

SPECIAL EDUCATION, POVERTY,  
AND THE LIMITS OF PRIVATE ENFORCEMENT

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*This Article examines the appropriate balance between public and private enforcement of statutes seeking to distribute resources or social services to a socioeconomically diverse set of beneficiaries through a case study of the federal special education law, the Individuals with Disabilities Education Act (IDEA). It focuses particularly on the extent to which the Act's enforcement regime sufficiently enforces the law for the poor. The Article responds to the frequent contention that private enforcement of statutory regimes is necessary to compensate for the shortcomings of public enforcement. Public enforcement, the story goes, is inefficient and relies on underfunded, captured, or impotent government agencies, while private parties are appropriately incentivized to act as private attorneys general. This Article challenges that argument as not applicable to*

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*all circumstances. Instead, it uses the IDEA to identify certain features of institutional design that can make heavy reliance on private enforcement lead to predictable disparities in enforcement in favor of wealthier beneficiaries as opposed to poor beneficiaries, in contravention of the stated goals of some statutes. These features of institutional design include universal rather than means-tested service provision distributed by relying on nontransparent, non-precedential, private bargaining over a highly individualized system where the contours of the right are determined through significant amounts of agency discretion. Where these features are present, the Article argues, greater attention to public enforcement, as opposed to private enforcement, is likely to be necessary if the goal is to avoid enforcement disparities in favor of wealthier beneficiaries. Alternatively, modifying these features may reduce enforcement disparities and make public enforcement less necessary.*

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## INTRODUCTION

Scholars frequently focus on the importance of private enforcement of statutory regimes in a variety of fields with a concomitant nod to the limits of public enforcement.<sup>1</sup> They point to the efficiency of private enforcement, since private parties will take action only when the expected value of doing so outweighs their expected costs.<sup>2</sup> They note the significance of private parties acting as private attorneys general<sup>3</sup> and explore how both class actions and serial individual actions can produce policy change.<sup>4</sup> They express concern about relying on underfunded, captured, or impotent government agencies to enforce the law.<sup>5</sup> In turn, this focus on private enforcement results in expressions of dismay at doctrinal and legislative cutbacks on such enforcement;<sup>6</sup> advocacy around creating private rights of action in legislation or permitting private enforcement through judicially

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1 See, e.g., Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1132–34 (2007) (highlighting the shortcomings of public enforcement); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 409 (2008) (arguing that private enforcement is necessary for some statutes “because the threat that federal funds will be withheld is remote at best”).

2 See, e.g., Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 168–69 (1985) (“[P]rivate enforcement agents, unlike government regulators, will possess ongoing economic interests directly related to the costs and benefits of public policy implementation.”).

3 See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (describing the essential role of private attorneys general in civil rights enforcement).

4 See, e.g., Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 297–305 (1996) (describing role of private actions in a variety of contexts, including statutory enforcement).

5 See, e.g., Albiston & Nielsen, *supra* note 1, at 1133–34 (describing these concerns); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1458–59 (1998) (same); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 108–09, 130–31 (2005) (same).

6 See, e.g., Karlan, *supra* note 3, at 187 (criticizing attempts to limit private enforcement).

implied private rights of action or § 1983 suits;<sup>7</sup> and even suggestions that some government enforcement agencies ought to go out of business.<sup>8</sup>

There is no doubt that private action can play a significant role in enforcing statutory regimes, for all of the above reasons. But at the same time, there are serious questions about whether scholars and policymakers can place too much emphasis on private enforcement when more public enforcement is actually necessary to effectuate the goals of a statute. The burdens associated with private enforcement—burdens that may be disproportionately more difficult for people in poverty—cast doubt on arguments for greater reliance on private enforcement as a general matter.<sup>9</sup> Moreover, evidence that many violations go unreported further suggests that overreliance on private enforcement may result in underenforcement of the law.<sup>10</sup> This problem may be especially acute when a statute seeks to distribute funding or social services to a socioeconomically diverse set of beneficiaries without privileging those in the wealthier end of the group. If beneficiaries with fewer financial resources consistently bring fewer claims than their wealthier counterparts, relying heavily on private enforcement may mean that the former group will not receive their fair share of the distribution. Reliance on private enforcement will thus unintentionally undercut the statute's substantive goals.

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7 See, e.g., Melanie Natasha Henry, Comment, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CALIF. L. REV. 1117, 1158–68 (2004) (advocating private right of action and § 1983 suits for No Child Left Behind); Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667, 693–703 (2004) (discussing alternative theories for private enforcement of No Child Left Behind).

8 See, e.g., Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 64 (1996) (“[I]t is time to fundamentally rethink the necessity and proper role of the EEOC. Whatever the EEOC's original mission, and whatever the original hope, today the agency is clearly a failure, serving in some instances as little more than an administrative obstacle to resolution of claims on the merits.”).

9 See BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS 43–44 (1997) (describing burdens).

10 See Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 27 n.144 (2001); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 379–80 (1988); Selmi, *supra* note 8, at 27–28 n.99; cf. Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 720–24 (1977) (offering evidence that many potential consumer complaints go unreported and exploring reasons why complaints are never registered).

This Article considers questions about the appropriate balance between public and private enforcement in such a statutory scheme through a case study of the federal special education law, the Individuals with Disabilities Education Act (IDEA).<sup>11</sup> The IDEA requires that states provide “appropriate” educational services to children with disabilities, supplying some federal funding to help make this possible.<sup>12</sup> It creates a host of private enforcement mechanisms, from administrative hearings to lawsuits, as well as a system of public enforcement through federal and state agencies.<sup>13</sup> The statute is a universal rather than a means-tested program, meaning that its benefits are intended to extend to the wealthy and middle class as well as the poor. It explicitly announces its intention that resources under the statute are to be distributed equitably, and it directs greater funding to states with a higher share of poor children.<sup>14</sup> Yet the evidence suggests that children from wealthier families enforce their rights under the statute at higher rates than do children in poverty<sup>15</sup> and that this enforcement disparity has a negative effect on the amount and quality of services children in poverty actually receive.<sup>16</sup> Part of the goal of this Article is to explain how certain features of statutory design in the IDEA’s private enforcement system lead to this result.

To study how institutional design choices may create and sustain private enforcement disparities in distributional statutes is not to suggest that such disparities do not exist in other types of statutes, nor is it to suggest that the design features that may be particularly salient to enforcement disparities in distributional statutes do not exist to some degree in other types of statutes. Yet because the federal government uses distributional statutes to achieve a number of its policy goals—especially in education, health, and other social welfare programs—it is worthwhile to isolate the features of statutory design that lead to enforcement disparities in those statutes, so that those who wish to counter such disparities in distributional statutes understand which statutory levers to adjust.

There is a growing literature on the problem of economic disparities in the implementation and enforcement of the IDEA.<sup>17</sup> Chief

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11 20 U.S.C. §§ 1400–1482 (2006 & Supp. IV 2010).

12 *See infra* Part I.A.

13 *See infra* Part I.A.

14 *See infra* Part I.C.

15 *See infra* Part I.B.

16 *See infra* Parts I.C, II.A–D.

17 *See, e.g.*, MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE 67–92 (1997) (describing socioeconomic disparities in disability education programs); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y

among the concerns expressed in the literature is that wealthier parents use the Act's private enforcement mechanisms more than poor parents do. This is not a new concern. Congress has amended the private enforcement system over the years in attempts to make that system more accessible to low-income families. For example, prevailing parents may recover attorneys' fees, and alternative dispute resolution, which can be less expensive than adversarial lawsuits, is encouraged.<sup>18</sup> Contemporary scholarship largely focuses on additional ways to reform the private enforcement system to ensure that poor families are not left behind, with comparatively little focus on the ways that public enforcement can or should be reformed to achieve this goal.<sup>19</sup>

The critical focus on private enforcement at the expense of public enforcement may have a variety of explanations: it may grow out of frustration that public enforcement of the IDEA has historically not been vigorous,<sup>20</sup> reluctance to introduce a note of class consciousness

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171, 171–73 (2005); 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 (Gary Sykes et al. eds., 2009); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 *YALE L.J.* 1802, 1836–37 (2008); Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 *Nw. J.L. & Soc. POL'Y* 263, 269–71 (2008).

A parallel literature addresses the problem of racial disparities in special education, including concerns about overrepresentation of minorities in certain disability classifications and inappropriate provision of special education services to minorities. *See, e.g.*, BETH HARRY & JANETTE KLINGNER, *WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION?* (2006); *COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC.*, NAT'L RESEARCH COUNCIL, *MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION* (M. Suzanne Donovan & Christopher T. Cross eds., 2002); *RACIAL INEQUITY IN SPECIAL EDUCATION* (Daniel J. Losen & Gary Orfield eds., 2002); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 *HARV. C.R.-C.L. L. REV.* 407, 430 (2001). The legal tool to remedy these disparities is Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2006), which prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin. *See id.* The literature on economic and racial disparities raises overlapping but not identical concerns. I address only the former in this Article.

18 *See infra* Part I.B.

19 The focus on private enforcement is primary but not exclusive. For example, Hehir notes that greater state enforcement is necessary to effectuate the goals of the statute for poor children, but does not go into much detail about what this enforcement should look like. *See* Hehir, *supra* note 17, at 839. Similarly, Caruso gestures toward the need for more public involvement but provides little in the way of specifics. *See* Caruso, *supra* note 17, at 195–96.

20 *See infra* Part IV.A.

in the statutory framework to avoid the sense that it is a program for the poor,<sup>21</sup> or an understanding that private enforcement for wealthier children will have positive externalities for poor children.<sup>22</sup> Whatever the explanations, however, the almost exclusive focus on private enforcement is a mistake. As I argue below, certain design features of the IDEA's private enforcement mechanisms severely limit their utility for children in poverty. Because modifying these mechanisms to address this problem is either normatively undesirable on other grounds or politically implausible, there is a strong case to be made for increased attention to public enforcement strategies.

The Article proceeds in five parts. After briefly describing the purpose of the IDEA and the structure of its enforcement mechanisms, Part I discusses the evidence that there are disparities in the use of the Act's private enforcement mechanisms in favor of wealthier families. The existence of these disparities is often asserted as a matter of anecdote and theory, but this Part marshals the available empirical evidence to support this assertion. This Part then explains why the disparities are a problem. The statute purports to distribute resources in a way that is sensitive to children's actual needs while blind to their financial needs. When poor children enforce their rights at lower rates than wealthier children, the dynamics tend to lead to better services for wealthier children. This outcome runs counter to the statute's distributional goals.

While Part I demonstrates that these are, in fact, the statute's distributional goals, I do not in this Article attempt to justify these goals as normatively correct. My project instead is to highlight how a statute's design choices in its enforcement regime may unintentionally undercut its substantive distributional goals. To that end, Part II describes the elements of institutional design that contribute to the problem of enforcement disparities: a universal rather than means-tested program that relies on nontransparent, nonprecedential, private bargaining over a highly individualized right to the provision of social services, where the contours of the right are determined through significant amounts of agency discretion. This Part examines the way that these features lead to informational asymmetries, negative externalities, and high transaction costs that make private enforcement of the law comparatively difficult for families without financial resources. It also demonstrates why other elements of institutional design that have attempted to correct for these problems have not done so.

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21 *See infra* Part III.A.

22 *See infra* Part II.C.

Part III reviews possible reforms to the Act's private enforcement mechanisms that other scholars and policymakers have suggested and argues that they are insufficient for a host of structural as well as political reasons. In assessing the feasibility of reforms to the private enforcement system, one of my goals is to maintain the political economy of the statute, which has long received support across party lines and the socioeconomic spectrum. I do not, therefore, consider making the statute a means-tested program or eliminating the existence of individual rights or private rights of action altogether, even though these options would have the effect of eliminating class-based enforcement disparities. Following the literature suggesting that universal programs can achieve more redistribution than means-tested programs, I reject reforms that would pit the wealthy against the poor.

This perspective also informs Part IV. In that Part, I first justify a greater role for public enforcement focusing on children in poverty in light of the insufficiency of reforms to the IDEA's private enforcement system. I then propose three types of reforms to the public enforcement system: one based on informational regulation, one based on monitoring and oversight, and one based on financial incentives. I attempt to show why each type of reform would improve enforcement of the law for children in poverty and why the political economy of the statute could support some version of each type of reform.

Part V explores lessons from this case study for allocating enforcement responsibilities between public and private actors in distributional statutes more generally. This Part first highlights other statutes that share some of the features of the IDEA, for which similar types of public enforcement may be helpful to support the statutes' distributional goals. This Part also observes that where public enforcement is unlikely to be forthcoming in a given statutory scheme, adjusting the statute's other design features may reduce distributional problems. This Part concludes by considering how such adjustments might work in several specific instances.

## I. THE PROBLEM OF DISPARITIES IN PRIVATE ENFORCEMENT OF THE IDEA

### A. *The Legal Framework of the IDEA's Enforcement System*

The IDEA is the second largest federal program in education, providing states and districts with approximately \$12 billion each year to serve about six million children with disabilities nationwide,



roughly ten percent of all school-aged children.<sup>23</sup> To be eligible for service under the IDEA, a child must (1) be classified as having a statutorily recognized disability and (2) need special education and related services (such as various kinds of physical, occupational, medical, or psychological therapies) because of that disability.<sup>24</sup> Together, special education and related services define the Free and Appropriate Public Education (FAPE) to which every child served by the IDEA is entitled.<sup>25</sup> What constitutes each child's FAPE must be detailed in an individualized education program (IEP), designed and updated annually by a team of teachers, specialists, and the child's parents.<sup>26</sup> The statute requires that education for such children be provided in the "least restrictive environment"<sup>27</sup>—that is, that children with disabilities must be educated to the maximum extent possible with children without disabilities.<sup>28</sup> Other than this requirement, the statute permits states, which in turn permit districts and schools, to design

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23 See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. G, tit. III, 121 Stat. 1844, 2190–200 (2007) (codified in scattered sections of U.S.C.); 1 U.S. DEP'T OF EDUC., 27TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2005, at xiv (2007). Special, one-time funding of \$11.7 billion for IDEA came as part of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 1115, 123 Stat. 115 (codified in scattered sections of U.S.C.), which was spread over fiscal years 2009 and 2010. See Alyson Klein, *Guidelines Sketch Out Use of Aid*, EDUC. WK., Mar. 18, 2009, at 16. Notwithstanding this federal funding, states and districts continue to bear most costs of special education themselves (as they do the costs of education more generally). See Eloise Pasachoff, *How the Federal Government Can Improve School Financing Systems* 4–5, 27–28 (Jan. 2008) (unpublished manuscript), available at [http://www.brookings.edu/~media/Fils/rc/papers/2008/01\\_education\\_pasachoff/01\\_education\\_pasachoff.pdf](http://www.brookings.edu/~media/Fils/rc/papers/2008/01_education_pasachoff/01_education_pasachoff.pdf). Federal funding for the IDEA is second only to federal funding for Title I of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.), which was reauthorized as the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.). Title I funds are directed toward children in poverty and in fiscal year 2008 stood at \$15.7 billion. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. G, tit. III, 121 Stat. 1844 (2007) (codified in scattered sections of U.S.C.).

24 See 20 U.S.C. § 1401(3)(A), (26), (29) (2006). See generally *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 68 n.1 (1999) (interpreting breadth of "related services" provision).

25 See 20 U.S.C. §§ 1400(d)(1)(A)–(B), 1401(9), 1412(a)(1).

26 See *id.* §§ 1412(a)(4), 1414(d).

27 *Id.* § 1412(a)(5).

28 See *id.*

the substantive particulars of educational programs for children with disabilities.<sup>29</sup>

The IDEA is often called “a model of cooperative federalism” for the way it envisions the collaborative roles of the federal, state, and local governments.<sup>30</sup> The federal agency tasked with oversight over the IDEA issues regulations;<sup>31</sup> disburses funds to the states;<sup>32</sup> reviews, approves, and monitors state performance plans;<sup>33</sup> provides technical assistance;<sup>34</sup> and, where it determines that a state is failing to comply with the IDEA, takes enforcement action against the state, either by moving to cut off its IDEA funds or to refer it to the Department of Justice for litigation.<sup>35</sup> For their part, states are responsible for general supervision of all educational programs for children with disabilities in the state<sup>36</sup> and for monitoring the implementation of the IDEA by school districts.<sup>37</sup> In turn, school districts must comply with a variety of requirements in order to receive state and federal funds and are primarily responsible for service delivery.<sup>38</sup> No public actor is tasked with reviewing on its own initiative the substance of individual children’s IEPs.

It is the Act’s private enforcement system that takes on this role. The IDEA is unusual among education programs created under the framework of cooperative federalism in that it creates an individually enforceable right to services.<sup>39</sup> The provision of FAPE is an entitle-

29 *Cf. Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 183 (1982) (stating that the predecessor statute to IDEA “leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility”).

30 *See Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (quoting *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999) (internal quotation marks omitted)).

31 *See* 20 U.S.C. §§ 1402, 1406.

32 *See id.* § 1411.

33 *Id.* § 1416(a)–(d) (2006 & Supp. IV 2010).

34 *Id.* § 1417(a) (2006).

35 *Id.* § 1416(e) (2006 & Supp. IV 2010).

36 *Id.* § 1412(a)(11) (2006).

37 *Id.* § 1416 (2006 & Supp. IV 2010).

38 *Id.* § 1413 (2006).

