

Out of Sight, Out of Mind: Rural Special Education and the Limitations of the IDEA

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In 1975, the Individuals with Disabilities Education Act (IDEA) established a substantive right to “free appropriate public education” (FAPE) for children with special needs. Since that time, the right to FAPE has primarily been defined by — and enforced through — the IDEA’s robust set of procedural safeguards and avenues for private enforcement. However, the Act’s emphasis on procedure over substance has prevented the realization of meaningful educational programming for a significant number of special needs students. This Note illustrates the fundamental tension between the IDEA’s substantive and procedural goals by contrasting the legislative and judicial vision of the IDEA with the current state of special education in rural public schools.

Part II gives a general overview of frameworks for policy implementation. Part III provides a background in the evolution of special education law, with a focus on the role that courts have played in the development of special education policy. Part IV argues against the IDEA’s proceduralist approach by demonstrating how this approach fails to account for the challenges faced by rural students at every stage of the special education process, including eligibility for special education, the formulation and enforcement of individualized education plans, and the provision of feasible alternatives to students’ initial public school placement. Finally, Part V argues that the current framework for the provision of special education should be modified to include more effective means for enforcing students’ rights and should incorporate the “inclusive schools” approach, which allows for a more substantive, collaborative, and holistic approach to providing FAPE.

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I. INTRODUCTION

In 2017, the Supreme Court handed down the most important decision on special education law of the last thirty-five years. The decision, *Endrew F. v. Douglas County School District RE-1*,¹ dramatically redefined the standard for the substantive adequacy of education for special needs students. The unanimous Court held that the Individuals with Disabilities Education Act (IDEA) requires schools to provide special needs students with educational programming that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances[.]”² and that gives “every child . . . the chance to meet challenging objectives.”³ *Endrew F.* marked a significant departure from the standard the Court previously had articulated in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*.⁴ In *Rowley*, the Court held that special needs students had a right only to educational programming that provided a “basic floor of opportunity[.]”⁵ More specifically, the *Rowley* decision established that special education programming had to confer only “some educational benefit”⁶ to be substantively adequate, a standard that many courts, including the Tenth Circuit in *Endrew F.*, interpreted as “merely . . . more than *de minimis*” services.⁷

Disability advocates hail the *Endrew F.* decision as a major step forward in the fight to secure meaningful educational opportunities for students with special needs.⁸ But without a dramatic shift in the current framework for the provision of special education, the promise of *Endrew F.* will likely go unfulfilled for special needs

1. 137 S. Ct. 988 (2017).

2. *Id.* at 1001.

3. *Id.* at 1000.

4. 458 U.S. 176 (1982).

5. *Id.* at 200.

6. *Id.* (emphasis added).

7. See *Endrew F. ex rel. v. Douglas Cnty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338 (10th Cir. 2015) (“This circuit has long subscribed to the *Rowley* Court’s ‘some educational benefit’ language in defining a FAPE and interpreted it to mean that the educational benefit mandated by IDEA must merely be ‘more than *de minimis*.’”) (citation and internal quotation marks omitted).

8. See Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/> [https://perma.cc/98HK-4GGS]. See also Terry Jean Seligmann, *Flags on the Play: The Supreme Court Takes the Field to Enforce the Rights of Students with Disabilities*, 46 J.L. & EDUC. 479, 479–81 (2017).

students in under-resourced schools. This is especially true for special needs students living in rural areas, as rural families and schools are particularly ill-equipped to overcome the fundamental flaws in federal special education policy. These flaws are that (1) the families of students with special needs do not have the institutional knowledge or resources to act as effective advocates for their child's unique needs, and (2) public schools are either unwilling or unable to provide truly individualized programming.⁹

Andrew F. assumes these flaws away by characterizing current special education practices in a way that is more aspirational than realistic. According to the Court, the current process for the development and implementation of individualized education plans (IEPs)¹⁰ for students with special needs “ensures that parents and school representatives will fully air their respective opinions” regarding student progress, such that “[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement” and “offer [] cogent and responsive explanation[s] for their decisions.”¹¹ Yet high barriers to effective private

9. See COUNCIL OF PARENT ATT'YS & ADVOCs., INC., THE INDIVIDUALS WITH DISABILITY EDUCATION ACT: IMPACT AND RELEVANCE TO 6 MILLION STUDENTS WITH DISABILITIES 4–5, 7 (2018), https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2018_Documents/COPAA_IDEA_Brief3-1-18.pdf [<https://perma.cc/K34C-SBUD>] (“For parents who have had to fight for their child to receive even the most basic of services, whose child’s annual IEP goals remain stagnant from year to year, or who know their child is not being held to high expectations, this new standard upholds both the purpose and promise of IDEA. . . . However, for many, the gap between the promise and the reality are still far too great. . . . Families need to have access to the full spectrum of tools and processes available under the law to assure their child those rights. Schools need to have available full funding and resources necessary to ensure each child has the opportunity to succeed.”) (emphasis omitted).

10. The IEP is essentially a “road map” for a special needs student’s educational programming that includes (1) “a statement of the child’s present levels of academic achievement and functional performance[]”; (2) “a statement of measurable annual academic and functional goals[]”; (3) “a statement of the special education and related services and supplementary aids and services to be provided[]”; and (4) if necessary, “an explanation for why the child will not participate with nondisabled children” in a general education setting. THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUC. LAW 109–10 (3d ed. 2008).

11. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1001–02 (2017) (“The [IDEA] vests [school] officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”) (citations omitted).

enforcement¹² alongside a dearth of qualified personnel and appropriate services and supports in public schools¹³ have meant that the “challenging objectives”¹⁴ and meaningful progress ostensibly required by *Endrew F.* are often neither pushed for nor provided. The Court’s failure to acknowledge this reality has rendered *Endrew F.* a largely hollow victory for special needs students and their families.

The significance of the Court’s mandate in *Endrew F.* and the possibility that the IDEA may soon be reauthorized for the first time since 2004¹⁵ make this an opportune time to reexamine the ways in which the current special education system fails families and schools without the resources to achieve its substantive aims or to benefit from its procedural safeguards. This Note does so by focusing on the provision of special education in rural schools, where socioeconomic and geographic barriers combine to create a significant gap between the IDEA’s promise and its practical implementation.

The IDEA requires rural schools, like others, to provide special needs students with a free appropriate public education (FAPE) in the least restrictive environment (LRE) at public expense.¹⁶ Meeting this requirement obliges rural schools to comply with statutory procedures intended to identify students with special needs and ensure that they are provided with appropriate services.¹⁷ Despite the significant amount of resources necessary to provide the kinds of programming and professional supports required to meet these objectives, Congress has never fully funded the IDEA.¹⁸ While many problems in rural special education can be traced back to a

12. See *infra* Parts III.B, IV.B.

13. See *infra* Parts III.C, IV.B, IV.C.

14. *Endrew F.*, 137 S. Ct. at 1000.

15. On April 10, 2019, the Department of Education released a notice soliciting comments on data collection regarding state and local implementation of the IDEA. According to the notice, the data collection is intended to “inform the next reauthorization of IDEA. . . .” Individuals with Disabilities Education Act (IDEA) State and Local Implementation Study 2019, 84 Fed. Reg. 15204, 15205 (Apr. 15, 2019).

16. 20 U.S.C. §§ 1412(a)(1)(A), (a)(5)(A) (2018).

17. 20 U.S.C. § 1414 (2018).

18. “The Federal Government’s failure to meet its promised funding obligation has stressed many state and local budgets to the point where many districts routinely struggle to meet student needs. In 1975, Congress promised to cover 40 percent of the average cost to educate a child with disabilities. Congress later amended the law to say that the Federal Government would pay a ‘maximum’ of 40 percent of per-pupil costs. Today, the Federal Government pays less than half of what it originally promised in 1975.” NAT’L COUNCIL ON DISABILITY, BROKEN PROMISES: THE UNDERFUNDING OF IDEA 1 (2018), https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf [<https://perma.cc/P7PU-Z3RW>].

lack of adequate funding, the proceduralist nature of the IDEA as well as the overall legalization of the special education system create obstacles to the provision of appropriate special education in rural schools that funding alone cannot fix.

The IDEA is a fundamentally proceduralist piece of legislation in that it establishes a set of legalized¹⁹ rights for parents seeking to challenge the adequacy of their child's special education programming, yet does little to define what such programming must look like — and what goals it must achieve — in order to provide FAPE.²⁰ Rather, the IDEA “simply requires the development of an [IEP] for each student with a disability and then imposes a series of administrative and judicial devices for resolving disputes about the content and implementation of a student's IEP.”²¹ It is certainly true that substantive goals and supports must look different for every child if programming is to be truly individualized. But the IDEA's prioritization of adherence to procedural requirements in determining IEP adequacy has allowed procedural compliance to act as a shield for substantively deficient outcomes.²² This “excessive focus on process over substance”²³ has been at the center of critiques of the IDEA since it was passed into law, and is especially

19. Legalization refers to a method of “giv[ing] substance to a policy objective[]” that places responsibility on individuals to enforce their rights through legal means such as written agreements and litigation or court-like proceedings. David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW. & CONTEMP. PROBS. 63, 65 (1985); see also *infra* Part II.

20. Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121 (Joshua M. Dunn & Martin R. West eds., 2009) (discussing the right to FAPE in the context of the Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142 (1975) (amended 1990), the predecessor legislation to the IDEA).

21. *Id.*

22. Concededly, no education plan, no matter how well-designed or implemented, can guarantee that a child will succeed as hoped for or expected. *Cf.* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 992 (2017) (noting that planning an appropriate program “requires a prospective judgment by school officials[]”). However, to satisfy the FAPE requirement, the goals included in a student's IEP must still be “ambitious” and uniquely tailored to the student's current needs and individual potential. *Id.* Despite this requirement, schools often treat an IEP as more of a “form document,” *id.* at 999, carrying over goals and objectives from year to year and using the existence of the IEP itself as evidence that a student is receiving FAPE. *Cf. id.* at 1000 (“The school district protests that these provisions impose only procedural requirements — a checklist of items that the IEP must address — not a substantive standard enforceable in court.”) (citation omitted); see also *infra* Part IV.B. In these instances, even if school districts can demonstrate that they have met the basic procedural requirements of the IDEA, students lose the opportunity to realize their individual potential, thereby depriving them of even the *likelihood* of greater academic success.

23. Bagenstos, *supra* note 20, at 122.

harmful where external factors — such as barriers to parent participation and a lack of adequate funding for appropriate and individualized programming — are likely to cause the process to break down. As critics of the IDEA have observed from the time of its passage almost fifty years ago, “the tragic irony is that the letter of the law has become the principle barrier to achieving the spirit of the law. . . .”²⁴

This Note proceeds in four parts. Part II provides a brief overview of general frameworks for the implementation of public policy, with a focus on the concepts of legalization and proceduralism. Part III discusses the history and structure of the IDEA and emphasizes the role that court decisions and private enforcement have played in the development of special education law and policy. Part IV highlights how the IDEA’s highly procedural and legalistic approach to special education fails students with special needs in rural schools, particularly in determining special education eligibility and providing appropriate programming and supports. Finally, Part V presents the inclusive schools model²⁵ as an alternative approach to the IDEA’s emphasis on procedure over substance and the continued legalization of special education.

II. GENERAL FRAMEWORKS FOR POLICY IMPLEMENTATION

In policymaking, “conceptualization shapes response.”²⁶ That is, the way a particular policy problem is framed often affects how it will be resolved.²⁷ In education policy, rights of special needs students have long been framed in due process terms.²⁸ This has fostered an overreliance on adversarial arbitration for the

24. Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, 61 HARV. EDUC. REV. 148, 149 (1991) (citations omitted).

25. See *infra* Part V.B. The “inclusive schools” model deemphasizes the use of strict categorization and legal enforcement mechanisms in favor of “a form of school governance aimed at assisting educators in working with all students regardless of perceived or diagnosed abilities.” Ani B. Satz, *Disability, Vulnerability, and Fragmented Protections: Accessing Education, Work, and Health Care*, in RIGHTING EDUCATION WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 265, 288 (Arlene S. Kanter & Beth A. Ferri eds., 2013).

26. David L. Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, 34 WORLD POL. 137, 137 (1982).

27. See *id.*

28. See Neal & Kirp, *supra* note 19, at 67–68 (“The means adopted for effecting . . . change [in the treatment of disabled students] were distinctively legal. The language of rights and the mechanisms of due process were introduced into an area that had previously relied on the professional discretion of teachers, psychologists, and school administrators.”). For a history of the lawsuits brought in the context of special education reform, see *id.* at 67–70.

enforcement of FAPE.²⁹ Unfortunately, this highly legalized means of dispute resolution is responsible for many of the IDEA's failings.

Legal and policy scholars have outlined four general methods for addressing policy issues: professionalization, politicization, bureaucratization, and legalization.³⁰ The professional model defers resolution of policy problems to subject matter experts.³¹ The political model primarily relies on bargaining between interest groups.³² The bureaucratic model depends on accountability through regulatory control.³³ The legalization model, by contrast, transfers the responsibility of achieving a particular policy goal to individuals, who enforce their rights through “the employment of legal techniques such as written agreements and court-like procedures to enforce and protect rights.”³⁴ The use of the legalization model for rights enforcement and the achievement of policy objectives is grounded in the assumption that individuals — not government agencies or organizations — are in the best position to protect their own interests.³⁵ While these methods of policy implementation are not mutually exclusive,³⁶ an emphasis on one model over another for the achievement of a particular policy objective can significantly impact the policy landscape as a whole.³⁷

The highly individualized nature of the legal model favors a procedural rather than substantive approach to policy

29. See Chris Borreca, *The Litigious Mess of Special Education*, ATLANTIC (May 1, 2012), <https://www.theatlantic.com/national/archive/2012/05/the-litigious-mess-of-special-education/256541/> [<https://perma.cc/9GVV-PP42>] (“Because IDEA and its counterpart statutes were considered civil rights laws, Congress included in them due-process mechanisms allowing for private causes of action to enforce their provisions.” As a result, the IDEA is one of “the most litigated federal statutes in existence.”).

30. Kirp, *supra* note 26, at 138.

31. *Id.* at 137–38.

32. *Id.* at 138.

33. *Id.* at 138.

