LEAs using measurable indicators to reflect progress in three areas: (1) the provision of FAPE in the least restrictive environment, (2) the use of the due process system, and (3) the disproportionate representation of minority students in special education that results from inappropriate identification.¹⁰⁷ The state must collect this data and report on it annually to OSEP.¹⁰⁸ If the state believes that the LEA is not meeting the requirements in the three priority areas, it may reduce or withhold funds from the LEA until the noncompliance is corrected.¹⁰⁹

¶26 State-level enforcement is ineffective due to the inability of state agents to fully monitor the actions of the local districts.¹¹⁰ State reform initiatives and budgetary cutbacks have stripped vital staff and resources from state monitoring agencies.¹¹¹ One result of these limitations is that states do not have the resources to visit every school district every year to ensure compliance.¹¹² In larger states, monitoring visits can occur as infrequently as every five to seven years.¹¹³ When state agents are not able to visit local school districts, the states rely on data that is produced by the LEA.¹¹⁴ This data can be unreliable because it requires self-reporting. Intuitively, enforcement that rests on LEA self-reports may be subject to abuse. As a result, both federal and state enforcement of the IDEA are ineffective at ensuring all children the right to FAPE.

D. Parental Enforcement

¶27 In its comprehensive evaluation of IDEA enforcement, the National Council for Disability found that due to twenty-five years of federal non-enforcement, parental advocacy is the main enforcement mechanism of the IDEA.¹¹⁵ However, parental advocacy has several limitations. Under the IDEA, parents work collaboratively with teachers, representatives of the LEA, psychologists and other education professionals to develop the IEP for each student.¹¹⁶ Parents are equal members of the IEP planning team and, thus, are entitled to protection as their children's educational representatives.¹¹⁷ The IEP process for determining services takes the form of a "contract" or "political deal" between the family and the school in which both parties come to the table with realistic goals and a willingness to compromise.¹¹⁸ When that process breaks down and the school

¹⁰⁶ *Id.*

¹⁰⁷ §§ 1416(a)(3)(A)-(C).

¹⁰⁸ § 1416(b)(2)(B)(i).

¹⁰⁹ § 1416(f).

¹¹⁰ Massey & Rosenbaum, *supra* note 9, at 276.

¹¹¹ NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 67.

¹¹² *Id.*

¹¹³ *Id.* The California Department of Education conducted a review of its monitoring in order to improve system-wide accountability.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 70.

¹¹⁶ 20 U.S.C. § 1414(d)(1)(B) (2000 & Supp. IV 2004).

¹¹⁷ *Id.* Parents are entitled to informed consent, participation in decision making, involvement in the placement decisions, the right to an independent evaluation and general notice requirements for any change in the educational placements. § 1415.

¹¹⁸ Ann Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 394, 463 (1998).

does not provide FAPE or violates some procedural protection, parents have the right to file for an impartial due process hearing.¹¹⁹

¶128 Parents enforce the IDEA through compliance complaints or due process hearings.¹²⁰ Parents may file compliance complaints when a school district fails to follow the provisions of the IDEA.¹²¹ A parent may file for a due process hearing when a child has been denied FAPE.¹²² Compliance complaints allege a school district's violation of the IDEA, while due process hearings aim to resolve disputes about the IEP and the provision of FAPE.¹²³ If these administrative remedies do not result in the desired change, parents have the right to appeal to federal courts.¹²⁴ These private rights of action serve as unofficial forms of enforcement for the IDEA.¹²⁵ A review of Department of Education monitoring reports finds that enforcement of the IDEA is largely the burden of parents due to the failure of federal and state enforcement.¹²⁶ Therefore, efforts to improve parental use of the due process system could potentially increase IDEA enforcement significantly where the state and federal enforcement mechanisms have failed.

¶129 Although the due process system is a potentially strong enforcement mechanism for the IDEA, there are significant problems that prevent its effectiveness for widespread enforcement. The first problem with parental enforcement is that many parents do not know their rights under the IDEA and do not know that they can challenge decisions that are made by the IEP team.¹²⁷ Under the IDEA, schools have the responsibility to communicate with parents about their legal rights.¹²⁸ They are expected "to provide understandable documents, to invite them to meet and ask questions, even to hold workshops or training sessions to inform parents."¹²⁹ However, this mandate appears to be more of an aspiration than a reality.¹³⁰ Schools are not making these documents accessible to all parents, especially those who have little formal education.¹³¹ A recent study found that states' documents outlining parental rights have readability levels that are much higher than the recommended seventh or eighth grade levels.¹³² For example, the documents that schools in Illinois distribute to parents are on a college reading

¹¹⁹ 20 U.S.C. § 1415 (2000 & Supp. IV 2004).

¹²⁰ Massey & Rosenbaum, *supra* note 9, at 278.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 52.

¹²⁶ *Id.*

¹²⁷ Massey & Rosenbaum, *supra* note 9, at 278.

¹²⁸ Advocacy Institute, *Schools Not Communicating with Parents about Special Education Legal Rights*, ADVOCACY IN ACTION, Sept. 2006, at 1, 1.

¹²⁹ *Id.* at 5 (quoting Julie Fitzgerald, author of a study on the effectiveness of Procedural Safeguard Notices).

¹³⁰ As a special education teacher, I saw this problem firsthand. We would hand the parents a copy of the procedural safeguards at every meeting without fail. The document was unreadable for the majority of the parents I worked with, many of whom were not well-educated. It took me a while to realize that this was their only way of learning their rights.

¹³¹ Advocacy Institute, *supra* note 128, at 2-3.