39 By contrast, for example, there are no individual rights or private enforcement mechanisms in No Child Left Behind. Courts have further held that certain provisions in No Child Left Behind permitting students in failing schools to transfer or to receive supplemental educational services are not enforceable under § 1983. *See Ass’n of Cmty. Orgs. for Reform Now v. N.Y.C. Dep’t of Educ.*, 269 F. Supp. 2d 338, 343–47 (S.D.N.Y. 2003); *see also Alliance for Children, Inc. v. City of Detroit Pub. Schs.*, 475 F. Supp. 2d 655, 658 (E.D. Mich. 2007) (holding that the No Child Left Behind does not create a private right of action); *Stokes v. U.S. Dep’t of Educ.*, No.

ment, not merely a precatory goal. Parents who wish to challenge a substantive decision about their child's IEP or the process by which it was made may go through a formal state administrative process, called a due process hearing.<sup>40</sup> An impartial hearing officer presides over the hearing, at which the parties have the right to be represented by counsel, to present evidence, to cross-examine, and to compel the attendance of witnesses.<sup>41</sup> The results of the hearing may subsequently be disputed in state or federal court.<sup>42</sup> Between 3000 and 7000 due process hearings are held each year, about 300 to 400 of which annually proceed to litigation.<sup>43</sup>

In addition to requesting due process hearings, parents have two other options for enforcing rights under the IDEA.<sup>44</sup> First, they may ask for mediation about any dispute with the school district regarding their child's special education services.<sup>45</sup> A little over 4000 such mediations are held each year.<sup>46</sup> Second, they may file a complaint with the state educational agency challenging some aspect of the provision of special education services by the school, district, or state itself.<sup>47</sup> The state educational agency must then investigate and resolve the complaint in some way.<sup>48</sup> Approximately 6000 state complaints are

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05-11764-RWZ, 2006 WL 1892242, at \*2 (D. Mass. July 10, 2006) (same); *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 914-17 (N.D. Ohio 2005) (same).

40 See 20 U.S.C. § 1415(f)-(g) (2006).

41 See *id.* § 1415(h).

42 See *id.* § 1415(i)(2).

43 See JAY G. CHAMBERS ET AL., CTR. FOR SPECIAL EDUC. FIN., REPORT 4: WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000?, at 8-9 (2003), available at <http://www.csef-air.org/publications/seep/national/Procedural%20Safeguards.PDF>; U.S. GEN. ACCOUNTING OFFICE, GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 13-14 (2003). Although the numbers of due process hearings and court cases are small as a percentage of the number of children receiving services under the IDEA, it is much larger than initially anticipated, as the statute was expected to diminish the need to litigate over the rights of children with disabilities. See R. SHEP MELNICK, BETWEEN THE LINES 135, 140, 158-59 (1994); see also Samuel R. Bagenstos, *Where Have All the Lawsuits Gone? The Shockingly Small Role of the Courts in Implementing the Individuals with Disabilities Education Act* (Wash. Univ. Sch. of Law Working Paper No. 08-12-05, 2008), available at <http://ssrn.com/abstract/=1302085>.

44 In *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), the Supreme Court held that parents themselves hold individually enforceable rights under the IDEA. See *id.* at 535.

45 See 20 U.S.C. § 1415(e).

46 See U.S. GEN. ACCOUNTING OFFICE, *supra* note 43, at 15.

47 See 34 C.F.R. §§ 300.151-153 (2010).

48 See *Id.*

filed annually.<sup>49</sup> These three options—due process hearings, mediation, and state complaints—constitute the IDEA’s private enforcement mechanisms.<sup>50</sup>

The individualized right and private enforcement mechanisms are generally seen as important victories for the disability community, allowing parents (and indeed disabled children themselves) a degree of autonomy and control in the construction of their educational experience. However, as the next subpart demonstrates, there have been unforeseen distributional consequences arising from this system of private enforcement, making this victory decidedly less effective in enforcing the statute overall.

### B. Enforcement Disparities

Within the first ten years of the IDEA’s existence, a number of studies found that wealthier families were the primary instigators of due process proceedings, which were at that time the only private enforcement option available in the statute.<sup>51</sup> Since that time, a variety of statutory and regulatory changes have attempted to make the system of private enforcement more accessible to low-income families.

First, in 1986, Congress provided that prevailing parents could have the cost of their attorneys’ fees paid for by losing school districts.<sup>52</sup> Fee-shifting provisions are thought to level the playing field

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49 U.S. GEN. ACCOUNTING OFFICE, *supra* note 43, at 15.

50 Some scholars would call the state complaint system a form of public enforcement, treating as public enforcement anything that involves a government agency. These scholars then differentiate between government action that involves processing complaints made by private parties and government action that involves investigations initiated without the involvement of private parties. See Selmi, *supra* note 5, at 1411–23 (differentiating between individual complaints filed with the government and complaints initiated as a result of government investigation). It is this second type of government action that I consider to be public enforcement in this Article because filing a complaint with a government agency takes private initiative, much as filing an administrative action or a lawsuit does. Where the line between public and private itself is drawn, however, is of less importance than the analysis of how the actual mechanisms function with respect to private action and government action.

51 See, e.g., Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in LAW AND SCHOOL REFORM 205, 214 (Jay P. Heubert ed., 1999) (discussing studies from early 1980s); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in SCHOOL DAYS, RULE DAYS 343, 354 (David L. Kirp & Donald N. Jensen eds., 1986) (same).

52 See Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415 (2006)). The fee-shifting provision responded to the Supreme Court’s decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the original IDEA legislation did not permit prevailing parents to recover their attorneys’ fees, see *id.* at 1021.

for individuals without financial resources, as they are designed to encourage attorneys to take up the meritorious cases of plaintiffs, especially those who would otherwise not be able to afford legal fees.<sup>53</sup>

Second, in 1997, Congress mandated that all states create a mediation option separate from the due process proceeding, making a national requirement out of a move that many states had already made.<sup>54</sup> This option, too, was designed in part to make the enforcement system friendlier to low-income families, on the theory that a less adversarial process would reduce the need for an attorney to begin with.<sup>55</sup>

Third, the regulation creating the state complaint system was modified in 1992<sup>56</sup> and again in 1999<sup>57</sup> to ensure that information about the availability of that system was more widely disseminated, to mandate that states solicit more information from the complainant instead of simply adopting as findings the response of the complained-about public actor, and to require states to respond to a complaint not only by correcting the violation for the particular complainant but also by extending the correction to any other children the complaint might conceivably affect.<sup>58</sup> These modifications also had the potential to improve low-income children's access to this mechanism as well as the mechanism's utility.

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53 See, e.g., Albiston & Nielsen, *supra* note 1, at 1093–95 (describing advantages of fee-shifting provisions); Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don't Get It)* (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, No. 150, John M. Olin Ctr. for Law & Econ., Working Paper No. 09-010, Wash. Univ. Sch. of Law Pub. Law & Legal Theory Working Paper Series, Working Paper No. 09-06-01, 2009), available at <http://ssrn.com/abstract=1407275> (same).

54 See 20 U.S.C. § 1415(e) (2006).

55 See Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 41–48 (1999).

56 See Assistance to States for the Education of Students with Disabilities Program and Preschool Grants for Children with Disabilities, 57 Fed. Reg. 44,794, 44,829 (Sept. 29, 1992) (current version at 34 C.F.R. §§ 300.151–153 (2010)); Assistance to States for Education of Handicapped Children, 56 Fed. Reg. 41,266 (proposed Aug. 19, 1991) (current version at 34 C.F.R. pt. 300).

57 See Assistance to States for the Education of Students with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,413 (Mar. 12, 1999) (current version at 34 C.F.R. § 300.151(b)).

58 The earliest version of the state complaint system was located at 45 C.F.R. § 121a.602(a) (1978) (current version at 34 C.F.R. § 300.151–153). For a brief history of state complaint procedure regulations, which remain surprisingly understudied, see Nicole Suchey & Dixie Snow Huefner, *The State Complaint Procedure Under the Individuals with Disabilities Education Act*, 64 J. EXCEPTIONAL CHILDREN 529 (1998).

Notwithstanding these changes, the available evidence suggests that wealthier parents continue to come out ahead in the enforcement game. At the individual and intradistrict level, the evidence is largely anecdotal, but it is consistent and widespread. Throughout the country, scholars and commentators provide repeated examples of parents with greater financial resources disproportionately taking advantage of the IDEA's private enforcement mechanisms in comparison to their less well-heeled neighbors.<sup>59</sup> One small-scale study in Maine confirmed these anecdotal reports, finding that families with higher annual household income took advantage of the availability of due process hearings and mediations more than lower-income families did.<sup>60</sup>

More concrete empirical evidence exists of a wealth-based interdistrict disparity in the use of the IDEA's private enforcement mechanisms. According to a federally funded national study of due process cases, mediations, and litigation (collectively labeled "procedural activity") in the 1999–2000 school year, districts serving families with the highest median family income were more likely to have some type of procedural activity than districts serving families with the middle or lowest median family income.<sup>61</sup> For example, only four percent of the lowest income and ten percent of middle-income districts had due process hearings, while fifty-two percent of the highest income districts did.<sup>62</sup> Similarly, only nine percent of the lowest income and

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59 See, e.g., JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 140 (2003); KELMAN & LESTER, *supra* note 17, at 77, 87; CARUSO, *supra* note 17, at 196; Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only" Students*, 92 NASSP BULL. 19, 23 (2008) (describing research on IDEA); Wade F. Horn & Douglas Tynan, *Time to Make Special Education Special Again*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 23, 30–31 (Chester E. Finn, Jr. et al. eds., 2001); Daniel McGroarty, *The Little-Known Case of America's Largest School Choice Program*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY*, *supra*, at 289, 293–94; Christine Gralow, *The Special-Needs Kindergarten Crunch*, LESSON PLANS (Sept. 22, 2008, 9:09 PM), <http://lessonplans.blogs.nytimes.com/2008/09/22/the-special-needs-kindergarten-crunch/?scp=1&sq=special-needs+kindergarten@runch&st=cse&apage=1>.

60 Michael J. Opuda, *A Comparison of Parents Who Initiated Due Process Hearings and Complaints in Maine* 57–58, 92 (Nov. 17, 1997) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University) (on file with author).

61 CHAMBERS ET AL., *supra* note 43, at 14.

62 *Id.* The highest-income districts also had more litigations than districts in the other income categories (five percent compared to two percent), but these results were not statistically significant. *Id.* This may be because of the relatively smaller sample size of litigations (301 cases initiated and 293 cases ongoing in 1999–2000) compared to mediations (4266) and due process cases (6763). See *id.* at 8.

five percent of the middle-income districts had any mediations, while forty-three percent of the highest income districts did.<sup>63</sup>

It is unlikely that procedural activity in the highest income districts is due to inferior educational services in those districts. To the contrary, the evidence suggests that wealthier districts both spend more on and provide better special education services than less wealthy districts do.<sup>64</sup> Instead, as the authors of the study on procedural activity acknowledge, their findings are consistent with the idea that families with more financial (and perhaps also educational) resources are better situated to pursue their rights under the IDEA.<sup>65</sup>

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63 *Id.* at 14. There is much less disparity in the use of the state complaint system between high- and low-income districts, and the disparity is not statistically significant. *Id.* (finding thirty-five percent of lowest-income districts had state complaints, compared to eighteen percent of middle-income districts and thirty-two percent of highest-income districts); *cf.* Opuda, *supra* note 60, at 57–58, 92 (finding that lower-income families file state complaints more than they request due process hearings). Whatever the reason for this difference in utilization between the state complaint system and other forms of private enforcement, there are nonetheless reasons to be concerned about over relying on parents to file complaints. *See infra* Part II.

That families in low-income districts file state complaints at about the same rate as families in high-income districts might be a result of the relative ease with which a state complaint can be filed without the need for attorneys or an adversarial process. However, mediation was also intended to be a less adversarial process without the need for attorneys, and significant disparities exist in the use of that enforcement mechanism. It would be useful for future empirical research to compare the success rate for families using each kind of private enforcement mechanism and to consider whether there are class effects in any difference.

64 For example, a national study revealed that districts serving lower-income families spend less, both in real and in cost-adjusted terms, per child with a disability than do districts serving middle-income and wealthier families. JAY G. CHAMBERS ET AL., CTR. FOR SPECIAL EDUC. FIN., REPORT 2: HOW DOES SPENDING ON SPECIAL EDUCATION VARY ACROSS DISTRICTS?, at iv, 7–8 (2002), available at <http://www.csef-air.org/publications/seep/national/advRpt2.PDF>. A study of districts in Massachusetts found disparities in special education services between low-income and high-income districts, with students in low-income districts receiving later interventions, more segregated classrooms, less access to the general curriculum, and higher staff-to-student ratios. THOMAS HEHIR, NEW DIRECTIONS IN SPECIAL EDUCATION 120–24 (2005). Preliminary results from a study of districts in California suggested that white, relatively privileged students received more expensive, less restrictive special education services than their poorer minority classmates did. KELMAN & LESTER, *supra* note 17, at 75–82.

65 *See* CHAMBERS ET AL., *supra* note 43, at 19. Of course, because even districts with high median family incomes may serve poor children in addition to wealthy children and because these data do not disaggregate district-level data down to individual-level data, it is theoretically possible that poor children in wealthy districts may be enforcing their rights at the same rate as the wealthy children in those same districts. That the available individual and intradistrict evidence supports the contrary story suggests that this theoretical possibility does not reflect reality. *See also infra* Part II

Just as there is evidence of intradistrict and interdistrict disparities in the use of the IDEA's private enforcement mechanisms, so is there evidence of interstate disparities, even when adjusting for the number of children with disabilities within each state. For example, in 2006–2007, across all states and territories, there were 22.9 requests for due process hearings per 10,000 children with a disability, but six states had over thirty such requests per 10,000 children with a disability while twenty-nine states had fewer than five such requests per 10,000 children with a disability.<sup>66</sup> Similarly, nine states faced over twenty mediation requests per 10,000 children with a disability while thirty states faced under five such requests per 10,000 children with a disability.<sup>67</sup> Meanwhile, four states faced over twenty complaints per 10,000 children with a disability while nineteen states faced under five complaints per 10,000 children with a disability.<sup>68</sup>

Further research and data analysis beyond the scope of this Article are needed to disentangle the factors that explain this variation, but several observations that raise some concerns are possible now. First, states with more procedural activity do not seem to have services or outcomes that are either noticeably better (a potential result of more procedural activity) or noticeably worse (a potential cause of more procedural activity) than states with less procedural activity.<sup>69</sup> Second, especially with respect to requests for due process hearings and mediations, there is a striking regional variation. The states with higher numbers tend to be in the Northeast and California, while the states with fewer numbers tend to be in the Midwest, West, and South.<sup>70</sup> Third, this regional variation does not perfectly track child poverty rates, but there is enough connection to be troubling. Of the

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(analyzing how design features of the IDEA's private enforcement system privilege wealthier families).

66 See Dick Zeller, *Five Year State and National Summaries of Dispute Resolution Data*, CADRE, 28 (Dec. 21, 2010), <http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Table%207%20Summary%20CADRE520Dec5202010.pdf>.

67 See *id.* at 18.

68 See *id.* at 8.

69 See, e.g., 1 U.S. DEP'T OF EDUC., 28TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2006, at 205–18 tbls.3-1 to 3-8 (2009) (ranking states by measures such as percentage of students with disabilities receiving regular high school diplomas, exiting high school by dropping out, and receiving a high percentage of education in a more restrictive environment than the regular classroom).

70 See Zeller, *supra* note 66, at 18, 28; cf. Kenneth R. Weiss, *New Test-Taking Skill: Working the System*, L.A. TIMES, Jan. 9, 2000, at A1 (describing “high litigation corridor” for special education issues between Boston, New York, and Washington, D.C., and in wealthy communities in California, as compared to other regions).



ten states with the lowest child poverty rates, four had twenty-eight or more requests for due process hearings per 10,000 children with a disability and another two had approximately nineteen or twenty such requests,<sup>71</sup> while of the ten states with the highest child poverty rates, eight had under five such requests and another two had approximately seven or ten such requests.<sup>72</sup>

To be sure, the correlation between state child poverty rates and requests for due process hearings is not perfect. For example, Minnesota, Utah, and Colorado have low child poverty rates and low rates of procedural activity, while New York and California have high child poverty rates and high rates of procedural activity.<sup>73</sup> A variety of factors other than poverty are likely at work in these regional variations. These factors may include, among other things, heightened parental

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71 The child poverty rates in rank order by state are available through the Annie E. Casey Foundation using Census 2000 data. See *Data Across States*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?1Oct=2&by=a&order=a&ind=43&dfm=322&tf=38> (last visited Mar. 18, 2011). The four states with twenty-eight or more due process hearing requests per 10,000 children with disabilities in this low-poverty group are Connecticut (28.6 requests), Maryland (29.9 requests), Massachusetts (35.7 requests), and New Jersey (34.4 requests); New Hampshire and Vermont, also in this low-poverty group, had 19.7 requests and 18.6 requests, respectively. See Zeller, *supra* note 66, at 28.

72 The eight states in this high-poverty group with under five requests for due process hearings per 10,000 children with disabilities are Mississippi (4.1 requests), Louisiana (1.9), New Mexico (4.2), West Virginia (2.9), Arkansas (1.2), Kentucky (2.3), Tennessee (4.0), and South Carolina (1.3); also in this high-poverty list, Texas had 6.7 requests and Alabama had 9.7. See Zeller, *supra* note 66, at 28; *Data Across States*, *supra* note 71.

