Aligning or Maligning?
Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All

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[L]aws can be subtle and sneaky, especially when they seek to change what has become or is becoming common knowledge and practice. IDEA always has had procedural safeguards of some type or another. . . . We believe it is human nature to want to hold on to what you have, especially when you are threatened with losing it. Here the potential loss . . . appears insignificant in the total scheme of things . . . [But, this] creates one more opportunity for parents to “voluntarily” waive what is an essential right and need for their child.¹

There’s nothing wrong with thinking like a lawyer, it’s just not enough.²

I. STARTING OVER
The student and parent advocacy community is waiting with

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2. E-mail from “J. Egan” to Stephen A. Rosenbaum, Staff Attorney, Protection & Advocacy, Inc. (Oct. 8, 2003) (on file with author). J. Egan is the alias for a Texas community organizer-turned-lawyer now living in Fresno, California.
apprehension and angst for Congress’ reauthorization of the Individuals with Disabilities Education Act (IDEA), to be reincarnated as the Improving Education Results for Children with Disabilities Act of 2003 (IERCDA). The fact that IERCDA does not quite make it into the top ten of clever legislative acronyms is the least of their worries. No matter what the final version looks like, most special education supporters think the recast act spells trouble. For about the past quarter-century, states receiving earmarked federal funds have been obliged to meet the educational needs of youngsters with disabilities. School authorities must provide all students who have a categorically defined disability with a free appropriate public education in the least restrictive environment. Yet, even as public debate swirls around pedagogical and philosophical differences, there seems little prospect that Congress will finally take the steps universally recognized as the key to the statute’s success: to adequately fund a reauthorized IDEA.


4. I use the more accepted popular name, IDEA, throughout this article. Citations are either to the Act or to the United States Code.

5. The fear and despair associated with this legislation is epitomized by the creation of a web site tracking the IDEA bills, and parent response, entitled www.ourchildrenleftbehind.com.


7. Free appropriate public education (FAPE) is defined as special education and related services that are provided at public expense, under public supervision and direction, meet the state educational standards, and are provided in conformity with a student’s individualized education program (IEP). 20 U.S.C. § 1401(8) (2000); 34 C.F.R. § 300.13 (2002).


9. K-12 public education spending for students with disabilities increased from 16.6% in
The proposed legislation contains many provisions that appear to dilute important values rooted in federal special education statutes and case law. These include procedural protections to insure that parents are involved in the educational planning process and that students are not easily expelled, as well as definitions of program eligibility, built-in mechanisms for measuring student objectives, and, lastly, assurance of compliance by school instructional and administrative staff. The legislation itself was prompted by the recommendations of a presidential commission and critiques in recent years by politicians, educators, academics and assorted analysts. The national trend toward standards-based testing of students as a means for making teachers and administrators more accountable and closing the achievement gap for all students has also been a contributing factor in the reauthorization.

In this article, I review briefly the background for this latest articulation of federal special education policy. I then suggest ways that advocates can set aside their inquietudes and learn to live with a changed legal landscape — and perhaps even flourish. With each cycle of program review, policy revisitation and legislative revision, those who speak for students and their families must adapt to new language and concepts. Some of the adaptations are cosmetic or pragmatic, and others genuinely seek to affect positive change for the students.

In this latest lesson in “navigating the legal process,” one should: (1) embrace some of IDEA’s new provisions, and make the best of others; (2) aggressively monitor the Administration’s other major educational reform — The No Child Left Behind Act of 2001;11 and (3) effectively use interest group organizational strategies. After waging a vigorous battle in Congress to keep the IDEA intact, it will be the task of advocates to shape the remaining legal text in ways that will ultimately enhance the learning and lives of our student clients. In the reauthorization aftermath, we must engage in new tactics to mitigate what we see as damaging changes and yet be open to honest and critical reflection on changes that may actually be

1977 to 21.4% in 2002. Marie Gryphon & David Salisbury, Escaping IDEA: Freeing Parents, Teachers, and Students through Deregulation and Choice, POL’Y ANALYSIS, July 10, 2002, at 9 (citing American Institutes for Research estimates). The overriding importance of funding is dramatized by the authors’ characterization of two competing forces: parents who want as many services as possible for their children and districts “driven by budgetary constraints [who] try to shortchange every parent who doesn’t make trouble.” Id. at 5. See also H.R. REP. NO. 108-77, at 125 (2003) available at http://thomas.loc.gov/cgi-bin/cpquery/T7?&report=hr077&dbname=cp108& (historically, congressional appropriations “have not come close to reaching the 40 percent” goal established in original legislation).

10. In saying this, I risk alienating colleagues at PAI, sister protection and advocacy systems and DREDF, as well as Council of Parent Attorneys and Advocates (COPAA) members and other special education advocates — many of whom view most modifications to the current IDEA as the kiss of death.

harmless or even beneficial.

II. POLICY PRELUDE

The President’s Commission on Excellence in Special Education\textsuperscript{12} set the stage for many of the changes found in IDEA. When George W. Bush established the Commission, he proclaimed: “One of the most important goals of my Administration is to support States and local communities in creating and maintaining a system of public education where no child is left behind. Unfortunately, among those at greatest risk of being left behind are children with disabilities.”\textsuperscript{13} The Commission found that IDEA is generally providing basic legal safeguards and access for disabled\textsuperscript{14} children, but the current system “places process above results, and bureaucratic compliance above student achievement, excellence and outcomes.”\textsuperscript{15} It is difficult to disagree with this conclusion, as well as specific recommendations that call for early and simplified identification of, and intervention for, eligible children (especially those with learning and behavioral difficulties), increased and more flexible financing, and reduced paperwork.\textsuperscript{16} The Commission also recommended better preparation, recruitment and retention programs for teachers and administrators, and assurances that children with disabilities are considered “general education students first” and not left behind when it comes to federally mandated achievement testing and high standards.\textsuperscript{17}

The latter suggestion is one of the obvious cross-references to the No Child Left Behind Act (NCLB). While one can discount some of the

\textsuperscript{12} U.S. DEP’T OF EDUC., Off. of SPECIAL EDUC. & REHAB. SERVICES, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002) [hereinafter PRES. COMM’N REP.].
\textsuperscript{14} Advocates and those informed about disability issues have all but abandoned the antiquated label “handicapped.” See David M. Engel, Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference, 1991 DUKE L.J. 166, 182-83 (1991); 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, 160 n.7 (2001) [hereinafter When It’s Not Apparent]. However, the verdict is not yet in whether “disabled person” is acceptable in lieu of a “people first” term like “person with a disability.” Some crip activists and academics actually choose what might be called “disability first” nomenclature as an act of defiance or pride or as a matter of mere habit. See, e.g., Mark D. Sherry, Keynote Address at the PAI Annual Training Conference (May 2, 2003); Paul K. Longmore, Why I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 1, 14, 19, 32 (2003). To those offended by my occasional use of “disabled” as an adjective, note that it is less an act of insurance against the lingua fascisti than a nod toward readability, viz., fewer words and less monotonous. See Stephen A. Rosenbaum, Hammerin’ Hank: The Right to Be Raunchy or FM Freak Show? 23 DISABILITY STUDIES QTRLY. \textsuperscript{51-57} and accompanying text (2003) (discussing the naming and reclaiming of outmoded identity terms and epithets) [hereinafter Hammerin’ Hank].
\textsuperscript{15} PRES. COMM’N REP., supra note 12, at 7.
\textsuperscript{16} id. at 11-19, 21-34.
\textsuperscript{17} id. at 9, 35-41, 51-57.
Commissioners' rhetoric as boosterism for the Bush Administration, it should not detract from the common sense notion that integrated laws and practices addressing the needs of all children at risk of educational failure stand a better chance of succeeding than a patchwork of policies pigeonholing different classes of students. The real test will come when the theory is converted to practice.

In a statement preceding the reauthorization of the Act, U.S. Secretary of Education Rod Paige declared: "Our goal is to align IDEA with the principles of [NCLB] by ensuring accountability, more flexibility, more options for parents and an emphasis on doing what works to improve student achievement." Paige unveiled a set of principles which stated that the "IDEA must move from a culture of compliance with process to a culture of accountability for results." Some of these same themes were sounded in the testimony received by Congress just days before the introduction of IDEA reauthorization legislation announced in a Republican Party media statement. Almost every witness paid homage to No Child Left Behind insofar as it raises expectations and holds districts accountable for the progress of all students, including those with disabilities. One district administrator delivered a virtual blueprint of H.R. 1350, with her list of ten proposed procedural reforms, including the elimination of short-term objectives and triennial reevaluations, shorter program planning meetings and modified attendance and plan revision procedures, a statute of limitations on claims, and a cooling-off period prior to due process filing.

19. Id.
20. Press Release, U.S. House of Representatives Committee on Education and the Workforce, House Republicans Propose Reforms to Improve Education Results for Children with Disabilities (Mar. 19, 2003), at http://edworkforce.house.gov/press/press108/03mar/idea031903.htm. The highly partisan release touted a "first-of-its-kind web-based project—dubbed 'Great IDEAS'," which received more than 1700 responses from stakeholders across the nation, and credited President Bush with a 50% increase in federal spending for IDEA "even amid the twin challenges of war and economic uncertainty." Id. By contrast, the bipartisan bill introduced in the Senate was co-sponsored by the HELP Committee's chair and ranking member. S. REP. NO. 105-185, at 1 (2003), available at http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr185&dbname=cp108&. My colleagues at the National Association of Protection & Advocacy Systems (NAPAS) later declared the House bill "so seriously flawed that there is no way it can be fixed... and [will] ultimately result in harm to students with disabilities." Action Alert: House IDEA Bill Threatens Children’s Right to Education (April 17, 2003) (on file with author).
21. IDEA: Focusing on Improving Results for Children with Disabilities: Hearing on H.R. 1350 Before the House Subcomm. on Educ. Reform of the Comm. on Educ. & the Workforce, 108th Cong. (2003) [hereinafter 2003 IDEA Hrg.]. Parts C (early intervention) and D (research and training grants) of the IDEA actually expired on September 30, 2002. Although Part B (eligibility and program criteria) is permanently authorized, some of the law’s critics see the reauthorization bill as an opportunity to amend the whole statute.
22. Id. at 9-11 (testimony of Harriet P. Brown). Ms. Brown, a district due process and
The National Council on Disability (NCD) has issued two reports on IDEA to the President and Congress since 1995. The Council, whose members are Senate-confirmed Presidential appointees, plays an important role in developing American disability policy. Curiously, almost none of the recommendations made by this independent federal agency have found their way into the reauthorization bills. Instead the reauthorization principles were foreshadowed in a much-heralded private think tank report emanating from a November 2000 conference of academics, lawyers, school administrators, journalists and others. While noting the fairness and access that IDEA had ushered in for millions of disabled students for more than 25 years, the report, published by the Thomas B. Fordham Foundation and Progressive Policy Institute, claimed that there had been scant objective policy analysis of the multi-billion dollar federal special education program, as it was “considered ... taboo to discuss ... problems and challenges” of such things as the identification and assignment of students and the focus on compliance, rather than achievement.

Parts of the report’s analysis rely heavily on vintage conservative ideology, but it is hard to take issue with its core principles for reform: “(1) [m]ake the IDEA standards- and performance-based, using section 504 as the civil rights underpinning of special education . . . (2) [s]tratify the number of eligibility categories into a very few groupings, [based on] need for prevention or intervention, remediation and/or accommodation (3) [f]ocus on prevention and early intervention, using research-based practices (4) [e]ncourage flexibility, innovation and choices . . . [in placement and

compliance complaints representative in Florida for ten years, was previously the supervising attorney of a protection and advocacy system office in that state. Before law school, she had worked for 12 years as a school speech-language pathologist.


