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LEFT BEHIND WITH NO “IDEA”: CHILDREN WITH DISABILITIES WITHOUT MEANS

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Abstract: This Article examines the changes to the Individuals with Disabilities Education Act (“IDEA”), which were intended to reconcile the Act with the No Child Left Behind Act of 2001, and the effect those changes have had on the education of children with disabilities. The Article highlights the important role that parents were given in the original IDEA and the procedures set up to protect that role. It then looks at the manner in which the 2004 amendments to the law and certain U.S. Supreme Court cases have undermined the ability of parents to influence the individualized education plan for their children with disabilities, especially for parents with less financial means. Finally, this Article suggests alterations to the IDEA that would strengthen the role of parents in the education of children with disabilities.

INTRODUCTION

The No Child Left Behind Act of 2001 (“NCLB”)¹ was supposed to bring every public school student, including students with disabilities, up to a challenging standard of academic proficiency by the year 2014.² That has not happened.³ In 2004, Congress amended the Individuals with Disabilities Education Act (“IDEA”)⁴ to conform to the NCLB.⁵ The 2004 amendments diminished the powers of parents of children with disabilities to enforce rights promised by the IDEA, presumably because the NCLB offered an alternative

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¹ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

² See 20 U.S.C. § 6311(b)(2)(F) (2012).

³ See Press Release, U.S. Dep’t of Educ., States Granted Waivers from No Child Left Behind Allowed to Reapply for Renewal for 2014 and 2015 Sch. Years (Aug. 29, 2013), available at <http://www.ed.gov/news/press-releases/states-granted-waivers-no-child-left-behind-allowed-reapply-renewal-2014-and-201> (explaining that the Administration would provide state education agencies with flexibility regarding specific requirements of NCLB, and indicating that all states had received waivers of at least some NCLB requirements).

⁴ Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. § 1400 (2012)).

⁵ See *id.* This Article refers to the amended statute by its common name, the IDEA.

means of enforcement, namely, sanctions against schools and school districts if their students failed to meet the new standards. Public school students with disabilities are disproportionately from low-income families, and the amendments to the IDEA disproportionately impact low-income families.⁶ The enforcement mechanism of the NCLB—publication of aggregated test scores and sanctions against schools with bad results—is not a suitable substitute for the power of parents of children with disabilities to enforce the procedural and substantive guarantees of the IDEA.⁷ Unless Congress and the courts protect and strengthen the ability of parents to enforce the educational rights of their children with disabilities, those children will continue to be left behind.

Both the IDEA⁸ and the NCLB⁹ attempt to secure educational results for elementary and secondary school students. The IDEA is a national strategy for the education of children with disabilities. The NCLB is a national strategy to close the gap between children in poverty and other students in the nation's public schools. Congress passed the IDEA, originally called the Education for All Handicapped Children Act, in 1975 to remedy conditions facing children with disabilities, which included lack of access to appropriate educational programs in public schools, segregation within schools, and, for some, outright exclusion from public education.¹⁰ The NCLB amended the Elementary and Secondary Education Act of 1965 ("ESEA"),¹¹ which provides financial aid to schools and districts with a high proportion of low-income children.¹² The NCLB sets targets for academic achievement by all children,

⁶ See Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1431–35 (2011) (reviewing the correlation between poor children with disabilities and unequal access to IDEA benefits).

⁷ See Ruth Colker, *Politics Trump Science: The Collision Between No Child Left Behind and the Individuals with Disabilities Education Act*, 42 J.L. & EDUC. 585, 590–91 (2013). Colker argues:

Whether a student earns a proficient score on a state assessment is rarely a factor in determining if an IEP is effective under the IDEA. We should not expect the IDEA and NCLB to select the same students to receive extra assistance—or even some kind of assistance—because their target population and goals are quite different.

Id.

⁸ 20 U.S.C. § 1400.

⁹ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

¹⁰ See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401–1461 (1976)).

¹¹ See Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301).

¹² See Matthew Bernstein, *Whose Choice Are We Talking About? The Exclusion of Students with Disabilities from For-Profit Online Charter Schools*, 16 RICH. J.L. & PUB. INT. 487, 494–95 (2013) (describing the origin of the ESEA).

including those with disabilities, and mandates standardized testing to measure the progress of schools and school districts.¹³

The 2004 amendments to the IDEA no doubt reflected Congress's determination to bring children with disabilities into the mainstream of public education and to ensure that no child with a disability was left behind. The amendments to the IDEA, however, reduced the power of parents to participate in planning their child's program of education by making it more difficult for parents to seek judicial review of school system actions and decisions.¹⁴ These changes to the IDEA might have reflected the legislators' belief that the NCLB was a suitable substitute for the negotiating power of parents in guaranteeing a free appropriate public education for children with disabilities.¹⁵ Despite this belief, the changes failed to take into account the essential role of parents in securing appropriate and effective programs for children with disabilities. The changes disproportionately affect families in poverty by adding to the time, money, and difficulty required to be an active participant in the education of a child with a disability.¹⁶

Children with disabilities are more likely to live poverty than other children in public schools.¹⁷ Two-thirds of the over six million children receiving services under the IDEA live in households with incomes of \$50,000 or less.¹⁸ One-fourth of the children who receive services under the IDEA live in households below the federal poverty line.¹⁹ Almost twenty percent live in households with annual incomes of \$15,000 or less.²⁰ One-fourth of students with disabilities receive government benefits based on low income, such as Food Stamps, Temporary Assistance for Needy Families, and Supplemental Security Income.²¹ Any effective strategy for educating children with disabilities must take into account the limited financial resources of their families.

Two decisions by the U.S. Supreme Court following the 2004 amendments reduced the power of parents to bring administrative appeals of special

¹³ See 20 U.S.C. §§ 6311, 6316(e) (2012).

¹⁴ See Kelly D. Thomason, Note, *The Costs of a "Free" Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation Under the IDEA*, 57 DUKE L.J. 457, 478–79 (2007) (noting that the amendments decreased procedural safeguards).

¹⁵ See Colker, *supra* note 7, at 589 (stating that requiring school districts to make "adequate yearly progress" typically entails the school offering "remedial education to struggling students so that they can score as proficient on state assessments").

¹⁶ See Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 112–15, 126–28 (2011).

¹⁷ See *id.* at 112–13 (finding that two million of the children with disabilities who qualify for services under the IDEA live below the poverty line); Pasachoff, *supra* note 6, at 1432 (noting that a disproportionate number of children with disabilities live in poverty).

¹⁸ Hyman et al., *supra* note 16, at 112–13.

¹⁹ *Id.* at 112.

²⁰ *Id.* at 113.

²¹ Thomason, *supra* note 14, at 483–84.

education determinations.²² The two cases interrupted a long pattern of support by the Court for parent involvement in the education of children with disabilities.²³ Perhaps the decisions reflect a belief that the IDEA and NCLB together already provided sufficient guarantees for children with disabilities.²⁴ The remedies provided by the NCLB, however, are not a suitable substitute for the role of parents in their children's education. The NCLB neither provides the mechanisms needed to meet a child's individual needs, nor does it concern itself with all aspects of a comprehensive education.

The provisions of the IDEA that empowered parents to participate in planning their child's education are still necessary to provide a framework for the education of children with disabilities. In contrast with the NCLB, the IDEA does not mandate results. It requires the creation of a plan reasonably calculated to confer educational benefits for each eligible student with a disability.²⁵ In *Board of Education of Hendrick Hudson School District, Westchester v. Rowley*, the first Supreme Court case interpreting the IDEA, the court, citing the "infinite variations" among children, declined to set a standard for judging the adequacy of educational benefits afforded by the IDEA.²⁶ The court explained, quoting from the legislative history of the IDEA, that "in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome."²⁷ Instead, the court opted to emphasize the procedural safeguards specified by the Act, rather than the expected results.²⁸ Thus, under the IDEA, parental participation in the planning process is the key to an adequate educational program and attainment of results.²⁹

²² See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (holding that a prevailing party in the appeal of a special education matter could not obtain reimbursement for experts' fees); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that the party seeking relief in a special education due process hearing always has the burden of persuasion).