73 See Zeller, *supra* note 66, at 28. The District of Columbia is a dramatic outlier in this regard, as it has a greater percentage of child poverty than any state and yet is off the charts with respect to due process hearings, holding over 1700 hearings per 10,000 children with a disability in 2006–2007, compared to 6.7 hearings per 10,000 children with a disability across all states and territories. See Zeller, *supra* note 66, at 23; *Data Across States*, *supra* note 71. The high rates of due process hearings in D.C. are generally understood to reflect that city's broken special education system. See, e.g., DC APPLESEED CTR. & PIPER RUDNICK LLP, *A TIME FOR ACTION* (2004), available at [http://www.dcappleseed.org/library/Special\\_ed\\_Rprt.pdf](http://www.dcappleseed.org/library/Special_ed_Rprt.pdf). Notwithstanding D.C.'s high rates of private enforcement overall, concerns about enforcement disparities between poor and wealthier children continue to exist. In 1999, Congress placed a cap on the amount of attorneys' fees prevailing parents in special education cases in D.C. could receive from the school district. This limitation makes it more difficult for poor families who cannot afford to pay lawyers' fees to bring IDEA cases. See Lynn M. Daggett, *Special Education Attorney's Fees: Of Buckhannon, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. JUV. L. & POL'Y 1, 47–50 (2004); McGroarty, *supra* note 59, at 306 & n.15 (describing two "separate and unequal" special education systems in D.C. varying largely by parental wealth). I discuss the usefulness of the IDEA's attorneys' fees provision more generally in Part II.C.

expectations about schooling in general and special education services in particular in certain areas; cultural norms about when it is appropriate to challenge educational authorities, norms that may become replicated through social networks in a region;<sup>74</sup> and states' different approaches to IDEA dispute resolution.<sup>75</sup>

While the various contributing factors are complicated to unpack, and further empirical work remains to be done, the available evidence suggests that the disparate use of the IDEA's private enforcement mechanisms is less connected to substantive differences between special education services in each state or district than it is to student and family demographic factors that should be irrelevant to enforcement efforts defined by need.<sup>76</sup> The question thus becomes whether and why these enforcement disparities matter.

### C. *Why Enforcement Disparities Matter*

The wealth-based disparities in private enforcement raise troubling questions about the IDEA's effectiveness for children in poverty. Nothing in the statute suggests that it is intended to privilege comparatively wealthy children. To the contrary, while the statute is a universal rather than a means-tested program, its intent to pay particular attention to traditionally disadvantaged populations is clear. As a matter of history, the statute grew out of lawsuits brought by civil rights attorneys and poverty lawyers, who went on to be instrumental in drafting the original statutory provisions in ways that they thought would benefit their clients.<sup>77</sup> The current statutory text reflects this early concern. For example, the statute declares "equitable allocation of resources" as one of its central goals in light of "the Federal Government[']s . . . responsibility to provide an equal educational opportunity for all individuals."<sup>78</sup> It singles out for special efforts minority

74 See *infra* Part II.C.

75 See, e.g., U.S. GEN. ACCOUNTING OFFICE, *supra* note 43, at 16–21 (discussing different approaches to dispute resolution among states); KELLY HENDERSON, NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., *OPTIONAL IDEA ALTERNATIVE DISPUTE RESOLUTION* (2008), available at <http://www.directionservice.org/cadre/pdf/optional%20IDEA%20Alternative%20Dispute%20Resolution.pdf> (same); JOY MARKOWITZ ET AL., NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., *DISPUTE RESOLUTION* (2003), available at [http://www.projectforum.org/docs/dispute\\_resolution.pdf](http://www.projectforum.org/docs/dispute_resolution.pdf) (same).

76 Cf. Zeller, *supra* note 66, at iv (noting that it is "unlikely that these variations result solely from real differences in educational programs across these states").

77 See MELNICK, *supra* note 43, at 144, 155–56; MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 74 (2010).

78 See 20 U.S.C. § 1400(c)(7) (2006); see also *id.* § 1400(c)(1) ("Improving educational results for children with disabilities is an essential element of our national pol-

children with disabilities and those whose first language is something other than English.<sup>79</sup> It directs greater federal funding to states with a higher share of poor children.<sup>80</sup> And Congress and the implementing federal agency have continually revised the statute's private enforcement mechanisms in an (albeit unsuccessful) effort to make them more accessible to families without means.<sup>81</sup> Yet because of the statute's heavy reliance on private enforcement, and because private enforcement of the IDEA continues to be skewed in favor of wealthier families, the IDEA's enforcement regime is at cross-purposes with rest of the statute.<sup>82</sup>

The disparities in the enforcement of the IDEA are a signal of a still larger problem: disparities in the quality of special education programs provided to children in poverty. Simply put, and as described further in Part II of this Article, wealthier parents of children with disabilities are able to use the private enforcement system or the threat (whether implicit or explicit) of private enforcement to obtain superior services and more ambitious IEPs.<sup>83</sup> While the causal link between educational inputs and educational outcomes is notoriously difficult to pinpoint with precision,<sup>84</sup> there is reason to believe that the superior services provided to wealthier children with disabilities has had a real effect over time. A national study comparing outcomes

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icy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”).

79 See *id.* § 1400(c)(10)–(13); see also *infra* notes 264–268 and accompanying text (describing requirements for addressing racial disparities in special education services).

80 See 20 U.S.C. § 1411(a)(2), (d)(3)(A).

81 See *supra* notes 51–58 and accompanying text.

82 A funding regime that privileges wealthier children is also at cross-purposes with much of the rest of federal education spending. For example, one of the purposes of No Child Left Behind was to “clos[e] the achievement gap . . . between disadvantaged children and their more advantaged peers” by, for example, “distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest.” 20 U.S.C. § 6301(3), (5). Some federal education funding is specifically designed to encourage states to create school finance systems that do not permit great spending disparities between poor and wealthy districts. See, e.g., *id.* § 6337(b) (describing process for distributing Education Finance Incentive Grant funds based upon a state’s “fiscal effort and equity”); *id.* § 7709(b)(1) (encouraging “state equalization plans” under Impact Aid funding). Further, the federal Department of Education has recently established an Equity and Excellence Commission to consider “how the Federal government can increase educational opportunity by improving school funding equity.” See Equity and Excellence Commission, 75 Fed. Reg. 48,661 (Aug. 11, 2010).

83 See *infra* Part II.

84 See Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 440–41 (2005).

of students with disabilities in the mid-1980s with outcomes of students with disabilities in the early 2000s found that the impressive gains of this population overall were largely due to improved outcomes for children living in middle-income and upper-income homes.<sup>85</sup> In contrast, outcomes for children living in lower-income homes showed virtually no improvement.<sup>86</sup> This disparity is not attributable merely to differential services offered by wealthy and less wealthy districts, for even low-income children with disabilities who attended schools in relatively well-off districts still showed little improvement in outcomes over time.<sup>87</sup> The results of this study underscore two important points: that federal mandates matter and that the way federal mandates are implemented, including enforcement efforts, is critically important.

The wealth disparity in private IDEA enforcement is particularly disturbing because children with disabilities are more likely to live in poverty than children in the general population are. Data from the early 2000s shows that twenty-one percent of elementary- and middle-school students with disabilities live in poverty, compared to sixteen percent of children in the general population.<sup>88</sup> Thirty-seven percent of secondary-school students with disabilities live in households with family incomes of \$25,000 or less, compared to twenty percent of children in the general population.<sup>89</sup> The numbers are even more striking when race is factored in: more than half of African-American and Hispanic secondary-school students with disabilities live in households with family incomes of \$25,000 or less, compared with twenty-five percent of white secondary-school students with disabilities.<sup>90</sup> If the IDEA's private enforcement regime is insufficiently accounting for the needs of these students, large numbers indeed of the IDEA's intended beneficiaries are not being appropriately served.

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85 See Hehir, *supra* note 17, at 831–33; see also HEHIR, *supra* note 64, at 120–24 (describing a Massachusetts study finding that the majority of disabled students in high-income districts, who had received superior services, passed the state exit exam, while the majority of disabled students in low-income districts failed it).

86 See Hehir, *supra* note 17, at 831–33.

87 See *id.* at 836.

88 Jose Blackorby & Mary Wagner, *As Time Goes By: Short-Term Changes in the Experiences of Elementary and Middle School Students with Disabilities*, in SEELS: WAVE 1 WAVE 2 OVERVIEW 1-1, 1-2 to 1-5 (2004), available at [http://www.seels.net/designdocs/w1w2/SEELS\\_W1W2\\_complete\\_report.pdf](http://www.seels.net/designdocs/w1w2/SEELS_W1W2_complete_report.pdf).

89 Mary Wagner et al., *Who Are Secondary Students in Special Education Today?*, 2 NLTS2 DATA BRIEF 1, 2 (2003), available at [http://www.ncset.org/publications/nlts2/NCSETNLTS2Brief\\_2.1.pdf](http://www.ncset.org/publications/nlts2/NCSETNLTS2Brief_2.1.pdf).

90 See *id.*

It is useful to unpack the problem underlying the enforcement disparity a little more closely at this stage. There are at least two possible ways the enforcement disparity could affect the substance of the education provided to poor children with disabilities. First, the problem could be an absolute one: poor children could be receiving an amount or quality of service that is inadequate as measured against some minimum statutorily acceptable baseline, regardless of what wealthier children are receiving. Alternatively, the problem could be a comparative one: poor children could be receiving less than wealthier children do in terms of the amount or quality of service, even though the amount or quality poor children receive does not on its own violate the terms of the statute. To use the language of school finance litigation, the first problem is one of adequacy, while the second problem is one of equity.<sup>91</sup>

However, as the literature on school finance increasingly recognizes, the distinction between adequacy and equity is not as clear as it is sometimes made to seem. As James Ryan explains, “there is not a clear divide between equity and adequacy cases for the simple reason that courts in all cases tend to converge around the goal of rough comparability.”<sup>92</sup> In school finance cases brought under equity theories, “courts rarely require complete equality of resources” but instead something more like “‘substantial’ equality.”<sup>93</sup> In turn, in school finance cases brought under adequacy theories, courts “typically define adequacy in comparative terms and remain focused on resource disparities.”<sup>94</sup> The connection between equity and adequacy concepts makes sense to the extent that education is in part a “positional good”: one whose value depends on the extent of what others

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91 See generally William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990) (detailing the first two waves of school finance reform and predicting a new, third wave).

92 JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART* 150 (2010); see also Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS* 25, 27, 47 (Martin R. West & Paul E. Peterson eds., 2007) (describing “interconnectedness” of adequacy and equity theories in school finance reform); Aaron Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 895–96 (2006) (observing that “adequacy is a fuzzy concept not at all distinct from equality,” because what is adequate “is not an objective question” but one to be determined in part by reviewing what well-financed, high-performing schools propose and achieve).

93 RYAN, *supra* note 92, at 150.

94 *Id.*

possess.<sup>95</sup> In other words, because the quality of one's elementary and secondary education permits one to compete, to varying degrees, in the labor market and in admission to post-secondary education, it is difficult to define what an acceptable bare minimum should be without considering what one's future competitors will have received.<sup>96</sup> Just as in the school finance litigation context, a focus on the adequacy of education for poor children with disabilities is thus implicitly connected to equity with the education for wealthier children with disabilities.

But even if adequacy and equity could be cleanly separated in the case of the IDEA, both issues are important. On the one hand, if poor children are not receiving the minimally "appropriate" individualized services that the statute mandates, then the IDEA is failing to achieve its goals for this set of intended beneficiaries. On the other hand, when a wealthier child receives superior services to what his otherwise similarly situated poor neighbor receives simply because his parents have relied on the private enforcement system to their advantage, it gives the appearance that what is legally "appropriate" for a given child is connected to familial income. Nothing in the statute indicates that this is a desired result.

How are these disparities different from others? American law and policy allow a great deal of wealth-based inequity in both education and access to justice, after all. For example, parents have a constitutional right to send their children to private school,<sup>97</sup> and the federal Constitution both permits funding disparities between school districts<sup>98</sup> and treats the line between suburban and urban school districts as largely inviolable by federal intervention.<sup>99</sup> Further, while indigent criminal defendants have a constitutional right to an attorney provided at public expense,<sup>100</sup> no law forbids wealthy criminal defendants from purchasing superior legal services, and no law requires public funding for an attorney for indigent civil litigants at all. These regimes all privilege the wealthy.

What concerns me here, however, is a wealth-based disparity of a fundamentally different nature. I consider not an abstract, moral

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95 See *id.* at 151; William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 595-604 (2006).

96 See RYAN, *supra* note 92, at 15; Koski & Reich, *supra* note 95, at 597-603.

97 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

98 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

99 *Milliken v. Bradley*, 418 U.S. 717, 745 (1974); see also RYAN, *supra* note 92, at 63-117.

100 *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

question about the appropriate components of the social contract for children with disabilities,<sup>101</sup> but a narrower question about the distribution of public moneys in the context of a statute that does not purport to give more to the wealthy. My frame is not the philosophical consideration of whether or why this statutory goal is correct but instead the technical one of how to implement this spending statute according to its terms.<sup>102</sup> The IDEA does not mean to privilege wealthier children in its distribution of taxpayer dollars. It is therefore worthwhile to study the statutory design choices that unintentionally lead to this result.

## II. INSTITUTIONAL DESIGN AND DISPARITIES IN PRIVATE ENFORCEMENT OF THE IDEA

### A. *Institutional Design*

Daniela Caruso helpfully articulates certain elements of institutional design that lead to distributional problems in the implementation of the IDEA: the primacy placed on parental involvement in the construction of IEPs for each student, which Caruso describes as the bargaining mechanisms at the core of the statute;<sup>103</sup> the wide agency discretion of the school system in proposing appropriate services;<sup>104</sup> the lack of transparency, both in the negotiations over these services and in the resulting IEPs;<sup>105</sup> and the federal/state/local funding structure that results in budget constraints limiting districts' ability to provide all children with all the services they desire.<sup>106</sup> I would add one more element of institutional design to this list: the construction of the right at an individualized level, as opposed to a generalized right similar to the rights provided by the education clauses in state constitutions (entitling children to, for example, a "thorough and efficient public education"),<sup>107</sup> or those protected by the line of cases stem-

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101 Others have explored variations on this important question with great care. For example, Mark Kelman and Gillian Lester have asked on what moral basis it makes sense for public policy to prioritize middle-class children with learning disabilities over poor children without learning disabilities but with generally poor school performance. See KELMAN & LESTER, *supra* note 17, at 218–19.

102 Cf. Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 167 n.1 (1985) (defining an efficient regulation as "one that obtains the social goal established by policymakers and does so at the least cost" (emphasis added)).

103 Caruso, *supra* note 17, at 172.

104 *Id.* at 172, 187–88, 190–92.

105 *Id.* at 172, 187.

106 *Id.* at 172, 190–92.

107 See, e.g., Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 320–26 (1991).

ming from *Brown v. Board of Education*<sup>108</sup> (entitling children to attend schools that do not segregate).<sup>109</sup>

All of these features have much to commend them in the abstract. For example, the bargaining mechanisms may empower parents to become involved in their child's education, and, as Caruso notes, are "in principle status-blind."<sup>110</sup> Agency discretion, as opposed to a grid or handbook of permitted options, may ensure that the individual needs of any given child are met and may also reflect a valuable commitment to the diversity that educational federalism brings.<sup>111</sup> The individualized right may be important because different children with the same disability can have different needs.<sup>112</sup> Finally, the lack of transparency may ensure privacy in a sensitive area.<sup>113</sup>

But at the same time, these features interact to result in distributional problems that disfavor poor families. As Caruso explains, parents with more financial and educational resources have greater bargaining power to obtain IEPs that provide more educational benefits.<sup>114</sup> These parents know the types of services they want and will fight to have them provided, whether in the public school system or through a private placement supplied at public expense, using lawyers and experts.<sup>115</sup> The resulting IEPs will provide more services than the districts would originally have provided in the absence of parental demands.<sup>116</sup> This negotiation produces an IEP that is much closer to a contract—the consideration for which is the parents' agreement not to sue during the term of the IEP—than an IEP agreed to by parents with fewer financial and educational resources.<sup>117</sup> For these other parents, who by and large are unaware of the services in IEPs for wealthier children and of their rights under the statute, it is more common to accept the districts' proposed IEPs, regardless of their adequacy, without making additional demands.<sup>118</sup> These IEPs will

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108 347 U.S. 483 (1954).

109 See, e.g., Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1660–67 (2007).

110 Caruso, *supra* note 17, at 180.

111 See *id.* at 187–88; cf. MELNICK, *supra* note 43, at 179 (describing the different level of discretion in welfare structure).

112 Caruso, *supra* note 17, at 187–88.

113 See *id.* at 187.

114 See *id.* at 178.

115 See *id.* at 179.

116 See *id.*

117 See *id.* at 178–80; see also Hehir, *supra* note 17, at 836 (noting that many middle- and upper-income parents use the threat of due process hearings to obtain better services).

118 See Caruso, *supra* note 17, at 178.



include services that may (but may not) comply with the IDEA's FAPE requirement, but they will also be affected by the districts' financial needs.<sup>119</sup> Far from a contract with bilateral agreement and consideration, these IEPs will reflect the parents' acceptance of social services as they would accept any other government benefit.<sup>120</sup>

These distributional problems evident at the time at which IEPs are constructed are then compounded by the way these design features interact in the use of the IDEA's private enforcement mechanisms. In the rest of this Part, I show how these design features create information asymmetries, limited positive externalities with a strong potential for negative externalities, and high transaction costs that together limit the utility of the IDEA's private enforcement mechanisms for children in poverty. As I discuss each of these problems, I also show how certain attempts to counter these problems by re-designing elements of the law have not succeeded.

### B. Information Asymmetries

The private bargaining mechanisms surrounding the individualized right combine with the discretion and lack of transparency to produce information asymmetries, both among parents and between parents and schools, with particularly negative ramifications for poor families.<sup>121</sup> Consider the confidential nature of IEP proceedings.<sup>122</sup> Because there are no public records of the services a disabled child receives, it is hard for an unknowledgeable parent to determine the universe of services to ask for. Indeed, courts have held that knowledge of other students' IEP services is irrelevant to the FAPE determination for any given child, denying parents' discovery requests for such information.<sup>123</sup> If there is no public information on services, parents are left to call on their own informational networks to determine what services to ask for and when bringing a claim is necessary to enforce their rights effectively.