34. Neal & Kirp, *supra* note 19, at 65. In the special education context, these procedures include opportunities for mediation, 20 U.S.C. § 1415(e) (2018), and administrative hearings in front of an impartial hearing officer, *id.* § 1415(f), the ability to appeal hearing decisions to the State, *id.* § 1415(g), and, as a last resort, the right to bring a civil action in state or federal court, *id.* § 1415(i)(2).

35. See Neal & Kirp, *supra* note 19, at 65.

36. For example, while the IDEA relies on a legalized approach to enforcing students' rights and resolving disputes between families and schools, the IDEA itself emerged from the political process, and federal, state, and local educational agencies — as well as educators and medical professionals — are highly involved in its implementation. See *infra* Part III.

37. See Kirp, *supra* note 26, at 139 (explaining that policy frameworks “matter a great deal,” because they “determine what will be provided, by whom, and on what terms[]”).

development and implementation. In theory, the establishment of procedural requirements and protections rather than clearly defined substantive guarantees facilitates a more flexible and personalized consideration of what particular individuals are entitled to receive.³⁸ Yet this emphasis on procedure also risks allowing process to overshadow substance — a risk that has become a reality in the context of special education.³⁹

The legal model presents other problems that are particularly prevalent in special education policy. While legalization creates procedural mechanisms that empower individuals to enforce their rights, enforcement “is too often dependent on access to resources.”⁴⁰ Courts are often inaccessible to individuals without the necessary financial means or institutional knowledge. Accordingly, those without income or education have a much harder time mounting successful legal challenges when their rights are infringed.⁴¹ Further, because litigation in American courts is inherently adversarial, legalization can lead to defensiveness, delay, and hostility between parties, impeding productive collaboration.⁴² Finally, the legal model’s focus on individual rights also makes it ill-suited to address systemic problems and institute broad reform.⁴³

38. Cf. Neal & Kirp, *supra* note 19, at 67 (noting that legalization gives individuals a greater “opportunity to have input on the substance of the right”). The Supreme Court endorsed this approach in *Rowley*, writing that “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of . . . a substantive standard[.]” based upon the “conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of [the] substantive content of [special education].” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205–06 (1982) (citation omitted).

39. See Neal & Kirp, *supra* note 19, at 83 (observing that “strict compliance with procedures [can serve] as a means of avoiding review of the substance[.]”); see also *infra* Part III.

40. Neal & Kirp, *supra* note 19, at 82.

41. For a broad overview of the limitations of legalization, see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974). For a discussion on barriers to private enforcement in the special education context, see generally Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011) (providing an in-depth treatment of the pitfalls of the IDEA’s private enforcement mechanisms). See also Erin Phillips, Note, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1821 (2008) (discussing the IDEA’s problematic assumption that parents have the knowledge and resources to act as effective advocates on their child’s behalf).

42. Neal & Kirp, *supra* note 19, at 82.

43. See, e.g., *id.* at 86 (noting that “systemic problems . . . may be missed by the individualized nature” of the IDEA’s private enforcement mechanisms).

Given the drawbacks of the legal model for the implementation of sound special education policy and the enforcement of students' rights, it is important to recognize that legalization was — and is — not the only plausible approach to ensuring access to adequate special education services.⁴⁴ Rather, the legalization of the special education system emerged from the use of litigation in the disability rights movement of the 1960s and 70s, which secured rights for special needs students by casting them in due process terms.⁴⁵ While this strategy undoubtedly benefited special needs students who had previously been marginalized within the education system,⁴⁶ the legal model no longer furthers the substantive goals this litigation was intended to achieve.

III. FEDERAL SPECIAL EDUCATION LAW AND ITS IMPLEMENTATION

This Part traces the emergence of the IDEA from the disability rights movement and the impediments it has created in the provision of appropriate special education services and supports. Part III.A summarizes the history of the IDEA and outlines its procedural requirements and protections. Part III.B provides an overview of the evolution of the FAPE requirement and the impact of Supreme Court decisions on private enforcement of the IDEA. Part III.C explains how public special education is funded at the federal and state levels and outlines the impact of funding mechanisms on student identification and placement.

44. Indeed, other countries have developed strong special education systems within more professionalized or bureaucratic frameworks, as will be discussed *infra* Part V.

45. See *supra* note 28; cf. Neal & Kirp, *supra* note 19, at 68 (“The language of rights and the mechanisms of due process were introduced in an area that had previously relied on the professional discretion of teachers, psychologists, and school administrators.”).

46. In 1970, “[t]wo million handicapped children between 7 and 17 years of age were not enrolled in school. . . . Many were excluded by state laws, . . . which designated them as ineducable or untrainable. Other handicapped children were consigned to institutions offering only custodial care.” Neal & Kirp, *supra* note 19, at 67. This exclusion led to a significant number of federal court challenges that resulted in injunctions preventing state educational agencies from denying special needs children public education. See *id.* at 69; see also, e.g., Pa. Ass’n for Retarded Child. (PARC) v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972) (requiring Pennsylvania to provide every special needs child access to a free public program of education and training appropriate to his or her learning capabilities).

A. THE HISTORY AND STRUCTURE OF THE IDEA

In 1975, Congress enacted the Education for All Handicapped Children Act, renamed in 1990 the Individuals with Disabilities Education Act (IDEA — the acronym used herein to refer to both Acts) to assure equal educational opportunities for children with disabilities.⁴⁷ Before the IDEA, school systems regularly denied children with disabilities access to meaningful public education — or to any public education at all.⁴⁸ This situation began to change after disability rights advocates successfully pushed federal courts to interpret the Fourteenth Amendment to guarantee a right to public education for all children with disabilities, primarily through a series of lawsuits brought in the wake of *Brown v. Board of Education*.⁴⁹ Many of the principles included in the IDEA originated in the consent decrees and educational plans developed in these lawsuits.⁵⁰ Within a decade of the IDEA's adoption, all fifty states had agreed to implement the Act's substantive and procedural requirements in exchange for federal special education funding.⁵¹ Currently, fourteen percent of all public school students in

47. *The Right to Education*, DISABILITY JUSTICE, <https://disabilityjustice.org/right-to-education/> [https://perma.cc/E6KU-R8FE] (last visited Oct. 13, 2020).

48. According to a House Report on the passage of the EACHA, prior to the passage of the statute students with disabilities “were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 179 (1982) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

49. 347 U.S. 483 (1954). *Brown's* rejection of the “separate but equal” doctrine in the context of public education “provided the constitutional foundation for parents of children with disabilities and disability rights activists to press for equal educational opportunities for all children, including those with developmental and other disabilities.” *The Right to Education*, *supra* note 47. The two most influential special education cases were *PARC*, 343 F. Supp. 279, and *Mills v. D.C. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). The courts in both *PARC* and *Mills* applied *Brown* to find that “education was essential to enable a child to function in society and that *all* children can benefit from education. They applied the equal protection and due process guarantees of the Fifth and Fourteenth Amendments to furnish this important right to handicapped students.” H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 30 (1990).

50. See, e.g., *PARC*, 343 F. Supp. 279, which “included the right to a free appropriate public education, individualized education planning, notice of proposed changes in educational programming, and other due process procedures, including formal due process hearings[,]” all of which “[found] their national application four years later in IDEA.” GUERNSEY & KLARE, *supra* note 10, at 5.

51. GUERNSEY & KLARE, *supra* note 10, at 6.

the United States, or approximately seven million students, receive special education services under the IDEA.⁵²

In exchange for federal funds,⁵³ the IDEA requires states to ensure that all children with disabilities residing in the state are afforded a free appropriate public education⁵⁴ by means of an individualized education plan⁵⁵ in the least restrictive environment.⁵⁶ Once a local educational agency (LEA)⁵⁷ identifies a child as eligible for special education services, the IDEA requires the LEA to develop an IEP outlining the child's current levels of academic and functional performance, a set of measurable annual goals, and the special education services and aids the LEA will provide to achieve those goals.⁵⁸ The LEA must develop the IEP with the input of the child's parents, at least one special education teacher, at least one general education teacher if the child is or could be educated in a general education classroom, and a representative from the school district.⁵⁹ The IDEA also requires LEAs to review IEPs on an annual basis.⁶⁰ The IDEA's LRE requirement encourages LEAs to educate students with disabilities in the general education classroom to the greatest extent possible⁶¹ and to place them in self-

52. *Children and Youth with Disabilities*, NAT'L CTR. FOR EDUC. STAT. (last updated May 2020), https://nces.ed.gov/programs/coe/indicator_cgg.asp [<https://perma.cc/4WAV-RZAP>].

53. 20 U.S.C. § 1411(a) (2018). Under the IDEA, participating states may receive up to 40 percent of the average per-pupil expenditure in public elementary schools and secondary schools, multiplied by the number of students identified as requiring special education and related services. As discussed *infra*, one of the major challenges for states in the implementation of the IDEA is the fact that Congress has never fully funded the statute. Currently, federal funding for IDEA only accounts for approximately sixteen percent of special education costs. See NAT'L COUNCIL ON DISABILITY, *supra* note 18, at 20.

54. 20 U.S.C. § 1412(a)(1)(A). The substantive requirements of FAPE are discussed *infra* Part III.B.

55. 20 U.S.C. § 1412(a)(4).

56. 20 U.S.C. § 1412(a)(5). The IDEA's LRE provision requires that "[t]o the maximum extent appropriate, children with disabilities[] . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A).

57. Most of the time, the LEA will be the child's local school district. See GUERNSEY & KLARE, *supra* note 10, at 111. For clarity, this Note will refer to LEAs as school districts unless otherwise noted.

58. 20 U.S.C. § 1414(d)(1)(A).

59. 20 U.S.C. § 1414(d)(1)(B).

60. 20 U.S.C. § 1414(d)(3).

61. 20 U.S.C. § 1412(a)(5). The IDEA's LRE provision requires that "[t]o the maximum extent appropriate, children with disabilities[] . . . are educated with children who are not disabled[.]" 20 U.S.C. § 1412(a)(5)(A).

contained classrooms⁶² or alternative placements only when the nature of their disability so requires.⁶³

To ensure that states meet their obligation to offer an appropriate education to all students with special needs, the IDEA includes a “Child Find” provision that requires states to identify, locate, and evaluate all children known or suspected to have a disability.⁶⁴ Most students identified for special education services in the United States are classified under “soft” eligibility categories⁶⁵ such as learning disabilities (LD).⁶⁶ The IDEA provides only general definitions for these more subjective classifications,⁶⁷ and the law in general “is quite open-ended in directing school districts whom to diagnose . . . what diagnostic procedures to follow . . .

62. “A self-contained classroom typically consists of five to ten special education students and is led by a special education teacher or paraeducator[.]” Josh Cowin, Note, *Is That Appropriate?: Clarifying the IDEA’s Free Appropriate Public Education Standard Post-Andrew F.*, 113 NW. U. L. REV. 587, 595 n.37 (2018).

63. See 20 U.S.C. § 1412(a)(5)(A) (“[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment [should occur] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”).

64. 20 U.S.C. § 1412(3)(A). Child Find requires that “[a]ll children with disabilities residing in a State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.” *Id.* The categories of disability covered under the IDEA include “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities[.]” 20 U.S.C. § 1401(3)(A).

65. The term “soft” is used here to describe more mild disability classifications under the IDEA as well as those that are heavily based on subjective determinations by educators and evaluators rather than more objective medical diagnoses. See, e.g., Anastasios Karagiannis, Abstract, *Soft Disability in Schools: Assisting or Confining At Risk Children and Youth?*, 34 J. EDUC. THOUGHT 113, 113 (2000) (“Soft disability includes the categories of specific learning disabilities (LD), speech and language impairments (SLI), emotional and behavioral disorders (EBD), and mild mental retardation (MMR).”).

66. LD is the most frequently applied classification for students considered eligible for services under the IDEA. In the 2017–18 school year, thirty-three percent of special education students were identified under LD. See NAT’L CTR. FOR EDUC. STAT., *supra* note 52.

67. For example, the IDEA “defines . . . specific learning disabilities as psychological processing disorders that interfere with one’s ability to perform a number of learning tasks; these disorders cannot be the result of physical disabilities or the result of mental retardation, emotional disturbance, or environmental or socioeconomic factors.” MARK KELLMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 5 (1997); see also 34 C.F.R. § 300.8(c)(10) (2020). The challenge of excluding environmental and socioeconomic factors in eligibility determinations is discussed in Part IV.A, *infra*.

[and] how to educate those who have been diagnosed.”⁶⁸ As a result, “[s]pecial education identification practices vary widely across and within states and school districts” and depend upon different “school finance environments and state accountability frameworks.”⁶⁹ These differences can lead to significant disparities in the number of students identified⁷⁰ and the kinds of services they receive,⁷¹ a problem discussed in greater detail in Part III.C.

The backbone of the IDEA⁷² is “a host of private enforcement mechanisms, from administrative hearings to lawsuits, as well as a system of public enforcement through federal and state agencies.”⁷³ While the IDEA also requires federal⁷⁴ and state⁷⁵ monitoring to ensure LEA compliance with the statute’s requirements, disability rights advocates and other observers convincingly characterize these procedures as under-resourced, unresponsive, and ineffective.⁷⁶ Further, agency oversight addresses only procedural compliance — that steps are taken to identify students with disabilities and provide them with IEPs — but “[n]o public actor is tasked with reviewing on its own initiative the substance of individual children’s IEPs[,]”⁷⁷ that is, the adequacy and effectiveness

68. KELLMAN & LESTER, *supra* note 67, at 67 (discussing federal law in the context of LD eligibility requirements).

69. Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS (Sept. 20, 2017) (citing Amanda L. Sullivan & Aydin Bal, *Disproportionality in Special Education: Effects of Individual and School Variables on Disability Risk*, 79 EXCEPTIONAL CHILD. 479 (2013); Elizabeth Dhuey & Stephen Lipscomb, *Funding Special Education by Capitation: Evidence from State Finance Reform*, 6 EDUC. FIN. & POL’Y 316 (2011)), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/> [<https://perma.cc/3NY7-36FJ>].

70. See FRONTLINE RSCH. & LEARNING INST., CROSSING THE LINE: EXPLORING EQUITY IN SPECIAL EDUCATION ACROSS THE UNITED STATES 7 (2017), https://www.frontlineinstitute.com/uploads/2018/01/Frontline_Education_2017_Special_Ed_Report_Part1.pdf [<https://perma.cc/KQ2D-WSAD>] (“[V]ariation among the states’ classification rates has much to do with how states define and implement due process procedures and identify students with special needs versus the true population that actually exists.”).