¹³² *Id.* at 2-5 (citing Julie L. Fitzgerald and Marley W. Watkins, *Parents' Rights in Special Education: The Readability of Procedural Safeguards*, 72 EXCEPTIONAL CHILDREN 497 (2006)).

level.¹³³ Even states that do keep readability levels on the seventh and eighth grade levels use acronyms and small text that make the documents difficult to read for parents.¹³⁴ As a result, many parents do not know their rights or even that they can challenge educational decisions at all.

¶30 The second problem with parental enforcement is that most parents lack the educational knowledge to successfully challenge IEP decisions. Although parents are equal team members under the IEP model, the balance of power in this relationship is significantly tipped towards the parties with knowledge.¹³⁵ On one side of the table sit the professionals who may be trained in psychology, nursing, social work, medicine, and teaching. On the other side of the table sit the parents, who are not at the school every day and do not know about instructional practices.¹³⁶ Parents are placed at a disadvantage because they do not know when schools are in noncompliance with IEPs, when the IEPs are not resulting in academic progress, or what the best instructional practices are for their children's disabilities.¹³⁷ Most teachers and school administrators view the IEP conference as a time to disseminate information to the parent, rather than an opportunity to collaboratively plan the child's education.¹³⁸ When asked about the parent's role on an IEP team, one school administrator commented: "They come to us for educational services and educational advice, based on our experience and knowledge of options, I would expect that they would follow what we have to say."¹³⁹ This relationship is echoed by both parents and school officials, but is contrary to the intention of the IDEA. Further, it is an obstacle to parental enforcement of the IDEA.

¶31 Ironically, although parents have the most legal power to challenge the IEP, they lack the social power relative to the other team members to do so.¹⁴⁰ Parents lack social power because they are outnumbered in the process and, often, are outsiders relative to the other team members.¹⁴¹ Because parents are the most interested in seeing their children make educational progress, other team members fear that they make unrealistic educational decisions for their children. Often, because more is at stake for them than for the other IEP team members, parents come across as nervous, anxious, or inarticulate.¹⁴² Parents fear that meetings that go poorly will result in fewer services for their children and, accordingly, greater academic failure. Thus, they are further perceived as less effective team members.

¶32 These negative interactions between parents and schools are widely reported.¹⁴³ In a survey of parent-administrator interactions, most parents described themselves as "terrified and inarticulate" when addressing school administrators.¹⁴⁴ Rather than

¹³³ *Id.* at 3-4. The reading levels of the print materials are assessed using the Flesch Reading Scale.

¹³⁴ *Id.*

¹³⁵ Stephen A. Rosenbaum, *When it's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. DAVIS J. JUV. L. & POL'Y 159, 166 (2001).

¹³⁶ Engel, *supra* note 45, at 188.

¹³⁷ *Id.* at 187.

¹³⁸ *Id.* at 189.

¹³⁹ *Id.* at 190 (quoting Interview with Chair of CSE for School District "A," (Apr. 15, 1988)).

¹⁴⁰ *Id.* at 194.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Rosenbaum, *supra* note 135, at 166 (quoting David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188 (1991)).

¹⁴⁴ *Id.*

viewing the educational planning process as an avenue for advocacy for the rights of their children, they perceive the process as judgmental.¹⁴⁵ Most strikingly, parents largely feel disempowered by the process rather than respected and influential.¹⁴⁶ Although parents have the most legal power, they often come away from the IEP process feeling powerless, and this greatly dissuades them from bringing due process claims.

¶33 The third problem with parental enforcement is that parents are anxious about advocating for FAPE for their children for various reasons. First, parents fear that the school will retaliate against their children if they bring due process hearings. This fear is not without base. In *Mosely v. Board of Education of the City of Chicago*, a mother alleged that her son was victimized by the school after she started working to improve his special education placement.¹⁴⁷ She alleged that he was improperly referred for suspension hearings, questioned by police, and targeted by school officials because of her advocacy.¹⁴⁸ Many parents share the *Mosely* plaintiff's fear that if they bring due process hearings, the schools will take action against their children. Additionally, parents fear that they will destroy their good relationships with the school if they bring due process hearings. Again, this is a fear for which there are documented cases. In a highly contentious Arkansas case involving the denial of FAPE to a child with autism, the school district superintendent declared in a newspaper interview that the child's parent was "'unwanted' at the school and that he was a 'radical with a personal agenda.'"¹⁴⁹ Thus, parents' worries that schools will become unfriendly if they bring due process hearings have some rational base.

¶34 Moreover, parents fear advocating for FAPE for their children because they question their own authority to make educational decisions and they choose to respect the decisions of the educators. In many communities, cultural norms place educators in positions of authority that remain unquestioned.¹⁵⁰ Because they do not perceive that they are equal members of the team, parents fear challenging the decisions of the educators.¹⁵¹ One parent remarked, when discussing her role in the IEP process, "I don't know if I have a choice [about my kid's program], but then—to be honest with you—I'm kind of glad I don't, because I don't want to make the wrong one anyway. I'd rather have the choice left to somebody else . . . I'm so unschooled as far as the therapies and the teaching and whatnot. I don't think I'm in a place to judge whether or not he's receiving the right thing."¹⁵² This quote reflects many anxieties that parents feel when determining the right course for their child's education. The parent does not know that she has a choice, she worries that she would make the wrong one, she feels unschooled, and she does not feel that it is her place to voice her opinions. These anxieties all pose significant barriers to parental enforcement of the IDEA.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 434 F.3d 527, 529 (7th Cir. 2006) (ruling that her complaint should not be dismissed under FED. R. CIV. P. 12(b)(6) and remanding case to district court to decide merits of allegations).

¹⁴⁸ *Id.* at 530.

¹⁴⁹ Brief of Petitioners-Appellants at 19, *Bradley v. Ark. Dep't of Educ.*, 443 F.3d 965 (8th Cir. 2005) (No. 04-3520) (quoting a May 1, 1997 newspaper interview).

¹⁵⁰ Engel, *supra* note 45, at 194.