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119 *See id.* at 178–79.

120 *See id.* at 179.

121 There may also be information asymmetries among schools, as schools that do not intend to provide inferior services to children in poverty may do so because of a lack of information of how other schools address certain needs in a more fulsome way.

122 Caruso, *supra* note 17, at 187–88.

123 *Hupp v. Switz. of Ohio Local Sch. Dist.*, No 2:07-CV-628, 2008 WL 2323783, at \*2–3 (S.D. Ohio June 3, 2008).

Studies have shown that parents in poverty have less knowledge in this regard.<sup>124</sup> Why is this? Wealthier parents tend to have broader social networks with more varied geographical range, so they can find out the best services offered to other children with the same set of disabilities no matter where they are located in the country. They also tend to have a social network that is in the same socioeconomic range, so the information they glean will be information supported by the bargaining weight of other families who are similarly well off.<sup>125</sup> In contrast, the informational networks of poor families tend to be more limited in geographical scope, while the fact that these networks tend to be limited to the same socioeconomic range means that the information provided will not be filtered through bargaining power.<sup>126</sup> Wealthier families thus come out ahead in the informational game.

As for informational asymmetries between parents and schools, poor families are once again at a disadvantage. Schools are repeat players in the IEP game with all of the resources and accumulated expertise that that entails.<sup>127</sup> Parents, meanwhile, have only their own child, and while they have the right to engage with the school in each year's IEP meeting to discuss the appropriate level and type of services, each year's IEP will likely use the previous year's as an anchor against which adjustments will be made.<sup>128</sup> The school's initial greater informational advantage therefore pervades all future interac-

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124 For example, one 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. See Ellen Anderson Brantlinger, *Making Decisions About Special Education Placement: Do Low-Income Parents Have the Information They Need?*, 20 J. LEARNING DISABILITIES 94, 96-98 (1987). Another study found that mothers who were welfare recipients tended not to understand the rights afforded to them under the IDEA, instead uncritically accepting the programs offered to their disabled children by their schools. See N. Kagendo Mutua, *Policed Identities: Children with Disabilities*, 32 EDUC. STUDIES 289, 292-93, 295 (2001). While these parents may be well intentioned and involved, they are unlikely to press for better services or to raise claims about insufficient IEPs.

125 See JOHN FIELD, *SOCIAL CAPITAL* 82-91 (2d ed. 2008).

126 See *id.*

127 See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (describing limitations of using the legal system as a means of redistribution).

128 See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 23-24 (2008) (discussing the dangers associated with the common process of "anchoring and adjustment" because of the ease with which "obviously irrelevant anchors creep into the decision-making process" and because "adjustments are typically insufficient").

tions. To the extent that wealthier parents can use their networks to counter the school's informational advantage more easily than poor families can, poor families will suffer more from the school's advantage. In turn, these informational asymmetries mean that it can be more difficult for low-income families to recognize when their IDEA rights have been violated by inadequate IEPs, and accordingly it can make them less likely to pursue private enforcement actions.

The law includes a variety of mechanisms to counter these informational asymmetries. For example, Parent Information Centers receiving federal assistance in each state are required by statute to provide information on services and advocacy.<sup>129</sup> Attorneys' fees are available to prevailing parties to make it more possible for families without financial resources to find an attorney to represent them,<sup>130</sup> as attorneys, particularly specialists who themselves are repeat players, can counter the school's informational advantage. These resources are important and necessary, but they do not sufficiently undercut the existence or effect of the informational asymmetries.

First, the information provided through Parent Information Centers (or informal, parent-run informational websites) is not generally translated into what services look like on real IEPs.<sup>131</sup> Poor families are less well situated to wade through the available information to work this out, while Parent Information Centers are at a structural disadvantage in gathering sufficiently detailed and varied data on the substance of IEPs, without any authority to require schools or families to share this sensitive information with the public at large. Second, because poor families tend to be less aware of their rights under the IDEA and of the meaning of particular diagnoses, they are thus less

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129 20 U.S.C. § 1471(b) (2006). Parent-run websites also proliferate in this space to supplement the more formal centers. One of the most prominent is Wrightslaw. See generally WRIGHTSLAW, <http://www.wrightslaw.com> (last visited June 13, 2011) ("Parents, educators, advocates, and attorneys come to Wrightslaw for accurate, reliable information about special education law, education law, and advocacy for children with disabilities.").

130 20 U.S.C. § 1415(i)(3)(B). Fee-shifting provisions are designed to encourage attorneys to take up the meritorious cases of plaintiffs, especially those who would otherwise not be able to afford legal fees, under statutes for which private enforcement is important to vindicate the public interest. See, e.g., Albiston & Nielsen, *supra* note 1, at 1088, 1093–95.

131 The brochures available from the Wyoming Parent Information Center are typical. See *Publications*, PARENT INFO. CENTER, <http://www.wpic.org/publications.html> (last visited June 13, 2011). They describe a typical diagnosis for a variety of disabilities and suggest a few strategies for parents, but they do not give a sense of the range of accommodations and services that children have received from local schools.

likely to pursue this information to begin with.<sup>132</sup> Third, as I will discuss in more detail below, there are a variety of structural impediments to relying on the fee-shifting provision to ensure that families without financial resources can find an attorney, not least of which is that attorneys' fees are available only to prevailing parties, so there is a financial risk to pursuing representation.<sup>133</sup> Notwithstanding these resources, then, informational asymmetries continue to exist in practice.

### C. Externalities

Information asymmetries would matter less if there were positive externalities from wealthier children's use of private enforcement mechanisms. Indeed, the class-based enforcement disparities would be less problematic overall if poor children benefitted from the enforcement actions of wealthier families. Thomas Hehir has frequently argued that these externalities exist, explaining that as some parents advocate for their rights under the law, school administrators begin to change practices system-wide, benefitting even those students whose parents did not or could not advocate for them.<sup>134</sup>

While poor children undoubtedly benefit from private enforcement that leads to expansive interpretation of legal principles under the IDEA, the argument for the existence of positive externalities should not be overstated, as Hehir himself at times acknowledges.<sup>135</sup> In contrast to the school finance cases or school segregation cases, where one person's enforcement of her right to attend a school that is funded properly or not segregated improperly effectuates the full extent of that right both for her and for her classmates, much enforcement of IDEA rights involves rights that are unique to an individual and therefore does little to affect the education of another child. The subject of many private enforcement actions is the specific assortment of services that should be in a particular child's IEP.<sup>136</sup> When a wealthier child prevails in a private enforcement action, she may simply receive the services she desires (or reimbursement for having

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132 See *supra* notes 121–28 and accompanying text.

133 See *infra* Part II.D.

134 See Hehir, *supra* note 17, at 836; Hehir & Gamm, *supra* note 51, at 214–16; Thomas Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors* (1990) (unpublished Ed.D. dissertation, Harvard University) (on file with author). Hehir makes the point with reference to due process proceedings but the rationale behind this theory could apply to remedies stemming from state complaints and mediations as well.

135 See Hehir, *supra* note 17, at 836; Hehir, *supra* note 134, at 44.

136 See Caruso, *supra* note 17, at 182.

obtained those services privately) without giving any of her disabled classmates access to those services as well and without setting any enforceable precedent for those who might follow her.

In addition, the theory behind positive externalities in this context relies on the idea that administrators may change practices because they are concerned about avoiding a due process challenge or other private enforcement action.<sup>137</sup> But if the likelihood is slim that a family in a particular demographic will bring a private enforcement action, a school district has little incentive to change its practices in advance. Similarly, the argument in support of positive externalities does not stand in the vast majority of states, where the chance of private enforcement is minimal.<sup>138</sup> The problem of informational asymmetries helps limit the possibility of positive externalities. Where parents do not know what services other children are receiving, there is less chance of relying on one family's successes to the benefit of another family, as well as less chance that school administrators will consistently feel pressure to make broader change.<sup>139</sup> Because poor children are unlikely to reap the benefits of wealthier children's remedies, enforcement disparities matter.

In turn, the enforcement disparities contribute to several different negative externalities. First, at the district level, when wealthier parents obtain services for their children that translate into more money, there is less money available for poor children with disabilities.<sup>140</sup> Districts may consider costs when choosing among appropriate options for a child with disabilities.<sup>141</sup> When facing choices

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137 See Hehir & Gamm, *supra* note 51, at 215; Neal & Kirp, *supra* note 51, at 354 (discussing the value of bargaining in the "shadow of the law"); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 966 (1979) (describing a similar theory of bargaining in the context of divorce).

138 Hehir acknowledged this limitation in his early work. See Hehir, *supra* note 134, at 44 ("It is doubtful that due process has as much impact on the programs in states where it is seldom used.").

139 Administrators may also feel that an appropriate public education for a given child depends to some extent on the resources the family itself can provide, again making it less likely that the individual-focused advocacy of wealthy parents will trickle down to lower-income children with disabilities. See, e.g., HEHIR, *supra* note 64, at 59–60 (advocating that special education administrators take into account family capacity and desires in making decisions).

140 See Caruso, *supra* note 17, at 182. For example, the more wealthy parents who obtain reimbursement for private school tuition or coveted slots in classrooms with low teacher-student ratios, the less money in the system to provide other children with special education services. See Hehir, *supra* note 17, at 836.

141 See Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 *HARV. C.R.-C.L. L. REV.* 301, 321 (1997).

among possible programs for a wealthy child and a poor child, districts have an incentive to acquiesce to the more expensive requests of the former and to provide the less expensive option to the latter, since the risk of a private enforcement action is greater with wealthier families.

Similarly, individual actions by wealthier children may result in judicial decisions or settlements that are contrary to the interests of children in poverty.<sup>142</sup> For example, wealthier parents may use the private enforcement options to obtain private school placement at public expense.<sup>143</sup> These families will then have little reason to work to improve the local public school system more generally, although there is evidence that the presence of families with greater financial resources plays an important role in ensuring school quality.<sup>144</sup>

Finally, to the extent that the enforcement disparity contributes to worse service provision to poor children, which then contributes to worse outcomes (fewer high school diplomas, worse test scores, and the like), society bears the consequences. These consequences include financial ones, such as lower tax revenues and greater cost of social services as this group progresses through life after school,<sup>145</sup> as well as moral ones, such as concern about equal educational opportunity for this group.<sup>146</sup>

The state complaint system attempts to counter the problem of externalities by requiring that any time the state agency resolves a complaint by finding a failure to provide appropriate services, the written decision must address not only corrective action as to the particular child but also “[a]ppropriate future provision of services for all children with disabilities.”<sup>147</sup> But where the complaint addresses the narrow set of appropriate services for the child who filed it, there are

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142 Cf. LANDSBERG, *supra* note 9, at 46, 118 (noting that one potential problem with private enforcement is its focus on vindication of private interests that may be contrary to a broader public interest).

143 See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 9–10 (1993); *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

144 See generally RICHARD D. KAHLBERG, *ALL TOGETHER NOW* (2001) (arguing that poor children do better academically in schools that are socioeconomically integrated and that public school choice is the best path to achieve such integration).

145 Cf. HENRY LEVIN ET AL., *THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA’S CHILDREN 2* (2007) (estimating “the additional tax revenues and reductions in the cost of public health, criminal justice, and welfare associated with” an increase in the high school graduation rate).

146 See generally HOCHSCHILD & SCOVRONICK, *supra* note 59 (examining the American dream of education and the dilemmas created by that dream).

147 34 C.F.R. § 300.151(b) (2010).

limited possibilities for extending the results of the complaint more broadly. Where the complaint addresses a systemic problem, there is a greater potential to affect children beyond the complainant, to be sure; but even here, the individual needs of poor children will often not be affected. For example, a systemic complaint that seeks to ensure that a district processes requests for due process hearings in a timely way will have a broader benefit, but it will affect only those children who request due process hearings in the first instance, and does not address the greater ability of the wealthier child to bargain his way to better individualized services overall. Class actions, which I discuss at more length in subpart III.D below, suffer from a similar problem. Neither the state complaint system nor class actions can sufficiently offset the issue of externalities.

#### D. *Transaction Costs*

One could argue that dependence on an aggrieved individual to bring a claim produces a socially efficient level of enforcement, as the expected value of the remedy would have to exceed the individual's cost of complaining.<sup>148</sup> But where the transaction costs associated with bringing a claim are high and are unevenly spread throughout the affected population, an enforcement system that relies too heavily on private individuals to raise claims likely fails to capture the spectrum of harms that the public policy in question seeks to remedy. At least four such transaction costs result in enforcement disparities that are anything but socially efficient when viewed against the goals of the IDEA.

The first type of transaction cost is the cost of involvement in educational decisions. This cost is more expensive for parents with fewer financial resources, both in the cost of obtaining sufficient knowledge to participate in these decisions<sup>149</sup> and in the comparative cost of losing time at work to participate in these decisions.<sup>150</sup> Relying on parents to raise claims will therefore not produce socially efficient results because this reliance privileges the children of parents who can more easily afford to be more engaged with their education.<sup>151</sup>

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148 See Selmi, *supra* note 8, at 28.

149 See *supra* Part II.B.

150 See ANNE L. ALSTOTT, NO EXIT 10–11 (2004).

151 The concern is similar to the concern raised by opponents of school vouchers about “skimming,” where the children of the most involved low-income families will be the ones who get vouchers, leaving children of less involved families in ever-worsening public schools. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2092 (2002) (“[I]f more families are empowered to choose among education options, the most well-informed, motivated, and economi-

The second type of transaction cost is the risk involved in raising a claim, which varies with the ease of exiting the school system.<sup>152</sup> These risks are also connected to class and geographical disparities. Wealthier families are better able to raise individual claims because they can more easily move to a different district or into private school if the relationship with the school is harmed in the process of complaining, while lower-income parents have fewer such options.<sup>153</sup> Similarly, where exit is less possible for geographic reasons, such as in districts that cover a wide area with limited private options, there may be more risks in raising complaints.

The third type of transaction cost is the cost of losing standing in one's community, which involves the extent to which social and cultural norms support or undercut the raising of claims. Different regions may have different cultural expectations around bringing complaints that may lead to variations in enforcement that are unconnected to any differences in substantive wrongs.<sup>154</sup> For example, the Northeast and California may face disproportionate numbers of complaints because it may be more culturally acceptable to file complaints there than in other areas of the country.<sup>155</sup> Similarly, certain districts may get a reputation for providing excellent services so knowledgeable parents flock there and then pursue their rights to the fullest extent.<sup>156</sup> There may also be some social sets in which parents try to obtain certain accommodations or services that they know their child's peers have obtained in an effort to ensure that their child is

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cally well-off families are more likely to avail themselves of school choice.”). The statute provides for various surrogates to stand in place of the parent where the actual parent is unavailable, *see* 20 U.S.C. § 1401(23) (2006), but nothing in the statute requires a parent who is simply uninvolved, for whatever reason, to act. The state complaint procedure permits anyone (not just parents) to file a complaint alleging a violation of the statute, *see* 34 C.F.R. § 300.151(a)(1) (2010), but there are few incentives for individuals or organizations other than parents to file complaints on behalf of individual children, so complaints filed by nonparents tend to be systemic. *See generally* Monica Costello, Note, *Systemic Compliance Complaints: Making IDEA's Enforcement Provisions a Reality*, 41 U. MICH. J.L. REFORM 507, 513–18 (2008) (discussing limitations of relying on individual enforcement and the virtues of organizational systemic complaints).

152 *See* Neal & Kirp, *supra* note 51, at 354.

153 *See id.*; *cf.* Julie A. Davies & Lisa M. Bohon, *Re-imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 44 n.99 (describing litigation as an “irreparable breach of the relationship between parties where no future relationship is expected to exist”).

154 *See* DAVID L. SHAPIRO, *FEDERALISM* 75–106 (1995) (discussing evidence that different geographies have different subcultures).

155 *See, e.g.*, Weiss, *supra* note 70.

156 *See, e.g.*, McGroarty, *supra* note 59, at 291.



not at a comparative disadvantage, leading to disproportionate filing of complaints.<sup>157</sup> On the flip side, in smaller, less wealthy districts where everyone knows everyone else, parents may be reluctant to push for additional services to which their children may be entitled because of social pressure not to overburden the district's finances. Other parents may not raise claims because of cultural expectations that the school knows best. These variations underscore the inefficiency of relying on parents to raise claims as an enforcement strategy.

Finally, and perhaps most significantly, the cost of hiring an attorney is a considerable transaction cost that affects families differently depending on the extent of their financial resources. To limit the size of this transaction cost and incentivize attorneys to take these cases, the IDEA includes a provision permitting prevailing parents to obtain attorneys' fees from the other party.<sup>158</sup> However, Congress has shown

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157 Cf. Jane Gross, *Paying for a Disability Diagnosis to Gain Time on College Boards*, N.Y. TIMES, Sept. 26, 2002, at A1 (describing a growing number of students seeking a diagnosis of a learning disability); Weiss, *supra* note 70 (similar).