71. See, e.g., Allison Zimmer, Note, *Solving the IDEA Puzzle: Building a Better Special Education Development Process Through* Andrew F., 93 N.Y.U. L. REV. 1015, 1023 (2018) (“A student’s classification plays a large role in the resulting program and goals developed for the child, but there are limited guidelines or standards determining how schools should be selecting a classification.”) (citation omitted).

72. See generally 20 U.S.C. § 1415 (2018).

73. Pasachoff, *supra* note 41, at 1417; see generally *id.* at 1420–24.

74. 20 U.S.C. §§ 1416(a)–(d).

75. 20 U.S.C. § 1412(a)(11).

76. See generally NAT’L COUNCIL ON DISABILITY, FEDERAL MONITORING AND ENFORCEMENT OF IDEA COMPLIANCE (2018), <https://ncd.gov/publications/2018/individuals-disabilities-education-act-report-series-5-report-briefs> [<https://perma.cc/TD9Z-QTNX>].

77. Pasachoff, *supra* note 41, at 1422.

of the services that are intended to provide students with FAPE. The IDEA conceives of the IEP as the result of meaningful collaboration between parents and schools regarding identification, placement, and services.⁷⁸ But when disagreements cannot be resolved through informal means, the school has the final say, unless the parents resort to the IDEA's slow and costly private enforcement mechanisms to ensure that their child is receiving FAPE.⁷⁹

The IDEA provides three avenues for addressing individual complaints. Parents may (1) file a written complaint with the state educational agency (SEA);⁸⁰ (2) request mediation of disputes with the school district;⁸¹ or (3) file a due process complaint before an administrative hearing officer⁸² whose decision can then be appealed to a court.⁸³ Although SEA complaints could act as powerful compliance tools,⁸⁴ procedures for resolving these complaints vary widely among the states,⁸⁵ and the process is underutilized.⁸⁶ Mediation requests have increased in recent years,⁸⁷ and the process is often touted as a less costly and more productive alternative to litigation.⁸⁸ Nevertheless, families may resist it because there

78. For example, IEP teams are required to consider “the concerns of . . . parents for enhancing the education of their child.” 20 U.S.C. § 1414(d)(3)(A)(ii); *see also* Honing v. Doe, 484 U.S. 305, 311 (1988) (“Congress repeatedly emphasized throughout the Act the importance and . . . necessity of parental participation in both the development of the IEP and any subsequent assessment of its effectiveness.”) (citations omitted). However, it is important to note that “while parent participation is mandatory during the IEP creation process, [the] IDEA does not require parental preferences [to] be implemented.” GUERNSEY & KLARE, *supra* note 10, at 116.

79. *See, e.g.*, Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 994 (2017) (“Parents and educators often agree about what a child’s IEP should contain. But not always. When disagreement arises, parents may turn to dispute resolution procedures established by the IDEA.”).

80. 34 C.F.R. § 300.151 (2020).

81. 20 U.S.C. § 1415(e).

82. Impartial hearing officers are provided by either the LEA or the state educational agency (SEA), depending on state law. *See id.* §§ 1415(f)(1)(A), (f)(3)(A).

83. *Id.* §§ 1415(f)–(g).

84. *See* NAT’L COUNCIL ON DISABILITY, *supra* note 76, at 35 (noting that state complaints are “the only option that allows complainants to allege systemic violations against” school districts, and “only the state complaint process is available to parties other than the parent or guardian of a student receiving special education[.]”).

85. *See id.* (“The manner in which SEAs handle investigations of written state complaints, including findings of fact and corrective action ordered, varies significantly across states.”).

86. *See id.* at 36 (noting that the number of written state complaints filed declined by 12.2% from the 2006–07 to 2014–15 school years, and that written state complaints are the least utilized method of dispute resolution).

87. *Id.*

88. *See, e.g.*, KATHY S. MEHFOUD & KATHLEEN SULLIVAN, IDEA AT 40+ PART TWO: DUE PROCESS, EXHAUSTION, AND MEDIATION: THE EXPANSION OF LITIGIOUSNESS AND A

is no assurance that the process will resolve the underlying disagreement.⁸⁹ As a result, “[d]ue process complaints continue to be the most utilized dispute resolution option for individual students and their families.”⁹⁰

Under the IDEA, parents have the right to file a due process complaint against a school district “with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of [FAPE].”⁹¹ The complaint must allege a violation that occurred within two years of filing,⁹² and satisfy various other requirements establishing the nature of the allegation and providing notice to the school district.⁹³ Once a complaint is filed, parents have the right to a due process hearing conducted by an impartial hearing officer.⁹⁴ If either party is unsatisfied with the outcome of the hearing, they may challenge the outcome in state or federal court.⁹⁵

B. THE ROLE OF THE COURTS: ENFORCING FAPE FROM *ROWLEY* TO *ENDREW F.*

Although the legal guarantee of FAPE drives both the creation of and challenges to individual IEPs, the definition of FAPE has remained frustratingly vague since the IDEA was first implemented. The IDEA itself simply provides that FAPE consists of “special education and related services . . . provided in conformity with the individualized education program[.]”⁹⁶ and defines special education as “specially designed instruction” that “meet[s] the unique needs of a child with a disability[.]”⁹⁷ As the Supreme Court noted in *Rowley*, this open-ended standard reflects the fact that Congress’s primary goal in passing the IDEA was to provide access to special education, rather than to establish a substantive

PROPOSAL FOR A RESET 13–14 (2017), <https://cdn-files.nsba.org/s3fs-public/05.%20Mehfoud%20Sullivan%20IDEA%20at%2040.pdf> [<https://perma.cc/N9ZW-HKQF>].

89. See, e.g., *id.* at 13 (“No one can be forced into mediation and no one can be forced into an agreement.”).

90. NAT’L COUNCIL ON DISABILITY, *supra* note 76, at 35.

91. 20 U.S.C. § 1415(b)(6)(A) (2018).

92. *Id.* § 1415(b)(6)(B).

93. *Id.* § 1415(b)(7).

94. *Id.* § 1415(f)(1).

95. *Id.* § 1415(i)(2)(A).

96. *Id.* § 1401(9).

97. *Id.* § 1401(29).

standard for what such education must achieve.⁹⁸ After all, truly individualized education plans cannot be formulated through “any one test for determining the adequacy of educational benefits conferred upon all children. . . .”⁹⁹ Nevertheless, some standard of adequacy was necessary to allow for a determination of whether the needs of children with disabilities were actually being met through the IEP process.

Rowley represented the Court’s first attempt to define the contours of the FAPE requirement. In *Rowley*, the Court held that while school districts were required to meet all of the IDEA’s *procedural* requirements, the actual, *substantive* instruction afforded to special education students need only “confer *some* educational benefit.”¹⁰⁰ Federal circuit courts interpreted *Rowley* in a variety of ways. For example, the Tenth Circuit held that the IDEA required educational benefit that was “merely ‘more than *de minimis*,’”¹⁰¹ while the Third Circuit applied a more demanding “meaningful educational benefit” standard.¹⁰² In a more colorful interpretation of *Rowley*, the Sixth Circuit held that the *Rowley* standard only required schools to “provide the educational equivalent of a serviceable Chevrolet . . . [and] that the Board [of Education] is not required to provide a Cadillac[.]”¹⁰³ The *Andrew F.*¹⁰⁴ Court redefined the substantive standard for FAPE, holding that to meet its obligation under the IDEA, an LEA school must offer special needs students an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s

98. 458 U.S. 176, 193–94 (1982).

99. *Id.* at 202.

100. *Id.* at 200 (emphasis added). *Rowley*’s “some educational benefit” standard created a relatively low bar for school districts to clear in the provision of special education and related services. “Under [*Rowley*], the statute’s procedural requirements [were] frequently the most significant hurdle for school districts; once a district satisfie[d] those requirements, it [was] typically quite easy to show that the child [was] receiving *some* benefit from his or her education. *Rowley* thus g[ave] school districts a strong incentive to focus on process rather than substance in special education.” Bagenstos, *supra* note 20, at 124.

101. *Andrew F. ex rel. v. Douglas Cnty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338–39 (10th Cir. 2015) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)).

102. See, e.g., *Shore Reg’l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (“[T]he school must establish that it complied with the procedures set out in the IDEA and that the IEP was ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the child’s ‘intellectual potential.’”) (citations omitted); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988) (“Congress intended to afford children with special needs an education that would confer meaningful benefit.”).

103. *Doe v. Board of Education*, 9 F.3d 455, 459–60 (6th Cir. 1993).

104. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

circumstances[.]”¹⁰⁵ and that gives the “child . . . the chance to meet challenging objectives.”¹⁰⁶

Although *Andrew F.* “unequivocally heightened the bar for district action in creating and justifying a given student’s special education placement[.]”¹⁰⁷ it is unclear how great an effect the decision will have in practice. Lower courts have been inconsistent in their application of the rearticulated FAPE standard,¹⁰⁸ and questions persist about the level of deference courts should give to school districts on the issue of whether a particular IEP is appropriate.¹⁰⁹ This lack of clarity adds to already considerable hurdles facing families with limited resources and capacity to understand legal proceedings when they mount a FAPE challenge in a private action.

Through a series of decisions governing private enforcement under the IDEA — all predating *Andrew F.* — the Supreme Court has declined to remove these hurdles. In *Schaffer v. Weast*,¹¹⁰ the Supreme Court ruled that the party challenging the adequacy of a child’s IEP — typically parents — bear the burden of proof of establishing that FAPE is not being provided.¹¹¹ The following year, in *Arlington Central School District Board of Education v. Murphy*,¹¹² the Court held that parents engaged in IDEA litigation are not entitled to reimbursement for the services of expert witnesses in making the case that their child is not receiving FAPE, even if they cannot otherwise afford this often crucial resource¹¹³ and even

105. *Id.* at 1001.

106. *Id.* at 1000.

107. Zimmer, *supra* note 71, at 1040; *see also Andrew F.*, 137 S. Ct. at 993 (noting that “[the FAPE] standard is markedly more demanding than the ‘merely more than *de minimis*’ test” used by the Tenth Circuit).

108. *See Cowin, supra* note 62, at 604–06 (describing the application of the *Andrew F.* holding in three district court cases).

109. *Id.* at 606–07 (“The Court in *Andrew F.* stated that lower courts should defer to school authorities based on their expertise and exercise of judgment yet declined to elaborate on what appropriate progress would look like from case to case. In the same paragraph, however, the Court lauded the procedural nature of the IEP process and the reviewing authority’s ability to evaluate ‘cogent and responsive explanations’ for decisions made by a school district.”).

110. 546 U.S. 49 (2005).

111. *Id.* at 51.

112. 548 U.S. 291 (2006).

113. The exclusion of expert witness fees is extremely consequential for parents bringing due process claims, as expert testimony is “[p]erhaps the single largest expense associated with litigation in special education. . . . In many instances, the LEA has paid for an Independent Educational Evaluation (IEE) prior to the due process hearing, but the parent still confronts the costs and travel of [their] expert testifying at trial as well as any additional expert testimony.” GUERNSEY & KLARE, *supra* note 10, at 261. In 2014, Senator Tom

if their petition prevails.¹¹⁴ Unsurprisingly, the practical result of these decisions has been that “[i]f parents do not have the resources to independently locate and pay for experts and other costs of proving IEPs inadequate, shouldering the burden of proof to successfully [mount a challenge] will be a difficult, if not impossible, task.”¹¹⁵

Even decisions intended to strengthen parents’ due process rights and ensure access to effective remedies provide limited benefits for families without the means to take advantage of them. The Court’s 1985 decision in *School Committee of Burlington v. Department of Education*¹¹⁶ established a right to reimbursement for private school placement if a court determined that the private placement was necessary to provide a student with FAPE.¹¹⁷ Later, the Court held in *Florence County School District Four v. Carter*¹¹⁸ that parents could secure reimbursement even if the private placement was not a state-approved provider of special education services.¹¹⁹

Two other Supreme Court decisions — *Winkelman v. Parma City School District*¹²⁰ and *Forest Grove School District v. T.A.*¹²¹ — strengthened parental rights to reimbursement by holding that parents could bring such claims pro se,¹²² and that parents could seek reimbursement for private placement even if their child had not received special education services while enrolled in public school.¹²³ However, these decisions “provide an opportunity for parents only when they are able to shoulder the heavy tuition burden of a private school education upfront and await

Harkin introduced a bill that would amend the IDEA to include expert witness fees within the definition of “attorney’s fees” to be awarded to the prevailing party. See S. 2790, 113th Cong. (introduced Sept. 10, 2014).

114. See *Arlington*, 548 U.S. at 300.

115. Claire Raj & Emily Suski, *Andrew F.’s Unintended Consequences*, 46 J.L. & EDUC. 499, 500 (2017). Highlighting the limitations of the IDEA’s private enforcement system, Raj and Suski note that the *Andrew F.* heightened FAPE standard came about “only because [Andrew’s parents] had the resources to know about and pay for his private school tuition, evaluations by experts, and, of course, retain an attorney.” *Id.* at 501.

116. 471 U.S. 359 (1985).

117. *Id.* at 370.

118. 510 U.S. 7 (1993).

119. *Id.* at 14.

120. 550 U.S. 516 (2007).

121. 557 U.S. 230 (2009).

122. *Winkelman*, 550 U.S. at 535.

123. *Forest Grove*, 557 U.S. at 246–47.

reimbursement (which could take years).”¹²⁴ Even where parents can potentially afford private placement, geographic constraints might limit access to appropriate private facilities.¹²⁵ Thus, even the Court’s more parent-friendly decisions do little to ensure that all students are receiving FAPE.

For parents facing financial and geographic barriers to securing private placement, the effect of these decisions is not only lacking, but actively harmful. While cost is generally not considered an appropriate factor in placement determinations under the IDEA,¹²⁶ it is an unavoidable reality that school budgets are limited. As small numbers of wealthy families continue to exit the public school system in favor of private placement, schools are left with fewer funds with which to offer appropriate services to the

124. Zimmer, *supra* note 71, at 1039 n.126; *see also* Bagenstos, *supra* note 20, at 126 (“Supporters of the private school reimbursement rule argue that it provides a necessary safety valve for children who simply are not being served. Critics contend that the rule essentially creates two special education systems, ‘separate and unequal.’ Because the parent bears the burden of finding the appropriate private school and then must front the tuition pending the resolution of reimbursement proceedings (and risk not obtaining reimbursement . . .), the beneficiaries of the reimbursement rule are likely to be disproportionately wealthy and educated.”).