²³ See Thomason, *supra* note 14, at 476, 478 (noting that the "tide turned in 2004" on support for rights of children with disabilities in Congress and the Supreme Court).

²⁴ See *Murphy*, 548 U.S. at 304; *Schaffer*, 546 U.S. at 59–61 (reviewing the costs of complying with procedural duties under the 2004 amendments and concluding that schools have no special advantage); Thomason, *supra* note 14, at 479–80.

²⁵ See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley (Rowley II)*, 458 U.S. 176, 206–07 (1982).

²⁶ *Id.* at 202.

²⁷ *Id.* at 208 (quoting S. Rep. No. 94-168, at 11–12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435).

²⁸ See *id.* at 206–07. Therefore, a court's inquiry in suits brought under § 1415(e)(2) is two-fold: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" See *id.* (footnotes omitted).

²⁹ See *id.* at 209 ("As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act.").

The IDEA recognizes that public education is a balance of socialization and academic preparation.³⁰ The NCLB, however, addresses only the limited sphere of academic preparation.³¹ The IDEA mandates that a student's goals must include functional skills, as well as academic skills.³² The NCLB, in contrast, addresses and measures only specified academic skills.³³ As a result, the NCLB does not ensure that a child with a disability will receive a public education consistent with the IDEA. The processes created by the IDEA to ensure that children with disabilities are provided with an appropriate education, including parental involvement in the process, are necessary components of any attempt to improve educational outcomes for children with disabilities. Both the IDEA and the NCLB must be reauthorized before the beginning of 2015, and Congress has the opportunity to strengthen them both.³⁴

Part I of this Article discusses the origins of the IDEA and its strategy for ending the exclusion and segregation of children with disabilities in public education. Part II describes the IDEA strategy of providing a free appropriate public education to children with disabilities through the use of individualized educational programs. Part III contrasts the approaches of the IDEA and the NCLB to ensure the delivery of appropriate educational services, arguing that legislative attempts to reconcile the two approaches have diminished the ability of parents of children with disabilities to participate in planning their children's educations, with particular impact on low-income families. Part IV asserts that parents' negotiating power is key to achieving equal educational opportunities for children with disabilities. Part IV also examines the procedural protections afforded by the IDEA, as well as the obstacles that prevent families without means from taking full advantage of them. Part V suggests ways to make the IDEA a more effective instrument to win meaningful educational opportunities for children whose families cannot afford to pay for lawyers, experts, or private schools.

³⁰ See 20 U.S.C. § 1400(c)(2)(B) (2012) (stating that one reason students with disabilities' educational needs were not fully met historically was their exclusion from "being educated with their peers").

³¹ See Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1478 (2011).

³² See 20 U.S.C. § 1414(d)(1)(A)(i)(II).

³³ See Salomone, *supra* note 31, at 1478.

³⁴ See *id.* (noting that the NCLB expired in 2008 and has yet to be reauthorized); *Individuals with Disabilities Act (IDEA): Early Preparation for Reauthorization*, NAT'L SCH. BOARD ASS'N 1 (Jan. 24, 2014), <http://www.nsba.org/Advocacy/Key-Issues/SpecialEducation/NSBA-Issue-Brief-Individuals-with-Disabilities-Education-Act-IDEA.pdf>.

I. THE PROMISE OF THE IDEA: AN APPROPRIATE EDUCATION IN AN INTEGRATED SETTING

The promise of the IDEA is an appropriate education in an integrated setting.³⁵ The IDEA is a civil rights statute that prohibits segregation in public education on the basis of disability.³⁶ The Education of All Handicapped Children Act, later renamed the IDEA, was influenced by two federal court cases, which held that handicapped children must be provided an “adequate, publicly supported education.”³⁷ In *Pennsylvania Association for Retarded Children v. Pennsylvania* (“*PARC I*”), one of the named plaintiffs, David Tupper, a child with an intellectual disability, only learned that he had been excluded from school when his school bus failed to show up.³⁸ In *Mills v. Board of Education of the District of Columbia*, the seven named plaintiffs, all children with disabilities, were excluded from school because the District of Columbia school system had no programs to serve them.³⁹ All of the plaintiffs in that case were poor and unable to pay for private education.⁴⁰ In both cases, the courts ordered the school systems to identify and evaluate children with disabilities, to educate children with disabilities with children who do not have disabilities whenever possible, to create individualized educational programs, and to permit parents to appeal schools’ decisions.⁴¹

The drafters of the IDEA incorporated the principles established by the plaintiffs in *PARC I* and *Mills* into the new statute.⁴² The heart of the IDEA is its guarantee that children with disabilities will not be removed from regular classrooms, except when it is necessary.⁴³ The IDEA requires that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special

³⁵ See Individuals with Disabilities Act, 20 U.S.C. § 1400 (2012).

³⁶ See *id.* § 1412(a)(5).

³⁷ See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley (*Rowley II*), 458 U.S. 176, 193–94 (1982) (“The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act.” (footnote omitted)).

³⁸ Pa. Ass’n for Retarded Children v. Pennsylvania (*PARC II*), 343 F. Supp. 279, 293 (E.D. Pa. 1972); Pa. Ass’n for Retarded Children v. Pennsylvania (*PARC I*), 334 F. Supp. 1257 (E.D. Pa. 1971).

³⁹ 348 F. Supp. 866, 868 (D.D.C. 1972).

⁴⁰ *Id.* at 870.

⁴¹ See *Rowley II*, 458 U.S. at 194 n.16; *Mills*, 348 F. Supp. at 876–83; *PARC I*, 334 F. Supp. at 1257–69.

⁴² *Rowley II*, 458 U.S. at 194.

⁴³ See Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174, 176–77 (2007), available at <http://www.pennlawreview.com/online/156-U-Pa-L-Rev-PENnumbra-174.pdf> (giving a history of the IDEA’s commitment to integration).

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.⁴⁴

In *Rowley v. Board of Education*, a federal district court found that the disparity between a child's academic achievement and her potential to learn was due to her disability and ordered the school district to pay for services calculated to maximize her potential.⁴⁵ On appeal, the Supreme Court rejected the goal of maximizing the child's potential embraced by the district court and instead approved the limited services that had been offered by the school district, reasoning that they were sufficient to allow the child to pass, if not to excel.⁴⁶ The failure of the Supreme Court in *Rowley* to mandate services calculated to maximize a child's academic potential encouraged lower courts to give unnecessary deference to school systems.⁴⁷ The *Rowley* case, however, was also a strong affirmation both of the rights of children with disabilities to participate in the mainstream school environment and of the power of the parents of children with disabilities to participate in planning their children's education.

A school that wants to remove a student from the regular educational setting can often demonstrate that the student would make more academic progress in the more restrictive environment of a special class, a special school, a residential institution, or a homebound placement.⁴⁸ Academic achievement, however, is not the only goal of a public education. Attendance at a public school offers exposure to a community of one's peers, participation in social events and extracurricular activities, and opportunities for leadership. In *Brown v. Board of Education*, the Supreme Court described the broad role of public education in American society, explaining, "[i]t is the very foundation of good citizenship. Today it is a principal instrument in awakening the child

⁴⁴ 20 U.S.C. § 1412(a)(5)(A) (2012).

⁴⁵ See *Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty (Rowley I)*, 483 F. Supp. 528, 532–36 (S.D.N.Y. 1980), *rev'd*, 458 U.S. 176 (1982).

⁴⁶ See *Rowley II*, 458 U.S. at 203.

⁴⁷ See Mark C. Weber, *Foreword: Board of Education v. Rowley After Thirty Years*, 41 J.L. & EDUC. 1, 1 (2012) (describing the impact of *Rowley II*); see also Alex J. Hurder, *The Individuals with Disabilities Education Act and the Right to Learn*, 24 HUM. RTS. 16, 16–17 (1997) (criticizing how lower courts interpreted *Rowley II*).