158 See 20 U.S.C. § 1415(i)(3)(B) (2006). As indicated above, fee-shifting statutes are traditionally understood to be part of a system to ensure that people of limited means have access to attorneys and thereby access to justice. See *supra* note 53. Recent work by James Greiner and Cassandra Wolos Pattanayak has substantially challenged the extent to which the existing literature on the effect of legal representation in civil disputes supports the widespread belief that litigants tend to benefit with the use of attorneys. See generally D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: Report of a First Study, a Critical Review of the Literature, and Prospects for the Future*, 121 YALE L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1708664>. In reporting the results of an initial study of the effect of an offer of legal representation in administrative hearings to determine eligibility for unemployment benefits, Greiner and Pattanakak (1) conclude that a service provider's offer of legal representation "had no statistically significant effect on the probability that a claimant would prevail but that the offer did delay the adjudicatory process," *id.* at 8, 23–48, and (2) critique the existing literature on the effect of legal representation for "methodological problems so severe as to render their conclusions untrustworthy, which (we hasten to emphasize) is different from wrong," *id.* at 8–9, 48–67. They include in their critique several studies purporting to show the value of legal representation in special education hearings. *Id.*, at 50 n.161 (citing MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM 7–9 (2002), available at <http://www.dueprocessillinois.org/Access.pdf> (noting that school districts were represented by counsel in 94% of hearings, compared with parents' representation by counsel in only 44% of hearings and finding that 50.4% of parents represented by counsel won due process hearings, compared with only 16.8% of parents without counsel who won hearings); U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-90-22BR, SPECIAL EDUCATION: THE ATTORNEY FEES PROVISION OF PUBLIC LAW 99-372, at 5 (1989) (finding that parents prevailed forty-three percent of the time, but that fifty-nine percent of the parents who prevailed had attorneys)). One need not rely on the argument that IDEA litigants fare better with attorneys (which, as Greiner and Pattanakak explain, could well be true but has not satisfactorily been demonstrated through the

ambivalence about how much it wishes to reduce the size of the transaction costs associated with hiring an attorney by placing statutory restrictions on the fee-shifting provision and by leaving in place Supreme Court decisions limiting its effect.<sup>159</sup> These restrictions help explain why the provision has not significantly ameliorated the difficulties low-income families face in finding an attorney<sup>160</sup> and has not led to an explosion of IDEA practitioners.<sup>161</sup>

For example, no attorneys' fees can be recovered even if parents prevail at the conclusion of a proceeding if the relief they obtain is not more favorable than a settlement offer they rejected before the proceeding began, unless they were "substantially justified" in refusing the offer.<sup>162</sup> Practitioners cannot recover a contingency risk multiplier to compensate them more heavily in cases they do win, in recognition of the dangers of not receiving payment in the cases they lose.<sup>163</sup> Further, no attorneys' fees can be awarded for participation

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"gold standard" of a well-run randomized control trial, *id.* at 6, note 4, and 54) in order to observe that it is more difficult for low-income litigants to find counsel than for high-income litigants to do so.

159 See Bagenstos, *supra* note 53, at 3 (noting limitations on fee-shifting statutes for ensuring access to justice).

160 A significant rise in attorney representation and requests for due process hearings followed the creation of the IDEA's fee-shifting provision, see U.S. GEN. ACCOUNTING OFFICE, *supra* note 158, at 3, suggesting that it did some of what it was intended to do. However, the finding that wealthier parents are far more likely to use the IDEA's enforcement mechanisms than lower-income parents has been remarkably consistent over time. Compare Hehir & Gamm, *supra* note 51, at 214 (citing studies from the early 1980s), and Neal & Kirp, *supra* note 51, at 354 (same), with *supra* Part I.B (discussing more recent evidence of enforcement disparities).

161 Many states have very few private attorneys who handle special education cases, and the various public interest organizations that exist to support low-income parents are able to serve only a small percentage of those who seek their services. See Brief of Autism Society of America et al. as Amici Curiae in Support of Petitioners at 6–10, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983) [hereinafter Brief of Autism Society of America]. The existence and extent of these public interest organizations also varies widely by state. See *id.*

162 See 20 U.S.C. § 1415(i)(3)(D)(i), (E). This limitation incorporates the Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1, 11–12 (1985), interpreting Rule 68 of the Federal Rules of Civil Procedure. This decision is widely understood to increase the financial risk of pursuing a case after a settlement offer has been made and to limit the incentives for litigants to pursue claims without a clear favorable outcome. See Albiston & Nielsen, *supra* note 1, at 1096–97; Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 222–25 (1997).

163 See 20 U.S.C. § 1415(i)(3)(C); cf. Davies, *supra* note 162, at 225–31 (discussing effect of *City of Burlington v. Dague*, 505 U.S. 557 (1992), which indicated that contingency risk enhancers are rarely to be permitted under fee-shifting statutes).

in IEP meetings,<sup>164</sup> and attorneys' fees can be reduced if the parent or parent's attorney "unreasonably protracted" the proceedings; if the fees or hours are determined to be excessive; or if the attorney did not provide certain information in the due process complaint.<sup>165</sup> These limitations sound reasonable—who could object to attempts to curb unreasonable attorney or client conduct?—but cumulatively they amount to the potential for litigation over fees that can lead to uncertainty and delay in payment, which can make attorneys less willing to take fee-shifting cases.<sup>166</sup> No doubt in part to hedge against this uncertainty and delay, IDEA practitioners often require retainers that place legal counsel out of the reach of many.<sup>167</sup> The limitations on the attorneys' fees provision thus work to constrict the supply of practitioners and reduce low-income families' access to lawyers.

Fee limitations, moreover, are not the only factor limiting the attractiveness of IDEA cases for attorneys. Parents and attorneys also face direct financial risks. In 2004, Congress added a provision making parents or their attorneys responsible for the attorneys' fees of defendant school districts under a variety of circumstances: if the complaint is determined to be frivolous, unreasonable, or without foundation, or if the complaint was presented for "any improper purpose," such as to delay proceedings unnecessarily.<sup>168</sup> Again, these limitations have much to commend them, incentivizing only proper complaints, but since the statute also encourages vigorous advocacy on the part of parents, there is the potential for parents to cross the line into unreasonable advocacy and face a bill for the school district's legal fees.<sup>169</sup> The consequences of this risk fall more heavily upon families without

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164 See 20 U.S.C. § 1415(i)(3)(D)(ii).

165 *Id.* § 1415(i)(3)(F).

166 See Selmi, *supra* note 5, at 1453–54 (noting that uncertainty surrounding fee recovery, sometimes involving litigation and always involving additional costs in documentation, can constrict attorneys' willingness to take cases under fee-shifting statutes).

167 See Brief of Amici Curiae Council of Parent Attorneys & Advocates Inc. et al. in Support of Petitioners at 9 n.4, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983) [hereinafter Council of Parent Attorneys & Advocates Inc. Brief] (describing survey results indicating that retainers in IDEA cases range from \$3000 to \$10,000, hourly rates in IDEA cases range from \$150 to \$450, and total matter costs for cases at end of litigation range from \$10,000 to over \$100,000).

168 See 20 U.S.C. § 1415(i)(3)(B)(i)(II)–(III).

169 See Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 29–30 (2006); cf. Perry A. Zirkel, *Impossible Parents?*, 84 PHI DELTA KAPPAN 335, 335–336 (2002) (describing school responses to challenging parents).

financial resources, and may also limit attorneys' willingness to take cases.

A further check on attorneys' fees results from two Supreme Court cases. In 2001, the Court held in *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Resources*<sup>170</sup> that attorneys' fees may be awarded only when litigation results in a court-ordered remedy.<sup>171</sup> Ending the previously common practice of awarding attorneys' fees in cases where the litigation was the catalyst for a change in the defendant's conduct (the so-called "catalyst rule"), the case has had a negative effect on the bringing of civil rights cases, with a particularly negative effect on the poor.<sup>172</sup> Application of the *Buckhannon* rule in IDEA cases has meant that attorneys' fees are unavailable in those not infrequent instances where districts and parents resolve their disputes after a formal proceeding is initiated but before a judgment on the merits.<sup>173</sup> It also raises the risk that defendants will engage in "strategic capitulation": delaying a settlement that would be expensive for them to implement until the last minute, then settling and avoiding paying attorneys' fees.<sup>174</sup> More recently, the Supreme Court held in 2006 in *Arlington Central School District Board of Education v. Murphy*<sup>175</sup> that the plain language of the IDEA's attorneys' fees provision does not allow prevailing parents to recover the cost of experts, whose analysis and testimony are often crucial to winning a case.<sup>176</sup> These procedural hurdles thus constrict the ability of the fee-shifting provision to reduce transaction costs. *Buckhannon* makes the

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170 532 U.S. 598 (2001).

171 See *id.* at 600. The case addressed only the attorneys' fees provisions of the Fair Housing Act, 42 U.S.C. §§ 3601–3636 (2006), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, but its reasoning has widely been understood to apply to attorneys' fees provisions in civil rights statutes more broadly. See generally Albiston & Nielsen, *supra* note 1 (describing the effects of *Buckhannon* in various areas of civil rights).

172 See Albiston & Nielsen, *supra* note 1, at 1120–30; Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595, 636–39 (2005).

173 See Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 541–49; Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 360, 370–77 (2004).

174 See Albiston & Nielsen, *supra* note 1, at 1108–11; Weber, *supra* note 173, at 400–01.

175 548 U.S. 291 (2006).

176 See *id.* at 293–94.

prospect of fee shifting much less certain, while *Murphy* forbids reimbursement of a significant cost.

These transaction costs are problems not only for due process proceedings and litigation. Just as parents may benefit from attorney representation in those actions, scholars suggest that parents who appear at mediation sessions without an attorney are at a disadvantage, given the power and informational imbalances that remain present even in alternative dispute resolution.<sup>177</sup> Limitations on the availability of special education attorneys thus reinforce the enforcement disparities in mediation.<sup>178</sup>

As for the state complaint procedure, because it is not an adversarial process, the advantages of having an attorney to file a complaint are not as great as having an attorney to accompany a family through a due process hearing.<sup>179</sup> It is possible, though, that having an attorney shape the state complaint will produce better results for the complainant, so one might want to encourage attorneys to serve low-income families throughout this process.<sup>180</sup> However, after years in which courts divided as to whether the complaint process (which exists only by regulation, not by statute) is a “proceeding” under the

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177 See, e.g., Beyer, *supra* note 55, at 53; Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65, 74–75 (2007); Steven S. Goldberg, *Special Education Mediation: Responding to a Proposal for Reform*, 30 J.L. & EDUC. 127, 129–32 (2001); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 60–63 (1997); Stephen Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 344–51 (2001); cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78 (1984) (describing the imbalance of power between ADR parties and the influences those disparities have on settlements); Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 57–61 (1999) (questioning whether alternative judicial models are more procedurally just than traditional litigation).

178 See CHAMBERS ET AL., *supra* note 43, at 14 (showing that only nine percent of the lowest-income and five percent of the middle-income districts had any mediations, while forty-three percent of the highest-income districts did).

179 To file a complaint, an individual need only present basic information such as the complained of facts and a proposed resolution. See 34 C.F.R. § 300.153(a)–(b) (2010). The state agency then conducts whatever investigation is necessary and reaches a conclusion. See *id.* § 300.152(a). No hearing is available.

180 Cf. Moss et al., *supra* note 10, at 98–101 (noting that representation by an attorney during the process of filing a complaint with the EEOC has an important effect on the size of benefits, although the overall benefit rate is about the same with or without an attorney, but questioning whether lawyers cause better outcomes or whether they sign onto stronger cases).

IDEA as to which the fee-shifting provision applies,<sup>181</sup> the Department of Education has recently clarified its position that it is not.<sup>182</sup> This regulatory design choice is yet another limitation on the availability of attorneys for families without financial resources.

While these statutory, regulatory, and doctrinal limitations weaken the ability of the attorneys' fees provision to mitigate transaction costs, even in their absence attorneys' fees provisions cannot reduce transaction costs in one significant way: there is always the risk that parents will lose<sup>183</sup> and be left with a legal bill that can be larger than the cost of the services they were fighting to obtain.<sup>184</sup> This risk again acts as a larger deterrent for those who cannot afford to pay for an attorney than for those who can.

### III. WHY REFORM OF THE IDEA'S PRIVATE ENFORCEMENT MECHANISMS IS INSUFFICIENT

Information asymmetries, externalities, and transaction costs could be greatly reduced if low-cost or free legal services were widely available and if class actions were more broadly used.<sup>185</sup> Accordingly, several scholars have proposed ways to incentivize attorneys to take up IDEA cases or to mandate the provision of counsel in these cases and have called for an increase in IDEA class actions. However, as detailed below, there are insurmountable political obstacles to implementing a number of these ideas, and some would be undesirable even were they

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181 *Compare* *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1026–30 (9th Cir. 2000) (holding fees available in complaint procedure), *and* *Upper Valley Ass'n for Handicapped Citizens v. Blue Mountain Union Sch. Dist.* No. 21, 973 F. Supp. 429, 433–36 (D. Vt. 1997) (same), *with* *Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 601–02 (2d Cir. 2003) (no fees available in complaint procedure), *and* *Johnson v. Fridley Pub. Sch.*, No. 01-1219, 2002 WL 334403, at \*2–4 (D. Minn. Feb. 21, 2002) (same).

182 *See* 71 Fed. Reg. 46,540, 46,602 (Aug. 14, 2006).

183 The risk of losing is not an idle fear. *See* James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 J. EXCEPTIONAL CHILD. 469, 474 (1999) (finding, in IDEA cases litigated between 1975 and 1995, that school districts won the majority of cases at the state administrative level and that, although at the conclusion of all proceedings, including judicial appeals, parents won with more frequency, the rate of success was still fairly evenly split between parents and school districts).

184 *See, e.g.,* Hanson, *supra* note 173, at 520, 522 (noting that cost of IDEA services that are subject of disputes are often smaller than attorneys' fees required to obtain them).

185 As noted earlier, *supra* note 158, whether attorneys have a positive effect on a litigant's chances of success is an empirically contested proposition. This Part does not take a position on this question but rather explains why, even assuming the value of attorneys, reforms to increase attorney involvement are unlikely to be sufficient in this context.

politically feasible. This Part thus argues that tinkering with the design of the IDEA's private enforcement system is unlikely to remedy enforcement disparities. The Part concludes by explaining why means-testing the benefits provided under the statute or eliminating private enforcement entirely would be no more satisfactory.

#### A. *Incentivizing Lawyers by Changing Attorneys' Fees Rules*

A number of scholars and commentators have suggested that the rules governing attorney compensation in IDEA cases should be modified to replace the *Buckhannon* rule with the catalyst rule<sup>186</sup> and to eliminate the *Murphy* rule by including the award of expert costs as part of attorneys' fees.<sup>187</sup>

The latter of these seems within the realm of possibility. The Supreme Court decided *Murphy* in the face of a Conference Committee Report indicating that expert costs should be available under the fee-shifting provision of the IDEA.<sup>188</sup> Other civil rights statutes explicitly provide that expert costs may be included as part of fees,<sup>189</sup> and at least one bill to overturn *Murphy* has already been introduced.<sup>190</sup>

Revising the *Murphy* rule would be helpful to low-income litigants, but the *Murphy* rule is a minor obstacle in comparison with the other restrictions on attorneys' fees, and those restrictions are much less likely to be modified. In particular, Congress declined to reinstate the catalyst rule in the last reauthorization of the IDEA, and bills to overrule *Buckhannon* in general have been similarly unsuccessful.<sup>191</sup>

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186 See, e.g., Weber, *supra* note 173, at 360, 370–77; see also Hanson, *supra* note 173, at 541–49 (describing how *Buckhannon* makes the matter of attorneys' fees a negotiating issue).

187 See, e.g., Ashlie D'Errico Surur, Note, *Placing the Ball in Congress' Court: A Critical Analysis of the Supreme Court's Decision in Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455 (2006), 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 547, 598–602 (2007); Leslie Reed, Comment, *Is a Free Appropriate Public Education Really Free? How the Denial of Expert Witness Fees Will Adversely Impact Children with Autism*, 45 SAN DIEGO L. REV. 251, 298–302 (2008).

188 See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 308–09 (2006) (Breyer, J., dissenting).

189 See Davies, *supra* note 162, at 263–64 (noting that expert fees are available under Title VII and the Americans with Disabilities Act).

190 See IDEA Fairness Restoration Act, H.R. 4188, 110th Cong. (2007). Although the bill did not make it out of committee, the issue is likely to be considered as part of the upcoming IDEA reauthorization. See NANCY LEE JONES & CAROL J. TOLAND, CONG. RESEARCH SERV., R 40521, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 1–2, 24 (2009).

191 See, e.g., Settlement Encouragement and Fairness Act, S. 1117, 108th Cong. (2003).

Moreover, even if *Buckhannon* were to be replaced with the catalyst rule, the other restrictions on attorneys' fees would still disproportionately burden low-income litigants,<sup>192</sup> and it is just not plausible that the entire scheme governing attorneys' fees would be substantially modified. The last two reauthorizations have focused on ways to make interactions between schools and parents less adversarial, as exemplified by the ever-growing restrictions on attorneys' fees and the push towards alternative dispute resolution. Congress has been looking for ways to take lawyers out of the process, not to increase their ranks. Given this trend, the transformation of the attorneys' fees provision is not likely.

But even if the political stars aligned to make such a modification possible, two central problems would remain. The first, of course, is that parents who do not prevail are not entitled to attorneys' fees, and parents who cannot afford to pay for a lawyer in the event that they lose are likely to be deterred from bringing cases. The second is that fee-shifting provisions do nothing to counter the other difficulties associated with bringing claims.<sup>193</sup> Even the purest fee-shifting provision cannot make up for limitations associated with lack of knowledge, uninvolved parents, risks in challenging the school system, and social and cultural factors. While the limitations in the attorneys' fees provision place disproportionate burdens on low-income families, the removal of these limitations would not actually level the playing field. Even if it were politically feasible, then, changing the rules about when attorneys' fees may be awarded is not likely to significantly ameliorate the IDEA enforcement disparities.

### B. *Incentivizing Lawyers by Providing Damages*

Research suggests that the availability of damages can have an even bigger effect on incentivizing attorneys to take civil rights cases than fee-shifting provisions do. For example, one study found that civil rights lawyers were reluctant to take cases with low damages—which tended to be cases of low-income individuals—even where statutory attorneys' fees were available.<sup>194</sup> This was so because in practice, higher damages meant greater compensation for attorneys in light of the prevalence of contingency-fee arrangements.<sup>195</sup> As a result, low-income potential plaintiffs have a more difficult time finding counsel

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192 See *supra* Part II.D.