125. Rural areas in particular suffer from a lack of access to private schools offering appropriate services. *See* Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 337 (2010); *see also id.* at 333–34 (noting that in Utah, a significant number of families withdrew from the state’s private school voucher program for special needs students because the private school was located too far from their home); *infra* Part IV.C.

126. The IDEA “makes no provision for refusing to provide [educational] services because of cost.” GUERNSEY & KLARE, *supra* note 10, at 40. While cost may be considered when choosing between multiple options that would provide FAPE, Congress has rejected the notion that insufficient funding in general is an appropriate basis for denying or modifying services. *Id.*; *see also* S. REP. NO. 94-168, at 22 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1446 (“The Committee rejects the argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education.”). Courts have both informed and reinforced this view. *See, e.g.,* Mills v. Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972) (holding that insufficient funds were not a defense to the denial of FAPE); Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 695 (3d Cir. 1981) (requiring a “comprehensive range of services . . . regardless of financial and administrative burdens[]”). However, some courts have acknowledged the “competing interests” that limited funding creates in terms of providing for the needs of both the students who bring FAPE claims and those who do not. *See, e.g.,* Clear Creek Indep. Sch. Dist. v. J.K., 400 F. Supp. 2d 991, 995 (D. Tex. 2005) (finding that courts may consider the realities of limited funding in deciding whether a student has received FAPE because excessive “expenditures made to meet the needs of one handicapped child may reduce the resources that can be spent to meet the needs of other handicapped children[]” (citation omitted)); Stacey G. v. Pasadena Indep. Sch. Dist., 547 F. Supp. 61, 78 (S.D. Tex. 1982) (“It cannot be disputed that educational funding is limited. Accordingly, it necessarily follows that competing interests must be balanced to reach a reasonable and fair accommodation.”).

students who remain behind.¹²⁷ Critics of special education voucher programs — which, like reimbursement awards, use public funds to pay for private placement — have reported that private tuition expenses “operate[] as a transfer of wealth away from students with . . . significant needs [in public schools.]”¹²⁸ Thus, for families without the resources required to mount a successful FAPE challenge, court decisions strengthening parental rights in the private enforcement process are not only hollow victories, but potentially disastrous defeats, causing public school funding to diminish while simultaneously preventing recourse for students provided with the substandard services that result.

C. FUNDING THE FAPE MANDATE

Both the legislative history of the IDEA as well as federal court decisions regarding the provision of FAPE have made clear that the “IDEA . . . makes no provision for refusing to provide [educational] services because of cost.”¹²⁹ Yet cost necessarily informs what schools are able to provide for students. The resulting clash between formal rights that “know no dollar limitations[]”¹³⁰ and the realities of education funding incentivizes school districts to limit who can claim a legal entitlement to special education services, often through decisions regarding initial identification and placement determinations.

127. See Hensel, *supra* note 125, at 337 (“The pool of [special education] funding . . . becomes smaller as students exit through [private placement].”).

128. *Id.* at 338. In the tuition voucher context, Hensel reports that in one Florida county alone, \$1.25 million was redirected from the public schools to cover private school tuition. *Id.* Officials from the district testified that in the absence of the voucher program, the “money would have been spent on students enrolled in public schools. . . .” *Id.* (citation and internal quotation marks omitted).

129. See *supra* note 126; see also NAT’L COUNCIL ON DISABILITY, *supra* note 18, at 13 (“IDEA’s substantive right to a free appropriate public education (FAPE), requiring that the individual needs of each student drive special education services and instruction, is independent of the availability of resources.”).

130. Neal & Kirp, *supra* note 19, at 83.

Chronic underfunding of the IDEA at the federal level¹³¹ combined with restrictions on the use of federal IDEA funds¹³² means that state and local revenue provide the bulk of special education funding.¹³³ Reliance on local revenue — typically local property taxes¹³⁴ — can lead to significant disparities in education funding between districts,¹³⁵ causing school administrators in poorly funded districts to face difficult decisions about how and where funds should be allocated.¹³⁶ As a result, state-level funding formulas¹³⁷ create significant “incentives and disincentives for local, state, and federal personnel . . . mak[ing] . . . educational decisions

131. Congress is authorized to appropriate funding to cover up to forty percent of the costs associated with implementing the IDEA, based on a funding formula that multiplies a state’s total number of students with disabilities by forty percent of the national average per pupil expenditure (APPE). See NAT’L COUNCIL ON DISABILITY, *supra* note 18, at 9. However, “[a]t no time since Congress established the federal funding formula in the [IDEA] (in 1975) has the amount of funds appropriated matched the authorized amount.” *Id.* at 20. Congress came closest in 2009 when it reached thirty-three percent, but the average appropriation amount has hovered around sixteen percent since 2010, with the lowest amount of at nine percent in 1996. See *id.* at 21 (report of federal appropriations from 1988–2017).

132. Federal IDEA funds are governed by “supplement not supplant” and “maintenance of effort” provisions. Supplement not supplant requires school districts to first use state and local funds to cover special education costs, and turn to federal funds only in the event that costs exceed the district’s annual per-pupil expenditure (APPE). See 34 C.F.R. § 300.202(a)(3) (2020). The maintenance of effort provision obligates school districts to spend at least the same amount of state and local funds on special education and related services as was spent in the previous year. See 34 C.F.R. § 300.203(a)(1).

133. In the 2015–16 school year, eight percent of public school funding came from federal sources, while forty-seven percent came from states and the remaining forty-five percent from local revenue sources. For an overview of public school revenue sources in general, see *Public School Revenue Sources*, NAT’L CTR. FOR EDUC. STAT. (last updated Apr. 2020), https://nces.ed.gov/programs/coe/indicator_cma.asp [<https://perma.cc/5NJV-VADV>].

134. See VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 74 (2010).

135. See *id.* While the overarching issue of public school finance is outside the scope of this Note, it is important to highlight the ways in which reliance on local revenue streams can lead to significant disparities in education funding. Reliance on local property taxes for education funding creates “disparities of educational funding *within* states,” as well as “disparities in funding *among* states.” *Id.* at 74–75 (emphasis in original). In 2017, the APPE in the state of New York was \$23,091, while Idaho spent only \$7,486 per student. Mike Maciag, *States That Spend the Most (and the Least) on Education*, GOVERNING (June 4, 2019), <https://www.governing.com/topics/education/gov-state-education-spending-revenue-data.html> [<https://perma.cc/GM2R-848G>]. Within states, “per-pupil expenditures in the wealthiest districts historically could be triple the amounts spent per pupil in the poorest districts.” DODD, *supra* note 134, at 74–75 n.13.

136. See Neal & Kirp, *supra* note 19, at 83.

137. Special education funding practices vary significantly across all fifty states. For a breakdown of special education funding mechanisms by state, see *K-12 Special Education Funding*, EDUC. COMM’N OF THE STATES (Mar. 2019), <https://c0arw235.caspio.com/dp/b7f93000f26bd86ea194864a088> [<https://perma.cc/Y4LA-GHYT>].

concerning handicapped children.”¹³⁸ These pressures may lead special education administrators to shape eligibility criteria around what is available as opposed to what is needed. This phenomenon is perhaps best illustrated by the significant disparities in classification rates¹³⁹ and program placements¹⁴⁰ among the states.

Empirical evidence that funding formulas have a direct impact on special education practices is mixed.¹⁴¹ Yet it is “unlikely that

138. William T. Hartman, *Policy Effects of Special Education Funding Formulas*, 6 J. EDUC. FIN. 135, 144 (1980).

139. Special education identification rates among the states vary significantly from the national average of 14 percent of total public school enrollment. NAT'L CTR. FOR EDUC. STAT., *supra* note 52. A 2017 study by the Frontline Research & Learning Institute reported that New York state had the highest population of identified students at 17.6%, while Texas had the lowest at 8.6%. FRONTLINE RSCH. & LEARNING INST., CROSSING THE LINE: EXPLORING EQUITY IN SPECIAL EDUCATION ACROSS THE UNITED STATES (2017), https://www.frontlineinstitute.com/uploads/2018/01/Frontline_Education_2017_Special_Ed_Report_Part1.pdf [<https://perma.cc/5JLC-F23N>]. Researchers have noted that child-based formulas that tie funding to the number of identified students — based on either a uniform amount for each student or a formula that gives different weights to different disability categories — may give school districts an incentive to overidentify students for special education, potentially in “higher-cost and often more restrictive settings[.]” in order to receive more state funding. Kanya Mahitivanichcha & Thomas Parrish, *The Implications of Fiscal Incentives on Identification Rates and Placement in Special Education: Formulas for Influencing Best Practice*, 31 J. EDUC. FIN. 1, 5 (2005). In contrast, census-based formulas that rely on the total population of students in a state or school district “create incentives to identify fewer special education students and to provide less costly services[]” in an effort to conserve a fixed amount of resources. *Id.*

140. Evidence suggests that resource-based models that allocate funds based on units of special education services and required personnel rather than the number of identified students create incentives to place students in more restrictive environments, as school districts can maximize resources by assigning a greater number of students to the same placement. Mahitivanichcha & Parrish, *supra* note 139, at 5. The use of cost-based formulas may also contribute to placement decisions. Funding systems that reimburse school districts for a fixed percentage of special education costs create incentives for districts to minimize expensive programming in an effort to hold down their own costs. Hartman, *supra* note 138, at 150. Even states that purport to fully cover excess costs frequently implement “regulations . . . specify[ing] maximum reimbursement amounts to control costs and limit the state or federal financial obligation.” *Id.* at 151. Thus, “if the state pays only a portion of the excess costs or if reimbursements are limited . . . the ability of small districts to pay for special education may [still] be curtailed.” Suzanne S. Magnetti, *Some Potential Incentives of Special Education Funding Practices*, in PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY 300, 313 (Kirby A. Heller et. al. eds., 1982).

141. Mahitivanichcha & Parrish, *supra* note 139, at 21. It is important to note that “few studies have directly examined fiscal incentives in the context of special education identification rates, disability classifications, and placement decisions.” *Id.* at 7. Three such studies focusing on changes in special education fiscal policies within states — namely Texas, Tennessee, and Vermont — found notable correlations between shifts in fiscal policy and subsequent changes in student disability rates and placement patterns. *Id.* at 7–12 (citing Julie Berry Cullen, *The Impact of Fiscal Incentives on Student Disability Rates*, 87 J. PUB. ECON. 1557 (2003); Samuel Dempsey & Douglas Fuchs, “Flat” Versus “Weighted” Reimbursement Formulas: A Longitudinal Analysis of Statewide Special Education Funding

district policymakers, who most often are operating with very constrained resources, are oblivious to the more obvious fiscal tradeoffs they face in attempting to interpret, negotiate, and implement state policy.”¹⁴² That both state¹⁴³ and federal¹⁴⁴ funding policies have been adjusted to address concerns regarding identification rates and placement determinations supports this conclusion, and further highlights the extent to which the implementation of special education policy has become a function of resources rather than rights.

When parents are unable to take advantage of the IDEA’s private enforcement mechanisms, eligibility and placement determinations made by their child’s school are effectively final.¹⁴⁵ And while it is true, as courts¹⁴⁶ and commentators¹⁴⁷ have noted, that educators are often in the best position to determine a child’s needs, the practical finality of these decisions is problematic for

Practices, 59 EXCEPTIONAL CHILD. 433 (1993); JAY P. GREENE & GREG FORSTER, MANHATTAN INST. FOR POL’Y RSCH., CIVIC REP. NO. 32, EFFECTS OF FUNDING INCENTIVES ON SPECIAL EDUCATION ENROLLMENT (2002), <https://files.eric.ed.gov/fulltext/ED476373.pdf> [<https://perma.cc/8EDW-7V24>]). However, findings of direct correlations may be overstated, as there is also evidence to suggest that non-fiscal factors “such as history, impact of advocacy groups, organizational structure, professional judgment, program constraints, and regulations[]” also “influence rates of identification, disability classifications, and placement decisions.” Mahitivanichcha & Parrish, *supra* note 139, at 11–12.

142. Mahitivanichcha & Parrish, *supra* note 139, at 6.

143. For example, New York state established new funding weights to counteract fiscal incentives that led the state to have the most restrictive special education placements in the country. *Id.* at 19. “Although prior analyses[] . . . showed that fiscal policy was not the only factor affecting these placements, . . . [f]ederal monitors found [the fiscal incentives] sufficiently clear to find the state’s funding formula out of compliance with federal law.” *Id.*

144. In 1997, Congress amended the IDEA’s federal funding formula based on the “concern[] that tying funding to the number of students receiving special education was acting as an incentive to overidentify students as needing special education.” NAT’L COUNCIL ON DISABILITY, *supra* note 18, at 18.

145. In addition to financial constraints, deference to educational judgment regarding programming and a lack of knowledge as to the extent of their child’s substantive and procedural rights contribute to parents’ inability to act as effective child advocates. *See generally* Phillips, *supra* note 41, at 1827–37. While the development of a child’s IEP ostensibly includes significant opportunities for parental involvement, in many instances “participation in the meetings and consent to the placement are . . . formalities only.” Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1010 (1988). Rather, “studies have shown that, more often than not, school personnel make decisions about educational programming before IEP meetings, thereby preventing any meaningful parental input.” Phillips, *supra* note 41, at 1834.

146. *See, e.g.*, *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017) (emphasizing that courts should exercise deference to school authorities as to what constitutes appropriate educational progress based on their professional judgment and expertise).

147. *See, e.g.*, Seligmann, *supra* note 8, at 498 (“[M]ost teachers and schools are not aiming low when it comes to education of children[.]”).

students in under-resourced areas where placement may be driven by funding rather than individual need, and neither schools¹⁴⁸ nor families¹⁴⁹ are in a position to provide the kind of individualized programming envisioned by the Court in *Endrew F.*

While the rights of all special needs students are governed by the same piece of legislation, the procedure-driven nature of special education policy in the United States has created what is effectively two special education systems. Under the ideal system, students and families equipped with the requisite knowledge and resources are able to secure the provision of individualized and appropriate educational services through an extensive set of legal and procedural rights. Yet this system — the special education system enacted by the IDEA and endorsed by the Court in *Endrew F.* — is not the one in which most families and schools operate. For too many, the guarantee of FAPE has been undermined by significant procedural hurdles and financial and budgetary constraints that prevent effective parental advocacy and impede access to meaningful services and opportunities for academic progress. In such instances, current special education policy has effectively disengaged students' rights from their realities. The next Part illustrates this phenomenon by examining the state of special education in rural schools.