⁴⁸ See *Continuum of Alternative Placements*, 34 C.F.R. § 300.115 (2006) (establishing a continuum of placements, from least restrictive to most restrictive, that includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions).

to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”⁴⁹

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court recognized that contact with other students is an important part of the educational process because it promotes a “marketplace of ideas.”⁵⁰ The court explained:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects⁵¹

Developing children for citizenship requires give and take with peers, as well as with teachers. *Rowley* preserved access to the school community for students with disabilities. The impact of the *Rowley* decision is that the goal of maximizing achievement in academics, athletics, music, or social life, however important, cannot alone justify removal of a student from the regular educational environment.⁵²

The integration of children with disabilities into the school environment presents challenges that must be overcome by the parties involved in the children’s education. Children with disabilities have different needs, which can affect their education.⁵³ The educational program for these children must be structured to accommodate their individual needs. The IDEA creates such a structure through the use of individualized educational programs (“IEPs”).

⁴⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁵⁰ 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

⁵¹ *Id.* at 512–13.

⁵² See *Cedar Rapids Cmty. Sch. Dist. v. Garrett F. ex rel. Charlene F.*, 526 U.S. 66, 78 (1999) (“But Congress intended ‘to open the door of public education’ to all qualified children and ‘require[d] participating States to educate handicapped children with non-handicapped children whenever possible.’” (alteration in original) (quoting *Rowley II*, 458 U.S. at 192, 202)).

⁵³ See 20 U.S.C. § 1414 (2012). A child with a disability under the IDEA is defined as a child:

- (i) 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; and
- (ii) who, by reason thereof, needs special education and related services.

II. THE IDEA'S STRATEGY FOR APPROPRIATE EDUCATION IS INDIVIDUALIZATION

The IDEA's strategy for appropriate education is individualization. The IDEA seeks to provide appropriate education to children with disabilities through an approach that takes into account the individual needs of each child. The IDEA guarantees a personalized plan of education for each eligible child, written by a team that includes teachers, other professionals, and the child's parents.

Both *Mills v. Board of Education* and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* ("PARC I") required the defendant school systems to develop individual education plans for each student in order to afford the students due process and equal protection under the Fourteenth Amendment.⁵⁴ Around the same time, U.S. District Court Judge Frank M. Johnson, Jr., held in *Wyatt v. Stickney* that individualized treatment plans were a fundamental condition for adequate and effective treatment for individuals with psychiatric and intellectual disabilities in public institutions.⁵⁵ The principles of these three landmark cases have been incorporated into Section 504 of the Rehabilitation Act of 1973,⁵⁶ the Americans with Disabilities Act,⁵⁷ and the IDEA. In the highly politicized environment of public education, however, it is necessary to be watchful that individualization does not translate into isolation and neglect. Families seeking services from public agencies might be disadvantaged when they lack the means to hire their own expert advisers, to retain lawyers to advocate for them, or to pay for private tutors and private

⁵⁴ See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley (Rowley II)*, 458 U.S. 176, 194 n.16 (1982); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876–83 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania (PARC I)*, 334 F. Supp. 1257, 1257–69 (E.D. Pa. 1971).

⁵⁵ *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971). In *Wyatt*:

[t]he patients at Bryce Hospital, for the most part, were involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.

Id.

⁵⁶ See Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012); Michael L. Perlin, "Abandoned Love": *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 124 (2011) (discussing the influence of *Wyatt* on Section 504 of the Rehabilitation Act of 1973).

⁵⁷ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12,101); Jack Drake, *Drafting the Case: The Parallel Legacies of Wyatt v. Stickney and Lynch v. Baxley*, 35 LAW & PSYCHOL. REV. 167, 176 (2011) (concerning the impact of *Wyatt* on the Americans with Disabilities Act); Perlin, *supra* note 56.

schools when problems arise.⁵⁸ It is important that the statutes, rules, and regulations that create our system of compulsory public education protect the needs and voices of the individuals subject to the system.

The overall promise of the IDEA is to deliver a free appropriate public education (“FAPE”) to each eligible child with a disability.⁵⁹ The IDEA defines FAPE as education, including special education and related therapeutic services, provided in conformity with an IEP, at public expense, under public supervision and direction, and meeting the standards of the State’s educational agency.⁶⁰

Under the IDEA, an IEP is a remarkable statement of educational philosophy.⁶¹ The IEP is a written document that summarizes a child’s present levels of academic achievement and functional performance and states measurable academic, functional, and other educational goals for the coming year.⁶² These goals must enable the child to make progress in the general educational curriculum and to meet the specific needs that arise from the child’s disability.⁶³ The IEP must specify and provide the special education and other services, as well as necessary support for school personnel and program modifications that will enable the child to attain annual goals, make progress in the general curriculum, participate in extracurricular and nonacademic activities, and be educated with other children both with and without disabilities.⁶⁴ The IEP must explain the extent, if any, to which the child will not participate with nondisabled children in regular classes and activities.⁶⁵ Services provided to children with disabilities must be “based on peer-reviewed research to

⁵⁸ See Hyman et al., *supra* note 16, at 112–13, 127, 129.

⁵⁹ See 20 U.S.C. § 1412(a)(1)(A) (2012) (stating that to be eligible for federal assistance, each state must provide assurances that a “free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school”).

⁶⁰ *Id.* § 1401(9).

The term “free appropriate public education” means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under § 1414(d).

Id.

⁶¹ See *id.* § 1414(d)(1)(A).

⁶² *Id.*

⁶³ *Id.* § 1414(d)(1)(A)(i)(II).

⁶⁴ *Id.* § 1414(d)(1)(A)(i)(IV).

⁶⁵ *Id.* § 1414(d)(1)(A)(i)(V).

the extent practicable.”⁶⁶ Additionally, an IEP provides for accommodations that might be needed for a child to take standardized tests, and allows alternative assessments if the child cannot participate in the regular test.⁶⁷ The IEP must say how and with what frequency the child’s progress will be measured, and it must specify the dates, frequency, location, and duration of services and program modifications.⁶⁸ Overall, the IEP is designed to be an enforceable promise of specific services.⁶⁹

An IEP Team, as defined by the IDEA, determines the content of an IEP.⁷⁰ The team must include a special education teacher or teachers, the child’s regular education teacher if there is one, a representative of the local educational agency (“LEA”), and the child’s parents or guardian.⁷¹ The IEP Team may also include experts to interpret the results of evaluations, people invited by the school or the parent because of their expertise or their knowledge of the child, and the child, if it is appropriate.⁷² The statute does not specify the manner in which the IEP Team makes its decisions. The statute does, however, require that the LEA representative be qualified to provide or to supervise special education, to know about the general education curriculum, and to be “knowledgeable about the availability of resources of the local educational agency.”⁷³ In practice, the LEA representative makes the final decision by signing off on the IEP for the school system.⁷⁴ The result is that the IEP Team meeting is, in effect, a multi-party negotiation over the contents of a child’s IEP.⁷⁵

Two of the negotiating parties have more clout than the others. The LEA representative has the unilateral power to bind the school system.⁷⁶ The child’s parent has the power to appeal to the local or the state education agency and ultimately to the state or federal court.⁷⁷ The other participants, whether teachers, therapists, evaluators, or relatives of the child, use their role on

⁶⁶ *Id.* § 1414(d)(1)(A)(i)(IV).

⁶⁷ *Id.* § 1414(d)(1)(A)(i)(VI).

⁶⁸ *Id.* § 1414(d)(1)(A)(i)(III), (VII).

⁶⁹ *See id.* § 1400.

⁷⁰ *Id.* §§ 1414(d)(1)(B), 1414(d)(3)–(4).

⁷¹ *Id.* § 1414(d)(1)(B).

⁷² *Id.*

⁷³ *Id.* § 1414(d)(1)(B)(iv).

⁷⁴ *See* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,670 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300 and 301) (noting that it is important “that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are described in the IEP will actually be provided”).

⁷⁵ *See* Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 177 (2005) (“IEPs are the product of veritable negotiations between a child’s family and the educational team.”).