193 See *supra* Part II.D.

194 See Davies, *supra* note 162, at 232–37.

195 See *id.* at 219.



than the existence of fee-shifting statutes would predict.<sup>196</sup> Another study reviewed the increase in filings of employment and housing discrimination cases after the relevant statutes increased the availability of damages and concluded that “the availability of damages, rather than fees, was the strongest incentive for private attorneys” to take on cases.<sup>197</sup>

The difficulty low-income families face in finding lawyers to take their IDEA cases may thus be partially explained by the absence of a damages provision in the statute. The relief generally requested is a revised IEP, although occasionally parents seek either compensatory education or reimbursement for expenses associated with obtaining private education in the absence of the school district’s provision of FAPE.<sup>198</sup> None of these remedies provides any financial incentive for an attorney. The courts are split on whether § 1983 may be used to enforce the IDEA and thereby obtain damages, but the weight of authority suggests that this avenue is not available.<sup>199</sup> In any event, even in courts that have permitted damages in special education cases, damages are limited to instances of bad faith or gross misconduct, situations that do not describe the typical IDEA dispute, which concerns the types or amounts of special services provided.<sup>200</sup>

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196 See *id.* at 258–59 (“[I]t is abundantly apparent that despite the existence of the Attorney’s Fees Awards Act and other fee-shifting statutes, persons of low socioeconomic status appear less able to attain representation in a federal civil rights case. . . . Exceptions exist, of course, but there is good reason to believe that the promise of the Attorney’s Fees Awards Act—enforcement of federal civil rights even though the rights may be non-pecuniary in nature—is sometimes illusory.”).

197 See Selmi, *supra* note 5, at 1453–54; see also James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1076–78, 1091 (1989) (describing dampening effect on private enforcement of pre-1988 limitations on damages in the Fair Housing Act); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 379–81 (1988) (same).

198 See Hanson, *supra* note 173, at 544–45; Weber, *supra* note 173, at 402–03.

199 The First, Third, Fourth, Ninth, and Tenth Circuits have all held that § 1983 may not be used to enforce the IDEA. See *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 937 (9th Cir. 2007); *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 806 (3d Cir. 2007) (en banc); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000); *Sellers v. Sch. Bd.*, 141 F.3d 524, 532 (4th Cir. 1998). The Second, Seventh, and Eighth Circuits have permitted such suits in certain circumstances, but these cases all predate the Supreme Court’s tightening of the doctrine governing § 1983 in *Gonzaga University v. Doe*, 536 U.S. 273, 290 (2002). See *Marie O. v. Edgar*, 131 F.3d 610, 622 (7th Cir. 1997); *Digre v. Roseville Schs. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987).

200 These damages cases also tend to be brought under the Americans with Disabilities Act or § 504 of the Rehabilitation Act of 1973, which are not identical in scope

The addition of a damages remedy might well open up a legal market to serve low-income families if the damages were large enough. But this, too, is likely politically infeasible for the same reasons that modifying the entire attorneys' fees structure is not.

Moreover, adding a damages remedy to the typical IDEA case would be normatively undesirable. Cases involving harassment, abuse, or willful neglect might justify an award of damages for deterrence and compensation purposes, but equitable remedies are a more appropriate response in cases simply involving disagreements about the set of services that constitute a child's FAPE.<sup>201</sup> In addition, as a practical matter, damages requests would be accompanied by allegations of educator bad faith and misconduct instead of mere professional disagreement, which would make IDEA disputes even more contentious and difficult than they already are.<sup>202</sup> And, of course, adding a damages remedy might attract more counsel, but it would not incentivize parents who are unaware of their rights to bring claims in the first place. Ironically, a damages remedy might thus end up benefitting wealthier families more than poor families.

### C. *Providing or Mandating Attorneys*

Instead of looking for ways to incentivize lawyers to take on IDEA cases through the market, some commentators have recently begun to call for providing a mandatory legal advocate for parents in IEP meetings and beyond.<sup>203</sup> While the contours of this proposal take a number of possible shapes, the goal is generally to avoid the difficulties of limited attorney incentives, the cost of funding a case, and parents' lack of knowledge of their rights by providing an attorney or other non-attorney legal advocate as a matter of right.

Increasing public funding for private enforcement efforts, whether through Legal Services Centers, the Parent Information Centers that the IDEA already requires, or some other entity, would certainly be a good idea.<sup>204</sup> Private law firms, law school clinics, and nonprofit organizations should also continue to sponsor IDEA advo-

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to the IDEA. See Marc C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83, 86 (2002); Weber, *supra* note 173, at 404–05.

201 See Weber, *supra* note 200, at 86; Weber, *supra* note 173, at 404–05.

202 See Weber, *supra* note 173, at 404–05.

203 See Costello, *supra* note 151, at 523; Phillips, *supra* note 17, at 1842–52; Wakelin, *supra* note 17, at 284.

204 Hehir, *supra* note 17, at 837; cf. LANDSBERG, *supra* note 9, at 43 (discussing negative effect of limited resources on enforcement efforts of civil rights organizations).

cacy efforts. But it is unlikely that it would be feasible to mandate legal services on the scale needed to level the playing field.

This is so first because of the cost involved. To provide an individualized advocate for each of the six million children covered by the IDEA would be prohibitively expensive. Assuming a cost of \$3000 per child—on the low end of attorney retainers to represent families in IDEA cases—the total would be eighteen billion dollars per year, or fifty percent more than the twelve billion dollars that is the current total annual federal contribution to the IDEA.<sup>205</sup> One way to cabin the cost would be to run pilot programs in individual states or districts,<sup>206</sup> but this would only exacerbate geographical disparities in enforcement. Another way to cabin the cost would be to provide legal assistance only to those who qualify under a means test. But even this limited proposal would likely be financially infeasible. For example, to provide advocates to the approximately twenty percent of students served under the IDEA who live in poverty would cost \$3.6 billion.<sup>207</sup>

Moreover, even if the cost of a means-tested public attorney program were not prohibitive, limiting legal assistance to the poor would likely be a political nonstarter, since IDEA cases remain expensive even for middle-class families.<sup>208</sup> Other political difficulties exist. Given the antilawyer trend of the last few reauthorizations, it is unlikely that a proposal to inject private advocates wholesale would succeed.<sup>209</sup> In addition, given concerns that special education budgets are draining general education budgets,<sup>210</sup> there is likely to be political resistance to the idea of providing a personal advocate to children with disabilities, on top of the other individualized extras that some feel these children are already receiving. This proposal is not likely to gain any traction.

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205 See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. G, tit. III, 121 Stat. 1844, 2190–220 (2007); Council of Parent Attorneys & Advocates Inc. Brief, *supra* note 167, at 10 n.4 (retainers in IDEA cases range from \$3000 to \$10,000).

206 Cf. Phillips, *supra* note 17, at 1847–53 (outlining different proposals for improving external advocacy in special education, such as parent advocacy centers).

207 See Blackorby & Wagner, *supra* note 88, at 2–5.

208 See *supra* note 167 (describing cost of typical special education proceeding).

209 See *supra* Part III.A.

210 See, e.g., Gregory F. Corbett, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. REV. 633, 634–36 (1999) (discussing the effect of special education on general education funding); Heubert, *supra* note 141, at 312 (same).

#### D. *Bringing Class Actions*

If remedies for individual private actions are too individualized to result in positive externalities for other children, might a greater use of class actions be a way to use private enforcement of the law to improve enforcement for children in poverty? Thomas Hehir has proposed this as one strategy.<sup>211</sup> Class actions do have the potential to improve services for low-income children (and others), especially to ensure systemic compliance with procedural aspects of the IDEA.<sup>212</sup> But—as Hehir acknowledges—class actions on their own will not satisfactorily address the problems associated with wealth-based enforcement disparities.<sup>213</sup>

Imagine a class action dealing with the central concern of this Article: an allegation that the quality of services being offered to poor children is inadequate (whether in the abstract or in comparison to the services offered to wealthier children).<sup>214</sup> It would be difficult to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure in such a case. Common questions of law and fact would likely not predominate, because defendants could reasonably attempt to justify why the services offered to each individual child were appropriate for that child.<sup>215</sup> The same problem would likely plague attempts to establish that the defendants had acted or refused to act on grounds that applied generally to the class<sup>216</sup> or that the substantive inadequacy of services for any one child were typical of the claims of other class members.<sup>217</sup> Reviewing the substance of IEPs would also likely lead a court to the conclusion that the case was unmanageable as a class action, not only because of the scope of such a review but also because of institutional competence concerns.<sup>218</sup> In practice, then,

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211 See Hehir, *supra* note 17, at 837–39.

212 *Id.* at 837.

213 *Id.* at 839.

214 As Hehir points out, it is easier to focus on procedural remedies than substantive educational practices through class actions. *Id.* at 836–37. But unless class actions address the substantive education received by poor children, instead of simply the procedures by which educational decisions are made, due process proceedings will continue to enable wealthier children to ensure that their individual needs are met while class actions will simply ensure bare compliance with rules of general applicability.

215 See FED. R. CIV. P. 23(a)(2), (b)(3); see also *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, slip op. at 8–12, 18–19 (U.S. June 20, 2011) (discussing commonality requirement).

216 See *id.* R. 23(b)(2).

217 See *id.* R. 23(a)(3).

218 See *id.* R. 23(b)(3)(D). Institutional competence concerns in judicial review of individual due process proceedings are quite different, because judges reviewing

while class actions are an important complement to due process hearings for their (at least theoretical, and at times actual<sup>219</sup>) ability to ensure that a district complies with the procedural requirements of the law, they cannot adequately protect the substantive rights of lower-income children.<sup>220</sup>

In addition, it would be difficult to scale-up class actions around the country to the extent necessary to ensure adequate enforcement of the law everywhere.<sup>221</sup> Where special education legal practitioners are scarce, which is most places in the country,<sup>222</sup> it is difficult to envision where they would find the resources to engage in the time- and labor-intensive work of a class action and how they could still find the time to represent individual low-income children in due process hearings. While class actions might accomplish useful things in particular districts, it is not an efficient strategy to rely on them to enforce the law throughout the country.

There is a further problem with the idea of using class actions to better enforce the law for low-income children. A class action that would seek to establish that wealthier children received better services than similarly situated poor children would have to convince wealthier children and their parents that it was in their interest to redress this inequity in order to obtain information on the substantive services offered in their IEPs. Because wealthier children might justifiably be concerned that such a lawsuit would culminate in a decline in their services, they might be reluctant to provide this information willingly.

Procedural problems would then likely compound this problem. While information on wealthier children's IEPs could potentially be obtained through a subpoena, districts would likely object on privacy

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those cases may not substitute their own views for those of school authorities and experts but instead must give the state administrative decisions under review "due weight." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205–08 (1982); *see also* Terry Jean Seligman, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 232–37 (2005) (discussing the "deferential standard of review" set forth in *Rowley*). In contrast, judges reviewing the substance of IEPs in a class action would have no administrative record to review but would be making decisions on educational substance in the first instance.

219 *See* Hehir, *supra* note 17, at 836–37 (noting that a number of districts have been under IDEA consent decrees stemming from class actions for years without demonstrating real reform).

220 *See* Weber, *supra* note 173, at 360, 407–08 (discussing difficulty of meeting Rule 23 requirements in IDEA cases).

221 Hehir, *supra* note 17, at 839; *cf.* Schwemm, *supra* note 190, at 383 (observing that geographic distribution of cases brought under the Fair Housing Act is uneven and connected to the uneven distribution of fair housing advocacy organizations).

222 *See* Brief of Autism Society of America, *supra* note 161, at 6–8.

grounds.<sup>223</sup> Even if plaintiffs were ultimately to prevail against such objections, these disputes would add to the efficiency concerns with using class actions as a large-scale enforcement mechanism. In any event, low-income plaintiffs would still need enough information to make a plausible case to a judge that they should survive a motion to dismiss, which—if they have not obtained information willingly from wealthier students—would be difficult to do.<sup>224</sup>

Finally, the Supreme Court continues to underscore its distaste for institutional reform litigation, into which category IDEA class actions surely fall.<sup>225</sup> This aversion arises in part because of the “sensitive federalism concerns”<sup>226</sup> raised by the prospect of federal courts ordering states and localities what to do, especially in “areas of core state responsibility, such as public education,”<sup>227</sup> and especially where “a federal-court decree has the effect of dictating state or local budget priorities.”<sup>228</sup> While “federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief,”<sup>229</sup> the Court recently explained, courts must nonetheless take a hard look at injunctions emanating from institutional reform cases and be willing to dissolve them and return control to the state as soon as the circumstances that led to the order have changed.<sup>230</sup> Injunctions stemming from IDEA class actions might thus be dissolved before plaintiffs feel adequate progress has been made. In the absence of some other enforcement mechanism to fill in thereafter, the effect of class actions could be time-limited.

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223 See FED. R. CIV. P. 45(a)(1)(C), (c)(2)(B). Although courts have refused to enforce subpoenas seeking information about other children’s IEPs as irrelevant in individual litigation, *see supra* note 123 and accompanying text, I am unaware of any such rulings in class action litigation.

224 FED. R. CIV. P. 8(a), 12(b)(6); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) (explaining that, to survive a motion to dismiss under Rule 12, a complaint must plead “more than a sheer possibility that a defendant has acted unlawfully,” and that Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

225 See *Horne v. Flores*, 129 S. Ct. 2579, 2593–95 (2009) (placing action challenging state school funding practice under the federal Equal Education Opportunity Act of 1974 in the category of institutional reform litigation); *id.* at 2615–21 (Breyer, J., dissenting) (critiquing majority’s crafting special rules for review of orders in institutional reform cases).

226 *Id.* at 2593 (majority opinion).

227 *Id.*

228 *Id.* at 2593–94.

229 *Id.* at 2594.

230 See *id.* at 2594–95.

*E. Means-Testing or Eliminating Private Enforcement*

A final reform might be to explode the current system altogether, whether by means-testing the services offered under the IDEA or by eliminating private enforcement entirely. While these proposals may seem at some level to fit one-to-one with the identified problem, implementing them is not an appropriate solution.

First, means-testing the program would disregard the important human values expressed in ensuring access to public education for all children with disabilities. Wealthier children no less than poor children deserve not to be turned away by their neighborhood schools. Making special education available to everyone further reflects the fact that disability is a possibility for everyone.

Second, means-testing the program would in the end run counter to the goal of improving the adequacy and equity of special education services provided to low-income children by destroying what works in the political economy of the IDEA, which has long been supported by an unusual coalition across social classes<sup>231</sup> and across political parties.<sup>232</sup> As Gillian Lester, a prominent critic of inequities in special education,<sup>233</sup> explains, “advocacy (largely by middle-class parents) on behalf of their own children succeeded in shifting the baseline—relative to the *status quo ante*—of publicly provided services for all children with disabilities,” thereby “benefit[ing] both wealthy and poor children with special needs—albeit perhaps not in equal measure[.]”<sup>234</sup> Poor children with disabilities have undoubtedly gained from the self-interested advocacy of families with more financial resources on the whole—whether in litigation broadly defining rights under the IDEA, amendments to the statute setting expansive terms, or generous appropriations decisions—even if in the particulars of individual cases the positive externalities are minor.

More generally, a large literature in social welfare law and policy suggests that, somewhat paradoxically, universal programs may achieve more redistribution than means-tested programs do because

231 See, e.g., Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. (forthcoming 2011) (manuscript at 5), available at <http://ssrn.com/abstract=1461098>.

232 See, e.g., MELNICK, *supra* note 43, at 150 (explaining that because disabilities “fall upon rich and poor, black and white, and residents of inner cities, suburbs, and farm districts—even members of Congress and their families,” “normal political cleavages—between Republicans and Democrats, liberals and conservatives, North and South, rural and urban—[are] nearly irrelevant”).

233 See generally KELMAN & LESTER, *supra* note 17.

234 Lester, *supra* note 231, at 5.

they may be more politically durable.<sup>235</sup> There is thus value in striving to keep the socio-economic breadth of the program while nonetheless looking for ways to reduce inequality. Instead of alienating wealthier families, the better approach is to find a way to harness their involvement in a way that benefits low-income families. In this respect, the IDEA presents an opening for the type of “tying” strategy advocated by James Ryan: to “link[ ] the fates of poor children with those from more affluent families . . . as a political strategy for equalizing educational opportunities.”<sup>236</sup>

Further, as a practical matter, it would be difficult, if not impossible, to means test the services provided under the IDEA because of the close connection between the IDEA and the antidiscrimination provision of Section 504 of the 1973 Rehabilitation Act.<sup>237</sup> Section 504 prevents discrimination on the basis of disability by any “program or activity receiving Federal financial assistance.”<sup>238</sup> The regulations implementing Section 504 in the public school context require schools to provide a “free appropriate public education” to all children who qualify for protection under the statute and explain that implementation of an IEP under the IDEA is one way of satisfying that requirement.<sup>239</sup> For children who do not qualify for services under the IDEA but do qualify as disabled under Section 504,<sup>240</sup> a “504 accommodation plan” is available.<sup>241</sup> Much of what is currently made available in an IEP could also be made available under a 504 accommodation plan<sup>242</sup>—just without the additional funds the IDEA provides. Because of this reality, and because antidiscrimination laws are

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235 See, e.g., *id.* at 5, 15–22; Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 70–73 (2004).

236 See RYAN, *supra* note 92, at 271–72.

237 Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. §§ 701, 794 (2006)).

238 29 U.S.C. § 794.

239 34 C.F.R. § 104.33(a), (b)(2) (2010).