24. Perhaps it is not so curious that the NCD did not have the ear of lawmakers. As the crafting of the House bill was essentially a Republican Party enterprise, there was little interest in what the Council — viewed as too close to special education advocates and too favorable to big government and liberal ideology — had to say.

25. RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY (Chester E. Finn et al. eds., 2001) [hereinafter FORDHAM FNDN. REP.].

26. Chester E. Finn, Foreword to FORDHAM FNDN. REP., supra note 25, at 9-10. The editors estimate that IDEA affects about 12 percent of American children and costs the federal government $7.4 billion annually. Id. at v. One of the “crucial questions” posed by the report is whether “the current regulatory/civil rights model [is] the best way to ensure quality education for youngsters with disabilities[,]” Id. at vi. One California superintendent, alluding to both the fiscal crisis and supposed taboo, put it this way: “If you criticize [IDEA] you will be publicly vilified as anti-handicap. But what is happening now will absolutely destroy public education before the next decade is out.” Gryphon & Salisbury, supra note 9, at 11. (citation omitted).
services] (5) [p]rovide adequate funding . . . (6) [e]nd double standards. 27

III. INSIDE A NEW IDEA

The House reauthorization bill, H.R.1350, 28 is considered the more draconian. 29 It calls for Individualized Education Programs (IEPs) 30 that are less specific and reviewed less frequently. It also eliminates some of the discipline protections for disabled students and curtails the rights of availability, notice, issues, and standards of review associated with administrative hearings to determine eligibility, placement or services. The bill allows federal funds to be spent on students without disabilities, reduces the so-called paperwork burden and puts limits on parents’ attorneys’ fees. H.R. 1350 also opens the door to voucher programs sending some students to private schools.

The Senate bill, S. 1248 31 is viewed as a much-improved piece of legislation, although it is still flawed. This bill calls for a broader application of positive behavior supports, a pre-suspension review of a student’s conduct as related to his disability and other discipline protections. S. 1248 provides for an additional focus on school-to-life transition, know-your-rights funding for the federally-mandated protection and advocacy system and a requirement that states to do more about alternative assessments for children with severe disabilities. Unlike the House of Representatives, the Senate does not propose a cap on attorneys’ fees or a demonstration project related to reducing the paperwork burden. Like the House, the Senate bill contains extensive language on funding training for teachers and other professionals and an overhaul of state compliance monitoring by the U.S. Department of Education. Also like the bill approved by the other chamber, the Senate version chips away at some of the procedural safeguards associated with IEPs and due process hearings. There is still concern that an effort will be made to attach a number of restrictive amendments, similar to those in H.R. 1350, once the bill is on the Senate floor.

27. Finn et al., Conclusions and Principles for Reform, in FORDHAM FNDN. REP., supra note 25, at 341. One could take issue, however, with the vague “double standards” principle.
30. The individualized education program is a written statement developed for each student by a team of professionals and the student’s family members, including present level of educational performance, annual goals, services, supplementary aids, program modifications and means of measuring progress. 20 U.S.C. § 1414(d)(1) (2000). The statutory term is “program,” but “plan” is often used in practice.
A. LESS IS BETTER?

Some of the provisions weaken present mandates on frequency and notice — of meetings, assessments, documentation and procedural safeguards. Perhaps most controversial is the House bill’s elimination of the mandatory annual individualized education plan. Instead families could opt for a multi-year IEP — not to exceed three years — designed to cover the child’s “natural transition points.”\(^\text{32}\) The Senate bill would retain the mandatory annual IEP only until the student reaches 18 years of age.\(^\text{33}\) A parent need not exercise this option, but may request an annual plan, as is the current requirement. Also annual benchmarks and short-term objectives would no longer be required.\(^\text{34}\) Both bills also contain a rule of construction that no additional information need be included in an IEP “beyond what is explicitly required in this subsection.”\(^\text{35}\) Part of the motivation in this change is to eliminate unnecessary “paperwork.” One disability rights organization, however, suggests that some of the proposed changes in IDEA, such as the elimination of short-term objectives and benchmarks, may actually increase the paperwork.\(^\text{36}\)

Under the House bill, a student’s reevaluation would be conducted no more than once a year and at least every three years. However, the parent and district could agree to an interim reevaluation, or dispense with the triennial altogether. Currently, reevaluations are done on a triennial basis or “if conditions warrant,” or if a parent or teacher requests one.\(^\text{37}\) The House bill also amends the consent provision for an initial evaluation. Under current law, the agency conducting an evaluation must obtain the parent’s prior informed consent. In H.R. 1350, the agency shall “seek to obtain” consent.\(^\text{38}\) IDEA, as now written, requires that testing and other

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\(^\text{32}\) Id. § 614(d)(5)(A). “[N]atural transition points” are defined as: “those periods that are close in time to the transition . . . from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high . . . to high school grades, and from high school grades to post-secondary activities, but in no case longer than 3 years.” Id. § 614(d)(5)(C).


\(^\text{36}\) DREDF, supra note 6. See text infra accompanying notes 93, 94, 96, 100, 102 for further discussion of the paperwork question.


evaluation be “administered in the child’s native language or other mode of communication, unless . . . clearly not feasible.” 39 Under the Senate amendments, assessments need only be conducted “to the extent practicable in the ‘language and form most likely to yield accurate’ data from the child.” 40 Finally, parent notification of procedural safeguards would be given less frequently — upon initial referral of a student, annually or upon parental request. 41 Presently, notice is given before every IEP meeting and upon reevaluation or registration of a compliance complaint. 42

These changes in notice, consent and frequency are in one sense alarming, as they contradict all of the conventional wisdom about the process due in educational planning. 43 After all, prior written notice of all available procedures to initiate or change a child’s identification, evaluation, placement or program is “[o]ne of the most important rights that parents have under the IDEA . . . .” 44 On the other hand, a properly informed client can waive certain procedures that are superfluous or of marginal use to the testing or educational program planning of a given student. The family’s focus must be on outcomes, as well as process. For example, an IEP document that is brief and comprehensible, and filled with school year goals, may be more valuable as a lesson plan and report card, than a longer, thicker packet of pages replete with painstakingly crafted shorter-term objectives. 45

For parents and disabled students, the challenge is to encourage best practices, locally, by policymakers, administrators and instructional staff. This will allow the retention or reinstatement, as needed, of the IEP requirements regarding notice, short-term objectives, waiver and

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43. But see, e.g., CAL. WELF. & INST. CODE § 4646.5(b) (West 1998). (individual program plans for consumers of California’s developmental disabilities services system required only every three years).
45. See text infra accompanying notes 89, 93, 120, 121. How many times have we heard about the special education teacher who could not even locate the class IEPs — much less read them? Seven weeks into the school year, this is what the new teacher in my son’s school reported. Interview with Aileen Alfandary, Berkeley, Cal. (Oct. 10, 2003).
reevaluation, which are currently part of IDEA. For example, in schools where these practices are — or can be — established, a competent case coordinator\textsuperscript{46} could facilitate such matters as dispensing notice or requesting reevaluations or more frequent meetings where these are necessary.

B. MORE ARDENT ADVOCACY

Clearly, the kinds of amendments described above require advocates to redouble their efforts at outreach, public education and direct representation and support. This is to insure that parents are sufficiently informed about their options, including more frequent meetings, evaluations and notice — or the waiver of same. At a recent meeting of San Francisco Bay Area lawyers and self-help providers considering the future of a whittled away IDEA, the suggestion was made, only half in jest, that parents be furnished “advo-kits” as part of a massive grassroots educational campaign.\textsuperscript{47} Trainers must also be prepared to undertake nontraditional and intensive outreach approaches. These go beyond workshops where a facilitator writes dutifully with colored markers on self-adhesive flipcharts. These also require more than a lawyer talking alphabet soup and statutory citations at polite audiences fortified by mediocre coffee and \textit{pan dulce}. Some community organizers suggest that advocacy can be encouraged through power-sharing and experience in school activities such as educational planning teams, student support teams, study circles and the like.\textsuperscript{48}

There is also some good news in reauthorization. First, the parent training and information centers and community parent resource centers funded by the U.S. Department of Education appear to be untouched by the amendments. Currently, these centers are operated by parent-majority boards, receive grants and technical assistance from the Secretary of Education.\textsuperscript{49} These affiliated centers should be easily re-programmed to

\begin{footnotes}
\footnote{46. See, e.g., Cal. Dep't of Educ., Special Educ. Div., Individualized Education Program Statewide Task Force Final Recommendations 10 (2003).}
\footnote{47. Meeting of the Bay Area Special Education Advocates (BASE-A) in Oakland, California (Oct. 23, 2003). I consciously urge \textit{ardent} advocacy, echoing the Supreme Court’s interpretation of the parental role in Bd. of Educ. Of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 205-06 (1982). See infra note 80.}
\footnote{48. See, e.g., Eric Zachary & Shola Olatoye, A Case Study: Community Organizing for School Improvement in the South Bronx, 2001 Instit. for Educ. & Soc. Pol’y, New York Univ. 6. See also discussion infra notes 66, 158, 159, 168 and accompanying text.}
\footnote{49. 20 U.S.C. §§ 1482-84 (2000). The resource centers are specifically created to give training and information to the “underserved parents of children with disabilities,” including those who are low-income, have limited English proficiency or are themselves disabled. Id. § 1483(a). There are approximately 100 centers — among them, DREDF of California — serving families of children with disabilities throughout the U.S., under the banner of “Parents Helping Parents.” PACER Center, Inc., Why Parent Centers? Why the Alliance? 2-4, 6-7 (2000) (copy on file with author). The centers are part of the Technical Assistance Alliance for Parent Centers network, which itself maintains a national office and}
\end{footnotes}
meet changes of this sort in IDEA. The Senate bill also contains language designed to ensure that states spend funds to support the state protection and advocacy systems in advising and assisting parents in the areas of dispute resolution, which arguably could include training on procedural safeguards involving notice, consent, assessment, etc. A much more ambitious technical assistance and self-advocacy scheme was recommended by the National Council on Disability a few years ago. It called for the Department of Education to fund more lawyers to counsel clients, a national back-up center and self-advocacy training programs for students with disabilities and their parents. The Council found that the advocacy training programs and services in most states were inadequate and called for funding a lawyer at every parent training center, protection and advocacy agency and independent living center "to provide competent legal advice..." NCD also wanted to engage attorneys not traditionally associated with disability rights, such as those in private bar associations and legal services. The Council also recommended more collaboration between the parent training centers and the protection and advocacy agencies in developing a statewide special education advocacy strategy.

Despite all attempts at promoting self-advocacy, the reality is that many individuals will require more intensive support. This is most obvious in the case of clients who have limited English proficiency, uncertain immigration status, limited formal education and/or live in remote areas. In addition, we must acknowledge the frustration or immobilization that stems from the trauma or grieving experienced by many parents of disabled

four regional offices. Id. The Alliance is in turn managed by the parent-run PACER Center, also funded by the Department of Education's (DoEd) Office of Special Education Programs (OSEP). Id. The training and support function of these various entities includes both individual and systems advocacy. NCD REP. 2000, supra note 23, at 207.