⁷⁶ *See* 71 Fed. Reg. at 46,670.

⁷⁷ *See* 20 U.S.C. §§ 1415(g), 1415(i) (2012).

the IEP team to lobby for the provisions that they would like to see in the IEP.⁷⁸

The IDEA influences the manner in which parties bargain over the provisions of the IEP.⁷⁹ The IDEA's admonition that services should be based on peer-reviewed research gives extra weight to the opinions of experts who are knowledgeable about current research.⁸⁰ The parent's intimate knowledge of the child and the statutory recognition of the parent's role give clout to the parent.⁸¹ The teachers who work with the child have practical knowledge that is crucial to crafting a workable plan. Although an LEA representative might have the authority to sign and implement an IEP, the objections of a substantial number of the other participants would make the IEP much more likely to be overturned in an appeal.⁸²

An IEP is a plan calculated to educate; it is not a promise of educational results. A child's record of achievement, however, does have an impact on the substance of the child's education.⁸³ An IEP Team must meet annually to review a child's IEP.⁸⁴ The detailed requirements of an IEP, the preplanned measurements of progress and the collection of data produce evidence of a child's achievements and the efficacy of methods of instruction.⁸⁵ The available data must be taken into account when the IEP is reviewed.⁸⁶ Thus, the IEP system is a loop in which each program produces measurable results, and each new program builds on the results of the last one.⁸⁷

⁷⁸ See Marcie Lipsitt, *The IEP Team: The Law, the Reality, and the Dream*, NAT'L CTR. FOR LEARNING DISABILITIES, (last visited Apr. 15, 2014), <http://www.nclld.org/students-disabilities/iep-504-plan/iep-team-law-reality-dream> (explaining that the IEP team requires someone, such as a psychologist or therapist, to interpret evaluations and suggesting that parents request permission to bring others to the meeting who may have specific knowledge about the child's needs).

⁷⁹ See Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982) (arguing that pre-trial bargaining—"a game played in the shadow of the law"—can be predicted).

⁸⁰ See 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

⁸¹ See *id.* § 1414(d)(3); Caruso, *supra* note 75, at 174–75 (describing parents as repeat players who learn sources of bargaining power over time).

⁸² See Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 220 (2005) (noting that a judgment is more likely to be upheld on appeal when the school district includes recommendations from parents and experts).

⁸³ See *id.* ("[T]he child's prior experience and progress is rightly given high importance.").

⁸⁴ 20 U.S.C. § 1414(d)(4) (2012).

⁸⁵ See *id.* § 1414(d)(3)–(4).

⁸⁶ See *id.* § 1414(d)(4).

⁸⁷ See *id.* § 1414(d)(3)–(4); *Rowley II*, 458 U.S. at 207 n.28 ("When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.").

III. A DIFFERENT APPROACH TO CHILDHOOD EDUCATION: THE TENSIONS BETWEEN NO CHILD LEFT BEHIND & THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

In spite of the sophistication of the IEP system imposed by IDEA, the results have been troubling. In 2009 and 2010 only thirty-nine percent of students who exited special education programs received a regular diploma.⁸⁸ In New York City, half of students receiving special education services were assigned to special education classes, and the graduation rate for children in special education classes was only 4.4%.⁸⁹ Data has consistently shown that minority children, particularly African American students, are overrepresented in special education and are frequently mislabeled as a result of inaccurate evaluations and diagnoses.⁹⁰ Meeting the needs of these children was one of the primary purposes of the NCLB.⁹¹

A. *The No Child Left Behind Act*

The NCLB was passed with the goal of ensuring an education for all students. The NCLB amended a key part of President Lyndon Johnson's Elementary and Secondary Education Act of 1965 ("ESEA").⁹² The ESEA directs federal dollars into public education programs run by the states with the goal of overcoming gaps in educational performance between low-income students and other students.⁹³ The ESEA provides financial aid to schools and school districts with a high proportion of low-income children and helps to pay for instructional materials, resources to support educational programs, and promotion of parental involvement in schools.⁹⁴ The NCLB constituted the 2001 reauthorization of the ESEA and imposed strict new standards on the states in exchange for receipt of federal grants under the ESEA.⁹⁵ The NCLB set the goal of ensuring "that all children have a fair, equal, and signif-

⁸⁸ See Hyman et al., *supra* note 16, at 135–36; *Historical State-Level IDEA Data Files, TA&D NETWORK*, <http://tadnet.public.tadnet.org/pages/712> (last visited May 8, 2014).

⁸⁹ Hyman et al, *supra* note 16, at 136 n.153; *Historical State-Level IDEA Data Files, supra* note 88.

⁹⁰ See Daniel J. Losen & Kevin G. Wellner, *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, 412–13 (2001); 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, 270 (2008); see also 20 U.S.C. § 1400(c)(12) (2012) (finding that minority students are overrepresented in special education).

⁹¹ See No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

⁹² See Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301 (2012)); Bernstein, *supra* note 12, at 494–95.

⁹³ 20 U.S.C. § 6301.

⁹⁴ *Id.*

⁹⁵ See Bernstein, *supra* note 12, at 494–95.

icant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”⁹⁶

To accomplish this goal, the NCLB recognized the necessity of meeting the special needs of “low-achieving” children, including children in high-poverty schools and children with disabilities.⁹⁷ The NCLB and the IDEA, however, take vastly different approaches to meeting the needs of children with disabilities. Whereas the IDEA requires an individualized educational plan for each eligible child, the NCLB mandates results without providing a strategy.⁹⁸

The goal of the NCLB is for every student to demonstrate proficiency in reading, math, and science on standardized tests adopted by state educational agencies.⁹⁹ The strategy for achieving proficiency is to direct money to low-achieving schools and to require each state to develop a system of rewards for schools that make satisfactory “adequate yearly progress” and sanctions for schools that fail.¹⁰⁰ A school that fails to make adequate yearly progress for two years in a row is identified as a school in need of improvement.¹⁰¹ After an additional two years of failing to make adequate yearly progress, the school is subject to corrective action, which might include replacing school staff, implementing a new curriculum, decreasing management authority, or extending the school year or day.¹⁰² The school district must notify parents and the public of the corrective actions taken.¹⁰³ If the school fails for an additional year to make adequate yearly progress, the school is subject to restructuring.¹⁰⁴ Restructuring can include reopening the school as a charter school, replacing all or most school staff, contracting with a private management company to operate the school, or turning the operation of the school over to the state.¹⁰⁵ When a school is subjected to corrective action or restructuring, students in the school have the right to transfer to another public school in the school district, and the school district must provide free transportation.¹⁰⁶

⁹⁶ 20 U.S.C. § 6301.

⁹⁷ *See id.* § 6301(2).

⁹⁸ *See id.* §§ 1414, 6301.

⁹⁹ *See id.* § 6311 (b)(1).

¹⁰⁰ *See id.* § 6311(b)(2)(A)(iii). The rewards can include “bonuses and recognition,” while the sanctions can include “corrective actions or restructuring.” *Id.* § 6316.

¹⁰¹ *Id.* § 6316(b)(1)(A).

¹⁰² *Id.* § 6316(b)(7)(C).

¹⁰³ *Id.* § 6316(b)(7)(E).

¹⁰⁴ *Id.* § 6316(b)(8)(A).

¹⁰⁵ *Id.* § 6316(b)(8)(B).

¹⁰⁶ *Id.* §§ 6316(b)(6)(F), 6316(b)(8)(A)(i).