¹⁵¹ *Id.*

¹⁵² *Id.* at 190 (quoting Interview with "Rachel Dolan" (Oct. 27, 1987)).

¶35 The final problem with parental enforcement is that, even when parents are able to overcome their anxieties, they are unable to find the legal support and advocacy that they need to be successful in due process hearings. Parents who can afford legal representation have difficulty finding it because the majority of lawyers in private practice in the United States work in law firms that primarily represent institutions rather than people.¹⁵³ Those lawyers who are willing to represent parents are often too expensive for the average American.¹⁵⁴ Although the IDEA allows parents to recover attorneys' fees, the prospect of recovery does not provide a strong incentive for attorneys because fees are only awarded to prevailing parties.¹⁵⁵ Legal services organizations take on a significant amount of due process cases but these legal services are not available for many Americans because they do not qualify under the income guidelines.¹⁵⁶ Even parents who do qualify for legal assistance have difficulty obtaining assistance because these organizations are limited by staff availability, case priorities, and service guidelines.¹⁵⁷

¶36 The due process system is a weak mechanism for enforcement of the IDEA as long as these barriers exist. Parental enforcement, although strong in some communities, is weak across the country because parents do not know their rights under the IDEA, do not feel competent to be equal team members, have anxieties about bringing due process claims, and cannot get legal assistance. These barriers must be directly addressed before this mechanism can be properly relied upon to enforce the provisions of the IDEA so that all children have FAPE. Because state and federal enforcement is ineffective, those serious about enforcing the IDEA should act to eliminate barriers to parental enforcement.

III. PART THREE: PROPOSED SOLUTIONS TO MEET PARENTS' ADVOCACY NEEDS IN IDEA CLAIMS

A. *A Right Enforced for Some but Not for All*

¶37 The rights granted to parents and children under the IDEA remain unequally enforced across the country. Federal and state enforcement is universally weak and

¹⁵³ David C. Vladeck, In re Arons: *The Plight of the "Unrich" in Obtaining Legal Services*, in LEGAL ETHICS STORIES 255 (Deborah L. Rhode & David Luben eds., 2006). As of 2002, Michigan had nine private attorneys who represented parents in due process hearings, Rhode Island had six, Wisconsin had ten, Texas had twenty-nine, and Arizona had only one. *Maroni v. Pemi-Baker Reg. Sch. Dist.*, 346 F.3d 247, 258 n.9 (1st Cir. 2003) (holding that parents have a right to proceed pro se in civil suits claiming a violation of FAPE under the IDEA).

¹⁵⁴ M. Brendhan Flynn, Note, *In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases*, 80 IND. L.J. 881, 901 (2005). The majority of Americans cannot afford an attorney's hourly rates.

¹⁵⁵ See 20 U.S.C. § 1415 (2000 & Supp. IV 2004).

¹⁵⁶ Brief for the Council of Parent Attorneys and Advocates Inc., et al. as Amici Curiae in Support of Petitioners at 8-9, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (No. 05-983) [hereinafter Council of Parent Attorneys and Advocates Amicus Brief]. For example, the Legal Services Corporation requires a family of four to have an annual income of \$20,750 or fewer. *Id.* at 9. Thus, only a quarter of the overall population of children with disabilities is eligible to receive services.

¹⁵⁷ Massey & Rosenbaum, *supra* note 9, at 282. A 2004 study found that programs funded by the Legal Services Corporation must turn away fifty percent of people seeking legal assistance due to insufficient resources. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7-8 (2005).

problematic.¹⁵⁸ Parental enforcement of the IDEA has been effective in some communities. However, the problems that hinder parents from employing the due process protections of the IDEA fall disproportionately on low-income, minority parents.¹⁵⁹ As a result, low-income, minority communities have fewer parents enforcing the provisions of the IDEA.¹⁶⁰ Congress did not contemplate this difficulty when it granted parents and children due process protections under the IDEA and it must now take steps to correct this clear inequality in law.

¶38 While Congress intended for schools and parents to work together at all levels of decision making, this does not occur in many schools. The National Council on Disability found that schools are consistently not fulfilling their responsibility of creating IEPs that meet the individualized needs of children with disabilities.¹⁶¹ Further, because low-income parents are less likely to bring due process hearings, when these parents informally express concerns about their children's education, schools are able to override those concerns without fear of legal retaliation.¹⁶² Many low-income parents cannot obtain representation,¹⁶³ cannot afford to pay for counsel, or cannot advocate effectively for their children because of education or language barriers.¹⁶⁴ As a result, many children with disabilities are precluded from exercising their statutory rights.¹⁶⁵ Even when low-income parents do overcome the barriers to bring due process hearings, their chances of prevailing without representation are slim.¹⁶⁶ Thus, the provisions of the IDEA are unequally implemented based on wealth; the rights provided by the IDEA become worthless because parents do not have true avenues to exercise them.¹⁶⁷

¶39 Congress's intent for the implementation of the IDEA is not realized if parents do not have the ability to participate fully in the educational planning for their children. Special education programs in high-poverty school districts suffer further because schools have little accountability for IDEA implementation.¹⁶⁸ Congress must take measures to ensure that the right to FAPE has meaning for all students and, in the event of a denial of FAPE, to ensure that parents can enjoy the due process protections that Congress intended them to have.

¶40 Congress has recognized the need to provide equal access to the justice system for all individuals who seek to assert their rights.¹⁶⁹ Congress understood that people who did not have access to the justice system did not have avenues to address their grievances

¹⁵⁸ See NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 7.

¹⁵⁹ Massey & Rosenbaum, *supra* note 9, at 281.

¹⁶⁰ Losen & Welner, *supra* note 11, at 422.

¹⁶¹ NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 15.

¹⁶² Flynn, *supra* note 154, at 887.