50. S. 1248, 108th Cong. § 611(e)(2)(B) (2003). This could provide the protection and advocacy (P&A) agencies with additional resources targeted specifically to IDEA issues. The P&As also publish a number of self-help special education materials. See, e.g., NAPAS, CHALLENGING SYSTEMS — ADVOCATING FOR STUDENTS WITH DISABILITIES IN THE PUBLIC SCHOOLS (2002); PROTECTION & ADVOCACY, INC. & COMMUNITY ALLIANCE ON SPECIAL EDUCATION, SPECIAL EDUCATION RIGHTS & RESPONSIBILITIES (9th ed. 2003), available at http://www.pai-ca.org/Pubs/504001.


53. Id. at 217.

54. Id. at 218.

55. Id. at 71.

56. The experience of parents involved in juvenile court dependency proceedings is not unlike that of parents in the special education system. See Report of the Parent Self-Advocacy Working Group (Fordham Interdisciplinary Conference Achieving Justice:
children. Clients also have different needs at different points of their engagement with the system. These clients may need more hand-holding or direct representation. Even the much-vaunted technical assistance parent/student advocates dispense can prove to be ineffectual if the client is unable to translate the advice and coaching into effective advocacy.

However much the appearance of a parent’s attorney can accomplish in the short-term, at an IEP meeting or elsewhere, it can have negative consequences as well. For one, it almost always prompts the school district to send its own lawyer too, which drives up costs and heightens tensions. It can also foster dependency, rather than independence. The disincentives for attorneys to attend the IEP meeting have been greater since the spate of federal court rulings restricting the availability of attorneys' fees to due process hearing judgments.

Even for nonprofit legal service providers, the disincentives for attorneys have been significant. For one, it is often required that the attorney attend the IEP meeting in order to be reimbursed. However, the costs of attending the meeting, particularly for attorneys representing parents of special education students, can be prohibitive. The costs of travel, meals, and lodging can add up quickly, making it difficult for attorneys to justify the time and expense.

In addition, the fees available to attorneys for representing parents in special education disputes are often insufficient to cover the costs of representing clients. The fees available under the Individuals with Disabilities Education Act (IDEA) are capped at a rate of $150 per hour, regardless of the complexity of the case. This rate is not enough to cover the costs of travel, meals, and lodging, let alone the costs of conducting research and preparing for the case.

Furthermore, the availability of attorneys to represent parents in special education disputes has been declining. The Supreme Court's decision in Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources, 532 U.S. 598 (2001) (drastically curtailing definition of “prevailing party” for purposes of attorneys’ fees awards under federal disability and fair housing civil rights statutes), has had a chilling effect on the availability of attorneys to represent parents in special education disputes. The decision has made it much more difficult for parents to recover fees for representation, even in cases where the parent has prevailed.

In conclusion, the disincentives for attorneys to attend IEP meetings and the limited fees available to attorneys for representing parents in special education disputes are significant disincentives for attorneys to represent parents in these cases. These disincentives have a real impact on the ability of attorneys to represent parents, and the quality of representation that is available.

Parents and the Child Welfare System, 70 FORDHAM L. REV. 405 (2001) (hereinafter, Self-Advocacy Wkg. Grp.). Professionals may fail to acknowledge the trauma and loss or may interpret the parents’ immobilization as a lack of interest or a sign of depression. Id. at 406. See also, CLIFF CUNNINGHAM & PATRICIA SLOPER, HELPING YOUR EXCEPTIONAL BABY 19-28 (1978) (discussing the process of coming to terms with parenting a disabled child).

57. See Rosenbaum, When It’s Not Apparent, supra note 14, at 180 n.70.

58. Self-Advocacy Wkg. Grp., supra note 56, at 407. Once, as the angry and distraught father of a young disabled son, I just had to yell “Fuck you!” at the anonymous clerk behind the HMO counter. It felt good, but I’m not sure it helped me get any service.

59. A recent client, who I shall call Carmen, is a case in point. She is concerned, intelligent, and attentive — and she keeps appointments. Yet, in her search for a different classroom for her daughter, or participation in a particular reading program or more minutes of math tutoring, she always wants to have a black-letter law response transmitted by fax or deposited into her voicemail. Lawyers like me sometimes labor under the fiction that we provide technical assistance when in fact our clients are really not equipped to advocate on their own. This is especially true where the dissatisfaction with placement or services does not really involve clear violations of procedure or law. Similarly, the parent may be too intimidated or unable to engage in negotiation, or to articulate an argument.


61. Following the Supreme Court’s decision in Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health & Human Resources, 532 U.S. 598 (2001) (drastically curtailing definition of “prevailing party” for purposes of attorneys’ fees awards under federal disability and fair housing civil rights statutes), a number of rulings have parents worried about the continuing availability of lawyers to represent them in special education disputes. See, e.g., J.C. v. Reg’l Sch. 3d 119 (2d Cir. 2002) (private settlement does not alter availability of lawyers to represent them in special education disputes. Boyd v. The Newark Public Schls., 44 Fed. Appx. 569 (3d Cir. 2002), available at 2002 WL 1810705 (catalyst theory as basis for fee award “is moribund”); and John T. v. Delaware Co. Intermed. Unit, 318 F.3d 545 (3d Cir. 2003) (Buckhannon is applicable to IDEA). But see, e.g., Barrios v. California Interscholastic Federation 277 F.3d 1128 (9th Cir. 2002), cert. denied 537 U.S. 820 (2002) (fees available where sufficient judicial oversight, and contrary language in Buckhannon is dictum) and T.D. v. LaGrange Sch. Dist. No. 102, 222 F.Supp.2d 1062 (N.D. Ill. 2002) (Buckhannon does not control for purposes of IDEA). Enacted in 1986, the attorneys’ fees provisions are found at 20 USC §§1415(i)(3)(B) (fees may be awarded to prevailing party), & (D)(ii) (no fees for attendance at IEP meeting unless meeting ordered by hearing officer or court). Parent support for the fees provision is strong. See, e.g., testimony before the National Council on Disability. NCD REP., supra note 23, at 128-30. On the other hand, critics claim the availability of fees has
organizations that do not charge a fee, there are issues of resource allocation to consider.

Part of the answer to this dilemma lies in encouraging more laypersons to master the procedures and develop substantive knowledge and skills. The peer advocate or peer counselor model has been urged in other legal services practices. "Collaboration tends to suggest that clients should turn to their peers for wisdom and support, and that each client can be a source of wisdom and support for others."62 One education advocate has recommended that a greater number of lay advocates, funded with public dollars, be trained and made available to children and youth with disabilities and their parents.63 These trained paraprofessionals would be knowledgeable, skilled and less costly than attorneys. Law schools should also be encouraged to offer paralegal courses for students interested in administrative agency representation, with course options in special education or other fields.64

C. DOING IN DUE PROCESS

Complaints about the so-called technical and burdensome requirements of IDEA usually include an attack on students’ extensive due process rights65 or over-reliance on the procedural nature of the school compliance

contributed to “needless adversariness” on both sides. See, e.g., Perry A. Zirkel, Over-Due Process Revisions for the Individuals with Disabilities Education Act, 55 MONT. L.REV. 403, 405, n.16 (1994) (citing commentary and federal court opinions) [hereinafter, Over-Due Process]. This article does not address the impact of the House bill amendment authorizing Governors to set a cap on fees for parents’ attorneys. H.R.1350, 108th Cong. § 615(i)(3)(B) (2003).

62. Louise G. Trubek & Jennifer J. Farnham, HOW TO CREATE AND SUSTAIN A SUCCESSFUL SOCIAL JUSTICE COLLABORATIVE, 24 Ctr. For Public Representation (2000). See also Trubek & Farnham, Multidisciplinary Practices, supra note 51, at 239 (describing integration of clients and former clients into program for access to services, on-going support and evaluation).

63. Lilliam Rangel-Diaz, Ensuring Access to the Legal System for Children and Youth with Disabilities in Special Education Disputes, 27 HUMAN RIGHTS 17, 21 (2000). Many of the tasks needed to provide legal protection for parents at special education draw on case management or paralegal skills and experience. See, e.g., the experience of a New Mexico project for at-risk families described in Trubek & Farnham, Multidisciplinary Practices, supra note 51, at 241. Sometimes the parent needs more support than actual advocacy. Id. at 243 (describing collaborative relationship of domestic violence survivors with counselors, victim advocates or other service providers).

64. Law schools should also provide their J.D. students with opportunities to become familiar with education disability laws and encourage the pursuit of expertise in this field. Rangel-Diaz, supra note 63, at 21. In addition, parents could inform the training of professionals by influencing curriculum at institutions of higher learning, including teaching “ways to empower parents to be strong and effective advocates for themselves.” Self-Advocacy Wkg. Grp., supra note 56, at 409.

65. For example, one ex-principal said to be sympathetic to IDEA complained of “the implementation of a law that has magnified the concept of due process to the point that it overshadows other school-based concerns, such as instruction and learning.” Zirkel, Over-Due Process, supra note 61, at 404 (citation omitted).
process. The criticism typically centers on the cost or utility of these procedures, particularly at the level of administrative hearings or litigation, but it may also emanate from “a strong resentment by educators of the parental right and power ... to challenge the educators’ professional judgment.”

It is easy to dismiss the criticism of procedural safeguards as rhetoric from harried or hostile school administrators, or the rehearsed dogma of anti-government conservatives. Nonetheless it must be acknowledged that the procedures have at times been adhered to in a pro forma or even burdensome manner — with no corresponding positive effect on a child’s educational objectives, school program or learning outcomes. Moreover there has been much rancor in the school conference rooms and administrative offices, not to mention the federal courthouses.

66. See infra text accompanying notes 172-73 regarding compliance complaint reforms. 67. See generally Zirkel, Over-Due Process, supra note 61 at 405-07 (citing legal specialists, parents and judicial officers). Popular belief notwithstanding, a recently released study by the U.S. General Accounting Office (GAO) shows that the actual number of due process hearings and state compliance complaints is small. SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (GAO-03-897) (Sept. 2003) [hereinafter, GAO STUDY]. Moreover, most hearings were concentrated in just a few states. Id. at 12-13. For a history and background description of the IDEA due process provisions, see Lanigan et al., supra note 60, at 213-20.


69. A progressive or leftist analysis might actually use the same words, in a slightly different context, to criticize “focusing more on compliance with the system’s regulations than on school accountability for student outcomes.” Zachary & olatoye, supra note 48, at 8.

70. IEP meetings have been described as “highly formal, non-interactive, and replete with educational jargon.” Kotler, supra note 68, at 364 (quoting William H. Clune & Mark H. Van Pelt, A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Analysis, LAW & CONTEMP. PROBS. (Winter 1985) at 33). See also, Steven Marchese, Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA, 53 Rutgers L.Rev. 333, 351 (2001) (“reality of IEP formulation may not be very collaborative” when parents receive little advance notice, lack substantive knowledge and objectivity and face school officials “often speaking to each other in technical terms.”).

71. It is also alleged that due process is used mainly for the benefit of educated, middle class parents. See, e.g., Terry Jean Seligmann, An IDEA Schools Can Use: Lessons from Special Education Legislation, 29 FORDHAM URB. L.J. 759, 779 nn.108-109, 781 nn.118-19 (2001). Even parents who have successfully utilized due process channels have expressed regret at having been “forced to resort to” this mechanism. See, e.g., NCD REP., supra note 23, at 121-26 (parent witness testifying: “Yes, due process protection does work, but the cost to families, emotionally, is not fair.”) Id. at 121.