IV. SPECIAL EDUCATION IN RURAL SCHOOLS

Approximately 9.3 million students in the United States attend a rural school — roughly eighteen percent of the country's entire public school population.¹⁵⁰ Among rural students, “one in seven qualifies for special education[.]”¹⁵¹ Despite these numbers, the problems of rural education — and rural special education more specifically — are often obscured by the more visible problems

148. See Phillips, *supra* note 41, at 1825–26 (“[There is a] frustrating interplay between limited resources and special education: the funding dilemma often makes it impossible for schools to comply with the IDEA and can discourage student evaluations and the implementation of expensive treatments. Without some advocacy by the child's representative, many school districts simply will not perform initial evaluations or subsequent revisions to ensure a child's IEP is effective.”).

149. Raj & Suski, *supra* note 115, at 500 (arguing that “*Endrew F.*'s new FAPE standard further entrenches the extant disparities between the special education programs of low-income children with disabilities and those who come from higher income families[]”).

150. See DANIEL SHOWALTER ET. AL., RURAL SCH. & EDUC. TR., WHY RURAL MATTERS 2018–2019: THE TIME IS NOW 1 (2019).

151. *Id.*

facing urban schools.¹⁵² Yet the challenges faced by rural school districts, including high poverty rates, lower tax bases with which to fund public schools, lower population density, changing demographics, and rural flight all significantly affect the ability of special education students in rural schools to receive FAPE.¹⁵³ This Part contextualizes the limitations of the IDEA framework outlined in Part III by exploring how a highly procedural and legalized approach to special education exacerbates the challenges of rural special education in three major aspects of special education law and administration: eligibility determinations, parent participation, and access to alternative placements.

A. SPECIAL EDUCATION ELIGIBILITY FOR RURAL STUDENTS

Although the overall number of rural students has decreased in recent years,¹⁵⁴ rural areas have seen an increase in the population of minority students and English Language Learners (ELL).¹⁵⁵ This has significant implications in the context of special education policy, as does the fact that one in six rural students live below the

152. *Id.* at 34 (“[T]he invisibility of rural education persists in many states. Many rural students are largely invisible to state policymakers because they live in states where education policy is dominated by highly visible urban problems. . . . The majority of rural students attend school in a state where they constitute less than 25% of the public school enrollment, and more than one in four are in states where they constitute less than 15%.”); see also Harvey Rude & Kevin J. Miller, *Policy Challenges and Opportunities for Rural Special Education*, 37 RURAL SPECIAL EDUC. Q. 21, 21 (2017) (noting that when it comes to special education scholarship, “the sheer volume of urban-focused research overshadows the concern for rural”); Story Hinkley, *Wanted: Teachers Willing to Work “In the Middle of Nowhere,”* CHRISTIAN SCI. MONITOR (July 12, 2017), <https://www.csmonitor.com/EqualEd/2017/0712/Wanted-Teachers-willing-to-work-in-the-middle-of-nowhere> [<https://perma.cc/9F83-NCVG>] (“We talk about urban schools, and the high-needs students in cities, while kind of ignoring the high-need rural communities that also exist[.]”).

153. See Harold W. Heller, *Rural Special Education: A Dilemma*, 14 THEORY INTO PRAC. 137, 137–38 (1975); Paul T. Sindelar et. al., *The Demand for Special Education Teachers in Rural Schools Revisited: An Update on Progress*, 37 RURAL SPECIAL EDUC. Q. 12, 12–13 (2018); Jerry Johnson et. al., *Demographic Changes in Rural America and the Implications for Special Education Programming: A Descriptive and Comparative Analysis*, 37 RURAL SPECIAL EDUC. Q. 140, 141 (2018).

154. Johnson et. al., *supra* note 153, at 142.

155. *Id.* The new racial and ethnic diversity of rural America has been characterized as “one of the most important and least anticipated demographic changes in recent U.S. history.” Daniel T. Lichter, *Immigration and the New Racial Diversity in Rural America*, 77 RURAL SOCIO. 3, 4 (2012). Between 2000 and 2010, the rural population of racial and ethnic minorities increased by 19.8 percent. *Id.* at 7. During this time, the rural Hispanic population alone grew by 44.6 percent — “faster than any other racial or ethnic minority. . . .” *Id.* This population increase has been attributed in part to the growth of rural industrial labor markets and “a new rural cosmopolitanism.” *Id.*

national poverty line.¹⁵⁶ Minority¹⁵⁷ and ELL status,¹⁵⁸ as well as low socioeconomic status,¹⁵⁹ have all been linked to the need for increased academic intervention. Yet under the IDEA, individualized support is only afforded to students whose needs have been identified as medical or pathological in nature.¹⁶⁰ This strict approach to special education eligibility means that many rural students are denied much-needed services and supports because they do not satisfy all of the IDEA's eligibility requirements, despite the fact that rural students often face the same educational challenges as students with officially diagnosed disabilities, and could benefit from the same kind of individualized interventions.¹⁶¹

Even rural students who exhibit deficiencies that the IDEA deems characteristic of a specific learning disability¹⁶² will be

156. Showalter et. al., *supra* note 151, at 1.

157. The link between minority status and the need for increased instructional support is not grounded in the notion that minority status itself is a cause of academic deficiency, but rather that minority students are more likely to live in poverty or receive lower quality educational instruction, either due to placement in poorly funded schools or due to cultural biases that lead teachers to refer minority students for special education more often than nonminority children. See Russel J. Skiba et. al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 *EXCEPTIONAL CHILD*. 264, 272–73, 275 (2008). Often these referrals are for behavioral as opposed to academic issues. *Id.* at 275. As this Part discusses, quality of education has a direct impact on rates of special education identification.

158. See generally Brenda L. Barrio, *Special Education Policy Change: Addressing the Disproportionality of English Language Learners in Special Education Programs in Rural Communities*, 36 *RURAL SPECIAL EDUC. Q.* 64 (2017).

159. Skiba et al., *supra* note 157, at 273 (explaining that “a variety of poverty-associated risk factors have been shown to predict academic and behavioral gaps that might be expected to lead to special education referral[]”); see also Vonnie C. McLoyd, Abstract, *Socioeconomic Disadvantage and Child Development*, 53 *AM. PSYCH.* 185, 185 (1998). Congress explicitly recognized the link between poverty and disability in the funding formula adopted in the 1997 reauthorization of the IDEA. See *supra* note 144.

160. While “federal law is relatively imprecise as regards varieties of learning disability, it clearly conceives of learning disabilities as organic or medical in nature. . . . The statute does not allow for judgments that learning disabilities are invariably on a continuum. To put the point another way, federal law does not permit states to allow local districts to decide that there is no class of ‘students with learning disabilities’ who can be neatly distinguished from non-LD students without forfeiting federal funds.” KELLMAN & LESTER, *supra* note 67, at 6.

161. Commentators on both sides of the eligibility debate have acknowledged that effective education looks “substantially the same for nonhandicapped and most mildly handicapped students. . . .” Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, 61 *HARV. EDUC. REV.* 148, 155 (1991); see also Mark C. Weber, *The IDEA Eligibility Mess*, 57 *BUFFALO L. REV.* 83, 96 n.53 (2009) (“Contrary to commonly held assumptions, research indicates that . . . [p]articularly among the more subjective, ‘mild’ disability categories . . . labeled students show significant overlap in skills and receive highly similar instruction.”) (first ellipsis and brackets in original).

162. See 30 C.F.R. §§ 300.309(a)(1)–(2) (2020). IDEA regulations provide that determinations of the existence of a specific learning disability may be based on evidence that a

excluded from eligibility if it is determined that the deficiencies are or may be the result of cultural factors, environmental or economic disadvantage, or limited English proficiency.¹⁶³ Further, rural students may also be shut out from the special education system based on a lack of access to healthcare services,¹⁶⁴ which creates barriers to rural families' ability to push for supports on the basis of independent evaluations.¹⁶⁵

The use of eligibility categories is a necessity within a legal and procedural model for special education, as categorization helps to limit the number of students who can claim entitlement to individualized services, and thus to control costs within public education systems forced to operate with scarce resources.¹⁶⁶ Under the current special education framework, this means that students whose mental or emotional/behavioral deficiencies are the result of external factors are not afforded access to individualized services, even if their academic weaknesses or behaviors are *identical* to those of students whose special needs are believed to be pathological in nature.¹⁶⁷ Yet academic and behavioral challenges can result from

child has not met appropriate grade- or age-level standards for certain skills or subjects, and that the child does not make progress in response to increased supports, or that “the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined . . . to be relevant to the identification of a specific learning disability[.]” *Id.*

163. See 30 C.F.R. §§ 300.309(a)(3)(iv)–(vi). Students may also be excluded from IDEA eligibility on the basis of a specific learning disability if it is determined that their failure to make adequate progress is due to a visual, hearing, or motor disability, an intellectual disability, or emotional disturbance, though these factors may establish IDEA eligibility under other disability categories. See 30 C.F.R. §§ 300.309(a)(3)(i)–(iii).

164. See *Healthcare Access in Rural Communities*, RURAL HEALTH INFO. HUB (last updated Jan. 18, 2019), <https://www.ruralhealthinfo.org/topics/healthcare-access> [<https://perma.cc/B37A-D35B>] (outlining the financial, geographic, and information barriers that limit access to quality healthcare in rural communities).

165. Under the IDEA, schools are required to consider outside evaluations (referred to as “Independent Educational Evaluations, or IEEs) of special education ability if parents choose to obtain one. See generally 34 C.F.R. § 300.502. The IDEA requires that IEEs be covered by public funds. See 34 C.F.R. § 300.502(b)(1). However, parents are only entitled to an IEE at public expense after their child is evaluated by the school. 34 C.F.R. § 300.502(b)(5).

166. See Weber, *supra* note 161, at 94. As Weber explains, eligibility categories work in part “to limit the number of children who can claim entitlement to a free, appropriate public education[,]” which contributes significantly to the “costs borne by the federal and state governments.” *Id.* “Without some limit on the number of such children, the maximum financial exposure for educating children with disabilities would be infinity.” *Id.* As such, “eligibility standards . . . continue[] to exert budgetary force.” *Id.*

167. See, e.g., 34 C.F.R. § 300.8(c)(10)(ii) (“Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.”); 34 C.F.R. § 300.309(a)(3)(specifying that students to whose

many factors, including students' home environment and socioeconomic status,¹⁶⁸ the quality of education they receive,¹⁶⁹ and the cultural sensitivity of their teachers.¹⁷⁰ Despite this reality, the IDEA's current eligibility framework forces educators to attempt to untangle the various potential causes of poor performance through academic assessment strategies intended to identify which students are suffering from pathological deficiencies alone.¹⁷¹

The use of formal identification requirements as a gatekeeping mechanism for access to special education services is particularly problematic given the enormous variation in state-level approaches to eligibility determinations.¹⁷² Because states maintain different standards for what constitutes sufficient evidence of a learning disability, "[c]hildren can go in and out of the learning disability category as they move from state to state."¹⁷³ Thus, "[t]he happenstance of geography can . . . materially affect whether students get extra help at school."¹⁷⁴ Schools may also fail to

academic performance indicates the existence of a specific learning disability do not qualify for services if it is possible that their academic deficiencies are the result of six enumerated exclusionary factors).

168. See Skiba et. al., *supra* note 157, at 272.

169. See Kirby A. Heller et. al., *Introduction: Disproportion in Special Education, in PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY* 3, 15 (Kirby A. Heller et al. eds., 1982) ("An almost uniform feature of the selection process for [special education] placement is that it begins with an observation of weak academic performance. . . . While academic failure is often attributed to characteristics of the learners, current achievement also reflects the opportunities available to learn in school. If such opportunities have been lacking or if the quality of instruction varies across subgroups of the school-age population, then school failure and subsequent [special education] referral and placement may represent a lack of exposure to quality instruction for disadvantaged or minority children.").

170. See Johnson et. al., *supra* note 153, at 141; see also Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII, and Justifying the Use of Race in the Hiring of Special Educators*, 2001 BYU EDUC. & L.J. 179, 190 (2001) (explaining that "teachers tend to more frequently refer students from backgrounds different from their own" to special education).

171. Examples of these practices in the context eligibility for learning disabilities (LD) services are the "ability achievement model," which determines LD eligibility based on the existence of a sufficiently "severe discrepancy between a student's achievement in one or more subject areas . . . and their ability (usually as measured by an IQ test)." KELLMAN & LESTER, *supra* note 67, at 5 (emphases omitted). A now more commonly used model is "response-to-intervention" (RTI), which identifies students for LD based on their response to "increasingly intense instruction." Nicholas L. Townsend, *Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229, 259 (2007). The potential benefits of the RTI model are discussed *infra* Part V.

172. See RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 1*, 229–33 (2013).

173. *Id.* at 232.

174. *Id.* at 232–33.

identify students with special needs because current methods of identification require highly trained and qualified teachers in order to operate effectively,¹⁷⁵ and rural schools often struggle to hire and retain such teachers.¹⁷⁶

Criticisms of the IDEA's eligibility requirements have largely focused on problems of overidentification for poor and minority students,¹⁷⁷ who, once identified for special education, are often misclassified or placed in unnecessarily restrictive settings away from the general education classroom.¹⁷⁸ Yet under-identification can

175. The RTI model, for instance, begins with interventions in the general education classroom, and determines special education eligibility based on how well students respond to increasing levels of educational support. See Townsend, *supra* note 171, at 259. Thus, the RTI model is grounded in the assumption “that a majority of students can learn if effective instruction is provided.” *Id.* However, if the quality of classroom instruction is lacking overall, then this model ceases to operate as an effective method of determining the source or severity of a student's needs.

176. See Joe P. Sutton et al., *Building Special Education Teacher Capacity in Rural Schools: Impact of a Grow Your Own Program*, 33 RURAL SPECIAL EDUC. Q. 14, 15 (2017) (“Finding and retaining highly qualified teachers, particularly special educators, is exceedingly difficult in rural and low-wealth areas. . .”).