240 As explained above, to qualify for services under the IDEA, a child must (1) be classified as having a statutorily recognized disability and (2) need special education and related services because of that disability. See 20 U.S.C. § 1401(3)(1); *supra* note 24. To qualify as disabled under Section 504, a child must “(i) ha[ve] a physical or mental impairment which substantially limits one or more major life activities, (ii) ha[ve] a record of such an impairment, or (iii) [be] regarded as having such an impairment.” 34 C.F.R. § 104.33(j)(1). For a study of students who qualify under Section 504 but not under the IDEA, see Holler & Zirkel, *supra* note 59.

241 See Perry A. Zirkel, *Comparison of IDEA IEP’s and Sec. 504 Accommodation Plans*, 191 EDUC. L. REP. 563 (2004) [hereinafter Zirkel, *Comparison*]; Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?*, 106 EDUC. L. REP. 471 (1996) [hereinafter Zirkel, *The Substantive Standard*].

242 See Zirkel, *Comparison*, *supra* note 241; Zirkel, *The Substantive Standard*, *supra* note 241.



not subject to means-testing in the way that service-provision is, there would be little point in means-testing the IDEA, even setting aside the political benefits of involvement across the socio-economic spectrum.

The goal of preserving the political economy of the statute further helps explain my disinclination to eliminate private enforcement of the IDEA. Such enforcement is a core commitment of the statute in general and is of particular importance to the (wealthier) demographic that tends to take advantage of it. Few suggestions, I think, would more swiftly eviscerate the possibility of real reform that would benefit poor children with disabilities than to argue that private enforcement should be cut.

Moreover, eliminating private enforcement of the IDEA would likely reduce the benefits offered to wealthier children under the statute, thereby promoting equality by leveling down. As I have indicated, however, the issue is not only one of equity but also one of adequacy.<sup>243</sup> It is therefore worth exploring alternative reforms to the enforcement system that would permit wealthier children to retain their full rights under the statute while nonetheless improving the lot of poor children. The next Part begins such an exploration.

#### IV. PUBLIC ENFORCEMENT ADDRESSING THE NEEDS OF LOW-INCOME CHILDREN WITH DISABILITIES

##### A. *Rationales for Public Enforcement*

In the absence of a viable large-scale private enforcement strategy for low-income children, two questions emerge. First, is public enforcement appropriate at all, given the norm of private lawsuits that pervades the American legal system?<sup>244</sup> Second, if public enforcement is appropriate, can it really avoid the problems for children in poverty associated with private enforcement?

As to the first question, my argument should not be taken to suggest that private litigation should give way to public enforcement wherever it is difficult for people in poverty to enforce their rights.<sup>245</sup> Instead, the normative justification for public enforcement of the IDEA is rooted in the close connection between enforcement and administration of a statute.

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243 See *supra* notes 91–102 and accompanying text.

244 See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 3 (2003).

245 For a variety of perspectives on the difficulties people in poverty have in protecting their rights across all domains of law, as well as proposals for reform, see generally *ABA Symposium on Access to Justice*, 37 *FORDHAM URB. L.J.* 1 (2010).

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.<sup>246</sup> Even if private action is enforcing the right at a generally adequate level, that action may focus on an aspect of that right that is more narrowly in the private interest instead of the public interest.<sup>247</sup> 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.<sup>248</sup> Alternatively, compensation may be skewed towards one set of individuals when public policy would prefer that compensation either be skewed towards a different set of individuals or spread across the class more evenly.<sup>249</sup> In turn, underdeterrence and undercompensation may breed cynicism that leads to negative repercussions in other areas of compliance with the statute.<sup>250</sup> Because—as earlier sections of this Article explain—all of these problems find analogues in private enforcement of the IDEA, attention to public enforcement strategies is appropriate.

As to the question of whether public enforcement of the IDEA can really serve poor children better than private enforcement does, I do not mean to paint a naively optimistic picture of the potential for

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246 Cf. LANDSBERG, *supra* note 9, at 46 (stating that private rights of action in civil rights laws serve deterrence and compensation functions as well as vindicate public policies against discrimination); Stephenson, *supra* note 5, at 95, 98 (noting that many statutory rights of action, including those that are linked to private plaintiffs' individual interests, serve a public deterrence function).

247 See LANDSBERG, *supra* note 9, at 46, 118 (noting that adequate protection of public values may not be satisfied where enforcement rests entirely with private parties because private parties pursue narrow individual agendas where public agencies pursue the public interest).

248 See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 14–15 (2002) (discussing compensatory rationale in certain statutory schemes); Stephenson, *supra* note 5, at 95, 98, 103–04 (discussing link between compensation and deterrence in private enforcement of statutory rights of action).

249 See Stephenson, *supra* note 5, at 118 (discussing potential for private enforcement to skew enforcement away from agency priorities).

250 See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 97, 172–73 (2006) (discussing the importance of procedural fairness in people's assessments of justice).

public enforcement, given the dangers of inefficiency,<sup>251</sup> inadequate resources,<sup>252</sup> and capture<sup>253</sup> mentioned above. Beyond these general problems, in 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.<sup>254</sup>

I do, however, want to suggest that these problems pose design challenges rather than insurmountable limitations. To limit inefficiencies, public enforcement should take advantage of what is efficient about private enforcement while avoiding duplication of effort and unnecessary oversight. To limit the problem of resource constraints, public enforcement should target its efforts to where the need is greatest and should engage in interventions that can have a transformational effect on a system as a whole. To limit capture, public enforcement should capitalize on the potential for varying concerns among low-income parents of children with disabilities, wealthier parents of children with disabilities, parents of children without disabilities, and local school systems.<sup>255</sup> And to limit replica-

251 See, e.g., Cohen & Rubin, *supra* note 2, at 169–72.

252 *Id.* at 188; cf. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 171 (1984) (arguing that congressional oversight operating under a “fire alarm” model of responding to problems is more effective than a “police patrol” model of looking for problems to which to respond).

253 See Stephenson, *supra* note 5, at 130.

254 See NAT'L COUNCIL ON DISABILITY, *BACK TO SCHOOL ON CIVIL RIGHTS* 7, 53 (2000); Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in *RACIAL INEQUITY IN SPECIAL EDUCATION*, *supra* note 17, at 219, 222; Arun K. Ramanathan, *Paved with Good Intentions: The Federal Role in the Oversight and Enforcement of the Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB)*, 110 TEACHERS COLL. REC. 278, 290 (2008).

255 Cf. Stephenson, *supra* note 5, at 131 (discussing research finding that the capture problem “has been wildly overstated,” because agencies respond to “public interest” concerns as well as competing interest groups, and observing that agencies with “broad jurisdiction [that] respond to (and draw their personnel from) multiple constituencies with competing interests” are less subject to the risk of capture). The fact that the federal government has rarely taken steps to withdraw funds from states that have failed to fully comply with the IDEA is not necessarily a sign of capture by the state and local educational establishment at the expense of the disability lobby. It may instead be a sign of reluctance to withdraw money from needy and blameless children, especially where the problems of compliance are nuanced and complicated. Cf. Jeremy Rabkin, *Office for Civil Rights*, in *THE POLITICS OF REGULATION* 304, 340–42

tion of historical concerns about inadequate public enforcement of the IDEA, a reenvisioned public enforcement should present options beyond a simple funding cut-off and should include provisions that mandate certain types of action when certain conditions are met. No system—public or private—will be perfect,<sup>256</sup> but there are better and worse ways to structure each, and regime architects should learn from past successes and failures.

In any event, given the significant amount of extant public oversight of the IDEA,<sup>257</sup> the relevant policy issue does not involve the first-order question about whether to build a public enforcement system from scratch. The issue instead is how best to build on the current public regulatory scheme to ensure adequate and equitable enforcement of the law for poor children in light of the deficits of private enforcement. An improved public enforcement system should thus avoid the need for individuals to raise claims on their own behalf; have a broad geographic reach; create positive externalities beyond the scope of any particular intervention; and incentivize the relevant parties to provide appropriate special education services for low-income children. It should also be sensitive to the concerns about inefficiency, resource constraints, capture, and IDEA enforcement history just mentioned.

The next subpart offers three proposals to improve public enforcement along these lines: one based on informational regulation, one based on monitoring and investigation, and one based on financial incentives. In each case, I propose a weak version and a strong version and assess their pros, cons, and likely feasibility. Preliminarily, it bears noting that none of these proposals involves a public litigation strategy, although the traditional model for public enforcement is often a lawsuit.<sup>258</sup> Instead, the proposals tend towards the bureaucratic and administrative. This is a deliberate choice reflecting the IDEA's status as a cooperative federalism program with significant existing infrastructure at the federal, state, and local levels. This infrastructure means that there is a relatively quick and efficient

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(James Q. Wilson ed., 1980) (outlining a similar challenge with respect to threats to cut off federal funds allocated to school districts that faced difficulties desegregating).

256 In fact, one might frame the problems of inefficiency, inadequate resources, and capture as problems for the private enforcement system as well, given the potential for too many lawsuits to be brought in one context and not enough in another; the difficulty that many low-income families have in finding and paying for lawyers; and the fact that in some contexts, wealthier families may receive more than their fair share of IDEA funds.

257 See *supra* notes 30–38 and accompanying text.

258 See, e.g., LANDSBERG, *supra* note 9, at 5.

way of effecting change in each of the 16,000 school districts in the country every year and on an ongoing basis.<sup>259</sup> Public litigation does not therefore appear to be the most promising strategy.

### B. *Proposals for Public Enforcement*

#### 1. Informational Regulation

##### a. Design Details

The collection and publicity of data or information is an increasingly important regulatory strategy.<sup>260</sup> Where no private party has an incentive to ensure that the public is provided with important information, mandatory disclosure can be an appropriate governmental response.<sup>261</sup> Mandating disclosure can be both less expensive and more efficient than command-and-control mechanisms, by giving people the information they need to make decisions rather than by requiring particular means or ends.<sup>262</sup> In addition, mandatory disclosure can encourage political processes to work by equipping citizens with information to hold their government accountable.<sup>263</sup>

The IDEA already requires a good deal of data collection and disclosure. For example, states must provide both to the Secretary of Education and to the public on an annual basis certain kinds of information disaggregated by race, ethnicity, limited English proficiency status, gender, and disability category (but notably not by income or socioeconomic class).<sup>264</sup> This information includes the number and percentage of children who are receiving a free, appropriate public education; participating in regular education; placed in separate classes or facilities; and subject to alternative placements because of disci-

259 For a breakdown of the number of school districts in each state, see *Rural Education in America*, NAT'L CENTER EDUC. STATS., <http://nces.ed.gov/surveys/ruraled/TablesHTML/5localedistricts.asp> (last visited June 13, 2011).

260 See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618 (1999). For the importance of data collecting to enforcement efforts, and for the role of the government in particular in these efforts, see generally Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 244–47 (2001); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 240–43 (2003); Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 359–77 (2000); and Selmi, *supra* note 5, at 1456–58.

261 See Sunstein, *supra* note 260, at 624.

262 See *id.* at 625.

263 See *id.* at 625–26.

264 20 U.S.C. § 1418(a)(1)(A) (2006).

plinary issues.<sup>265</sup> Where the data reveal disproportional identification, placement, and disciplinary treatment by race or ethnicity, states must take certain steps to review and revise their policies (but notably not to make particular changes to individual students' IEPs).<sup>266</sup>

This data collection is important, but more could be done to focus on children in poverty. The simplest change would be for poverty data to be added to the list of demographic features for which information is disaggregated. This could be done with reference to "economically disadvantaged" children under Title I,<sup>267</sup> the federal government's funding stream for compensatory education for children in poverty, and/or with eligibility for free or reduced-price lunch, another federal program for this group.<sup>268</sup> The data reports on the use of due process and mediation should also be disaggregated to make clear who is taking advantage of these private enforcement mechanisms. Calling attention to disparities in the use of special education services by socioeconomic status is an important step in working to remedy them, just as interventions have been designed to address disparities in the other demographic characteristics.

A more ambitious project would be to move beyond this limited data collection to a user-friendly database capturing information on the actual substance of IEPs and demographic characteristics, including, to the extent it is available, the income of the student (or a proxy, or at the very least whether the child is in poverty). It is often said that special education is not a place (that is, education in separate rooms or facilities) but a series of services.<sup>269</sup> Yet the statute itself requires the collection of data on placements, not services. The move to collect data on services is thus in keeping with the spirit of the statute. It is also in keeping with the move to open government and trans-

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265 *Id.* § 1418(a)(1). Additional data on the number of due process complaints filed, due process hearings held, mediations held, and settlement agreements reached through mediation are also required, but there is no requirement that these data be disaggregated according to demographic characteristics. *Id.* § 1418(a)(1)(F)–(H).

266 *See id.* § 1418(d).

267 *See id.* § 6311(b)(2)(C)(v)(II)(aa). *See generally* TITLE I (Geoffrey D. Borman et al. eds., 2001) (providing systemic information regarding Title I education policies for the improvement and increased efficiency of Title I).

268 42 U.S.C. § 1758(b) (2006).

269 *See, e.g.,* Anna B. Duff, *How Special Education Policy Affects Districts*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY*, *supra* note 59, at 135, 143; *cf.* 20 U.S.C. § 1400(c)(5)(C) (finding that special education can be more effective as a service to children with disabilities rather than a place they are sent).

parency of data in the current administration.<sup>270</sup> And it is in keeping with current educational trends, in which educators are increasingly finding that data can be used to transform substantive educational practices for both individual students and schools as a whole.<sup>271</sup>

What kinds of data should be included? Possibilities include the information that led to the construction of the IEPs, such as diagnoses, test scores, and evaluations of need, to allow evaluation of the connection between need and service provision. Other possibilities include broader demographic details about the children and their families, to allow evaluation of the extent to which potentially irrelevant factors (such as the extent of parents' education) enter (even if implicitly) into decisions about service provision. Still other possibilities include information about the school and districts, to allow relevant comparisons.<sup>272</sup> The data could also match outcomes to these inputs so that researchers, school staff, parents, and others can associate IEP services with results.<sup>273</sup> Of course such data collection and publication should be sensitive to privacy concerns and protect stu-

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270 See, e.g., Sheryl Gay Stolberg, *On First Day, Obama Quickly Sets New Tone*, N.Y. TIMES, Jan. 21, 2009, at A1 (describing presidential statements praising transparency and open government); *About*, DATA.GOV, <http://www.data.gov/about> (last visited June 13, 2011) ("The purpose of Data.gov is to increase public access to high value, machine readable datasets generated by the Executive Branch of the Federal Government.").

271 See, e.g., Catherine Gewertz, *9th Grade, By the Numbers*, EDUC. WK., Mar. 11, 2009, at 26; Sarah D. Sparks, *Data Mining Gets Traction in Education*, EDUC. WK., Jan. 12, 2011; Sarah D. Sparks, *States Making Great Progress on Student-Data Systems, Report Finds*, EDUC. WK., Feb. 16, 2011.

272 Because FAPE is a floor, not a ceiling, and since districts are not permitted to take resources into account in ensuring that at least FAPE is provided, it is perhaps more instructive to see comparisons within districts and between districts with similar characteristics. See Heubert, *supra* note 141, at 305 n.14, 321. That is, it is not that interesting to know that Greenwich, Connecticut (with a poverty rate of 4.0%, see *Greenwich, Connecticut*, CITY-DATA.COM, <http://www.city-data.com/city/Greenwich-Connecticut.html> (last visited Apr. 17, 2011)) provides better services than Bridgeport, Connecticut (with a poverty rate of 21.1%, see *Bridgeport, Connecticut*, CITY-DATA.COM, <http://www.city-data.com/city/Bridgeport-Connecticut.html> (last visited June 13, 2011)), but it would be interesting to know whether New Haven, Connecticut (with a poverty rate of 26.7%, see *New Haven, Connecticut*, CITY-DATA.COM, <http://www.city-data.com/city/New-Haven-Connecticut.html> (last visited June 13, 2011)) provides better services than similarly situated Bridgeport, and whether Greenwich provides better services in schools where there are fewer poor children, because these latter two disparities would raise red flags.

273 Federal education law increasingly requires schools to implement research-based strategies and calls for a focus on outcomes. Cf. 20 U.S.C. § 1416(a)(2) (requiring primary focus of federal and state monitoring efforts under the IDEA to be on "improving educational results and functional outcomes for all children with disabili-

dents from being personally identified, in keeping with the current legal framework on data collection under the IDEA.<sup>274</sup>

Such a database would have at least four goals. First, it would help families without financial resources to get a better sense of the types of services they could be receiving. Part of the problem with the private enforcement system is that less wealthy families generally have less knowledge about possible services than do wealthier families and school staff.<sup>275</sup> Research shows that poor families can make better educational decisions when they are given more information that is easy to understand and process.<sup>276</sup> This proposal would help in this regard.

Second, the database would help schools to avoid unintentional class-based differences as they work with families to draft IEPs. The data, in effect, would act as a “nudge” to make better decisions.<sup>277</sup> The data would not be a classic nudge, as identified by Richard Thaler and Cass Sunstein in their articulation of the principle of libertarian paternalism, because school authorities cannot opt out of the legal requirements to provide a FAPE under the IDEA, but it would nonetheless respond to many of the insights of behavioral law and economics that motivate Thaler and Sunstein’s work.<sup>278</sup> For example, where school authorities have “anchored” on a particular set of services for a particular type of child, it would be useful to see how other schools and districts respond, because that anchor might not be the best.<sup>279</sup> School authorities might also have fallen prey to the “availability heuristic,” in which people make assessments based on what they already

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ties”). A data set like this would allow ready comparisons to see what interventions work.