¹⁶³ Maroni v. Pemi-Baker Reg. Sch. Dist., 346 F.3d 247, 257 n. 9 (1st Cir. 2003).

¹⁶⁴ Massey & Rosenbaum, *supra* note 9, at 281.

¹⁶⁵ Maroni, 346 F.3d at 257.

¹⁶⁶ Hanson, *supra* note 3, at 548. A study of due process hearings in Illinois found that representation by an attorney was the single most important predictor of success at a due process hearing. Parents with attorneys prevailed in 50.4% of hearings, while parents without attorneys only prevailed in 16.8% of hearings. MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS, 1997-2002, at 7 (2002), available at <http://www.dueprocessillinois.org/Access.pdf> (last visited Aug. 6, 2008).

¹⁶⁷ Council of Parent Attorneys and Advocates Amicus Brief, *supra* note 156, at 7.

¹⁶⁸ Losen & Welner, *supra* note 11, at 408.

¹⁶⁹ 42 U.S.C. § 2996 (2000).

and, thus, the justice system did not exist for them.¹⁷⁰ In order to ensure equal access to justice for people who could not afford legal counsel, Congress created the Legal Services Corporation.¹⁷¹ Similarly, Congress must act to improve parental access to the due process system so that all parents and children, regardless of wealth or race, have the right to a free appropriate public education guaranteed in the IDEA.

B. The Winkelman Solution: Parents Represent Themselves Pro Se

¶41 During its October 2006 Term, the Supreme Court reviewed one potential solution to the problem facing parents with unequal access to judicial review of administrative due process hearing decisions.¹⁷² The Court granted certiorari to review the three-way split among six circuit courts of appeal about whether non-lawyer parents of children with disabilities could proceed pro se in federal claims brought under the IDEA.¹⁷³

¶42 The petitioners and amici curiae argued that parents must be able to proceed pro se in claims brought under the IDEA in order for all parents and children to exercise their statutory right to challenge due process hearing decisions.¹⁷⁴ The petitioners in *Winkelman* were the parents of an eight-year old boy who is classified with an autism spectrum disorder.¹⁷⁵ They brought their action under the IDEA to challenge the appropriateness of the special education program offered by the school district for their son and to address the various procedural violations committed by the school district against them.¹⁷⁶ The petitioners could not afford to hire an attorney, so they proceeded pro se.¹⁷⁷ On appeal, the Court of Appeals for the Sixth Circuit dismissed the case because petitioners proceeded pro se.¹⁷⁸ The petitioners sought the Court's review of the decision because it contradicted the decision of five other courts of appeal.¹⁷⁹

¶43 The Courts of Appeals were divided on the question of whether parents may proceed pro se in claims under the IDEA.¹⁸⁰ The Third Circuit has held that parents may only bring procedural claims pro se under the IDEA and that parents have no substantive right to FAPE for their children.¹⁸¹ In contrast, the First Circuit directly rejected the logic of the Third Circuit, holding that parents were "parties aggrieved" under the IDEA and, consequently, could bring any type of claim pro se.¹⁸² The Second, Seventh, and Eleventh Circuits have all held that parents may represent themselves pro se in their own procedural claims, but they must retain an attorney for any substantive claims under the

¹⁷⁰ *Id.*

¹⁷¹ 42 U.S.C § 2996(b). The Legal Services Corporation provides funding for civil legal services for low-income individuals.

¹⁷² *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 1994 (2007)

¹⁷³ *Id.* at 1999.

¹⁷⁴ *Winkelman Certiorari Petition*, *supra* note 19, at 14; Council of Parent Attorneys and Advocates Amicus Brief, *supra* note 156, at 7; Brief for the United States as Amicus Curiae at 18, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.* (2007) (No. 05-983) [hereinafter United States Amicus Brief].

¹⁷⁵ *Winkelman Certiorari Petition*, *supra* note 19, at 2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 5.

¹⁷⁸ *Id.* at 3.

¹⁷⁹ *Id.*

¹⁸⁰ *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 1999 (2007).

¹⁸¹ *See Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 227 (3d Cir. 1998).

¹⁸² *Maroni v. Pemi-Baker Reg. Sch. Dist.*, 346 F.3d 247, 250 (1st Cir. 2003).

IDEA.¹⁸³ However, none of the decisions in the Second, Seventh, or Eleventh Circuits have addressed the issue of whether parents had their own substantive rights to FAPE for their children.¹⁸⁴ The Supreme Court's decision resolved these conflicts among the courts of appeal.

¶44

The Court found that the text of the IDEA supports the contention that parents have the right to represent themselves pro se in both substantive and procedural claims brought under the IDEA.¹⁸⁵ First, the statutory language indicates that the Act confers rights to parents as well as children.¹⁸⁶ The IDEA's stated purpose is "to ensure that the rights of children with disabilities and parents of such children are protected."¹⁸⁷ The Court stated that this purpose would not make sense unless the Act accorded parents rights of their own.¹⁸⁸ Therefore, parents have every right at the administrative stage and should have these rights in federal courts as well.¹⁸⁹ Second, the IDEA's statutory language reveals that parents may be a "party aggrieved" under the IDEA and, thus, have the right to bring a civil action in federal court for substantive and procedural claims under the IDEA.¹⁹⁰ Because the IDEA permits parents to request due process hearings alleging substantive and procedural violations, they must be parties in the hearings. In addition, parents are allowed to appeal decisions made at hearings to the state educational agency.¹⁹¹ Under the IDEA only a "party aggrieved" may appeal the findings of the due process hearing.¹⁹² Congress intended for parents to have independent rights from their children as parties aggrieved.¹⁹³ Thus, the Court found that on its face, the language of the statute and history of our legal tradition supports the reading that parents have independent rights under the IDEA and, as a result, they may proceed pro se.¹⁹⁴

¶45

The Court's decision in *Winkelman* is consistent with the legislative history of the IDEA. Congress included due process protections in the IDEA in order to encourage parental involvement at every step of the IDEA's enforcement process. Congress created the IDEA to give parents assurance that their children received appropriate education.¹⁹⁵ Recognizing this intent, the Senate Committee on Health, Education, Labor and Pensions stated in 2003 that "parents have a right to represent their child in court, without a lawyer, for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues."¹⁹⁶ As further support, the Solicitor General filed a brief arguing that parents are "parties aggrieved" under the statute.¹⁹⁷ It is counterintuitive that these protections and encouragement for participation would only extend to the administrative

¹⁸³ See *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998); *Mosely v. Bd. of Educ.*, 434 F.3d 527 (7th Cir. 2006); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997).