177. While outside the scope of this Note, the disproportionate representation of poor and minority students in special education is well-documented. See, e.g., Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 205, 229–30 (Jay P. Heubert ed., 1999); Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Front Lines of Special Education Lawyering*, 20 AM. U.J. GENDER, SOC. POL'Y & L. 107 (2011); Nicholas Gumas, Note, *Socioeconomic and Racial Disparities in Public Special Education: Alleviating Decades of Unequal Enforcement of the Individuals with Disabilities Education Act in New York City*, 8 COLUM. J. RACE & L. 398 (2018). In some ways, the problem of overrepresentation is better characterized as a problem of disparate classification. Black students — and, in particular, Black boys — “are overrepresented in the categories of intellectual disability (formerly called ‘mental retardation’) and emotional disturbance, and underrepresented in the categories of autism and other health impairments (typically ADHD). . . . [Thus], an African American boy who ‘acts up’ in class because he has trouble sitting is likely to be classified as emotionally disturbed, whereas a white boy with similar characteristics is likely to be classified as having ADHD. Similarly, a very withdrawn African American boy is likely to be classified as emotionally disturbed whereas an equally shy white boy is likely to be classified as autistic. An African American preschooler who is having trouble keeping up with age-level expectations is likely to be classified as intellectually disabled; her white counterpart is likely to be classified as developmentally delayed.” Ruth Colker, *Disabled Education*, RETHINKING SCHS. (Fall 2013), <https://rethinkingschools.org/articles/disabled-education/> [https://perma.cc/6YA5-888G].

178. One particularly stark example of the risk of segregation as a result of special education classification is Georgia's Network for Educational and Therapeutic Support (NETS), the state's system of segregated schooling for students with emotional and behavioral disorders (EBD), which effectively warehoused EBD students in separate facilities. See Rachel Aviv, *Georgia's Separate and Unequal Special-Education System*, NEW YORKER (Sept. 24, 2018), <https://www.newyorker.com/magazine/2018/10/01/georgias-separate-and-unequal-special-education-system> [https://perma.cc/XVT3-8GFJ]; Timothy Pratt, *The Separate, Unequal Education of Students with Special Needs*, ATLANTIC (Mar. 21, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-separate-unequal-education-of-students-with-special-needs/520140/> [https://perma.cc/W6M5-JCHG]. The state is

have its own negative consequences, particularly if special education identification is the only way for struggling students to receive additional services and supports. As one school administrator from Mississippi explained:

In an effort to help more children, you're going to say that this kid has a learning disability so that we can give him some special ed assistance that we normally would not be able to do without the eligibility. . . . We're going to reevaluate and see if we can't fit that discrepancy somewhere. "Did we get it yet? Has he fallen far enough behind in achievement now that we can make him eligible for special ed?"¹⁷⁹

Such considerations illustrate that for many students, eligibility can "mean[] the difference between receiving essential [services] at public expense or nothing at all."¹⁸⁰ Thus, the IDEA's emphasis on pathological deficiencies as the basis for determining entitlement to special education services risks excluding students who have a demonstrated need for additional services and supports, but whose circumstances may exclude them from eligibility.

Further, even if a student's disability arises from a medically diagnosable limitation, rural families may still be unable to push for an appropriate eligibility determination when schools are unwilling or unable to engage in comprehensive evaluations. If a parent disagrees with a school's eligibility determination and believes

currently facing a class action lawsuit alleging that the GNETS system violates students' rights under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and the Fourteenth Amendment. *See* Ga. Advoc. Off. v. Georgia, 447 F. Supp. 3d 1311 (N.D. Ga. 2017) (denying state's motion to dismiss).

179. Terry Jean Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, FORDHAM URB. L.J. 759, 771 n.69 (2001).

180. Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 443 (2004). However, the IDEA "operates against the background of a separate law barring disability discrimination in all federally funded activity, section 504 of the Rehabilitation Act of 1973. Another law, the Americans with Disabilities Act of 1990, reinforces the nondiscrimination duty for school districts. . . . Under these statutes, children who have a physical or mental impairment that substantially limits a major life activity must receive reasonable accommodations from public school systems. Although the vast majority of these children will also be eligible under IDEA, some may obtain services as accommodations without ever going through the special education eligibility process[.]" Weber, *supra* note at 161, at 99. Thus, "the availability of the services under non-IDEA auspices may decrease the need to find children IDEA-eligible in certain cases." *Id.* at 100. However, accommodations under Section 504 or the ADA are only meant to ensure accessibility to the general education classroom; they do not provide for direct specialized instruction or substantial modification to a student's educational programming.

that their child is entitled to special education services, they have a right to pursue a second opinion through an IEE that must be considered by the school,¹⁸¹ and may be provided at public expense.¹⁸² However, there are significant limitations to receiving public funding for IEEs, including the fact that families are only entitled to an IEE if and when the school conducts an evaluation,¹⁸³ and the fact that evaluators must satisfy the LEA's own criteria for appropriate evaluations.¹⁸⁴ Because the IDEA does not require schools to reevaluate students more than once every three years,¹⁸⁵ parents without the resources to pay for evaluations — or who lack access to qualified evaluators¹⁸⁶ — may be restricted in their ability to ensure that their child is receiving appropriate services.

Rural students facing challenges arising from a variety of inter-related factors are particularly vulnerable to the avoidable “mess”¹⁸⁷ that has been created by the IDEA's categorical approach to special education eligibility, which creates artificial and inequitable barriers in the provision of individualized academic support for the students who may need it most.

B. RURAL PARENT PARTICIPATION IN THE IEP PROCESS

Even rural students who are identified as requiring special education services may not receive services that actually provide them with FAPE. Reports indicate that schools with limited resources “modify[] IEPs . . . and offer[] service plans based on what schools have available, not based on what the student truly needs.”¹⁸⁸ As Professor Sheila Hyatt writes, the increase in the number of students considered eligible for special education has created “mounting pressure to generalize, label, routinize, and categorize children into pre-existing programs.”¹⁸⁹ Thus, a lack of

181. See 34 C.F.R. § 300.502(c)(1) (2020).

182. See 34 C.F.R. § 300.502(b)(5).

183. *Id.*

184. 34 C.F.R. § 300.502(e)(1).

185. 20 U.S.C. § 1414(a)(2)(b)(ii) (2018).

186. See RURAL HEALTH INFO. HUB, *supra* note 164.

187. See generally Weber, *supra* note 161.

188. PERRY & ASSOCS., INC., GETTING IT RIGHT: SCHOOL-LEVEL IMPLEMENTATION OF NEW YORK CITY DEPARTMENT OF EDUCATION SPECIAL EDUCATION REFORM 27 (2013), https://www.perryandassociatesinc.com/NYC-SpecEd-12-3-13_FINAL.pdf [<https://perma.cc/KC3Z-B7FR>].

189. Sheila K. Hyatt, *The Remedies Gap: Compensation and Implementation Under the Education for All Handicapped Children Act*, 17 N.Y.U. REV. L. & SOC. CHANGE 689, 724 & n.234 (1990) (“The most important determinate for the placement of handicapped students

funding for adequate staff and specialized services can lead to students “being pigeonholed into inappropriate placements and lost within the system for the duration of their education.”¹⁹⁰ In these instances, as a result of IDEA’s reliance on private legal enforcement, the reach of the FAPE guarantee turns largely on the ability of parents to meaningfully participate in the creation of their child’s IEP and take advantage of their legal-procedural rights — an option that remains largely out of reach for families in low-income rural communities. In addition to the more generalized barriers to private enforcement discussed in Part III.B, *supra*, rural families face barriers to meaningful engagement in the development of their child’s IEP prior to the formal dispute resolution process.

While the IDEA requires schools to provide opportunities for parents to participate in the development of their child’s IEP,¹⁹¹ often parents “don’t even know what to fight for, or . . . ask for. And there’s never enough [financial] resources . . . [so] the system is only going to do what families [are able effectively to] push for.”¹⁹² In some instances, school districts have intentionally capitalized on parents’ lack of institutional knowledge,¹⁹³ but even families familiar with the IEP process can find themselves alienated by schools that are unwilling or unable to provide specific

is the availability of programs. The existence of particular programs means that students eligible to fill those slots will be identified, evaluated, and placed in those slots. If particular slots are not available, then those eligible for those programs will not be identified, evaluated, and placed.” (quoting JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 52 (1986)).

190. Donald H. Stone, *The Least Restrictive Environment for Providing Education, Treatment, and Community Services for Persons with Disabilities: Rethinking the Concept*, 35 *TOURO L. REV.* 523, 550 (2019).

191. In addition to the private enforcement mechanisms described *supra* Part III.A, the IDEA requires LEAs to provide “an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, . . . and to obtain an independent educational evaluation of the child.” 20 U.S.C. § 1415(b)(1).

192. See Pratt, *supra* note 178 (last alteration added); see also NAT’L COUNCIL ON DISABILITY, *supra* note 18, at 13 (“[S]chool districts continue to use lack of funding as an excuse to limit the level of support and services to students with disabilities.”).

193. In one Texas school district, teachers were “ordered to make it hard to get into special education. Because of the district’s poverty, the schools have historically had to teach parents about special ed[.] . . . But suddenly, . . . schools were ordered not to tell parents that they can test children to see if they qualify for services.” Brian M. Rosenthal, *Denied: Schools Push Students Out of Special Education to Meet State Limit*, HOUS. CHRON. (Oct. 22, 2016), <https://www.houstonchronicle.com/denied/2/> [https://perma.cc/TW7C-B9US].

accommodations.¹⁹⁴ For instance, one family with a child in Georgia's segregated program for students with emotional and behavioral disorders admitted that they "stopped keeping up" with their son's IEP after the program continually failed to implement even basic accommodations.¹⁹⁵ Notably, both parents were public school teachers familiar with the special education process.¹⁹⁶

The IDEA's reliance on parent participation and legal enforcement to ensure the provision of FAPE is particularly harmful in rural areas, where parents are often ill-equipped to act as effective advocates in the IEP development process. Unfamiliarity with the special education process, while a challenge for parents in general,¹⁹⁷ are all the more significant in rural areas where many parents are less educated¹⁹⁸ and a growing number have limited English proficiency.¹⁹⁹ Language barriers can be particularly problematic as schools often fail to provide interpreters for IEP meetings or to provide parents with important documents in their native language.²⁰⁰ In light of the "disproportionate representation of ELL students [in special education] within rural school districts,"²⁰¹ these language barriers prevent many rural parents from understanding their rights and responsibilities under the IDEA.

194. See Pratt, *supra* note 178.

195. *Id.* (internal quotation marks omitted).

196. *Id.*

197. See David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 194 (1991) ("[Parents] are often less educated than other [participants] and are non-conversant in the technical language or concepts used during [IEP] meeting[s]."); see also Gumas, *supra* note 177, at 425 (citation omitted) ("It is difficult for parents to properly assess if the services that their child is receiving are sufficient to constitute a FAPE. Frequently, parents, to no fault of their own, are 'incapable of judging outcomes' of their child's educational progress. Most parents are not trained in special education policy. . . . [C]ommonly, parents are too accepting of poor outcomes, tending to praise even poor programming, since they lack the awareness of what constitutes good programming." (citations omitted)).

198. See, e.g., Jon Marcus & Matt Krupnick, *The Rural Higher-Education Crisis*, ATLANTIC (Sept. 27, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-rural-higher-education-crisis/541188/> [<https://perma.cc/X948-Z97X>]; see also Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 29 tbl.6 (2018) (providing data showing that 57.6% of rural Georgians aged twenty-five and above have only a full or partial high school education).

199. Johnson et al., *supra* note 153, at 141 (noting that in rural areas, the number of students learning English as a second language has "more than doubled in the last 20 years[']").

200. See Yael Cannon et al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 453 (2013).

201. Barrio, *supra* note 158, at 64.

The small size of rural schools and communities may also heighten transaction costs for parents who are considering challenging decisions regarding their child's eligibility or placement. Parents "in smaller, less wealthy districts where everyone knows everyone else[] . . . may be reluctant to push for additional services . . . because of social pressure not to overburden the district's finances[] . . . [or] because of cultural expectations that the school knows best."²⁰² When requesting certain services could risk harming a family's relationship with their child's (and often a sibling's) school, parents may also be less willing to assert their rights due to geographical constraints that make changes in placement less feasible.²⁰³ Geographic isolation also prevents low-income rural families from taking advantage of broader information networks that could increase their knowledge of the range of potential services offered to other children with similar disabilities.²⁰⁴ And even if parents have the means or desire to retain a lawyer or professional advocate who could help them better navigate the IEP process, there remains a "dearth of lawyers in many rural communities — and [a] complete absence of them [in] others[.]"²⁰⁵

The IEP represents the intersection of a student's enforceable legal rights and the services actually provided by their school. In many ways, the IEP is intended to be the memorialization of a student's right to FAPE, translated into the services necessary to provide it. Yet the process-oriented and legalized nature of the special education system has allowed for the development of IEPs that are informed more by what schools are willing to give rather than what students actually need in order to progress and succeed. When rural parents lack "the requisite material, social, and cultural capital"²⁰⁶ to engage productively with schools or push for increased support through private enforcement, children with special needs are at a distinct disadvantage when it comes to receiving the services and supports to which they are legally entitled.

202. Pasachoff, *supra* note 41, at 1445; *cf.* Neal & Kirp, *supra* note 19, at 78–79 (describing the inherent "adversariness" of a legalized system, and the fact that "[l]awyers [can] aggravate the situation[]" and make parents feel as if they are being blamed for being "troublemakers").

203. Pasachoff, *supra* note 41, at 1444; *see also infra* Part III.C.

204. Pasachoff, *supra* note 41, at 1437–38.

205. Pruitt et. al., *supra* note 198, at 23.

206. Phillips, *supra* note 41, at 1833.

C. ADDITIONAL SERVICES AND ALTERNATIVE PLACEMENT

While many of the problems discussed in this Part concern students with mild disabilities, who represent the vast majority of students in special education, rural students with more severe needs face still greater challenges. As explained in Part III.B, *supra*, though wealthy families are able to rely on private school placement when their child's public school is not providing appropriate services, this is not a viable option for families without the means to front the costs of private school tuition or mount a due process challenge. Rural families may also be unable to take advantage of cheaper alternatives to private placement — such as working with LEAs to bring teachers with specialized training directly into their child's school, or participating in voucher programs that subsidize private school tuition — as the geographic isolation of rural communities often prevents school districts from attracting specially qualified teachers, and places private school options too far out of reach.