72. See Gryphon & Salisbury, supra note 9, at 5 (“IDEA’s single worst feature is its propensity to turn would-be allies — parents and special educators — into the equivalent of fighting dogs ...”). For a particularly nightmarish rendition of due process run amok, see
the congressional intent that parents and school officials form a partnership, “it is not at all unusual or unexpected that parents become the adversary of the district, sometimes to the point of ‘irreconcilable differences’ . . . .”73 This is the sad reality, notwithstanding the existence of parent support centers and other ardent advocates, and written recipes for IEP team success.74

The reforms in this area are fairly modest. In an effort to elevate function over form, the House reauthorization bill provides that a due process hearing office decision must be based on a determination of whether a child receives a free, appropriate public education or FAPE75 — and presumably not on purely procedural grounds. The bill also calls for voluntary binding arbitration.76 Both chambers propose other changes in procedural safeguards, such as a mandatory 30-day cooling off period before filing for due process and a hearing limited to issues raised in the hearing notice.77 The Senate bill also has very broad exceptions to the rule that procedural violations alone do not warrant a finding that the district failed to provide FAPE78 and a statute of limitations of two years prior to the date of filing.79

Lanigan et al., supra note 60, at 220-25.
73. Perry A. Zirkel, A Special Education Case of Parental Hostility, 73 WEST’S EDUC. L. REP. 1, 9 (1992). The degree of parent hostility vis-à-vis the school district was at the heart of one appellate court’s examination of the impact of the parent-school relationship on the educational benefit analysis. Bd. of Educ. of Community Consolidated Schls. Dist. No. 21 v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991), cert. denied, 502 U.S. 1066 (1992). Fortunately, my own experience has been congenial more often than not. After my son’s last planning meeting adjourned, the team chair reportedly exclaimed that she did not know an IEP meeting could be “so much fun.” Interview with Aileen Alfandary, Berkeley, Cal. (Aug. 20, 2003).
74. See, e.g., Collaborative Teams manual published by the Maryland Coalition for Inclusive Education (1999) (copy on file with author). One of the prescriptions is to explicitly assign IEP team members the roles of facilitator, encourager, jargon buster, observer, etc. Id. at 5. See also, IEP TASK FORCE, supra note 46 for recommendations on IEP — and pre-IEP — roles and procedures.
76. H.R. 1350, 108th Cong. § 615(d)(2)(I) – (e)(2) (2003). There is no corresponding section in the Senate bill. The President’s Commission did recommend that parents enter into voluntary arbitration in order to resolve conflicts. PRES. COMM’N REP. supra note 12 at 35. This is one of the rare instances where the Commission and the National Council on Disability agreed. NCD REP., supra note 22, at 132 (“explore the possible use of binding arbitration” as an alternative to mediation or due process). Several years ago, frequent commentator Perry Zirkel, a professor of education and law, actually proposed that due process decisions be binding. Zirkel, Over-Due Process, supra note 61 at 409.
77. §§ 615(f)(1)(B)-(C); (f)(3)(B). The Senate bill, however, would allow the filing of a separate petition where an issue is not previously raised in the notice. Id.,§ 615(f)(1)(C).
78. The exceptions are for procedural violations that compromised the child’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the process or caused a deprivation of educational benefits. S. 1248, 108th Cong. § 615(f)(3)(F)(ii)(I)-(II) (2003). The first exception alone seems to swallow the rule.
The limitation on hearing office decisions — particularly the Senate version — is a reasonable one and has a solid jurisprudential foundation. Beginning with the Supreme Court’s first examination of IDEA in *Board of Education v. Rowley*, the federal courts almost uniformly have ruled that a failure to adhere to IDEA’s procedures is tantamount to failure to provide FAPE. While procedural error has not always resulted in a decision adverse to the school district, it is viewed as an infringement on the right of parents to be full participants in planning their child’s education. We must be prepared to use common sense — and extend good will — in determining whether procedural safeguards are violated.

Binding arbitration is not really an appealing endeavor, and may well lead to a lose-lose situation between home and school. Again, vigorous identification, evaluation or placement to one-year after the alleged violation. H.R. 1350, §615(b)(6)(B). The idea of a shorter statute of limitations was even advanced several years ago by a parents’ advocate. Zirkel, *Over-Due Process*, supra note 61, at 408.

80. 458 U.S. 176 (1982). The Court inferred that Congress attached the most importance to compliance with highly specific procedural safeguards to insure that “parents and guardians will not lack ardor” in making sure their children receive all the educational benefits to which they are entitled under IDEA). *Id.* at 205-06, 209. See generally Allan G. Osborne, Jr., *Parental Rights Under the IDEA*, 80 *West’s Educ. L. Rep.* 771, 776 (1993) (stating that “Congress intended parents to be equal partners in the development of appropriate educational programs for their children.”). See also, 20 USC §1415 & Sen. Comm. on Labor & Pub. Welf., S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975), in 1975 USCAAN 1425, 1435. Even outside the special education context, it is recognized that parents have “valuable knowledge and perspectives about their children’s development and that the “school-family alliance is essential to a successful educational experience.” James P. Comer, *Educational Accountability: A Shared Responsibility Between Parents and Schools*, 4 *Stanford L. & Pol’y Rev.* 113, 113 (1993). And yet, ardor or not, there are certain built-in inequities. The school district, for instance, will usually have more in-house experts “to fill the IEP record with opinions” to support their view, unless the parents obtain their own experts. Gryphon & Salisbury, *supra* note 9, at 5-6.

81. For example, the usually divergent Fourth Circuit and Ninth Circuit Court of Appeals, have both held that a school’s failure to notify parents of their rights under IDEA may result in a failure to deliver FAPE. *See, e.g.*, Hall v. Vance Co. Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), Bd. of Educ. of the Co. of Cabell v. Dienelt, 843 F.2d 813 (4th Cir. 1988) and Amanda J. v. Clark Co. Sch. Dist. 267 F.3d 877, 882 (9th Cir. 2001). *But see*, Ms. S. ex rel. G. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1136 (9th Cir. 2003) (procedural violations re meeting notice and other errors by administration not tantamount to denial of FAPE).

82. “[T]he pervasive Congressional insistence that parents be involved in decisions affecting the placement of their children is striking.” Kotler, *supra* note 68 at 361 (citation omitted). But, the author adds, this is “hardly surprising in light of the fact that the prime impetus for [special education] reform came from parent groups.” *Id.* at 162. Kotler, like me, believes his perspective on IDEA is “somewhat unique” as he is the parent of a youngster with a disability as well as a lawyer and law school teacher. *Id.* at 331-32. Unlike me, Professor Kotler was also a litigant in a federal court action contesting the appropriateness of his son’s placement. *Id.* at 331 n.2.

83. Even if one shies away from the “harmless error” analogy, it is useful to look at degrees of compliance. *See* text accompanying note 124 *infra* on consequences of “substantial” vs. “egregious” noncompliance.

84. Consultant Lynwood “Lyn” Beekman thinks differently. In a memorandum to the McGeorge School of Law Institute for Administrative Justice, the special education expert
advocacy will be necessary to advise parents against exercising this option. On the other hand, there has been a great deal of success with informal, non-arbitrated resolution of disputes that would otherwise go to a due process hearing. Other alternative dispute resolution (ADR) options also have the potential to operate in a non-adversarial fashion and can be utilized before reaching the request for due process hearing stage. Mediation and other forms of ADR could benefit from more creative experimentation. The Senate reauthorization bill does include language designed to ensure that states spend funds to establish and implement the

notes that binding arbitration should be a voluntary option, and the process could be developed between parties as the outgrowth of informal negotiations, mediation or settlement during hearing. Special Education Solutions, LLC, Review Report 4 (July 3, 2003) (on file with author). But, as the Institute's long-time administrator and hearing officer observed, if the parties are getting on well enough to have discussions about arbitration framework, they may not be candidates for binding arbitration. Comments of Ed Villmoare, Senior Hearing Officer, California Special Education Due Process Advisory Committee, San Rafael, California (Oct. 27, 2003).

85. Some commentators complain of the complexity and length of the appeals process. Gryphon & Salisbury, supra note 9, at 4. See also PRES. COMM’N REP. supra note 12, at 35.

86. 20 USC §1415(e); 34 CFR §300.506.

87. See Steven S. Goldberg & Dixie S. Huefner, Dispute Resolution in Special Education: An Introduction to Litigation Alternatives, 99 WEST’S EDUC. L. REP. 703 (1995); Peter J. Kuriloff & Steven S. Goldberg, Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings, 2 HARV. NEGOT. L. REV. 35 (1997); Andrea Shemberg, Mediation as an Alternative Method of Dispute Resolution for the IDEA: A Just Proposal?, 12 OHIO ST. J. ON DISP. RESOL. 739 (1997); Jonathan A. Beyer, A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby, 28 J. L. & EDUC. 37 (1999). But see Marchese, supra note 70, at 355 on some of the disadvantages of mediation (tendency for parent, who is dependent on the district, to compromise in the face of intransigence; enforcement may be less even-handed because statutory norms less likely to govern agreement). See also GAO STUDY, supra note 67, at 19-21 (parent-educator and other models of earlier and more localized interventions for dispute resolution).

88. In his press statement announcing the reauthorization principles, supra note 18, Secretary Paige referred to mediation being requested “any time during the dispute resolution process.” This is consistent with the presidential commission recommendation that states develop processes to avoid conflict and make mediation available, even if no hearing request is pending. PRES. COMM’N REP. supra note 12, at 35. See also e.g., Cal. Educ. Code §§56500.3, 56503 & proposed 56509 (S.B. 636 (2003) (vetoed)), available at http://www.leginfo.ca.gov/pub/bill/sen/sb-0601-650/sb_636_bill_20030603_amended_sei.. (Oct. 31, 2003), on incentives for increasing local ADR options. For a description of the experience in various states with mediation and other dispute resolution alternatives, see GAO STUDY, supra note 67, at 16-21.

89. Lyn Beckman, a former hearing officer and mediator, promotes a number of non-traditional, common-sense options, including a mutually designated “ready cop” to quickly resolve post-agreement disputes or a “God” to fact-find and make decisions for a limited time. Lyn Beckman, King Solomon Approach: Mediating Special Education Disputes, LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 8 (1999). Appointing a neutral facilitator to run an IEP meeting to change the environment is another ADR technique. Id. at 8. His skepticism about the power imbalance notwithstanding, Professor Marchese writes that “one of the strongest arguments in favor of mediation has been the ability of the parties to voice community values as part of the dispute resolution process.” Marchese, supra note 70, at 355.
mediation process required by the Act and assist parents in the areas of dispute resolution and due process; voluntary mediation; and the opportunity to resolve complaints.\textsuperscript{90} It will also be important that advocacy with ardor be provided potential clients whose claims could expire under either bill's statute of limitations proviso.