In any school subject to corrective action or restructuring, the school district must make supplemental educational services available to children.¹⁰⁷ The school district must obtain the supplemental educational services "from a provider with a demonstrated record of effectiveness, that is selected by the parents and approved for that purpose by the State educational agency."¹⁰⁸ The U.S. Court of Appeals for the Third Circuit has held, however, that the NCLB does not create a right to supplemental educational services that can be enforced by parents.¹⁰⁹

This sanctions regime puts schools in a life or death battle to improve test scores every year.¹¹⁰ The need to increase the percentage of students who score in the proficient range each year pressures schools to focus resources on those who can pass the test with the least costly interventions.¹¹¹ The broad requirements of the IDEA can potentially come into conflict with the corrective actions or restructuring mandates imposed on schools that fail to show improved test scores.¹¹²

The reporting requirements of the NCLB are of particular significance to students with disabilities and their parents. The NCLB requires annual reports to the public of each school's performance on the statewide assessments, and it requires school districts to disaggregate the data by "race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged"¹¹³ Thus, the NCLB causes the publication of annual statistics on the progress of students with disabilities on the assessments of reading, math, and science required by the state. This transparency undoubtedly puts some pressure on school systems to incorporate meaningful goals in the IEPs of students with disabilities.¹¹⁴

¹⁰⁷ *Id.* § 6316(e)(1).

¹⁰⁸ *Id.*

¹⁰⁹ See Newark Parents Ass'n v. Newark Pub. Schs., 547 F.3d 199, 214 (3d Cir. 2008).

¹¹⁰ See Matthew D. Knepper, Comment, *Shooting for the Moon: The Innocence of the No Child Left Behind Act's One Hundred Percent Proficiency Goal and Its Consequences*, 53 ST. LOUIS U. L.J. 899, 911 (2009) ("By its very nature, NCLB's structure inevitably seeks to label virtually all schools as failing.").

¹¹¹ See Knepper, *supra* note 110, at 914 (arguing that the NCLB forces schools that have successfully targeted students with learning disabilities to shift resources to other students to meet school wide goals).

¹¹² See Caruso, *supra* note 75, at 177 (arguing that even school personnel committed to children with disabilities must work within budgetary and political restraints); Robert A. Garda, *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 682–89 (2012) (discussing reasons for the underrepresentation of children with disabilities in charter schools).

¹¹³ 20 U.S.C. § 6331(h)(1)(C)(i) (2012).

¹¹⁴ See Weber, *supra* note 43, at 186–87 (arguing that "it is essential to have the special education subgroup attain the same level of educational success as the general population" on NCLB testing).

The NCLB mandates that every child in the United States score at the proficient level on tests of reading, math, and science by the year 2014.¹¹⁵ The goal of one hundred percent success, however, is so impractical that the vast majority of states in the country have requested and received waivers from the strict provisions of the NCLB.¹¹⁶ The goal of universal proficiency is especially impractical for children with disabilities.¹¹⁷ As a result, the U.S. Department of Education amended its regulations in 2007 to permit school districts to administer alternative tests to students with severe cognitive disabilities, provided the number of eligible students does not exceed one percent of the students with disabilities in the school district.¹¹⁸ In addition, the regulations allow students with less severe impairments, up to two percent of students with disabilities in any school district, to take a modified alternative test that uses fewer, simpler questions, but measures the progress of these students in the general curriculum.¹¹⁹

*B. Problems Reconciling the No Child Left Behind Act with the
Individuals with Disabilities Education Act*

Congress recognized the need to coordinate the educational approaches of the NCLB and the IDEA, but the legislative attempts to reconcile the two statutes have diminished the opportunities available to children with disabilities, with significant impact on families in poverty.¹²⁰ In 2004, Congress re-wrote the requirements for attendance at an IEP Team meeting, allowing members of the Team not to come, subject to the agreement of the parent and the LEA, if the member's "area of the curriculum or related services is not being modified or discussed in the meeting."¹²¹ The new language undermines the concept within the IDEA that a parent will meet at least annually with the school personnel who work with the child for a group discussion of

¹¹⁵ 20 U.S.C. § 6311(b)(2)(F); Knepper, *supra* note 110, at 899.

¹¹⁶ See Press Release, *supra* note 3; see also Knepper, *supra* note 110, at 909 (arguing that "one hundred percent proficiency is most likely impossible").

¹¹⁷ See Knepper, *supra* note 110, at 904–05 (explaining that the goal of one hundred percent proficiency in reading, science, and math by 2014 applies to sub-groups in addition to the general population of the school).

¹¹⁸ See Improving the Academic Achievement of the Disadvantaged, 34 C.F.R. § 200.13(c)(2)(ii) (2007).

¹¹⁹ See *id.*

¹²⁰ See Marcia C. Arceneaux, *The Impact of the Special Education System on the Black-White Achievement Gap: Signs of Hope for a Unified System of Education*, 59 LOY. L. REV. 381, 396–97 (2013); Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 279 (2008); see also Stephen A. Rosenbaum, *A Renewed IDEA and the Need for More Ardent Advocacy*, 32 HUM. RTS. 3, 3–6 (2005) (summarizing changes made by the 2004 amendments to the IDEA, and noting that low-income parents will be hurt by the amendments the most).

¹²¹ 20 U.S.C. § 1414(d)(1)(C)(i) (2012).

everything pertaining to the child's education.¹²² Every member of the team should hear the parent's concerns, raise concerns, and be prepared to make adjustments to the child's program. This new language puts the parent in a difficult position. If a teacher or therapist asks to be excused, the parent bears the burden of insisting on the value of a full discussion. Parents who have less experience with the educational system, such as parents with less education themselves, are most likely to acquiesce to requests by members of the IEP Team to be excused from the meeting.¹²³

Furthermore, the 2004 amendments to the IDEA allow members of an IEP Team to stay away from a Team meeting, even when their area of expertise is going to be discussed, if they comment on anticipated modifications of a child's IEP in writing before the meeting and the parent agrees to their absence.¹²⁴ In addition, the 2004 amendments allow the local educational agency to amend or modify a child's IEP in between annual IEP Team meetings, without convening a team meeting if the parent agrees.¹²⁵ These provisions give schools flexibility to make changes, and they might even be a convenience for parents, but they put the burden on parents to insist on full participation in planning their children's education. Additionally, the new amendments give parents the burden of requesting a copy of the new IEP once it has been amended.¹²⁶ The amendments send a message that the parent's role in the education of a child with a disability is dispensable.¹²⁷

The NCLB neither provides the mechanisms needed to meet a child's individual needs, nor does it concern itself with all aspects of a comprehensive education. The NCLB does, however, set goals for individual children with disabilities. By requiring one hundred percent success on standardized tests of achievement, the NCLB expresses a clear intent to impose a uniform core academic curriculum for every student.¹²⁸ As schools struggle to meet

¹²² See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,676 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300 and 301) (explaining that a parent who finds out that an important member will not be attending the annual IEP meeting can request that the meeting be cancelled); Wakelin, *supra* note 90, at 275 (stating that parents and other members of the IEP team should be "equal team members").

¹²³ See Wakelin, *supra* note 90, at 273–74 (noting that many parents do not know their rights under the IDEA and thus "the balance of power in this relationship is significantly tipped towards the parties with knowledge").

¹²⁴ 20 U.S.C. § 1414(d)(1)(C)(ii).

¹²⁵ *Id.* § 1414(d)(3)(D).

¹²⁶ *Id.* § 1414(d)(3)(F).

¹²⁷ See Wakelin, *supra* note 90, at 275 (stating that while the IEP team members are supposed to have equal powers, "[m]ost 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").

¹²⁸ See Knepper, *supra* note 110, at 902. The content of the curriculum is determined by state educational agencies. *Id.* at 912. The statute merely directs that it be "challenging." *Id.* In practice,

the unrealistic goal of one hundred percent proficiency by 2014, the result is pressure on schools to cut resources for music, art, and athletic programs, particularly in schools that serve low-income students.¹²⁹

While the IDEA recognizes that public education is a balance of socialization and academic and functional learning, the NCLB addresses only a limited sphere of academic preparation.¹³⁰ The NCLB does not assure that a child with a disability will receive the free appropriate public education guaranteed by the IDEA. The accountability for results imposed by the NCLB cannot replace the procedures devised by the IDEA to educate children with disabilities.¹³¹ In fact, the individualized goals, introduced by the IDEA, might be the best approach to accomplishing the ambitious goals set by the NCLB.¹³² The key to raising academic standards for children with disabilities, and probably for all children, is the individualized approach of the IDEA.¹³³ To work effectively, however, individualization must be accompanied by significant protections for individual students.