¹⁸⁴ United States Amicus Brief, *supra* note 174, at 7.

¹⁸⁵ *Winkelman*, 127 S. Ct. at 2000.

¹⁸⁶ *Id.* at 2002.

¹⁸⁷ *Id.* (quoting 20 U.S.C. § 1400(d)(1)(B) (2000 & Supp. IV 2004)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2002.

¹⁹⁰ *Id.* at 2004; see 20 U.S.C. § 1415(i)(2)(A) (2000 & Supp. IV 2004).

¹⁹¹ *Id.* (citing 20 U.S.C. § 1415(b)(6)(A), (g) (2000 & Supp. IV 2004)).

¹⁹² *Id.*

¹⁹³ *Id.* at 2003.

¹⁹⁴ *Id.* at 2004, 2006.

¹⁹⁵ S.R. REP. NO. 94-168, at 6 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1430.

¹⁹⁶ S.R. REP. NO. 108-185 (2003).

¹⁹⁷ United States Amicus Brief, *supra* note 174, at 7.

hearing level and that parents would be barred from advocating for their children any further.

¶46 Proponents of the right of parents to proceed pro se in their civil actions under the IDEA argue that this decision disproportionately affects poor families.¹⁹⁸ Many parents must proceed pro se because they cannot afford private attorneys and do not qualify for legal services.¹⁹⁹ Over two-thirds of parents of children with disabilities belong to families living on household incomes of less than \$50,000 a year.²⁰⁰ Despite the desire to advocate for FAPE for their children, these parents lack the resources to afford skyrocketing attorneys' fees.²⁰¹ Until the Court held that parents could proceed pro se, proponents feared that parents who could not afford representation would never be able to vindicate their IDEA rights in federal court.²⁰²

¶47 However, even with the right to proceed pro se, many parents will still be unable to seek redress for their grievances because of the many factors that discourage parents from acting on their own behalves.²⁰³ Parents who lack language fluency, the ability to understand state and federal statutes, or the understanding of how to present a case with evidence, witnesses, and legal motions are still at a disadvantage even if they may proceed pro se.²⁰⁴ Thus, allowing parents to proceed pro se, though necessary, is not the solution to the problem of insufficient parent advocacy.

C. *Fee-Shifting: Inducing Private Attorneys to Represent*

¶48 Civil rights statutes, including the IDEA, usually have provisions that allow the court to award attorneys' fees to the prevailing plaintiffs in the action.²⁰⁵ These fee-shifting provisions are intended to encourage plaintiffs to enforce statutes by bringing claims.²⁰⁶ Most circuits award fees under the catalyst theory in which plaintiffs recover fees if they can show a causal connection between their litigation and a corresponding change in the defendant's behavior.²⁰⁷

¶49 Under the IDEA, parents who are the "prevailing party" in due process hearings or civil actions generally recover reasonable attorneys' fees.²⁰⁸ Although the EAHCA did not initially provide for the reimbursement of attorneys' fees for parents who successfully brought claims under it, Congress passed the Handicapped Children's Protection Act of 1986 ("HCPA") to give authority for these awards.²⁰⁹ The HCPA and the Supreme Court decision in *Hensley v. Eckerhart*²¹⁰ established the right of parents to recover attorneys' fees when they "succeed on any significant issue in litigation which achieves some of the

¹⁹⁸ Council of Parent Attorneys and Advocates Amicus Brief, *supra* note 156, at 7.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Hanson, *supra* note 3, at 547.

²⁰² Winkelman Certiorari Petition *supra* note 19, at 16.

²⁰³ Hanson, *supra* note 3, at 548.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 519.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2000 & Supp. IV 2004) (courts have discretion to "award reasonable attorneys' fees as part of the costs to a prevailing party who is a parent of a child with a disability").

²⁰⁹ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 § 2(B), 100 Stat. 796.

²¹⁰ 461 U.S. 424 (1983).

benefit the parties sought in bringing the suit.”²¹¹ This standard allows for full recovery of reasonable attorneys’ fees even when the plaintiff does not prevail on all of the issues.

¶50 Subsequent courts have interpreted the fee-shifting provision in a way that discourages attorneys from assisting parents in cases under the IDEA. In *Buckhannon Board & Care Home, Inc. v. West Virginia*, a case not involving the IDEA, the Supreme Court found that where parties reach a settlement prior to adjudication, the party achieving the desired result is not a “prevailing party.”²¹² In order to be a prevailing party, the party must receive a decision from a judicially-sanctioned body. Later courts have applied this holding to IDEA cases.²¹³ Consequently, attorneys do not have security that if they prevail in IDEA cases, they will receive attorneys’ fees.