1. Waive It Away

Both the House and Senate bills contain provisions for mutually acceptable waivers of procedure by parents and school authorities. These include: jointly excusing any member of the IEP team from attending a given meeting;\textsuperscript{91} revising the education plan using written documents rather than reconvening everyone in person;\textsuperscript{92} and making changes to the plan by amendment, not redrafting the entire IEP. In addition, the school district is to encourage consolidation of IEP meetings.\textsuperscript{93} The House bill also has a proviso for a pilot program in ten states granting waivers of paperwork requirements.\textsuperscript{94}

In a recent national study, 53 percent of special education teachers reported that routine duties and paperwork interfered with their teaching to a great extent.\textsuperscript{95} The accuracy of this conclusion is less important than the teachers' perception of time spent on tasks that are marginal or irrelevant to their primary role of instruction. The same study found that these teachers spend over ten percent of their time — an average of five hours per week — on administrative duties and paperwork.\textsuperscript{96} Even when one excludes the time devoted to preparing IEPs and attending IEP meetings, the findings are a bit disturbing. For example, an average of four hours per month is spent printing or copying special education forms; two hours per month scheduling IEP meetings; one hour mailing notices to parents; and four hours is the monthly average time spent tracking paperwork from other

\textsuperscript{90} See text accompanying notes 50-51 \textit{supra}.
\textsuperscript{94} H.R. 1350, 108th Cong. § 617(e) (2003). The Secretary is authorized to grant waivers for up to four years to a maximum of ten states, based on proposals submitted by the states. The Senate bill does not have a parallel provision.
\textsuperscript{95} Elaine Carlson, \textit{et al.,} \textit{STUDY OF PERSONNEL NEEDS IN SPECIAL EDUCATION: FINAL REPORT OF THE PAPERWORK SUBSTUDY I} (U.S. DoEd, Office of Special Education Programs (OSEP) Contract #ED00CO0010) (Mar. 24, 2003) [hereinafter, SPENSE].
\textsuperscript{96} \textit{Id.} at 1, 5. See also \textit{PRES. COMMN. REP., supra} note 12, at 18. In her testimony before Congress, special education administrator Harriet Brown asserted that the paperwork has gotten even more extensive since the 1997 amendments and that school staff "must work after hours and at home just to keep up with the minimal requirements" of the law, to the point where the redundancy "cause[d] even the most dedicated person to omit essential elements." 2003 IDEA Hrg., \textit{supra} note 21.
The same national study found that the average special education teacher had only fifty minutes during the school day for paperwork or administrative duties, and half of them had no help from a paraprofessional, secretary or volunteer. "School staff often prefer not to voice their opinions about [the paperwork burden] for fear of being portrayed as unsympathetic or uncaring for the needs of students," according to a special education administrator testifying before Congress. The documentation and meeting process required by IDEA supposedly "has created a barrage of compliance-driven paperwork so overwhelming that special educators are driven to quit the profession." These figures do not include time expended on tasks that are administrative and non-instructional, but, arguably, professional and non-clerical - e.g., conducting initial or triennial evaluations, maintaining behavior logs, completing report cards or other progress reports, and time spent on transition planning.

Some of the legislative changes concerning paperwork will require the kind of ardent advocacy discussed above to ensure their implementation does not work to the detriment of students and families. As a parallel course, we must also encourage teachers in classrooms and the academy to promote best practices concerning such things as the conduct of meetings, the role of team members, the recording of goals and objectives and measuring student progress.

Other changes should be accepted and implemented sensibly. Several years ago, for instance, one district court made a distinction between the acceptable practice of presenting a draft IEP at a team meeting and staff developing an IEP and presenting it for parent signature without meaningful discussion of the child's needs. There is nothing particularly redeeming about group "wordsmithing." Moreover, the fact that goals

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97. SPENZE, supra note 95, at 5. Variation in job design explains in part why some teachers devote more, or less, time to certain tasks. For instance, some teachers are more involved in the assessment process or act as case managers for their students. SPENZE at 8. A California IEP task force recently recommended as "essential" the assignment of a case coordinator to a student to "facilitate and guide the IEP process and be a focal contact for the parents/guardians prior to, during, and following IEP meetings." IEP TASK FORCE, supra note 46, at 7.

98. SPENZE, supra note 95, at 9.


100. Gryphon & Salisbury, supra note 9, at 1. See also id. at 7 (citing federal study revealing excessive paperwork and meetings as two top reasons special educators left their jobs). One exasperated school employee testified before the National Council on Disability at a public hearing in Alaska: "Now I have to... start looking for ten pounds of paperwork because the kid was never assessed, never referred, and the parents were never informed." NCD REP., supra note 23, at 46.


102. Rosenbaum, When It's Not Apparent, supra note 14, 173 nn. 50-51 (describing ritual of team members seated on undersized furniture, group editing the IEP on carbonless pastel
and objectives are considered in advance of a meeting, or are derived from standardized lists or prior IEPs, does not convert the planning process from one that is collaborative and individualized to one that is authoritarian and off-the-shelf. Doing one's “homework” before and after meetings, and designating drafters or rapporteurs is a time-honored and efficient way of conducting business. This still allows plenty of room for group participation and collaboration.

As for who attends the meetings, and how many of them, the conventional advice about quality over quantity is solid. How many IEP meetings are routinely postponed because the district’s cast of thousands cannot possibly align their calendars? Is it better to hold up a high school meeting for the indifferent or resistant regular education teacher, or the clueless workability counselor, or instead to proceed with the participation of a knowledgeable therapist and a caring resource teacher? Even if one needs to send a stern message to the former, a gathering with the latter could be far more productive and meaningful.

A California IEP task force actually recommended in its 2003 report that laptop computers should be used at IEP meetings to streamline the process. Its other recommendations, ranging from clarifying team roles and assuring advance preparation to calling for case managers and training, would be just the kinds of innovations and desirable practices that a ten-state pilot project could encourage. The protection and advocacy systems’ umbrella organization has also called for minimizing the amount of effort school staff must devote to tasks other than direct services, such as paperwork and meetings, without jeopardizing students’ rights.

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103. Under current law, the IEP team is to be composed of at least one regular education teacher where a child is, or may be, participating in the regular educational environment. 20 USC §1414(d)(1)(B)(ii). Under the Senate amendment, the teacher, or other specialist, may be excused for all or part of a meeting, if the parent and district agree that attendance is not necessary. H.R. 1350, 108th Cong. § 614(d)(3)(D) (2003); S. 1248, 108th Cong. § 614(d)(1)(C) (2003). The Senate bill is more explicit on the reasons for nonattendance, viz. where there will be no discussion at the meeting of that team member’s area of expertise.

104. See Rosenbaum, When It’s Not Apparent, supra note 14, at 173 n.52 (citing Public Policy Professor Eugene Bardach on the inverse relationship between the number of attendees and IEP meaningfulness).

105. IEP TASK FORCE, supra note 46, at 12. See also H.R. REP. NO. 108-77, supra note 9 at 138 (encouraging use of computer programs, teleconferencing and video-conferencing). This will necessitate the early retirement — and not a century too soon — of those who delight in the role of medieval scribe or Gutenberg typesetter.

106. The Senate bill actually authorizes funding to train school personnel on how to participate in IEP meetings. S. 1248, 108th Cong. § 651 (2003).

D. SEPARATION ANXIETY

Ending separation in schools typically refers to the process of ensuring that children with disabilities are not segregated from their non-disabled classmates in special day classrooms, or separate campuses. The concept of least restrictive environment applies to the entire school day and extra-curricular activities. It is time to end the compartmentalization and fragmentation. Disabled students should be viewed as members of the general school community, just like other students.

What about the concept that all children in need of auxiliary services and supports are entitled to get them — including the many who do not meet the eligibility requirements under IDEA or Section 504, but nevertheless are in need of extra help in the academic or socio-emotional realm? Some will say it is heresy for a special education advocate to paraphrase the rather provocative and painful question put forth recently by a team of researchers: “Exactly what gives students with [disabilities] an entitlement to greater education resources than their peers who simply are slow learners and/or struggling for other reasons?”

However, there are dangers in too much of a merger: Badly-needed funds may be commingled, resources diluted and the focus on student achievement could be fuzzy or finessed. Yet administrators will more easily be able to enforce mandates that are aligned or integrated. Policymakers will be able to justify a more equitable allocation of scarce resources. And youth with disabilities will be truly viewed as individuals by their peers and teachers alike. In the words of one commentator, a “focus on the individual child’s needs, parental involvement, enforceable rights, and a range of services should be part of every school child’s life, not only those designated as ‘special.’” Taken to its logical conclusion,

108. See supra note 8 for background on the least restrictive environment concept. In its annual report for 2000, OSEP reported that 75% of children benefiting from special education receive services in a regular classroom for most or all of the day. Seligmann, supra note 71, at 772 n.76 (citing 2000 OSEP ANN. REP. pt III, at 4, Table III-1).

109. The conclusion of one administrator and former special education teacher, testifying before the House subcommittee examining IDEA reform, is as simple as it is elegant: “Students in special education are simply general education students receiving specialized support.” 2003 IDEA Hrg., supra note 21, at 7 (testimony of Dianne Talarico).

110. One commentator writes that available funds must be used in inclusive ways, not “playing a tug of war between ‘regular’ and . . . ‘special education kids.’” Seligmann, supra note 71, at 761.

111. The question was actually asked about students with specific learning disabilities, but has more general applicability. Finn et al., Conclusions and Principles for Reform, in FORDHAM FNDN. REP., supra note 25, at 345.

112. This is what is embodied in “No Child Left Behind” — the slogan, the philosophy and the law.

113. Supra note 71 (emphasis added). See also Rosenbaum, When It’s Not Apparent, supra note 14, at 161 n.12 (every child should have an individualized learning plan — “a mandate waiting to happen”). Another commentator suggests that parental decisionmaking may extend beyond one’s own child. Linda L. Schlueter, Parental Rights in the Twenty-
this suggests that all classrooms would be “transform[ed] . . . into places
where individualized teaching is the norm.”114 This is where the special
education community and general school reformers share an interest — a
better examination of outcomes for everyone.

Under the House bill, a school district would be permitted to use up to
20 percent of excess funds for other categorical programs for such purposes
as student achievement, literacy, teacher quality and school safety —
provided it first assures FAPE to all students.115 The Senate bill has a
similar provision.116 In addition, a district could use IDEA funds for “pre-
referral” reading and behavioral services for children not eligible under
IDEA, as well as case management117 and administrative costs, and
supplemental educational costs under the No Child Left Behind Act of
2001 (NCLB).118 While close monitoring is required to ensure funds are
not diverted from students in need, this kind of allocation is consistent with
the federal trend of targeting school-wide programs rather than student
subclasses.119 Given the fine line between students deemed disabled and
those who are at risk, or who narrowly miss an eligibility label, it also
makes sense to permit expenditures that benefit youngsters on both sides of
the dividing line. Early intervention strategies have long been recognized as
critical in addressing a child’s developmental delays and eliminating more
significant and costly interventions down the road.120

There are also some elements of the reauthorized IDEA that are
unequivocally worth celebrating no matter where one stands on the
political or pedagogical spectrum. These involve federal oversight of state
compliance with the law and funding for teacher and paraprofessional
preparation and training.

First Century: Parents as Full Partners in Education, 32 St. Mary’s L. J. 611, 626-33
(2001) (recounting the story of a group of parents who filed suit against a Texas school
district, under a state statute encouraging parental participation in creating and
implementing educational programs, because of the district’s failure to offer a traditional
math class).

114. Seligmann, supra note 71, at 765-6.
117. See supra text accompanying notes 96-97 for a discussion about time spent by special
education teachers in indirect tasks. One of my former law students, who worked full-time
as a special education teacher, viewed the conflict among team members as inevitable, but
potentially innovative. He also expressed a strong desire to streamline communication and
information sharing between the school and other agencies providing services to disabled
(paper on file with author).
119. See, e.g., Daniel Johnson, Comment, Putting the Cart Before the Horse: Parent
Involvement in the Improving America’s Schools Act, 85 Cal. L. Rev. 1757, 1767-68
(1997) (discussing the evolution of Title I funding allocations).
120. See 20 U.S.C. § 1431(a) (2000) (congressional findings of “urgent and substantial
need” to enhance development of infants and toddlers and reduce social costs).
E. A FOCUS ON MONITORING

In a sweeping departure from the existing law, both houses of Congress have set out a detailed scheme for monitoring compliance and enforcement. The centerpiece is "focused monitoring." Its aim is to improve "educational results and functional outcomes," with particular attention to providing FAPE in the least restrictive environment, transition services, state supervision of complaint resolution and overrepresentation of racial and ethnic minorities through inappropriate policies and practices. In his review, the Secretary of Education is to rely primarily on student performance on state assessments — including alternate assessments, and dropout rates and graduation rates, as well as local and state compliance plans developed by the states. There is a complex scheme of graduated sanctions, based on standards such as "lack of satisfactory progress" for two consecutive years, "substantial noncompliance" and "egregious noncompliance." Early stages of noncompliance typically result in corrective action plans. When a district fails to correct, additional actions are available, e.g., fund recovery, withholding funds or suspension of payments and referral to the Department of Justice.