IV. PARENTS' NEGOTIATING POWER IS THE KEY TO EDUCATIONAL OPPORTUNITY

The IDEA makes parents an integral part of the education of a child with a disability.¹³⁴ It secures the parent's role with specific procedural safeguards that not only guarantee a parent's role in planning the child's education, but also confer significant negotiating power on the parent.¹³⁵ The Supreme Court in *Rowley v. Board of Education* commented:

however, some states set grade level standards low in order to achieve passing rates. *See id.* at 912–13. Students with disabilities might find that their claims for appropriate substantive goals are undermined by the low standards of the general educational curriculum. *See id.* at 914–15.

¹²⁹ *See id.* at 915.

¹³⁰ *See* Salomone, *supra* note 31, at 1486–88 (criticizing the limited scope of the NCLB and current education policy).

¹³¹ *See* Colker, *supra* note 7, at 590–91 (“Whether a student earns a proficient score on a state assessment is rarely a factor in determining if an IEP is effective under the IDEA.”).

¹³² *See* Arceneaux, *supra* note 120, at 397–98 (criticizing the stigmatizing effect of labeling children as having disabilities, but urging adoption of individualized education programs for all children).

¹³³ *See* Caruso, *supra* note 75, at 195 (finding that individualization has “proven essential to the success of special education”); *see also* W. P. Hurder et al., *Improving Evaluation of Human Services by Separating the Delivery of Service from Service*, 14 CMTY. MENTAL HEALTH J. 279, 279–90 (1978) (proposing a model of human service delivery that provides for individualization of health, education and social services).

¹³⁴ *See* *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007) (“Without question a parent of a child with a disability has a particular and personal interest in fulfilling ‘our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.’” (quoting 20 U.S.C. § 1400(c)(1))).

¹³⁵ *See* Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not To Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 296–97, 299 (2007) (arguing that a party's power in negotiation

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.¹³⁶

The procedures the Court is referring to give the parent or guardian of a child with a disability the right to notification of any proposed changes in the evaluation of the child, identification of the child as disabled, placement of the child in a specific educational setting, or the provision of a free appropriate public education to the child.¹³⁷ The parent has a right to examine all school records concerning their child and to obtain an independent educational evaluation of the child if the parent disagrees with the school's initial evaluation.¹³⁸ The parent or guardian has a right to participate in all meetings concerning identification, evaluation, educational placement, or provision of a free appropriate public education to the child.¹³⁹ A parent or guardian dissatisfied with proposed changes has a right to an "impartial due process hearing," conducted by the local or state educational agency, and a right to appeal the decision of state administrative authorities to a state or federal court.¹⁴⁰

A school system cannot evaluate a child for special education without the parent's consent, but a school can request a due process hearing to appeal a parent's refusal to grant consent.¹⁴¹ A parent must give separate consent to the initial provision of special education services to a child, and a school district has no right to appeal the parent's refusal.¹⁴² A parent may also withdraw consent and remove a child from services under the IDEA at any time.¹⁴³

stems from the party's best alternative to a negotiated solution, including the possibility of litigation).

¹³⁶ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley (*Rowley II*), 458 U.S. 176, 205–06 (1982) (internal citations omitted).

¹³⁷ See Individuals with Disabilities Education Act, 20 U.S.C. §§ 1415(b)(1), 1415(c)(1) (2012).

¹³⁸ *Id.* § 1415(b)(1).

¹³⁹ *Id.*

¹⁴⁰ *Id.* § 1415(f)(1)(A); see *Rowley II*, 458 U.S. at 206 (holding that reviewing courts should give "due weight" to the state administrative proceedings).

¹⁴¹ See 20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.507 (2006).

¹⁴² See 34 C.F.R. § 300.300.

¹⁴³ See *id.* A child with a disability who does not receive services under the IDEA might still be protected from discrimination and entitled to reasonable accommodations under Section 504 of the Rehabilitation Act of 1973. See Rehabilitation Act of 1973, 29 U.S.C. § 794; Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. ON C.L. & C.R. 1, 11–13 (2010).

An additional protection for children with disabilities under the IDEA is protection from discipline for behavior that is a manifestation of a child's disability.¹⁴⁴ Before a child with a disability can be suspended or expelled from school for more than ten days, the IEP Team must meet and determine whether the offending behavior was a manifestation of the child's disability.¹⁴⁵ If the behavior was a manifestation of the disability, the IEP Team must consider the circumstances and modify the child's IEP, if needed, to provide for positive behavioral interventions and supports and adopt other strategies to maintain the student in the least restrictive environment.¹⁴⁶ The IEP Team can decide to place the child in a more restrictive setting if less restrictive interventions would be unable to prevent behavior that impedes the child's learning or that of other students.¹⁴⁷ Despite these powers granted to the IEP team, the parent has the power to prevent the removal of a child from the current educational setting by requesting a due process hearing.¹⁴⁸ The "stay put" provision of the IDEA requires that the child remain in the current educational placement while appeals are pending, unless the parent and school agree to changes, or a hearing officer determines that leaving the student in the current placement is "substantially likely to result in injury to the child or to others."¹⁴⁹

The provisions meant to protect students who have disabilities that affect their behavior illustrate the strong intent of the IDEA to educate students in an integrated setting whenever possible and to address issues of socialization and social adaptation as a part of the educational program.¹⁵⁰ The provisions are especially valuable for students from communities that have traditionally experienced discrimination and exclusion by school systems due to race, ethnicity, language or poverty.¹⁵¹ For example, the named plaintiffs in *Mills v. Board of Education*, who inspired passage of the IDEA, were children with diverse disabilities who exhibited behavioral problems, wandered around the classroom, were absent due to health problems, or could not benefit from the standard curriculum.¹⁵² The families of these children could not afford private education, but they were all excluded from the District of Columbia public

¹⁴⁴ See 20 U.S.C. § 1415(k)(1) (2012).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* § 1415(f)(1)(A).

¹⁴⁹ See *id.* §§ 1414(j), 1414(k)(4).

¹⁵⁰ See Thomason, *supra* note 14, at 477–78.

¹⁵¹ See generally Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y. L. SCH. L. REV. 909 (2009/2010) (discussing school exclusion case under IDEA); Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School to Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y. L. SCH. L. REV. 875 (2009/2010) (discussing the relationship between low-income families, educational disabilities, and the criminal justice system).

¹⁵² See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868–70 (D.D.C. 1972).

school system.¹⁵³ The passage of the IDEA codified the relief they won in *Mills*, but the 2004 amendments to the IDEA put future victories like theirs at risk.

The procedural safeguards of the IDEA are vital because the possibility of appeal to state education authorities and ultimately to a court is a major source of negotiating power for parents. The IDEA makes it possible for parents who prevail in a due process hearing or court appeal to win attorney fees from the school system.¹⁵⁴ Nevertheless, even with this fee shifting provision, there are few, if any, attorneys who will take a case without payment up front from the client.¹⁵⁵ The cases are too complicated, the medical evidence is too complex, and the chance of winning is too uncertain to make special education cases profitable for private lawyers.¹⁵⁶

The 2004 amendments to the IDEA will make it harder for parents of any economic status to find lawyers to represent them. The amendments made it possible for school systems that prevail to claim attorney fees from parents and their attorneys.¹⁵⁷ An attorney who files a complaint that is judged "frivolous, unreasonable, or without foundation" can be ordered to pay attorney fees.¹⁵⁸ A parent or the parent's attorney can be ordered to pay attorney fees if "the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."¹⁵⁹ These changes needlessly undermine the negotiating powers of parents in the IEP process.