In addition to facing a lack of qualified special educators more generally, public schools — and rural schools in particular — face a severe shortage of qualified personnel for students with less common disabilities, which require specialized skills and knowledge to appropriately address.²⁰⁷ One response to this shortage has been the creation of special education voucher programs, which allow the families of special needs students to use public funds to enroll in another school district or a private program that offers services that their local school is unable to provide.²⁰⁸ While the merits of

207. Rural school administrators report having “moderate to extreme difficulty in hiring and retaining teachers, particularly those certified in areas of low-incidence disabilities.” Ann B. Berry et al., *Issues in Special Education Teacher Recruitment, Retention, and Professional Development: Considerations in Supporting Rural Teachers*, 30 RURAL SPECIAL EDUC. Q. 3, 8 (2011); see also Barbara L. Ludlow et al., *Low Incidence Disabilities and Personnel Preparation for Rural Areas: Current Status and Future Trends*, 24 RURAL SPECIAL EDUC. Q. 15, 15 (2005). Under the IDEA, a low incidence disability is defined as “a visual or hearing impairment, or simultaneous visual and hearing impairments; a significant cognitive impairment; or any impairment for which a small number of personnel with highly specialized skill and knowledge are needed in order for children with that impairment to receive early intervention services or a free appropriate public education.” 20 U.S.C. § 1462(c)(3) (2018).

208. See Elizabeth Adamo Usman, *Reality Over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. L. REV. 53, 53–54 (2014). While all of the voucher programs described in the article allow for private placement, only some allow for removal to another public school district.

these programs have been the subject of intense debate,²⁰⁹ voucher programs are arguably the “best solution available[]” to students with pressing needs currently placed in inadequate public schools.²¹⁰

Unfortunately, state voucher programs are often an inadequate solution for rural families. Such programs may not be available in rural areas,²¹¹ or may still be too costly. Private tuition costs often exceed award amounts for voucher programs,²¹² and families must still provide transportation to schools that could be hours away. As one family advocate noted in discussing the value of Georgia’s special needs scholarship program for families in the state’s rural districts, “special needs scholarships still impose costs on the families that have to provide transportation . . . [which] does nothing to help [a number of our] clients . . . who are single parents, who are working minimum wage jobs,” and who “have to choose between two hours a day of pay or potentially a better education for their child.”²¹³ These barriers can leave rural families in the position of being “stuck with what they have”²¹⁴ — which, as this Part has shown, is often far too little.

V. RETHINKING THE IDEA APPROACH

This Part provides an overview of potential approaches to special education reform and considers whether and how these reforms could help alleviate problems in rural special education discussed throughout this Note. Part V.A discusses proposals aimed at addressing the inequalities of the IDEA’s system of private enforcement, and argues that while ensuring effective oversight is a

209. *See, e.g.*, Hensel, *supra* note 125, at 291. One critique of voucher programs that is particularly relevant in the context of this Note is that voucher programs divert funding from severely disabled students who remain in their public school placement. *Id.* at 336–40; *see also supra* Part II.B.

210. Usman, *supra* note 208, at 54.

211. “Particularly in rural areas, there are few, if any, private schools providing services to children with significant disabilities.” Hensel, *supra* note 125, at 337.

212. *Id.* (noting that “[i]n Georgia . . . the tuition for many schools specializing in the education of students with disabilities easily exceeds \$20,000, while the average award provided to students in 2008–2009 was \$6,331[]”).

213. Telephone Interview with Dr. Elizabeth Morris Turnage, Fam. Advoc. & Educ. Consultant, The Kline L. Firm, LLC (Jan. 30, 2020). Dr. Turnage is a special education advocate with over thirty years of experience as a special educator and IDEA legal and policy consultant. She currently works as a family advocate for students with special needs in Georgia schools. Dr. Turnage is the author’s mother.

214. *Id.*

necessity under any framework for special education, simply reforming the private enforcement system will not do enough to address the limitations of the IDEA. Part V.B presents the “inclusive schools”²¹⁵ approach as a viable alternative to the IDEA’s procedure-driven and categorial approach to providing FAPE.

It is important to clarify that this Part is primarily intended to provide a broad evaluation of proposals for special education reform and their ability to address the challenges in rural special education, rather than assess their workability within existing education funding structures. However, as previously discussed, many of the problems in special education in its current form can be attributed to inadequate funding.²¹⁶ Thus, implicit in the following discussion is the understanding — and the argument — that a truly equitable system of special education requires, at minimum, full funding at the federal level.²¹⁷ No systemic reform to special education will be possible “unless schools have the financial resources to provide the services that children need to obtain a free and appropriate public education. The IDEA will always be a statute only about the ‘individual’ so long as the *system* is insufficiently resourced.”²¹⁸

215. See Satz, *supra* note 25, at 288 (internal quotation marks omitted); see also *infra* Part V.B.

216. Consider, for example, that “if IDEA had been fully funded from 1975 to 2006, local schools would have received an additional \$383.8 billion to devote to additional special education services.” Kerrigan O’Malley, Comment, *From Mainstreaming to Marginalization? IDEA’s De Facto Segregation Consequences and Prospects for Restoring Equity in Special Education*, 50 U. RICH. L. REV. 951, 986 n.216 (2016) (citing Alessandra Perna, Note, *Breaking the Cycle of Burdensome and Inefficient Special Education Costs Facing Local School Districts*, 49 NEW ENG. L. REV. 541, 566 (2015)).

217. One basic proposal for reform that has attracted broad bipartisan support is conversion of the IDEA “from a discretionary funding item to a mandatory one in the federal budget[.]” though “prospects for congressional enactment of this measure are far from certain in light of the [long] history of consistently deficient discretionary funding.” O’Malley, *supra* note 216, at 986–87.

218. COLKER, *supra* note 172, at 245.

A. REFORM FROM WITHIN THE LEGAL MODEL

Proposals for special education reform have focused heavily on enhanced private enforcement mechanisms²¹⁹ and increased public oversight.²²⁰ While a consideration of effective oversight and enforcement mechanisms is necessary to ensure the provision of FAPE, such efforts, on their own, are insufficient. The current state of special education been shaped in large part by the problems of a procedure-driven system; simply tinkering at the edges of current policy will do little to address its systemic flaws.

A significant area of focus for special education reform is in strengthening the role of parents as advocates in the private enforcement process, either through the introduction of independent advocates²²¹ or through the creation of parent advocacy training centers that could assist parents in understanding their rights and responsibilities under the IDEA.²²² In the context of rural special education, the parent training model provides the most realistic approach to supporting opportunities for parental advocacy. For many rural communities, reliance on assistance from third parties through something like a public defender approach is likely infeasible due to the lack of legal services in these areas.²²³ Resource centers providing information on the parental advocacy role could be supported through funding from discretionary grants awarded

219. See, e.g., Phillips, *supra* note 41 (offering various proposals for supplanting or supplementing parental advocacy, including a “public defender” model for special education advocacy, community volunteer recruitment, and the creation of parent advocacy centers).

220. See generally Pasachoff, *supra* note 41 (arguing that the inclusion of statutory provisions for increased data collection on individual IEPs and monitoring and investigation of district- or state-wide practices could incentivize schools to provide appropriate services that they otherwise might not provide in the absence of parental pressure, and could allow for the kind of systemic change that is unlikely to occur through due process proceedings alone).

221. This model would appoint a special education advocate for families of children being evaluated for special education services or already receiving such services, in a manner similar to the provision of counsel for criminal defendants without the resources to retain an attorney. See, e.g., Phillips, *supra* note 41, at 1847–49. See also Colker, *supra* note 177 (“[V]irtually no parent can be an effective advocate at [IEP] meetings alone. I have attended meetings with 15 or 20 school personnel and one parent. The parent is lucky if he or she can even identify who was present, let alone describe the issues considered at the meetings. Parents need an advocate to assist them at meetings. The mere presence of an advocate often makes an enormous difference.”).

222. See, e.g., Phillips, *supra* note 41, at 1847–53.

223. See Pruitt et. al., *supra* note 198.

under the IDEA's 2004 reauthorization.²²⁴ Such centers would also allow for community volunteers to assist parents in the special education process, an approach implemented in Madison, Wisconsin in the 1980s that facilitated more productive and less adversarial interactions between parents and school officials.²²⁵

While these centers could help lower the information barriers and transaction costs for rural parents engaging with school officials, the fact remains that special education law is complex, advocacy is time-consuming, and language, cultural, and educational barriers may still prevent parents from knowing what to ask for or being able to attain it.²²⁶ Further, enhancing the role of parent advocates within the private enforcement system will not necessarily provide students in rural schools with better programming when alternative placement isn't a realistic option.²²⁷ Focusing only on making the private enforcement system more accessible also does little to address systemic problems, as the benefits of any programming changes or enhancements generally accrue only to individual students.²²⁸

Other scholars, most notably Professor Eloise Pasachoff, argue that a more effective alternative would be to strengthen the IDEA's public enforcement mechanisms, which would reduce the responsibilities of individual parents and provide greater opportunities

224. See 20 U.S.C. §§ 1471–73 (2018) (providing discretionary funding for parent training and information centers, community parent resource centers, as well as technical assistance for such centers).

225. See HANDLER, *supra* note 189, at 83–119 (1986). But see COLKER, *supra* note 172, at 242 (“Systemic problems require structural solutions. We cannot solve these problems one child at a time through a cadre of well-meaning volunteers. There are not enough volunteers to make that possible, and there is a systemic unfairness to children’s welfare’s being dependent on the happenstance of volunteers being available.”).

226. “[O]ne study found that while low-income parents were concerned about their children’s education, they had little awareness of the particular disability classification assigned to their child; were not aware of the types of services that might be available to their child; and neither knew the formal terms of the statute (such as “due process,” “least restrictive environment,” or “mainstreaming”) nor recognized the concepts when explained to them.” Pasachoff, *supra* note 41, at 1438 n.124 (citations omitted).

227. See *supra* Part IV.C.

228. As Professor Eloise Pasachoff explains, “much enforcement of IDEA rights involves rights that are unique to an individual and therefore does little to affect the education of another child[.]” such that children whose parents are unable to act as effective advocates “are unlikely to reap the benefits of wealthier children’s remedies[.]” Pasachoff, *supra* note 41, at 1440–41. But see Thomas Hehir, *Looking Forward: Toward a New Role in Promoting Educational Equity for Students with Disabilities from Low-Income Backgrounds*, in HANDBOOK OF EDUCATION POLICY RESEARCH 831, 836–37 (Gary Sykes et. al. eds., 2009) (arguing that parental advocacy on behalf of one child can lead to positive externalities as school administrators change practices system-wide in order to comply with IEPs).

for system-wide change. Professor Pasachoff argues persuasively that based on the disparities inherent in the IDEA's procedural protections, reform to the statute's private enforcement mechanisms is not in itself sufficient to produce real change,²²⁹ and a system of public enforcement would better serve the statute's intended goal of providing FAPE to every student.²³⁰ Statutory requirements of increased data collection on individual IEPs and monitoring and investigation of district- or state-wide practices could incentivize schools to provide appropriate services where they otherwise might not, and could allow for the kind of systemic change that is unlikely to occur through due process proceedings alone.

Of particular note in the context of rural special education is the possibility of encouraging IDEA compliance through the collection and publication of data on the substance of IEPs.²³¹ Creating an accessible database of the information regarding evaluation determinations and service provisions could help to alleviate problems in rural special education in two ways: first, it would help low-income families overcome information barriers by giving them "a better sense of the types of services they could be receiving."²³² Second, it would assist rural schools in considering a broader range of possibilities for educating students with special needs,²³³ which may help to alleviate some of the challenges to service provision created by the difficulty rural schools have in attracting and retaining qualified special education professionals.

However, relying on increased government oversight in implementing the IDEA has its own shortcomings. In the first place, the

229. For an overview of the limits of enhanced private enforcement mechanisms, see Pasachoff, *supra* note 41, at 1450–61.

230. "Where a statute is enacted to effectuate a particular public policy and private enforcement is insufficient to effectuate that policy, it is reasonable to suggest that public enforcement is necessary if the statute is to be properly administered. For example, if private enforcement actions are disproportionately brought by one segment of a statute's intended beneficiaries with particular demographic characteristics, there is likely to be underdeterrence of the wrong the statute seeks to redress with respect to other demographics. . . . The need for public enforcement may be particularly acute where distribution of government funding or resources is at issue, for where there is underdeterrence, there may also be undercompensation of the individuals the public policy seeks to protect." *Id.* at 1462.

231. *Id.* at 1465–66.

232. *Id.* at 1468; see also Phillips, *supra* note 41, at 1819–22 (describing the how the existence of some type of educational "menu" of potential services would help mitigate the information barriers faced by parents in understanding their child's educational entitlements).

233. See Pasachoff, *supra* note 41, at 1469.

states and the federal government already enjoy oversight powers under the IDEA²³⁴ that have never been utilized to the extent envisioned by the drafters of the statute.²³⁵ Further, penalizing non-complying states or districts through funding cuts would only further punish students already suffering from noncompliance and a lack of adequate services.

Whether accomplished through private or public means, a continuing emphasis on a procedure-based approach focused primarily on the mechanisms by which IEPs generated and enforced is misplaced. This is especially true in light of the weak “demonstrable link between process compliance and student results and success.”²³⁶ Two additional concerns militate against a sole focus on purely procedure-based solutions to the challenges facing special education in rural areas. First, at a time when rural schools are facing extreme shortages of qualified teachers,²³⁷ special education teachers are becoming increasingly scarce, driven away by excessive paperwork²³⁸ and the stress of participating in formal dispute resolution proceedings.²³⁹ Second, these solutions do not address

234. See NAT'L COUNCIL ON DISABILITY, *supra* note 76, at 19.

235. See *id.* at 20; see also Pasachoff, *supra* note 41, at 1463 (“[I]n the particular context of the IDEA, there have long been concerns that the federal government and the states have failed to enforce the IDEA adequately. These concerns stem from observations that even though the federal agency charged with IDEA enforcement repeatedly found states in violation of the IDEA, it has almost never taken any formal action to withdraw funds, limiting its involvement to negotiation and acceptance of minimal improvements.”).