¶51 The fee-shifting provision within the IDEA has not encouraged attorneys to represent parents in their education claims.²¹⁴ There is a nationwide shortage of attorneys in private or not-for-profit practices who have experience representing parents in IDEA cases.²¹⁵ Fee-shifting provisions are not enough of an incentive for attorneys to take civil rights cases because they have low rates of success and are time intensive.²¹⁶ Special education cases are characterized by “voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer.”²¹⁷ The American Bar Association Commission on Nonlawyer Practice issued a report stating that very few attorneys have the experience or knowledge to pursue claims under the IDEA.²¹⁸ Thus, the fee-shifting provision within the IDEA has not induced private attorneys to represent parents despite having been in effect for nearly twenty years.

¶52 In addition to these deterrents, the 2004 revision of the IDEA added another component to the fee provision that may discourage attorneys from assisting parents in IDEA claims. The revised Act allows for school districts and states that prevail at due process hearings to recover attorneys’ fees against parents when the complaints are “frivolous, unreasonable, or without foundation.”²¹⁹ This addition to the provision may further discourage attorneys’ representation of parents in possibly worthy challenges under the IDEA.²²⁰

²¹¹ *Id.* at 433.

²¹² 532 U.S. 598, 600 (2001).

²¹³ See *John T. ex rel. Raul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556-61 (3d Cir. 2003) (affirming denial of award of attorneys’ fees to parents who, after obtaining a preliminary injunction, voluntarily dismissed the case because the school agreed to implement a new IEP); *J.C. v. Reg’l Sch. Dist. 10*, 278 F.3d 119, 123-25 (2d Cir. 2002) (holding that plaintiff was not entitled to attorneys’ fees where the school voluntarily agreed to all relief).

²¹⁴ Hanson, *supra* note 3, at 547.

²¹⁵ Brief of Autism Society of America et al. as Amici Curiae Supporting Petitioner at 9, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (No. 05-983). Of the six attorneys who represent parents in special education cases, only one works full-time on these cases. There are three private special education attorneys in Michigan. Two private attorneys accept referrals for special education cases in Arizona.

²¹⁶ *Id.*; Flynn, *supra* note 154, at 902.

²¹⁷ *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (9th Cir. 1998).

²¹⁸ ABA COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (1995), available at <http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=338#Summary> (last visited Aug. 6, 2008).

²¹⁹ *Id.* at 29 (quoting 20 U.S.C. § 1415(i)(3)(B)(i)(III) (2000 & Supp. IV 2004)).

²²⁰ NAT’L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 63 (2005), available at http://www.ncd.gov/newsroom/publications/2005/progress_report.htm (last visited Aug. 6,

¶53 Proponents of the fee-shifting provision as a solution to the lack of representation for parents argue that if the opportunities for recovery are expanded by Congress, more attorneys in the private bar will enter into the practice.²²¹ Under this solution, Congress would effectively revise the IDEA to statutorily overrule *Buckhannon* and provide more opportunities for parents to recover attorneys' fees.²²² However, this revision seems unlikely given Congress's recent addition in 2004, which discourages parents from pursuing claims. Even if the fee-shifting provision were to be revised, significant deterrents still prevent attorneys from representing parents in IDEA cases. Fee-shifting does not present a viable option for solving the gap in representation for parents of students with disabilities.

D. *Self-Advocacy Services: Giving Parents the Tools*

¶54 Congress and the courts agree that parents are the best advocates for the rights of their children.²²³ Proponents of self-advocacy services argue that if parents learn certain skills, they will work tirelessly to pursue the best educational interests of their children. The skills required to pursue due process challenges are not necessarily skills that require legal training like clear letter-writing, negotiation, and witness interviewing. They could be effectively employed by parents who receive training in them.²²⁴ However, there are not enough opportunities for parents to get training in these skills.²²⁵ This is especially true in under-resourced, high-poverty school districts.²²⁶ As a result, the National Council on Disability has made recommendations to increase the number of technical assistance and self-advocacy services for poor and underserved families.²²⁷ However, the Department of Education has not enacted these recommendations.

¶55 The solutions proposed to increase parental advocacy are ultimately insufficient because they do not directly address the problems that exist for parents in high-poverty and minority communities.²²⁸ Few parents will be able to successfully pursue IDEA claims pro se. Few parents will find attorneys who will represent them in IDEA claims on a contingency basis. Few parents will be able to self-advocate without intensive support. Congress must now take direct action to provide that all parents are able to effectively enforce their children's rights to FAPE.

2008).

²²¹ Hanson, *supra* note 3, at 559.

²²² *See id.*

²²³ *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 209 (1982); S. REP. NO. 94-168, at 11-12 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1435-36.

²²⁴ Massey & Rosenbaum, *supra* note 9, at 279.

²²⁵ *See id.* at 283 (explaining the National Council on Disability's recommendations that the Department of Education expand the availability of self-advocacy training opportunities for parents).

²²⁶ *Id.*

²²⁷ Recommendation VII.7, NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS (2000) [hereinafter BACK TO SCHOOL ON CIVIL RIGHTS].

²²⁸ Massey & Rosenbaum, *supra* note 9.

IV. PART FOUR: A PROPOSED REVISION TO THE IDEA

A. *Addressing the Insufficiency of Legal Assistance*

¶56 Congress must act to address the large disparities in special education programs across the country. The initial goals of the IDEA, achieving equality of access to education and self-sufficiency for children of disabilities,²²⁹ are not being met by a vast amount of the special education programs. Instead of facilitating equality of access, special education programs are physically and academically isolating students with disabilities.²³⁰ Instead of facilitating self-sufficiency, special education programs are leading to higher dropout rates, lower graduation rates and higher unemployment.²³¹ These disparities in equality of access and self-sufficiency disproportionately affect minority students in high-poverty school districts. Congress must act to ensure that the goals of the IDEA are met by future special education programs.