The National Council on Disability addressed the important subject of oversight extensively in its most recent special education report. It noted that under the 1997 IDEA amendments, with their emphasis on results, states were to establish performance goals and indicators to report on student progress. The NCD has also lamented the lack of a federal complaint system, which distinguishes IDEA from every other U.S. civil rights law. Furthermore, the Council found that under the current system, parents and other stakeholders were not adequately involved in the Department of Education’s on-site investigations or monitoring. The reauthorization offers a more explicit means of enforcement, as the department’s current practice of placing "special conditions" on new state grants has been criticized as politicized. While seemingly limited to certain performance indicators, the new provisions have the potential to remedy some of the NCD criticisms about lack of focus or unclear standards for determining whether noncompliance is systemic.

The President’s Commission on Excellence in Special Education also

122. S. 1248, 108th Cong. §§ 602(32), 616(a)(3), (b) (2003). The relevant sections in both bills are virtually identical in numbering.
123. Id., § 616(b).
124. Id., § 616(c).
126. Id. at 41, 62, 70-71. The Council also criticized the Department for its recent linguistic shift from federal control and enforcement ("administration" and "monitoring") to a more nebulous role of "assisting" and "review." Id. at 180-81.
made recommendations — but of a very different nature127 — as did the Fordham Foundation/Progressive Policy Institute. The latter report contains a detailed critique of the Department of Education status quo, which it terms a traditional compliance-based model, with the 1997 new regime of results-based accountability “merely grafted” onto the pre-existing approach.128 One of the more modest compliance alternatives Fordham recommends is “smart regulation.” While regulators can still verify that parties are following basic norms of behavior and impose sanctions where necessary under this alternative, they may “deploy a broader range of tools” that have a free market tinge. This might include forging voluntary agreements, using information to encourage good behavior, addressing underlying causes of noncompliance, and replacing procedural controls with after-the-fact checks.129

The student and parent advocacy community should give serious consideration to urging implementation of some of the proposals — whether at the state or federal level — that move beyond the typical compliance model. The framework laid out in the two IDEA bills could allow for this kind of experimentation.

F. BECOMING MORE PROFESSIONAL

Both the House and Senate bills include findings about, and funding for, preparation of teachers, paraprofessionals and other school personnel and their continued development.130 It is obvious to the advocacy community that more funds for training teachers and instructional aides is essential to improving outcomes for disabled students.131 Everyone can cite

127. See PRES. COMM’N REP., supra note 12, at 11-16. The report is not in all respects predictable. It does recite the mantra that the focus should be on results over process and the paperwork burden should be reduced. But, it also recommends timely issuance of monitoring reports — as does the NCD, NCD REP. 2000, supra note 23, at 360 — and that OSEP’s technical assistance role be separated from its enforcement role.

128. See Patrick J. Wolf & Bryan C. Hassel, Effectiveness and Accountability, in FORDHAM FNDN. REP., supra note 25 at 309. The “process-focus and procedural-documentation components” of the traditional model are laid out in great detail. Id. at 53-75. One non-public school director commented to researchers Wolf and Hassel: “The amount of paper we generate for accountability purposes to the county and state is enormous . . . . But I don’t know if it’s effective because I have no idea . . . what they’re using it for, you know what I mean?” Id. at 61. Most administrators know exactly what he means.

129. Id. at 311-17. More radical departures from the present scheme are described. Id. at 317-20. Policy analysts Gryphon and Salisbury also lambaste the focus on procedural compliance, not outcomes, and the credence the federal courts have given to this approach. Supra note 9, at 6-7. But, they respond with a call for de-regulation, state opt-out of IDEA and private school vouchers. Id. at 14-15. This classically conservative menu was not served up by the congressional drafters of an IDEA reauthorization.


131. See, e.g., NAPAS, Position Paper on Reauthorization, supra note 107, at 5-6. See also Talking Points on IDEA Reauthorization issued by the Council for Exceptional
statistics and anecdotes on the shortage of qualified teachers and the need for recruitment and retention. In a striking illustration of system dysfunction, one parent of a California high school student essentially assumed the duties of the personnel department, as she asked local special education teacher training professors for the names of their graduating students, helped to set up interviews and closely monitored the offer and acceptance process in a deficit-ridden district with high teacher turnover. Even with this unusual level of parent involvement, one candidate accepted a position elsewhere when she did not hear back from the district (the would-be teacher's first choice). The district staff, meanwhile, believed it had conveyed an offer to her.

The two bills recognize the importance of high quality, comprehensive professional development programs, models of development, continued support, comprehensive research and technical assistance and training. Both bills introduce the term "highly qualified" into the IDEA's prescription for instructional personnel at all levels, and they link it to the definition used in the Elementary and Secondary Education Act, the forerunner to the NCLB. Under the proposed IDEA legislation, grants are made available by the Secretary to state education agencies for a host of training, development and research activities for instructional personnel and administrators in special education — and in regular education.

There are other changes in the reauthorized IDEA. For example, there are provisions for more early intervention and research, services for students transitioning from high school, experimentation with vouchers and the disciplinary provisions which gut the current IDEA protections. Of course, one would welcome any increases in federal funding — as Congress has never come through with even the partial funding it promised.
at the time it enacted the precursor to IDEA. With or without additional funds, it seems the 108th Congress will leave its mark on IDEA in a myriad of ways. It is important, nonetheless, to look beyond this statute at complementary legislation and local policies and practice.

IV. BEHIND NO CHILD LEFT BEHIND

Given all the hype about aligning IDEA with the No Child Left Behind Act of 2001, it is time for special education advocates to know more about this statute. NCLB is a product of the standards-based reform movement and has a lot of currency among policy-makers and politicians otherwise opposed to the federal government’s meddling in education and other matters of local control. The Act is itself a reauthorization of federal legislation — the Elementary and Secondary Education Act of 1965, whose passage marked the federal government’s foray into major policymaking for local schools. Beginning with the 2003-04 school year, various under-achieving schools across the nation must implement plans to improve their performance. At the same time, districts must offer certain students supplemental educational services and the choice to transfer out of a school that has not demonstrated “adequate yearly progress” (AYP) for two consecutive years.

Much has been — and remains to be — said about whether this Act can ever accomplish its lofty goals, within or outside the prescribed timelines. Similarly, the debate over standards-based teaching and testing rages on.

139. See, e.g., Finn et al., Conclusions and Principles of Reform, in FORDHAM FNDN. REP., supra note 25, at v (“Washington’s well-known tendencies to over-regulate, over-manage, and make more complex.”). See also Anne P. Dupré, Disability, Deference, and the Integrity of the Academic Enterprise, 32 GEORGIA L.REV. 393 (1998) (lack of deference given by federal judiciary to elementary and secondary school educators).

140. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in various sections of title 20 of the U.S. Code). From the vantage point of the disability community, it might be said about No Child Left Behind that many people know the “title of the song,” but not “all the verses.”

141. The previous amendment to the Elementary and Secondary School Education Act (ESEA) was the Improving America’s Schools Act of 1994, 20 USC § 6319 et seq., the foundation on which NCLB is built. One of the aims of the 1994 amendment was to apply “challenging academic achievement standards” and “high quality, yearly assessments” to Title I students, who were perceived as receiving a second-class education due to lowered academic expectations. See 20 USC § 6311(b)(3); H.R. REP. No. 103-425, 3-5 (1994). From its inception, ESEA’s Title I has provided federal funding to schools serving children from low-income families in about 90% of the nation’s school districts. See Johnson, supra note 119, at 1767.


143. While I laud the theory underlying NCLB and urge advocates to rely on its mandate for students with disabilities, this should not be mistaken for naïveté or an all-out endorsement of the Act. For a particularly harsh critique, see Gerald W. Bracey, NCLB - A Plan for the Destruction of Public Education: Just Say "NO!" (Feb. 2003), “No Child Left
Nevertheless, it is hard to disagree with the goals of NCLB: closing the achievement gap between high- and low-achieving students, including those who are economically disadvantaged, have limited English proficiency, have disabilities, are migratory, are residing in institutions for dependent or delinquent youth, or are members of other “at-risk” groups.

If it is truly working, this law would permit educators and parents to tailor their instructional approaches to individual students who are not making progress under the standardized curriculum — for a variety of reasons. It would put an end to the processing and hoop jumping that students and their families now endure in order to get labels which improve their chances of getting the attention and support they need. Moreover, the fact is that No Child Left Behind is the law of the land, and IDEA as we know it is itself likely to get left behind. It behooves special education advocates to work hard to enforce those NCLB mandates that are helpful to students with disabilities and to be vigilant about implementation of more ambiguous provisions, because this is “the game everyone is now playing.”

How does NCLB benefit disabled students? First, it sets high achievement standards for all students, including those with a physical or mental impairment. The 1997 amendments to IDEA began the shift from “access to education” to “improving results,” although the reality does not necessarily match the rhetoric. NCLB has the potential to prove a stronger incentive than the IDEA amendments to align student IEP goals and objectives with the content standards of the state’s general education content. Advocates should insist upon this. This is particularly important in light of the elimination of short-term objectives and


144. The chair of the House Subcommittee on Education Reform specifically noted that one of the great benefits of NCLB was to raise expectations and hold school districts accountable for the progress of all students, including those with disabilities. 2003 IDEA Hrg., supra note 21, at 2 (opening statement of Rep. Michael N. Castle).

145. 20 USC § 6301; Improving the Academic Achievement of the Disadvantaged, 67 FED. REG. 71, 712 (Dec. 2, 2002) (to be codified at 34 C.F.R. § 200). Note that IDEA exempts from the definition of disability those learning problems due to “environmental, cultural or economic disadvantage” or social maladjustment in the absence of emotional disturbance. 34 CFR § 300.7(C)(4)-(10)(ii) (2002).

146. One witness before the House subcommittee examining the implementation IDEA put it this way: “I believe the success of the No Child Left Behind Act and the reauthorization of IDEA are intricately woven together . . .” 2003 IDEA Hrg., supra note 21, at 7 (testimony of Dianne Talarico).


148. Id. at 709, 720.

149. With this in mind, a recently convened state IEP task force declared that the educational plan “must be based on state curriculum standards and connected to statewide assessment and accountability.” IEP TASK FORCE, supra note 46, at 8.
benchmarks under IDEA.\textsuperscript{150}

NCLB also bolsters the right of special needs students to participate in the general curriculum by requiring that the same grade-level academic content standards apply to all students. This reinforces IDEA's requirement that students with disabilities be involved, and make progress, in the general education curriculum.\textsuperscript{151} The potential is great for improving the integration of disabled students in regular classrooms, beyond social opportunities. As one advocacy organization observed, the “[i]nclusive classrooms are designed to facilitate every student’s active participation in learning...”\textsuperscript{152} Advocates must be vigilant, however, against moves to re-segregate students through tracking or assigning independent seatwork, rather than attempting multi-level curriculum and instruction in heterogeneous classrooms.\textsuperscript{153}

Advocates must also ensure that students with disabilities are being provided the testing accommodations and adaptations that are required by NCLB. Some students will take the same tests as their non-disabled peers, with or without accommodations or modifications.\textsuperscript{154} Others will take an alternative assessment that measures the same grade-level achievement standards as their peers.\textsuperscript{155} Those who meet the definition of a student with a “significant cognitive disability”\textsuperscript{156} will take an alternative assessment based on alternative achievement standards. For IDEA-eligible students, each student’s IEP determines the necessary accommodations and adaptations.