Few people want to side with the parent or attorney who files a frivolous case, but in the context of special education law, the meaning of "frivolous, unreasonable, or without foundation" can be uncertain. The IDEA is very difficult to interpret, and it has become even more difficult as courts retreat from earlier assurances.¹⁶⁰ IDEA cases are very fact specific and their outcome often depends on the opinions of experts who testify about a child's abilities and which special education program is most likely to succeed.¹⁶¹ A parent's

¹⁵³ *Id.*

¹⁵⁴ See 20 U.S.C. § 1415(i)(3)(B) (2012); Wakelin, *supra* note 90, at 281.

¹⁵⁵ See Hyman et al., *supra* note 16, at 141–43.

¹⁵⁶ See *id.* at 141 (arguing that attorney fee-shifting provisions are essential to attract lawyers to civil rights cases where parties typically cannot afford the fees and costs); Wakelin, *supra* note 90, at 282.

¹⁵⁷ 20 U.S.C. § 1415(i)(3)(B)(i).

¹⁵⁸ *Id.* § 1415(i)(3)(B)(i)(II).

¹⁵⁹ *Id.* § 1415(i)(3)(B)(i)(III).

¹⁶⁰ See Hyman et al., *supra* note 16, at 111 (commenting on the "increasingly technical nature of the IDEA").

¹⁶¹ See *id.* at 141; Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1806 (2008) (arguing that "in the context of special education, neither teachers nor parents can act *independently* as effective representatives for children in the realm of special education"); Thomason, *supra* note 14, at 472.

conviction about what a child can or cannot do and which program is likely to succeed might lead the parent to file a complaint about a school system's decision, but it is not clear whether a reviewing judge would count the parent's opinion as a sufficient foundation for a claim.¹⁶²

In *Arlington Central School District Board of Education v. Murphy*, the Supreme Court held that the IDEA did not authorize payment of expert witness fees as part of its attorney fee provision.¹⁶³ It is generally recognized that it is hard to win a special education due process hearing without one or more expert witnesses.¹⁶⁴ School systems have experts on staff, but parents have to find and pay an expert.¹⁶⁵ In *Schaffer v. Weast*, the Supreme Court decided that the complaining party has the burden of persuasion in a case under the IDEA.¹⁶⁶ The case underlines the danger for a parent challenging a school system decision without presenting expert testimony. The parent's knowledge of what is best for the child is not likely to stand up in court against the professional opinions of school system employees.¹⁶⁷ Yet the original intent of the IDEA appeared to be to put the parent on the same footing as the professionals.

In addition to the added danger of being required to pay attorney fees, the 2004 IDEA amendments also severely reduced parents' ability to use due process hearings to enforce adherence to the procedural safeguards guaranteed by the IDEA.¹⁶⁸ This undermines the ability of parents to participate in planning their child's education. The new provision required hearing officers to make decisions only "on substantive grounds based on a determination of whether the child received a free appropriate public education."¹⁶⁹ It provided that "procedural inadequacies" are only actionable if they:

(I) impeded the child's right to a free appropriate public education;

¹⁶² See Hyman et al., *supra* note 16, at 126 (arguing that it is difficult to challenge placements without "outside experts to support the parent's claim"); Thomason, *supra* note 14, at 472 (arguing that parents will have to rely on experts to prevail).

¹⁶³ 548 U.S. 291, 293–94 (2006).

¹⁶⁴ Hyman et al., *supra* note 16, at 141 ("The necessity of expert testimony in most IDEA cases also cannot be disputed. Without skilled experts to counter the expertise enjoyed by school systems, parents are at a distinct disadvantage.").

¹⁶⁵ Thomason, *supra* note 14, at 472.

¹⁶⁶ See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

¹⁶⁷ See Hyman et al., *supra* note 16, at 141 ("Without skilled experts to counter the expertise enjoyed by school systems, parents are at a distinct disadvantage."); Thomason, *supra* note 14, at 472–73 (arguing that it might be "nearly impossible" for parents to overcome the testimony of a school's special education experts unless the parents can hire their own experts).

¹⁶⁸ See 20 U.S.C. § 1415(f)(3) (2012).

¹⁶⁹ See *id.* § 1415(f)(3)(E)(i).

- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.¹⁷⁰

This new standard appears to give hearing officers the responsibility that the Supreme Court attempted to avoid. It invites hearing officers to make judgments about the substantive content of a child's education and to weigh how significantly a departure from procedures might have affected the content of a child's education.¹⁷¹ This standard leaves no clear benchmark for parents or judges to follow in order to know when a parent is entitled to relief.¹⁷² Instead, it introduces greater uncertainty into an area of law that already lacks a roadmap.¹⁷³

¹⁷⁰ See *id.* § 1415(f)(3)(E)(ii). Clause (iii) states, "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." *Id.* § 1415(f)(3)(E)(iii). It is unclear, however, how this relates to clauses (i) and (ii). See *id.* § 1415(f)(3)(E)(i)–(iii).

¹⁷¹ See *Rowley II*, 458 U.S. at 202; see also *Winkelman*, 550 U.S. at 531–32 (explaining that determining substantive issues is confusing and impossible). In *Rowley II*, the court explained:

It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

458 U.S. at 202.

¹⁷² See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 826 (9th Cir. 2007) (Ferguson, J., dissenting) (explaining that "determining the 'materiality' of a school district's failure to implement a student's Individualized Education Program" is a standard that is inconsistent with the IDEA, "inappropriate for the judiciary, and unworkably vague").

¹⁷³ See *id.* In many states, careful development of an IEP does not guarantee that it will be fully implemented. See, e.g., *id.* at 822 (majority opinion) (holding that failure to implement an IEP must be material in order to violate the IDEA, but "the materiality standard does not require that the child suffer demonstrable educational harm"); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027–30 (8th Cir. 2003) (reviewing the school district's failure to implement an IEP under the standard of whether the student had received an educational benefit, in spite of failure to provide the IEP-mandated behavior management plan); *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349–50 (5th Cir. 2000) (holding that to obtain relief under the IDEA for denial of services promised by an IEP, a plaintiff must prove that the school "failed to implement substantial or significant provisions of the IEP" and that evidence of academic progress could prove that the omitted services were not significant). But see *D.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 511–13 (2d Cir. 2006) (holding that for three children whose IEPs had been written but not implemented, the IDEA required "compliance," not "substantial compliance"); David Ferster, *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, 86–95 (2009–10) (arguing that using the materiality standard to excuse failure to implement IEPs is contrary to the purpose of the IDEA).

V. THE IDEA MUST PROVIDE REMEDIES FOR FAMILIES WITHOUT MEANS

One of the most effective remedies to date in special education law is the right of parents to place a child in a private school and to claim reimbursement for tuition if the public school has not offered a free appropriate public education.¹⁷⁴ This remedy, however, is unavailable to families who cannot afford private school tuition. Justice Rehnquist, writing for the Supreme Court in *School Committee of Burlington v. Massachusetts Department of Education*, acknowledged that the private school option was an impractical remedy for parents without adequate means:

[T]he review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, *which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would*, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.¹⁷⁵

The IDEA cannot survive as a civil rights statute if its benefits are unavailable to poor families. The following suggestions provide ways to make the IDEA a more effective instrument to win meaningful educational opportunities for children with disabilities who cannot afford to transfer to private schools and wait for the possibility of reimbursement.