¶57 Congress should universalize parental access to the due process system to ensure that the IDEA is enforced. To accomplish this, Congress should revise section 1414(d)(1)(B) of the IDEA to add a legal advocate for the parent as a member of the IEP team. Sufficient precedent exists for Congress to expand the members of the IEP team under section 1414(d)(1)(B) to promote a policy goal. In 1997, Congress expanded this section to require a student's regular education teacher to serve on the IEP team.²³² Congress made this addition to the IEP team in order to promote the education of students in the least restrictive environment.²³³ It reasoned that a regular education teacher on the IEP team would participate in the discussion of how to best educate the student in the least restrictive environment and, consequently, increase the number of students educated in the least restrictive environment. Similarly, Congress should expand section 1414(d)(1)(B) to include a legal advocate for the parent as a team member.

¶58 This addition to the team will increase parental involvement in all levels of decision-making about the education of children with disabilities. Further, the presence of the legal advocate will increase parental enforcement and knowledge about due process protections. Most importantly, because the legal advocate will be federally mandated as a team member, legal advocate services will be available to all parents regardless of wealth or race.

B. *Qualifications of Legal Advocates*

¶59 The legal advocate team member need not be a lawyer; however, it is important that the advocate master the procedures under the IDEA and develop substantive knowledge about educating students with disabilities.²³⁴ The revised section 1414(d)(1)(B) must contain standards for qualifications of legal advocates. The standards should be similar to the structure of the qualifications for the representative of the local education

²²⁹ Garda, *supra* note 28, at 454-56.

²³⁰ LOSEN & ORFIELD, *supra* note 14.

²³¹ Artiles, *supra* note 84, at 247.

²³² U.S. DEPT. OF EDUC., REGULAR EDUCATION TEACHERS AS IEP TEAM MEMBERS—TOPIC BRIEF (1999).

²³³ *Id.*

²³⁴ Stephen J. Rosenbaum, *Aligning or Maligning? Getting Inside the New IDEA, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 HASTINGS WOMEN'S L.J. 1, 13 (2004).

agency.²³⁵ The IDEA includes details about the knowledge necessary for a representative of the local educational agency. For example, this person must be qualified to provide services to the child, be knowledgeable about general education and be knowledgeable about the resources of the local educational agency. Likewise, the IDEA should be revised to include details about the qualifications of the legal advocate. For example, the legal advocate must have knowledge of special education laws, due process protections, and education of students with disabilities. These qualifications must be codified in section 1414(d)(1)(B). My proposed addition to section 1414(d)(1)(B) is the following:

A legal advocate for the parent who is—(i) qualified to support the parent member at all levels of the educational planning process; (ii) knowledgeable about the due process protections available to parents under section 1415; and (iii) knowledgeable about evaluations, curriculum, education methods for students with disabilities, and characteristics of disabilities.

¶60 Legal advocates would need to be trained and certified. In order to maintain local control, Congress could leave the process for certifying legal advocates to the states, just as it does for teachers. States could use the National Guardianship Association's standards for certifying guardians ad litem as a guide to develop a similar program for IDEA-mandated legal advocates.²³⁶ The role of the guardian ad litem is to protect the rights and promote the welfare of another person, often a person with a disability.²³⁷ The National Guardianship Association outlines the certification requirements for two levels of guardians that would be appropriate guides for states: master guardian and registered guardian.²³⁸ Similar to a guardian, the legal advocate could become certified based on a combination of experience and training. For example, a state may find that if the legal advocate is not a licensed attorney, she must be qualified by training or experience in working or advocating for people with disabilities. States may elect to create an intensive training program for legal advocates, as is done for the position of guardian ad litem in several states.²³⁹ To universalize parental enforcement of the IDEA, legal advocates must be trained professionals who can serve as knowledgeable, skilled advocates for parents to turn to for guidance during this difficult process.

²³⁵ See 20 U.S.C. 1414(d)(1)(B)(iv) (2000 & Supp. IV 2004) (“[A] representative of the local educational agency who—(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency.”).

²³⁶ See NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE, 23-25 (2007).

²³⁷ See Illinois Guardianship and Advocacy Commission, Office of State Guardian, <http://gac.state.il.us/osg/osgfs.html> (last visited Aug. 6, 2008).

²³⁸ NAT'L GUARDIANSHIP ASS'N, *supra* note 236, at 23-25.

²³⁹ See The North Carolina Court System, Frequently Asked Questions, <http://www.nccourts.org/Support/FAQs/FAQs.asp?Type=12&language=1> (last visited Aug. 6, 2008) (requiring non-attorneys to complete a thirty hour training program); Illinois Guardianship and Advocacy Commission, *supra* note 237.

C. *Advantages to this Proposal*

¶161 The expansion of the IEP team to include a legal advocate for the parent will fill a gap in the current IDEA, while building upon the best features of the law. First, parents will remain central to the decision-making and advocacy for their children. This was Congress's initial intent for the IDEA.²⁴⁰ When passing the EHA, the Senate Committee stated that the intent of the Act was "to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."²⁴¹ Parental involvement is essential for the enforcement of the IDEA statutory scheme.²⁴² The Supreme Court noted in *Rowley* that parents will not lack passion when seeking all of the benefits for which their children are entitled under the IDEA.²⁴³ This, the Court found, made them the strongest and most effective advocates for their children.²⁴⁴ However, passion is not a substitute for knowledge about the due process system and the education system. My proposal will allow parents to remain the central advocates for their children, as Congress intended, while providing them with assistance and information about the process. The addition of the legal advocate will add knowledge to each parent's passion.

¶162 Second, the addition of the legal advocate to the IEP team will provide more statutory protection for parents. The team members are listed in the IDEA under section 1414(d)(1)(B) as statutorily required parties.²⁴⁵ If a statutorily required party is not present when the IEP is created or revised, it will be a procedural violation for which the parent has the right of administrative or judicial review.²⁴⁶ School districts will be required to include legal advocates at IEP meetings. Thus, parents will have additional support in their advocacy for their children.