Under certain circumstances, students with disabilities are eligible for

\textsuperscript{150} Pres. Comm’n Rep., supra note 12, at 11, 17; See also supra text accompanying notes 12-14 & 32-36.

\textsuperscript{151} See text supra accompanying notes 8, 108, 122, regarding LRE placement.

\textsuperscript{152} Southern Disability Law Center, supra note 142, at 8.

\textsuperscript{153} Id.; This kind of classroom configuration could be the result of pressures to do well on annual tests as schools resort to a “‘drill and kill’. ..strategy that may produce competent test-takers at the expense of real learning.” Id. at 7; See also, Lief, supra note 147, at 716-17 (bridging tension between disabled students’ education in regular classroom environment and their measured performance in meeting standards); See also Pres. Comm’n Rep., supra note 12, at 35-37 (suggesting that states must set high expectations for pupils with disabilities on state assessments and measure and report on rates of LRE).

\textsuperscript{154} Southern Disability Law Center, supra note 142, at 27.

\textsuperscript{155} See Lief, supra note 147, at 720-21 (proposing separate reporting of achievement for students labeled disabled and non-disabled); See also Pres. Comm’n Rep., supra note 12, at 21, 35-36 (recommending universal design of tools to assess student progress and disaggregated reporting of disabled student achievement).

\textsuperscript{156} See proposed 34 C.F.R. §200.1(d)(2) (those “identified as students with disabilities under the [IDEA] and whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean.”) 68 Fed. Reg. 13, 801 (Mar. 20, 2003). While the final NCLB regulations do not contain a definition for students with “the most significant cognitive disabilities,” they do permit states to develop different academic achievement standards. These must still be aligned with a given state’s academic content standards and “reflect professional judgment of the highest learning standards possible for these students.” Southern Disability Law Center, supra note 142, at 85.
“supplemental educational services.” Beginning in school year 2003-04, low-income students in schools that fail to demonstrate AYP for three consecutive years must be provided supplemental services, with specific achievement goals and a timeline for reaching those goals. Even with the restriction that this category of service is available only after a school’s demonstrated academic failure, and only to children from poorer families, it will undoubtedly reach a number of children enrolled in special education. These students could use these services to augment their IEPs — or compensate for IEPs that have not been fully implemented. While supplemental service providers need not adhere to a student’s IEP or §504 plan per se, they must enter into agreements with the school district and parents that describe the student’s specific achievement goals, how progress will be measured and the timeline for improving achievement. Furthermore, they are subject to ADA requirements to make reasonable modifications to their policies, practices and procedures for students with disabilities.  

Also beginning with the 2003-04 school year, those schools failing to demonstrate adequate yearly progress must develop school improvement plans. This must be done in consultation with parents, among others. It is important that parents of disabled students participate in the development of these plans. Lastly, NCLB sets standards for teachers and paraprofessionals that could be an improvement over current state standards for special education teachers and aides. By 2005-06, all teachers teaching core academic standards must be “highly qualified” — i.e., have at least a bachelor’s degree and meet other requirements. Paraprofessionals who teach in Title I programs are also subject to new qualifications. Moreover, parents are entitled to obtain the information

157. 20 U.S.C. § 6316(e) (2000); 34 C.F.R. §§ 200.47(a)(3), 200.47(b)(2)(iii) (2003); See also Southern Disability Law Center, supra note 142, at 77, 88; The Council for Exceptional Children (CEC) has criticized the proposed regulations for suggesting a disability accommodations standard that is weaker than that under the IDEA and §504. Letter from CEC to Acting Director, Student Achievement & Accountability Programs, U.S. Dep’t of Educ. at 4 (Sept. 5, 2002), available at http://www.cec.sped.org/pp/resources.html; Southern Disability Center, supra note 142, at 89 (requiring that when providers are unable to provide accommodations or modifications, the school district must do so). But see, NAPAS, Comments on Proposed NCLB Regulations (Sept. 5, 2002) (praising Department for requirement that supplemental educational service providers take account of students with disabilities and their IEPs).


160. 20 U.S.C. § 6319 (2000); 34 C.F.R. §200.55 (2003). Funding for teachers and paraprofessionals can be combined with ESEA Title II professional development funds. 20 U.S.C. §§ 6601-6676 (2000); See text accompanying supra notes 130-37, on professional staff training and preparation provisions of the IDEA reauthorization bills; See also IEP TASK FORCE, supra note 46, at 21 (recommending development of two year degree program for paraprofessionals to help meet NCLB requirements, increase effectiveness for students
regarding the instructional staff's professional qualifications — something that is routinely sought by parents of disabled students, and frequently withheld.

V. OUTSIDE OF IT ALL

In addition to continuous and concentrated "micro-advocacy" on behalf of individual students and their daily educational needs, and mining the NCLB for all that it has to offer in the disability context, it is also important for family members, advocates and other supporters of disabled students to engage in "macro-advocacy" at their schools, in their districts and at the state and federal level. This is to ensure that favorable policies and practices are adopted and that quality personnel are in place to implement them.

Parental group advocacy has played a significant role in the enactment and reauthorization of special education laws. In contrast with other federal education policy, parents have been the catalyst in seeing that schools address the needs of students with disabilities. Initially this was a movement led by middle-class, white parents. Eventually, parents of color and of limited English proficiency joined in, although sometimes because they protested the classification of their children as disabled — which they viewed as racist — or because they perceived the special education placements or services as ineffectual. Anecdotal evidence suggests that parental divisions remain along lines of race, language and class. The perception is that more affluent and better educated parents are able to obtain better quality placements and services for their children.

with disabilities and be a source of potential special education teachers).
162. Some readers may relate better to “Thinking Outside the Box.” However, as that phrase has now been appropriated by the disability and educational establishment, inter alia, I aim to go somewhere beyond that space.
163. Kotler, supra note 82, at 162. In contrast, ESEA, Title I legislation has typically contained provisions to promote various forms of parental involvement, but parents have not been the driving force behind the bills.
164. See Kotler, supra note 68, at 362 (citation omitted); “Race plays a powerful role in the placement of children in special education.” Matthew Ladner & Christopher Hammons, Special but Unequal: Race and Special Education, in FORDHAM FNDN. REP., supra note 25, at 107-08; PRES. COMM’N REP., supra note 12, at 3 (minority children are over-represented in some eligibility categories); See also 20 USC §1400(c)(8) (2000); See proposed IDEA findings of H.R. 1350, 108th Cong. §601(c)(9) (2003); See also S. 1248, 108th Cong. §601(c)(10) (2003) (mislabeling and over-identification of minority children in special education).
165. Along with some sister protection and advocacy systems, California’s PAI is dedicated to increasing the diversity of its clientele and the cultural competency of its staff. PAI Advocacy Services Plan, 2003-2008 at 11 & 16-17 (2003), at http://www.pai-ca.org/pubs/540201.pdf. See also Seligmann, supra note 71, at 759 nn. 108-09, 772-73 nn.118-119 (noting misidentification and tracking of students of color and tendency to place in traditional special education classrooms).
A. THE LOCAL FOCUS

One obvious form of involvement is sitting on a special education advisory committee or a NCLB council. Of course, these are both dependent on the school administration for their infrastructure and agenda, with no independent power to make decisions or allocate funds. As such, they have the potential for silencing parents, polarizing, and diverting attention from issues of funding or quality services, or otherwise co-opting parents. Nonetheless, if parents inhabit these institutions with a critical mass they can achieve some tangible results. And, if mindful of the limitations, parents will know when to look beyond these forums to obtain outcomes not achievable through advisory committee membership.

One model worth exploring is the Oakland Unified School District Community Advisory Committee (CAC). Unlike many of its counterparts across the state, this committee has managed to attract leaders who are active and feisty, and who can at once mobilize other parents and interact cordially with the administration. Like other school committees, it grapples with issues of when to confront and when to collaborate. Its tactics might include: speaking at board of education meetings, having a tête-à-tête with a key administrator or policymaker, rounding up parents and students through phone trees, and keeping constituents abreast through e-mail lists. It could also initiate letter-writing campaigns, or such

166. These limitations in school parent organizing are noted in Zachary & olatoye, supra note 48, at 6.
167. Two classic pitfalls are where a policy-making body can paralyze the administrative leaders or the administrators use the body to rubber stamp decisions. Comer, supra note 80, at 118; See Johnson, supra note 119, at 1760-66, 1777-91 (reviewing of the literature and a commentary on the effectiveness of parental involvement in decisionmaking, as opposed to other forms of home-school interaction); The author distinguishes between a model of parent enablement and one of empowerment. In general terms, the former seeks to change behavior of the person and the latter seeks to change an institution. See also Zachary & olatoye, supra note 48, at Foreword (contrasting the traditional parent involvement model with the community-organizing model, which “talks unabashedly about building power and changing the culture of schools”).
169. Its former long-time chair is now a colleague at PAI, but not everyone would cheer a move from community activist to professional advocate.
170. “Tactics that have regularly proven successful in a particular context are not guaranteed to work under other circumstances; even objectively foolish strategies have achieved their desired ends. Tactical activists must therefore be open to creativity, innovation, and provocative, controversial, or even dubious ideas.” RANDY SHAW, THE ACTIVIST’S HANDBOOK 274 (1996). Mr. Shaw goes on to urge “proceeding proactively and consciously analyzing tactics and strategies...” Id. at 275. While I eschew the ubiquitously uttered “proactive” (what is wrong with just active or affirmative?), the respected attorney-activist’s point is well taken.
171. But, beware of what I call “grievance overkill,’ viz., the labored-over, single-spaced letter of four pages dispatched to the superintendent, with copies to each board of education
“mass actions” as urging simultaneous requests to convene IEP teams, file compliance complaints or due process hearing requests, or initiate contacts with the print or broadcast media. These tactics can also be used to supplement a litigation strategy or, better yet, in lieu of litigation. On its “best behavior” days, the CAC could also be the vehicle for encouraging local board policies and administrative and classroom practices concerning the processes and standards that have been written out of the national special education legislation.

In a recent battle with a newly appointed superintendent — imposed during a state takeover of the financially failing district — and following the firing of a beloved special education director, the Oakland CAC managed to energize the masses for meetings in public spaces and to huddle with smaller groups in living rooms. Some parents are actually members of the Committee and others have formed ad hoc affinity groups to tackle a variety of special education-related concerns. In this way, certain positions adopted by the official body are played off those assumed by the “outside” parent activists. The latter group can afford to be more confrontational, or otherwise unconventional, allowing the public body to appear more moderate or reasonable.