236. NAT'L COUNCIL ON DISABILITY, *supra* note 76, at 20; see also MEHFOUD & SULLIVAN, *supra* note 88, at 4 (“[T]here is no evidence that students who go through court proceedings perform better academically after the costly hearings.”).

237. See Sutton et. al., *supra* note 176, at 15.

238. See Dan Benson & Julie Grace, *Teachers Want to Help Kids, Not Do Paperwork*, BADGER INST. (Jan. 25, 2018), <https://www.badgerinstitute.org/News/2017-2018/Teachers-want-to-help-kids-not-do-paperwork.htm> [<https://perma.cc/6ZH6-ME8C>] (commenting on the time-consuming nature of the IDEA's procedural mechanisms, one Wisconsin special education teacher is quoted as saying, “My energy was consumed by the paperwork and all the rules that needed to be focused on. Let me teach. Not waste my time on killing trees.”); see also *About the Shortage*, NAT'L COAL. ON PERS. SHORTAGES IN SPECIAL EDUC. & RELATED SERVS., <https://specialedshortages.org/about-the-shortage/> [<https://perma.cc/6RAX-3Q9G>] (last visited Oct. 13, 2020) (citing “excessive paperwork” and “unmanageable caseloads/workloads” as challenges to attracting and retaining special educators).

239. See MEHFOUD & SULLIVAN, *supra* note 88, at 5 (“As early as 1997, researchers reported that due process hearings may add to the rapidly increasing attrition of special educators. Twelve percent of school administrators said that more than half the time, district special education school personnel either left the district or requested a transfer out of special education after being engaged in a due process hearing or subsequent litigation. Almost a quarter of school administrators stated that 10% to 25% of the time, teachers either left the district or requested a transfer out of special education after being engaged in due process or similar proceedings.”) (citing Erling E. Boe et al., *Why Didst Thou Go? Predictors of*

the problems caused by the IDEA's eligibility "mess," which often prevents struggling students from receiving appropriate services and supports.²⁴⁰

B. THE "INCLUSIVE SCHOOLS" APPROACH

The current state of special education in rural schools — the limitations of private enforcement, the infeasibility of alternative placements, and the mismatch between the needs of many students with learning difficulties and IDEA's rigid approach to eligibility — provides compelling support for the need to reconceptualize rather than simply reform the administration of special education in the United States. The "inclusive schools" model²⁴¹ offers one model for a new approach.

Under the "inclusive schools" model, teachers and school administrators are empowered to provide services and supports to all children who need them, "regardless of perceived or diagnosed disabilities."²⁴² The inclusive schools approach has been implemented across Europe²⁴³ as well as through global programs for school reform in developing countries.²⁴⁴ As Finland's model of inclusive education has received significant attention in special education scholarship,²⁴⁵ this Section uses it as a case study in the benefits of the inclusive schools approach.

Retention, Transfer, and Attrition of Special and General Education Teachers from a National Perspective, 30 J. SPECIAL EDUC. 390 (1997).

240. See *supra* Part IV.A.

241. See Satz, *supra* note 25.

242. Satz, *supra* note 25, at 288 (defining the "inclusive schools" model as "a form of school governance aimed at assisting educators in working with all students regardless of perceived or diagnosed abilities").

In Finland, this approach has resulted in the provision of at least some level of increased academic support for approximately thirty percent of the student population. See *Increasingly More Comprehensive School Pupils Received Intensified or Special Support*, STAT. FIN. (June 11, 2018), https://www.stat.fi/til/erop/2017/erop_2017_2018-06-11_tie_001_en.html [<https://perma.cc/G5ZD-BXQW>].

243. See *Country Information*, EUR. AGENCY FOR SPECIAL NEEDS & INCLUSIVE EDUC., <https://www.european-agency.org/country-information> [<https://perma.cc/34DU-SPXC>] (last visited Oct. 13, 2020) (listing thirty-one European countries that have invested in inclusive education systems).

244. See *Partner Countries*, GLOB. P'SHIP FOR EDUC., <https://www.globalpartnership.org/where-we-work/partner-countries> [<https://perma.cc/F356-KBZD>] (last visited Oct. 13, 2020) (listing counties in which GPE has facilitated inclusive education programs).

245. See, e.g., Tiina Itkonen & Markku T. Jahnukainen, *Disability or Learning Difficulty? Politicians or Educators? Constructing Special Education in Finland and the United States*, 9 COMPAR. SOCIO. 182, 189 (2010); Joel Kivirauma & Kari Ruoho, *Excellence*

Like the U.S., Finland monitors the needs of all students in order to identify learning barriers and difficulties.²⁴⁶ However, because the Finnish model conceives of individualized support “as a part of basic education”²⁴⁷ for all rather than a legal right conferred upon only a discrete subset of students,²⁴⁸ there is no need for reliance upon strict eligibility categories built on the assumption of disability as being psychological or medical in nature.²⁴⁹ And because educational supports are formulated around a student’s individual needs as opposed to a particular diagnosis, students must be constantly monitored and assessed and learning plans constantly adjusted to account for changing circumstances. This process differs significantly from the U.S. approach, which effectively sets IEPs in stone by only requiring a once-annual review of a student’s goals and educational progress²⁵⁰ and places the onus on parents to push for additional evaluations or changes in placement and services.

In 2015, almost twenty-five percent of Finnish students received individual or small-group support as part of their general education, and almost half of Finnish students receive additional academic support at some point during their education.²⁵¹ This approach has led to the perhaps counterintuitive result that while Finland has one of the highest rates of special education identification in the world, it also scores extremely highly on international assessments of national education systems.²⁵² Indeed, a significant explanatory factor in Finland’s performance is that even its

Through Special Education? Lessons from the Finnish School Reform, 53 REV. EDUC. 283, 289 (2007).

246. See *Country Information for Finland — Assessment within Inclusive Education Systems*, EUR. AGENCY FOR SPECIAL NEEDS & INCLUSIVE EDUC. (Mar. 24, 2020), <https://www.european-agency.org/country-information/finland/assessment-within-inclusive-education-systems> [<https://perma.cc/69HH-5B85>].

247. Kivirauma & Ruoho, *supra* note 245, at 289.

248. See *supra* Parts II, III.A.

249. Students in Finland experiencing learning difficulties for any reason “receive services without formal diagnostic assessments or labels[.]” See Itkonen & Jahnuainen, *supra* note 245, at 189. Of course, low-incidence disability categories such as visual/hearing impairments or significant cognitive impairments are medically diagnosable. This discussion focuses on the high-incidence, “soft” eligibility categories that are based on more subjective considerations.

250. 20 U.S.C. § 1414(d)(3) (2018).

251. See *Finland: Supporting Equity*, NAT’L CTR. ON EDUC. & ECON., <http://ncee.org/what-we-do/center-on-international-education-benchmarking/top-performing-countries/finland-overview/finland-education-for-all/> [<https://perma.cc/23UA-ESL2>] (last visited Oct. 13, 2020) (defining special needs students as “any student who needs learning help[]”).

252. Kivirauma & Ruoho, *supra* note 245, at 285–88.

weakest students perform relatively highly on international assessments,²⁵³ demonstrating the value of a special education system dedicated to providing individualized support to all students.

Finland's implementation of the inclusive schools approach stands in contrast to the current procedure-driven and input-focused approach in the United States. Yet there is little evidence that procedural compliance determines student success,²⁵⁴ and the IDEA's formal approach to student identification risks shutting out a significant number of students with special needs.²⁵⁵ Eliminating the need for eligibility categories and classifications for low-incidence disabilities would give local schools significantly more latitude in determining how to structure programming to optimize student performance as well as account for local conditions and individual circumstances.²⁵⁶ It would also further the IDEA's commitment to mainstreaming students who can be taught in the general education classroom and support individualized learning for all students — not just those who receive official diagnoses or whose parents have the resources to push for them.

The abandonment of the special education eligibility categories would require a significant shift in how special education is conceptualized in this country.²⁵⁷ Yet in some ways, the United States is already moving towards a more integrated and intervention-based approach to special education. School districts are currently authorized to use up to fifteen percent of their federal IDEA funds on students “not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.”²⁵⁸ One such form of support is the “Response to Intervention” model, which offers tiered supports to struggling students, who may be

253. *Id.* at 288.

254. *See* Skiba et. al., *supra* note 157, at 272.

255. *See supra* Part IV.A.

256. *Cf.* Itkonen & Jahnukainen, *supra* note 245, at 192 (noting that, in Finland, “the IEP does not have the contractual nature of its U.S. counterpart, and instead is an educational blueprint for the teacher.” Because “special education in Finland was initiated by the school system, [and] not the political system[,] . . . disability construction is educational, and the policy is grounded in an educational model. Interventions are available to all students and teachers make decisions regarding them. The policy is thus broad, and assigns authority and latitude to the local school.”) (emphasis omitted).

257. *See, e.g., id.* at 198 (“An intervention model would fundamentally change the way by which special education has been organized in the US, by moving from a diagnosis-driven deficit model, based on rights, to a proactive academic intervention model, grounded in professional judgment of educators.”).

258. NAT'L COUNCIL ON DISABILITY, *supra* note 18, at 19; *cf.* 20 U.S.C. § 1413(f) (2018).

deemed eligible for special education and related services, but only if the additional supports are not successful in improving their performance.²⁵⁹ The model is by no means perfect; both parents and special education professionals have criticized RTI as perpetuating a “wait to fail” approach based on delays in identification and special education intervention.²⁶⁰ However, RTI demonstrates a move towards a more inclusive approach to meeting students’ individual needs without labels or exclusion from the general education environment.

Further, some states have taken advantage of the wide latitude they have in terms of establishing eligibility criteria for LD to loosen eligibility requirements to the extent that evidence of “sub-standard academic achievement” is sufficient to qualify a student for special education services.²⁶¹ If, as this Note has shown, eligibility requirements can be manipulated on a state-by-state basis to respond to funding rather than need,²⁶² and students whose educational deficits arise from different sources can be effectively educated in substantially similar ways,²⁶³ then the United States should encourage this trend towards the inclusive schools approach by taking the categorization out of special education and focusing instead on the provision of appropriate services to all students with special needs.

Despite the challenges rural schools currently face in funding and attracting and retaining special education teachers, these schools are an ideal setting for implementing an inclusive schools approach. Rural special education teachers report close relationships with students and parents, as well as an appreciation for smaller class sizes and increased opportunities for collaborative relationships with general education teachers.²⁶⁴ Further, a new approach to teacher recruitment in rural schools — Grow Your Own (GYO) educator programs — has the potential to provide a greater number of racially and ethnically diverse educators with the ability to address learning needs without perpetuating cultural

259. See COLKER, *supra* note 172, at 226–28.

260. *Id.* at 227.

261. See *id.* at 230 (“Some states, such as Connecticut, Illinois, Iowa, and North Dakota consider only a student’s achievement (and not aptitude) in determining if he or she should be classified as learning disabled.”).

262. See *supra* Part III.C.

263. See *supra* Part IV.A.

264. See Ann B. Berry & Maggie Gravelle, *The Benefits and Challenges of Special Education Positions in Rural Settings: Listening to the Teachers*, 34 RURAL EDUCATOR 1, 1–2 (2013).

biases.²⁶⁵ While increased funding and appropriate training is still necessary to help rural special educators meet a variety of needs, the rural setting provides ideal conditions for the development of a more flexible, collaborative, and culturally sensitive approach to special education.

As acknowledged at the beginning of this Part, the greatest obstacle to any kind of significant change in rural special education is the lack of sufficient funding for special education programming and rural public schools. But increased funding would be required to implement even the more modest reforms to the existing IDEA framework, which does little to benefit rural students with special needs either procedurally or substantively. For these students, reliance on parental advocacy is not enough, nor is private placement a workable alternative to inadequate public school programming. To meet the needs of students in rural communities, change has to happen from within local schools, in a manner that prioritizes academic growth over procedural compliance. While school districts must still be held accountable for ensuring that students are receiving FAPE, accountability should not come at the cost of procedural mechanisms that disadvantage parents, risk shutting out students with special needs, and pit families and schools against each other as adversaries rather than collaborators. As Professor Martha Minow wrote in the context of special education,

[b]udgetary and bureaucratic problems will not disappear in the face of new conceptual understandings; however, new attitudes and strategies for dealing with these problems could emerge. In short, we cannot change our world simply by thinking about it differently, nor can we change it unless we think differently enough to see where we are, and, with this sight, act differently.²⁶⁶

265. “GYO teacher programs help address teacher shortages, retention issues and teacher diversity by engaging in a variety of strategies that aim to recruit teachers from local communities in hopes that the pool of candidates will increase diversity and will be more likely to stay in teaching in the community.” ANGELA VALENZUELA, GROW YOUR OWN EDUCATOR PROGRAMS: A REVIEW OF THE LITERATURE WITH AN EMPHASIS ON EQUITY-BASED APPROACHES 2 (2017), <https://files.eric.ed.gov/fulltext/ED582731.pdf> [<https://perma.cc/6PGW-2V93>]. GYO programs have been used to increase the supply of special education teachers as well as general education teachers. See Sutton et. al., *supra* note 176, at 14.

266. Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 159 (1985).

The inclusive schools model provides a new way to conceptualize special education in a way that empowers educators to act in the interest of all struggling students and focuses on the transformation of public schools as a whole, rather than the outsourcing of vital funding to pay for private school tuition or voucher programs that do little to help the students left behind. For many of the country's most vulnerable students, such a model would come closer to delivering on the promises that the IDEA's legal model and procedural approach has been unable to achieve.

VI. CONCLUSION

The challenges facing students with special needs in rural schools have often remained hidden from scholars and policymakers. Understanding these challenges is important not just because of the significant population of rural students who require special education services, but because they are indicative of the failings of a special education system that is overly reliant on private enforcement and procedural compliance. The IDEA's inability to meet the needs of rural students adds to the mounting evidence that it is time to rethink the legalization of special education, so that truly individualized programming and opportunities for educational progress can become a reality for all students who need additional support.

The purpose of this Note is not to suggest that there is any single solution to the problems plaguing special education, in the rural context or otherwise. The inequity inherent in the current structure of special education is the result of a complex array of funding practices, judicial decisions, statutory schemes, and significant social and economic inequalities. Meaningful change for children with special needs requires not just incremental reform, but systemic change. A consideration of the benefits of the inclusive schools model in rural schools provides one step on the path to achieving it.