First, leaders in public education and legal advocacy should endorse the idea of individualized education, pioneered by the IDEA, and must encourage parents of every race, class, and socioeconomic status to demand appropriate services for individual children.¹⁷⁶ Participation in public education is a matter of quintessential importance for democracy and civil rights. Everyone has a stake in public education, and everyone has a role in improving it. The delivery system for providing a free appropriate public education created by the IDEA is a valuable tool, and every parent should be made aware of it. Many

¹⁷⁴ See *Sch. Comm. of Burlington, Mass. v. Mass. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ See Pasachoff, *supra* note 6, at 1461–62 (stating there is a need for public policy to encourage rights of low-income people because “if private enforcement actions are disproportionately brought by one segment of a statute’s intended beneficiaries with particular demographic characteristics, there is likely to be underdeterrence of the wrong the statute seeks to redress with respect to other demographics”).

parents of children with disabilities have become experts in their children's disabilities, effective advocates for their children, and skilled negotiators, and more can do the same with the right support. Poverty imposes large burdens on the ability of parents to exert their rights, but the burdens are not insurmountable, especially when people work together.¹⁷⁷ Thus, community organizations and community leaders need to become advocates for individual children with disabilities. This partnership between parents and community organizations will benefit all children. Legal aid and pro bono programs must recognize the civil rights implications of fighting for the education rights of children with disabilities.¹⁷⁸ Moreover, legislative proposals and legal arguments need to prioritize reforms that make it easier for parents of children with disabilities to participate in their children's education and to hold educational agencies accountable.¹⁷⁹

In addition to advocacy, demanding strict enforcement of the procedural safeguards established by the IDEA can reinforce the role of parents and students with disabilities. The IDEA must be amended to make it clear that it is the duty of hearing officers and administrative law judges to enforce strictly the procedural requirements of the IDEA. Until the IDEA is amended to allow unequivocal enforcement of procedural safeguards at the due process hearing stage, parents and other advocates should ask state and federal administrative authorities to step in to protect the procedural safeguards laid out in the IDEA.¹⁸⁰ State Departments of Education must be informed that the procedural safeguards are a priority. They have the power to intervene on the side of children when courts fail to take appropriate action. The U.S. Department of Education also needs to preserve the procedural structure of the IDEA by becoming an ally of children with disabilities and their parents.¹⁸¹

Furthermore, children with disabilities need the benefit of expedited procedures to enforce procedural rights. Linking procedural rights to the substantive content of a child's education, as the IDEA has done since the 2004 amendments went into effect, makes due process hearings more cumbersome and delays relief. Determining whether a procedural error was harmless, or

¹⁷⁷ See Hyman et al., *supra* note 16, at 111 (arguing that "some parents, of whatever means," have the power to advocate for appropriate services, but lawyers and courts have a role in leveling the playing field).

¹⁷⁸ See Hyman et al., *supra* note 16, at 146 (calling on offices receiving Legal Services Corporation funding to represent children with disabilities in IDEA cases).

¹⁷⁹ See Pasachoff, *supra* note 6, at 1461 ("Few suggestions, I think, would more swiftly eviscerate the possibility of real reform that would benefit poor children with disabilities than to argue that private enforcement should be cut.").

¹⁸⁰ See *id.* at 1462–64 (advocating an improved public enforcement system for the IDEA).

¹⁸¹ See Hyman et al., *supra* note 16, at 154, 159 (suggesting collaboration between parents and advocacy agencies and arguing that the "Department of Education [should] fund more lawyers to counsel clients, a national back-up center, and self-advocacy training programs for students with disabilities and their parents").

whether a change in the educational program was material, can require extensive investigation, hired experts, and complex legal judgments.¹⁸² By contrast, the law could be amended to allow a hearing officer or court to make an expedited ruling, after hearing the testimony of parents and school personnel and reviewing school records, on whether a procedural rule was followed. Even parents who proceed *pro se* would have a chance of success in a hearing limited to procedural issues.¹⁸³ Hearing officers would be able to order adherence to proper procedures in time to make a difference in a child's education.

Parents of children with disabilities should be afforded the status of expert witnesses at due process hearings. Parents have a statutory role in the creation of their children's IEPs because they have inimitable knowledge of their children and a unique interest in their children's welfare.¹⁸⁴ The opinions of parents with regards to their child's wellbeing deserve the same status as the opinions of experts. At the level of a due process hearing, no claim should be considered frivolous if it is based on the good faith belief of a child's parent.

Another beneficial change would be the repeal of the provisions of the IDEA that authorize judges to order parents of children with disabilities or their lawyers to pay attorney fees to school systems.¹⁸⁵ To a school system with a multi-million dollar budget, the possibility of paying the fees of a parent's attorney is a mere inconvenience. To a parent supporting a child with a disability, the possibility of paying the fees of a school system's attorney is a potentially catastrophic expense. The IDEA's current attorney-fee provisions discourage parents from taking advantage of due process protections, and

¹⁸² See Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f)(3)(E)(ii)(II) (2012) (stating that "procedural inadequacies" are only actionable if they "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child"); *Van Duyn v. Baker Sch. Dist.*, 5J, 502 F.3d 811, 826 (9th Cir. 2007) (holding that only material failures to implement an IEP constitute violations of IDEA); Hyman et al., *supra* note 16, at 141 ("The necessity of expert testimony in most IDEA cases also cannot be disputed.").

¹⁸³ See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley (Rowley II)*, 458 U.S. 176, 205–06 (1982). In *Rowley II*, the court found that:

congressional emphasis is upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Id.

¹⁸⁴ See 20 U.S.C. § 1414(d)(1)(B) (requiring the IEP team to include a parent of the child); *Rowley II*, 458 U.S. at 209 (stating that parents "will not lack ardor" in ensuring that their children receive benefits under the IDEA); Hyman et al., *supra* note 16, at 119 (stating that procedural protections, including "parent participation in the IEP process" are the heart of the IDEA).

¹⁸⁵ See *supra* notes 157–59.

discourage lawyers from taking special education cases.¹⁸⁶ Special education law is a relatively new and growing field. It requires the benefit of new ideas and theories. There is no rational reason to discourage novel theories, and the current fee-shifting provisions discourage new approaches to litigation, for fear of the claim being regarded as frivolous.¹⁸⁷ The enormous diversity within the population of children with disabilities guarantees a wide variety of causes of action and program proposals. Discouraging the creative voices of families of children with disabilities only adds to the discrimination that the IDEA attempts to overcome.

Finally, education advocates should study other adjudicatory systems to search for solutions to the problems that parents face in using the IDEA due process hearing system. The Social Security Administration operates an extensive adjudication system that has some commonalities with the IDEA hearing system.¹⁸⁸ Like the Social Security Administration, schools and state Departments of Education are benefactor agencies, rather than regulatory agencies, and are designed to advance human welfare.¹⁸⁹ The procedures of these educational institutions should reflect their goals. The Social Security Administration and other federal benefactor agencies have adjudicative procedures that give judges and hearing officers a more involved role in identifying issues and developing evidence than regulatory agencies have.¹⁹⁰ Comparing IDEA processes to alternative systems of adjudication might result in a model that would allow families who cannot afford to pay lawyers and experts to enforce their rights promised by law.

CONCLUSION

Families who have no other means to educate their children have the most difficulty accessing the benefits and protections of the special education system. The IDEA was one of the stellar accomplishments of the Civil Rights

¹⁸⁶ See Wakelin, *supra* note 90, at 280–81 (noting that the way courts interpret fee-shifting provisions discourages attorneys from taking on cases under the IDEA); see also Hyman et al., *supra* note 16, at 141–42 (noting that “[t]he shifting of expert witness fees to losing school systems was also an indispensable component of ensuring access to the due process hearing system and beyond”).

¹⁸⁷ Federal Rules explicitly provide for arguments to extend or modify existing law. See FED. R. CIV. P. 11(b) (stating that submissions to the court must be based in claims warranted by the law or “by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law”).

¹⁸⁸ See Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1291 (1997) (describing the Social Security Administration adjudicatory system).

¹⁸⁹ See *id.* at 1290–91 (defining regulatory and benefactor agencies).

¹⁹⁰ See *id.* at 1301–04 (describing the role of the Social Security Administrative Law Judge); see also Sims v. Apfel, 530 U.S. 103, 110–11 (2000) (citing Dubin, *supra* note 188, at 1301–05, 1325–29) (describing the role of the Social Security Administrative Law Judge).

era, but its goals need to be preserved and improved. The NCLB has failed to produce the results it promised, but it has called attention to the needs of public education and to the disparate educational results for children who are minorities, disadvantaged, with disabilities, and with limited English proficiency. The mission of public education cannot be accomplished without a strategy to educate children who are poor. A part of that strategy must be to assure equal opportunity for children with disabilities. Strengthening the IDEA so that its protections are accessible to every eligible child with a disability, regardless of family income, should be a key element of all education policy.