Yet it is always difficult to sustain parent interest and to distinguish between actions that are appropriate at a district or school level, and those that belong to an individual planning team. There are also risks that the concerted activity will end up in schisms and unproductive and harmful antagonisms, both internally and externally. Administrators will have

172. Successful organizing has been accomplished through the use of “media activism” in which members of a particular community are involved in the development and implementation of a media plan. ROBERT BRAY, SPIN WORKS!: A MEDIA GUIDE FOR COMMUNICATING VALUES AND SHAPING OPINION 2 & 38-84 (2000); See generally RANDY SHAW, RECLAIMING AMERICA 251-287 (1999) (mobilizing strategies through media and internet); See also Michael S. Wald, Comment: Moving Forward, Some Thoughts on Strategies, 21 BERKELEY J. EMP. & LAB. L. 473, 475 (2000) (noting that media strategy has to be part of any mobilization effort to shape public opinion on the disability rights movement).

173. Usually, the first thing parents want to do is file a lawsuit. But, this can be problematic. See Rosenbaum, When It’s Not Apparent, supra note 14, at 188-92, for other organizing illustrations and at 167-71, for a discussion of the limits of litigation in the special education context. Several years ago, researchers in one case study of special education placements noted that the “general consensus among legal advocates was that while some [court] cases had been resolved at the individual level, it was more difficult to use the judicial system to promote lasting systemic changes.” Susan Brody Hasazi & Katharine Furney, A National Study of the Implementation of LRE Policy: Seaview Case Study, Univ. of Vermont Dep’t of Special Educ. (draft 1993) (on file with author).

174. Apart from the dynamics of the organization itself, Dr. Comer writes about the “blaming, fragmentation, duplication of effort, and frustration” that can take place amongst parents, teachers and administrators when there is no structure to allow for mutual understanding and addressing of needs. Comer, supra note 80, at 117.
their own principled, or strategic, perspective on these issues.  

Above all, group leaders and other core members need to be focused on a few issues, save their energy, and avoid burn out. The traditional organizing criteria are: “[I]s the issue concrete, specific, urgent and winnable?” Also, a group must make choices about where to focus and not reach out to other parents before the core members “bolster their own understanding.” Finally, we must be charitable toward fellow parents and recognize that other things are going on in life — primarily a life that involves a disabled child.

Related to the need for organizing and mobilizing is the necessity of building alliances with other organizations that are not involved exclusively in special education or matters affecting persons with disabilities. Most organizers would agree that there is unity in numbers and more can be accomplished both long- and short-term if different interest groups unite around issues of common concern. In the schools context, there are a host of constituencies who could potentially form coalitions: parents of other subordinated or marginalized students. These include students of color; immigrants; speakers of English as a second language; gay, lesbian, bisexual and transgender youth; students from families with incomes below the poverty level; and under-achieving students. In some instances, it will be important to “triangulate the situation” by allying with a community group outside the school that has organizing and political skills.

It is also important to bring in more mainstream elements of the greater school community to understand the unique features of special education — for example, inclusive classrooms, private school placements. Although I disagree with the extent to which parents of non-disabled children should have a role in the decisionmaking, it is laudable to “...promote candid, open dialogue on all aspects of the inclusion policy.”

175. For instance, administrators do not like it when parents talk to each other. “Parents may get too much information” was the response of one Bay Area special education director to the innocuous request from a student teacher that the parents of middle school full inclusion students greet parents of incoming students at the school’s open house. Interview with Monica Novack (April 3, 2001).
177. Id. The authors’ analysis is based on organizing in a poor, minority community school and has particular resonance for that constituency. But the analysis is no less valid for other schools-oriented parent campaigns.
178. See Rosenbaum, When It’s Not Apparent, supra note 14, at 180 nn.69-70.
180. Professor Wald suggests that in creating “a new social vision” for the disability rights movement the search for allies must be even broader and should include women, gays and lesbians, poor people, labor and business. Wald, supra note 172, at 475; See Rosenbaum, When It’s Not Apparent, supra note 14, at 193-94, for other examples of alliance-building.
182. Rebell & Hughes, supra note 8, at 568; The authors also cite sociological research confirming that “when citizens are engaged in thinking about the whole, they find their
What ultimately makes for success? According to one advocate: “One is if there are parents who are pushing it, really, really pushing it. T[wo] if there are legal advocates who are helping them really push it . . . and the third thing is someone . . . in the district who sort of sees the handwriting on the wall . . . It really is a combination. Somebody inside and people outside, in our experience, making it happen.”

B. BUILDING IT STATEWIDE

Concerted parent activity can also take place in a broader, geographic or public policy context. This happens with formal coordination and networking among groups. These groups have the potential for keeping parents informed and united and even for restoring, at the district or state level, some of the provisions cut out of a reauthorized IDEA.

Organizations may develop common goals and resources and share published education and advocacy materials. One example is the Maryland Education Advocacy Coalition (EAC). The EAC’s activities evolved over time. At its inception, it filed comments on proposed regulations and then on proposed legislation. Eventually, it began to initiate legislation and actively participate in the legislative and regulatory process through written and oral testimony, monitoring of bills and the enforcement process.

The membership procedures are loose, with no protocols for approving new members. It is usually at the discretion of the chair. If there is a potential conflict, the Coalition discusses it. For example, a decision was made not to allow special education advisory committees to join because these committees include school system employees. A decision was also made not to include a non-public school director as a member.

The Coalition began to meet quarterly with the state special education director to raise systemic issues such as high stakes testing, problems in interpreting least restrictive environment, and the need for a statewide IEP. Subgroups have met as necessary. When the LRE issue became critical, five members formed a subgroup to address it. EAC has become recognized as an advocacy entity and is asked to participate in the development of regulations and other state education agency policy conceptions of their interests broadened, and their commitment to the search for common good deepens.” Id. (quoting ROBERT N. BELLAH ET AL., THE GOOD SOCIETY 135 (1991)).

Hasazi & Furney, supra note 173, (draft at 28).


Leslie Seid Margolis, Maryland Disability Law Center, Baltimore, Organizing and Maintaining An Advocacy Coalition: Maryland’s Education Advocacy Coalition For Students With Disabilities, NAPAS Annual Training Conference (May 28-31, 2003). The discussion here is based on written materials and oral comments made by Ms. Seid Margolis at the conference.

This may be one of those instances where the ad hoc advisory committee members or affiliates, see text supra accompanying notes 169-74, need to form a new non-district-sponsored organization.
With respect to information, even though many documents are available through public sources, copies of these documents are generally distributed to all members and people on the mailing list. This clearinghouse function ensures that everyone truly has access to the same information. Copies of any EAC-generated documents are also shared, as are proposed regulations, technical assistance bulletins and other state department of education, documents, conference announcements, etc.

EAC has gained credibility as it has grown. Its very diverse membership includes the National Foundation of the Blind, which does not usually participate in coalitions. There is strength in numbers and in diversity, although it can be unwieldy and difficult to manage. Differing opinions may result in taking positions that are not as forceful as some members would like. Still, individual member organizations are free to comment separately on initiatives or policy — in addition to, or in lieu of, signing on to Coalition documents. Despite differences of opinion on some issues, there is a remarkable amount of consensus, sometimes with delicate negotiations over a single word.

Another example of this kind of group advocacy is the Quality Education Coalition (QEC), Wisconsin’s coalition of parents, educators and advocates, who work together to improve the quality of special education in Wisconsin on a systemic basis. QEC has recently tried to influence the state budget process, at a time of great fiscal austerity. The Coalition worked on two bills to improve transition programming (at no additional cost) and one bill to limit the use of seclusion and restraints in schools (also at no additional cost). Like the Maryland group, QEC holds regular meetings with state education officials and the Governor’s office. It also participates in the Wisconsin Special Education Stakeholders monthly meetings where teachers, school administrators, and school board members meet to share collective concerns.

The Education Law Task Force is supported by the 30-year-old Massachusetts Advocates for Children (MAC). Unlike the Maryland and Wisconsin organizations, MAC’s focus is across the educational spectrum — the needs of children who are vulnerable because of poverty, race, limited English or disabilities. MAC is also a staffed, private non-profit organization that resembles more of a traditional legal services...

187. Written materials and other information was provided by Jeff Spitzer-Resnick, Quality Education Coalition (QEC) Chair, Madison, Wisconsin at the NAPAS Annual Training Conference (May 28-31, 2003), available at http://www.wcdd.org/dawn/specialed/QEC_Brochure.cfm.

organization, but its turf is statewide and among its broad range of strategies it directs much attention to coalition building and parent empowerment.

MAC has close relations with parent, community and religious groups and provides training, technical assistance, informational materials and legal assistance. The task force encourages attorneys to ask coalition members to weigh in prior to filing class actions or impact cases that can affect everyone's work. Sometimes someone will have better facts or a reason why the case could hurt more than help. Its efforts have led to the hiring of diverse staff, teacher training, reduced class size and increased parent participation in the Boston public schools.\textsuperscript{189}

What are some of the lessons learned about coalitions?\textsuperscript{190} These are straightforward, derived from experience and common sense. Start reasonably small. Decide if the coalition will be diverse, or if members will be required to share a common position. Get a small group of people together and learn to work with each other and then expand slowly.\textsuperscript{191} Identify one or two issues of significance in the state; too many issues will make it hard to focus the coalition's efforts at the beginning. Begin with issues for which there is broad-based agreement among group members. This will help group members develop strong working relationships. Set up a structure for decisionmaking.

Designate a chair and determine if the chair will rotate or remain fixed. Meetings should be short and to the point. Maintain minutes of meetings. Technology should also be used to stay in touch with members and prospective members. They may not come to every meeting, but they will respond in a crisis. Bring in speakers on topics of common interest.\textsuperscript{192}

Develop a letterhead for the coalition and decide if members' names and affiliations should be listed.\textsuperscript{193} Ensure that the coalition contains a core group of people who are willing to work. The EAC has functioned much more effectively over the last few years because more members are willing to share the work. Recognize that coalitions require work to maintain and one needs to make a commitment to ensure longevity.\textsuperscript{194}

These are some of the basic maxims. Experienced organizers caution against the tendency for community-based organizations to become service

\textsuperscript{189} Id.
\textsuperscript{190} Summary of comments made by Ms. Seid Margolis, supra note 184; E-mail from S. Cole, supra note 188.
\textsuperscript{191} Accord, Zachary & olatoye, supra note 48, at 10.
\textsuperscript{192} E-mail from S. Cole, supra note 188; Cole adds that the contact database should be disaggregated according to legislative districts in order to more efficiently direct member input and action. Id.
\textsuperscript{193} The EAC has discussed this issue on several occasions. Ultimately, a decision was made not to list individual members because not all organizations sign on to every document. Id.
\textsuperscript{194} Id.
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bureaucracies or, in their zeal to monitor compliance, to fall into the trap of mirroring the dysfunction of the larger monitoring system. These organizations have the potential to implement IDEA as it is amended and No Child Left Behind, and promote best pedagogical practices, so that the new legislation has the most favorable impact on students with disabilities.

C. NOT THE END

Advocating for students with disabilities is a challenge under any legal regime and administrative structure. To witness the IDEA being stripped of ideal language is particularly hard to bear for those who fought for the inclusion of specific text or who ply their trade by making that text into some young person's educational reality.

Nevertheless, it must be remembered that even the old text was not adhered to in numerous schools, or was perfunctorily applied in others. It is the job of advocates to transcend the periodic amendments and sail above shifting political winds. No matter how Congress votes this session to amend the Individuals with Disabilities Education Act, there is a foundation of statutes, case law, best practices, organizing strategies and common sense on which we can mount an ardent campaign for improving the future of youths with disabilities.

195. Shaw, RECLAIMING AMERICA, supra note 172, at 229-41.
196. Zachary & olatoye, supra note 48, at 8; See also text accompanying notes 121-29 supra on compliance monitoring.