¶163 Third, the addition of the legal advocate to the IEP team will fill the gap of experienced advocates, consistent with Congress's policies towards people with disabilities. Congress has long recognized the unmet legal needs for people with disabilities. In 1975, Congress created the Protection and Advocacy System (P&A System) as part of the Developmentally Disabled Assistance and Bill of Rights Act.²⁴⁷ In creating the P&A System, Congress gave one organization within each state the authority to investigate reports of abuse and neglect and violations of the rights of people with disabilities.²⁴⁸ In addition, these organizations are authorized to pursue legal and administrative remedies on behalf of people with disabilities to ensure that their rights are met in all areas of life.²⁴⁹

²⁴⁰ *Maroni v. Pemi-Baker Reg. Sch. Dist.*, 346 F.3d 247, 257 (1st Cir. 2003). Parents were meant to serve as advocates for their children at every stage of the administrative process, from creating the IEP to challenging the services received by the child. *Id.* at 256.

²⁴¹ *Id.* at 257 (quoting S.R. REP. NO. 94-168, at 6 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1430).

²⁴² *Winkelman Certiorari Petition*, *supra* note 19, at 4.

²⁴³ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209 (1982).

²⁴⁴ *Id.*

²⁴⁵ *Cone v. Randolph County Sch.*, 302 F.Supp.2d 500, 506 (M.D.N.C. 2004) (holding that a school district's failure to include representatives not listed under the IDEA as IEP team members was not a procedural violation).

²⁴⁶ *Id.*

²⁴⁷ H.R. 4005, 94th Cong. (1st Sess. 1975) (codified at 42 U.S.C. § 6001 (2000)).

²⁴⁸ Protection and Advocacy of Individual Rights, 29 U.S.C. § 794e (2000); Arizona Center of Disability Law, History of the Center, <http://www.acdl.com/history.html> (last visited Aug. 6, 2008).

²⁴⁹ Arizona Center of Disability Law, *supra* note 248.

¶64 Despite this mandate to provide legal services to people with disabilities, the P&A system has consistently been unable to meet the vast legal needs for children with disabilities who seek help with their special education cases.²⁵⁰ For example, New Hampshire's P&A could only provide representation for 35 of 390 special education inquiries in 2002.²⁵¹ As a result of this mismatch between need and availability, the National Council on Disability has recommended more attorneys, technical assistance, and self-advocacy services to meet the needs of poor and underserved communities.²⁵² The addition of a legal advocate on the IEP team will meet the legal needs of parents of students with disabilities and their children.

¶65 Fourth, the expansion of the IEP team to include a legal advocate will counter each of the barriers to parental enforcement addressed earlier in this Comment.²⁵³ Legal advocates will inform parents of their rights under the IDEA and empower them to challenge decisions that are made in the IEP meetings. Armed with the increased knowledge from the legal advocates, parents can become competent and equal team members. Further, parents will have social support from the legal advocate that will likely assuage their anxieties about bringing due process claims. As a result, this proposal will eliminate the barriers that prevent parental advocacy from being an effective enforcement mechanism for the IDEA.

¶66 Finally, the addition of a legal advocate to the IEP team will ensure that all parents, regardless of wealth and race, have access to the due process system. Under the current system, minority and low-income parents do not use the due process system to the successful degree of white or wealthy parents.²⁵⁴ Thus, the rights of the IDEA are not equally enforced across race and wealth lines. Congress should take action when a right is not equally enforced. As Justice Lewis Powell stated, "Equal justice for all men is one of the great ideals of our society We also accept as fundamental that the law should be the same for the rich and the poor."²⁵⁵ As it stands today, the law for the education of children with disabilities is not the same for the rich children as for the poor. This proposal to add a legal advocate to the IEP team will provide all parents vital guidance in the educational planning process. All parents, regardless of wealth and race, can become strong advocates for the educational rights of their children.

V. CONCLUSION

¶67 Parents of children with disabilities must play a central role in transforming the current level of enforcement of special education laws. Enforcement at the federal and state levels has proven to be particularly weak and problematic.²⁵⁶ Use of the due process system, when properly employed by parents, has led to dramatic changes within school

²⁵⁰ *Maroni v. Pemi-Baker Reg. Sch. Dist.*, 346 F.3d 247, 258 n.9 (1st Cir. 2003).

²⁵¹ *Id.*

²⁵² BACK TO SCHOOL ON CIVIL RIGHTS, *supra* note 227, at 217-18.

²⁵³ Specifically, many parents do not know their rights under the IDEA, do not feel competent to be equal team members, have anxieties about bringing due process claims, and cannot get legal assistance. See *supra* notes 115-157 and accompanying text.

²⁵⁴ Garda, *supra* note 59, at 1084-85 (citing COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC. OF THE NAT'L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 1-2, 18 (2002)).

²⁵⁵ Lewis Powell, *The Response of the Bar*, 51 A.B.A. J. 751 (1986).

²⁵⁶ NAT'L COUNCIL ON DISABILITY, *supra* note 26.

districts.²⁵⁷ However, many parents are not equipped to self-advocate with success.²⁵⁸ Parents, especially those in high-poverty areas, require more intensive support. High-poverty schools have greater educational deficiencies and more need for special education advocacy. However, even parents who are not in high-poverty areas may have difficulty seeking relief in the current due process system. Congress must act to universalize parental access to the due process system so that the rights under the IDEA can be attained for all parents and children. Once all parents become strong advocates for the enforcement of their children's educational rights, special education programs will improve. In time, the gap in achievement between minority students with disabilities and white students with disabilities can be eradicated with strong parental advocacy.

²⁵⁷ See Rosenbaum, *supra* note 234, at 31-34 (detailing the successes of parent advocacy groups that have challenged school district special education programs).

²⁵⁸ *Id.* at 11-12.