274 See, e.g., *id.* § 1417(c) (requiring the Secretary of Education to take appropriate action to ensure the confidentiality of any personally identifiable data); 34 C.F.R. § 300.123 (2010) (requiring states to have policies in place to ensure confidentiality of personally identifiable information).

275 See *supra* Part II.D.

276 See THALER & SUNSTEIN, *supra* note 128, at 203–06. Of course, improved access to information would benefit all families, poor or not, but the benefit likely matters more to poor families, given their generally greater informational disadvantage to begin with.

277 See *id.* at 3, 6 (defining a “nudge” as a decision made by a “choice architect”—someone who “has the responsibility for organizing the context in which people make decisions”—“that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives”).

278 See *id.* at 4–6 (explaining that libertarian paternalism “strive[s] to design policies that maintain or increase freedom of choice” while “steer[ing] people’s choices in directions that will improve their lives”).

279 See *supra* note 128 (discussing how “anchoring” can lead to poor decisionmaking).



know; here, too, it would be useful to get a broader view of options by seeing what others have done.<sup>280</sup> The danger of overrelying on “representativeness” might also be present, if school authorities come up with options for an IEP by implicitly assuming that the needs of one student are similar to other demographically similar students, where demographics should not be a relevant factor.<sup>281</sup> School authorities may be subject to the “overconfidence bias,” in which people are unrealistically optimistic about their abilities, and the “status quo bias,” in which people tend to maintain the existing state of affairs regardless of whether it is correct, both of which may hinder their ability to see the needs of the child before them clearly.<sup>282</sup> Reference to data may facilitate school authorities’ consideration of a broader range of possibilities.

Third, the database would help reviewing agencies assess whether districts are really providing adequate services to their lower-income students. Below I discuss a proposal for targeted and roving state review of IEP services for low-income students by district. This database would provide a ready way for the state to make its investigations. Relatedly, the database could bring new meaning to assessments of adequacy and fairness made by hearing officers in due process proceedings and mediators in mediation sessions.<sup>283</sup> While the central question would remain what is appropriate for any given child, information on what other children with similar needs have been provided would help create an objective range of what is generally appropriate.

Fourth, the database could lead states to coalesce around appropriate service norms, while respecting the federalism values that

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280 *Cf. id.* at 24–26 (explaining that people use the “availability heuristic” when they “assess the likelihood of risks by asking how readily examples come to mind,” and noting that the common use of this heuristic tends to lead to biased assessments because the ready availability of information frequently has little to do with actual probabilities).

281 *Cf. id.* at 26–31 (defining “representativeness” as decisionmaking shorthand in which people assess the likelihood that A belongs to category B “by asking themselves how similar A is to their image or stereotype of B (that is, how ‘representative’ A is of B)” and explaining that “biases can creep in when similarity and frequency diverge,” so that “[u]se of the representativeness heuristic can cause serious misperceptions of patterns in everyday life”).

282 *Cf. id.* at 31–35 (describing the dangers associated with each type of bias).

283 *Cf. Caruso, supra* note 17, at 195–96 (suggesting in passing that “rich databases” that permit for some “distributive analysis” would helpfully “inject firmer guidelines” in individual cases).

encourage states to experiment.<sup>284</sup> States have wildly varying outcomes now on measures such as the drop-out rate for children with disabilities and the percentage of time children with disabilities are in self-contained classrooms (that is, educated separately from children without disabilities).<sup>285</sup> There are currently no formal mechanisms for states to compare their outcomes to those of other states with reference to specific types of inputs provided. The database would provide a way for states to do so systematically.

b. Assessment of Success and Feasibility

The smaller version of this proposal, simply to add poverty to the list of factors that are disaggregated in the annual reporting of data, is not likely to be too politically contentious. Most of the data are readily available, as children need already be identified as eligible for Title I and free or reduced-price lunch, and No Child Left Behind already requires disaggregation of test scores by poverty status and disability (but not the overlap between the two categories).<sup>286</sup> To combine those factors is a logical next step.

The more ambitious proposal for the IEP database is likely to be more controversial. One potential concern is that it sounds incredibly burdensome and expensive to compile a database of six million annually changing IEPs. In actuality, though, the proposal would not be as burdensome as it initially seems. The information on IEPs already exists in written form, so the proposal would not call for the collection of information from scratch. Similarly, data on student demographics and school/district statistics already exist.

The most difficult and expensive part would be designing the architecture for a unified system and inputting the information into that system. The difficulty and cost of such projects have not prevented their requirement in related fields in recent years, however. No Child Left Behind required states to design data systems to track student progress and teacher effectiveness.<sup>287</sup> A federal grant has already provided fifty-three million dollars to fourteen states for the development of these data systems,<sup>288</sup> and the Commission on NCLB has proposed an additional one hundred million dollars a year for

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284 Cf. David J. Hoff, *National Standards Gain Steam*, EDUC. WK., Mar. 4, 2009, at 1 (describing collaborative state process to develop national education standards).

285 See, e.g., 1 U.S. DEP'T. OF EDUC., *supra* note 69, at 205–18 tbls.3-1 to 3-8.

286 20 U.S.C. § 6311(b)(2)(C)(v) (2006).

287 See Alyson Klein, *Effect of Stimulus on NCLB Renewal Mulled*, EDUC. WK., Mar. 11, 2009, at 24.

288 COMM'N ON NO CHILD LEFT BEHIND, *BEYOND NCLB* 142 (2007).

four years to be disseminated to all states for this purpose.<sup>289</sup> On another scale, the 2009 federal stimulus bill provided nineteen billion dollars for the development and adoption of electronic health record systems.<sup>290</sup> The cost of the IEP database would likely be closer to the NCLB system cost than the cost of the health data system, since the number of children with IEPs is a subset of the number of children overall, and the IEP system could (and should) piggyback on the systems that are already being designed to satisfy NCLB requirements. Start-up costs would be the greatest, as once the system is running the annual costs would be reduced to inputting the data and keeping the systems running. The cost is thus much less than the cost of providing individual attorneys to each child with a disability, as the annual cost of the latter would never decline.

A concern on the merits involves privacy. IEPs contain sensitive information, and information about student outcomes and family demographics is similarly subject to confidentiality concerns. The database would have to be constructed to ensure that no easily identifiable personal information is available and to limit the possibility of tracing back details of a given IEP or outcome to any individual.<sup>291</sup> Data compromises are of course possible, and the database design should be sensitive to security issues.<sup>292</sup> On this front, it is worth highlighting the existence of other government databases containing personally sensitive information, including other databases with educational information.<sup>293</sup> These other databases may provide mod-

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289 *Id.* at 144.

290 See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 13001–13424, 123 Stat. 115, 226–79.

291 Cf. 34 C.F.R. § 300.602(b)(3) (2010) (prohibiting states from providing any information to the federal government or the public on a district's progress in meeting state requirements if that information would result in disclosure of personally identifiable information about individual children).

292 In particular, regulators should consider the five factors identified by Paul Ohm for assessing the risk of reidentification and for designing systems to reduce that risk: data-handling techniques, the extent of the release of data, the quantity of data released, the motive for reidentification, and trust in people or institutions who might be interested in the data. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1764–69 (2010).

293 In addition to the new commitment of the federal government to make available to the public government data on a never before seen scale at [www.data.gov](http://www.data.gov), there are a number of large-scale federal education databases that are not open to the public but that are used for various other reasons. For example, the Department of Defense maintains a national recruiting database that includes students' names, date of birth, gender, ethnicity, and GPA. Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 103–04 (2008). The Department of Education maintains a database of information, includ-

els in how (or how not) to proceed.<sup>294</sup> Similarly, lessons from the current move towards electronic health records may also be applicable.<sup>295</sup>

Another objection might be that the proposal for an IEP database would not do enough to solve the problems with enforcement for the poor. Even armed with more knowledge, people may not pursue claims for a variety of reasons discussed above;<sup>296</sup> additionally, those who might most benefit from the knowledge might be least likely or able to use the database to obtain it.<sup>297</sup> This is indeed a limitation, underscoring the importance of affirmative government action to enforce the law for poor children. Because the database would still be useful to schools in designing IEPs, reviewing agencies assessing the quality of special education programs, and state players comparing notes, however, the database would still provide value to families in poverty even if they never consult it themselves.

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ing Social Security numbers, on sixty million students for financial aid purposes, which lenders are permitted to access. *See id.* at 104. The Department of Education has also supported the establishment of a national database to track student performance over time as a way of evaluating the accomplishments of colleges and universities. *See id.* Separately, data on school-level and grade-level performance on state tests, among other information, is available to the public at [www.city-data.com](http://www.city-data.com).

294 *See generally* Daggett, *supra* note 293 (suggesting ways to improve protection of student privacy in such databases). In late 2010, the Education Department created the Privacy Technical Assistance Center to help “education stakeholders to learn about data privacy, confidentiality, and security practices related to student-level longitudinal data systems.” *See Privacy Technical Assistance Center*, NAT’L CENTER EDUC. STATS., <http://nces.ed.gov/programs/Ptac/OtherResources.aspx> (last visited June 13, 2011); *see also* Sarah D. Sparks, *Help Offered on Guarding Student Privacy in School Data*, EDUC. WK., Nov. 10, 2010. As this Article went to press, the Education Department had just issued a Notice of Proposed Rulemaking setting forth proposed amendments to the regulations implementing the Family Educational Rights and Privacy Act (“FERPA”) and announced that it had hired its first Chief Privacy Officer. *See Family Educational Rights and Privacy*, 76 Fed. Reg. 19726 (proposed Apr. 8, 2011) (to be codified at 34 C.F.R. pt. 99); *U.S. Education Department Launches Initiatives to Safeguard Student Privacy*, ED.GOV (Apr. 7, 2011), <http://www.ed.gov/news/press-releases/us-education-department-launches-initiatives-safeguard-student-privacy>. These actions both demonstrate the prevalence of data systems in contemporary education practice and underscore the serious attention given to protecting student privacy in such data systems.

295 *See, e.g.*, Sharona Hoffman & Andy Podgurski, *In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information*, 48 B.C. L. REV. 331, 344–84 (2007).

296 *See supra* Part II.D.

297 *Cf.* Sunstein, *supra* note 260, at 628 (“Disclosure strategies may also have disproportionately little effect on people who are undereducated, elderly, or poor.”).

## 2. Monitoring and Investigation

### a. Design Details

Monitoring and detecting violations of the law are important regulatory strategies that can obviate the need for more serious enforcement action.<sup>298</sup> The act of having to produce information to regulators can induce compliance.<sup>299</sup> In turn, agencies can best target their investigative resources based on assessments of the information produced.<sup>300</sup>

The state enforcement system under the IDEA currently monitors local school districts for compliance with various requirements of the law. This system could be expanded to include a role for affirmative compliance investigations into the quality of FAPE provided in poor children's IEPs. The state agency would assess a series of IEPs in targeted locations and among students where the demographics are unlikely to result in either a due process hearing request or a state complaint. Locations where outcomes for children with disabilities are particularly low could be one trigger to provoke an investigation into inputs in the form of services on IEPs.<sup>301</sup> Other possibilities would be to target districts serving primarily low-income students, where there might be reason to believe that fewer parents would raise claims on their children's behalf, or districts with a high degree of socioeconomic stratification, where there might be reason to believe that parents with greater financial resources were skewing the special education budget towards their children and away from lower-income children. Different states could work out how to target their investigations each year, given how differently state education systems are organized, but some basic guidelines should exist. For example, to keep districts from getting complacent after an investigation, states probably should not engage in a strict rotation through every district over a period of years. Similarly, a minimum number of investigations should be required, perhaps as a percentage range of students with IEPs.

These investigations could take at least two forms. At the most basic level, the state agency could simply review IEPs on their own terms without making any comparisons to other IEPs. This is the cur-

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298 ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1012 (6th ed. 2009).

299 See NEIL GUNNINGHAM & PETER GRABOSKY WITH DARREN SINCLAIR, SMART REGULATION 430 (1998).

300 See *id.*

301 The IDEA amendments of 2006 included a new focus on student outcomes. See 20 U.S.C. § 1416(a)(2), (b)(2) (2006 & Supp. IV 2010); Ramanathan, *supra* note 254, at 283.

rent model in due process hearings. To do this, the agency either could review all of the evaluation data that went into the drafting of the IEPs or could further order an additional independent evaluation as a way of spot-checking the original assessments. This additional step would be of particular value where the parents were in no financial position to pay for such an independent evaluation themselves and so were reliant on the school's evaluations. Where the state found that IEPs were inadequate, it would require IEP meetings to be reconvened to make changes to individual students' IEPs on the threat of withholding funds from noncompliant districts. There could be an appeal process, but the process need not be particularly formal or require a hearing, as states are obligated under the IDEA to ensure that districts are appropriately implementing the law, and districts exist as creatures of the state.<sup>302</sup>

A more ambitious version of such a compliance review would consist of comparisons between the IEPs of low-income and high-income students in the same district.<sup>303</sup> While the process of evaluating FAPE for a given child is, as a legal matter in a private action, currently an individual inquiry in which comparisons to other children are irrelevant,<sup>304</sup> there are problems with the discretion associated with such individual inquiries, as wealthier families may be better able to advocate for the provision of greater services than can low-income families.<sup>305</sup> A state investigation into the possibility of such differential services would temper this possibility. The review should be intradistrict because wealthier districts may within the confines of the law decide to provide services that go beyond FAPE, so comparing IEPs of similarly situated students from district to district would capture too much.<sup>306</sup> But there is no reason that wealthier students within a dis-

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302 See 20 U.S.C. § 1412(a)(11). This is in contrast to the opportunities for formal hearings offered by the federal Department of Education to private entities and districts in OCR's enforcement of various civil rights laws, see 34 C.F.R. § 100.8(a) (2010); *OCR Case Processing Manual*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html> (last visited June 13, 2011), and to states in the Office for Special Education Program's enforcement of the IDEA, see 20 U.S.C. § 1416(c)-(d) (2006 & Supp. IV 2010).

303 Data on children who are eligible for Title I funding or who receive free or reduced-price school lunches, as well as data on school per-pupil expenditures, would be among the possible factors to compare.

304 See, e.g., *Hupp v. Switz. of Ohio Local Sch. Dist.*, No. 2:07-CV-628, 2008 WL 2323783, at \*2-3 (S.D. Ohio June 3, 2008); see also 34 C.F.R. § 300.615 (stating that parents have right to see special education records only for their child).

305 See *supra* Part II.

306 States can require schools to provide more than the floor of FAPE that the IDEA requires. In practice, however, courts generally interpret state statutes that

trict should receive superior services than do lower-income students within that same district simply because of family socioeconomics.

What would these comparative reviews look like? Similar to the investigations that the Education Department's Office for Civil Rights (OCR) has conducted to attempt to eradicate racial disparities in special education, this comparative review would examine wealth-based overrepresentation and disparate receipt of services within certain disability categories.<sup>307</sup> For example, as to the question of overrepresentation and appropriate diagnosis, the review would examine differential placement in the notoriously slippery categories of learning disabilities and behavioral or emotional disorders.<sup>308</sup> Are wealthier children receiving the relatively less stigmatic learning disability diagnosis while poor children are receiving the relatively more stigmatic diagnosis of a behavioral or emotional disorder? As to the question of differential services within the same disability category, the review might examine whether wealthier children with learning disabilities are receiving an in-class aide and several hours in a resource room while poor children receive a self-contained class. In the same vein, the review would also compare students receiving private placements at public expense to determine whether they have different socioeconomic profiles than students in the regular public school system. For example, are wealthier students more likely than poor children to obtain public payment for education at a private school focusing on learning disabilities or autism?<sup>309</sup> The goal would be to identify disparate treatment or disparate impact by socioeconomic class that is not educationally justified.

Where disparities that were not educationally justified were found, the state would order IEP meetings to be reconvened so that changes to individual students' IEPs could be made and would also require whatever broader systemic changes were required to limit the possibility of the problems of disparities continuing. As with all equity-based decisions, a choice would have to be made whether to

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seem to require maximizing a child's potential to be something closer to the lower federal floor. See, e.g., KELMAN & LESTER, *supra* note 17, at 54–55; Stephen A. Rosenbaum, *Full Spl! JEd Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus*, 4 STAN. J. C.R. & C.L. 373, 382 n.46 (2008).

307 See Theresa Glennon, *Evaluating the Office for Civil Rights' Minority and Special Education Project*, in RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 17, at 195.

308 See KELMAN & LESTER, *supra* note 17, at 17–36, 67–92.

309 Cf. Juan Gonzalez, *Class System in the City's Schools: Special-Ed Help Goes Mostly to the Rich*, N.Y. DAILY NEWS, Dec. 15, 2010, at 6 (reporting that most of New York City's special education students supported by public funding in private schools are from the city's wealthiest neighborhoods).

level up or level down: Should wealthier students receive the lower amount that poor children do, or should poor children receive the higher amount that wealthier children do? Leveling up is the better option as a substantive matter, and it is also more likely as both a practical and a political matter.

As a substantive matter, leveling up provides an opportunity to improve the quality of special education services provided to low-income children. As explained above, educational outcomes for poor children with disabilities have essentially remained flat over several decades, while educational outcomes for wealthier children with disabilities have dramatically increased.<sup>310</sup> Reducing the services provided to wealthier children would fix the equity problem but would do nothing to improve educational outcomes for poor children. Because the IDEA is supposed to “improv[e] educational results and functional outcomes for all children with disabilities,”<sup>311</sup> it would make little sense to design the new system to undercut this goal.

The practical dynamic would also likely lead to some degree of leveling up. It is difficult to envision a scenario in which services that the IEP team had agreed were appropriate for a wealthier child could be taken away from that child simply because another child for whom those services were newly deemed appropriate had not previously had them. The removal of those services would also likely trigger a request for a due process hearing or the filing of a state complaint. Similarly, to the extent that districts might be inclined to level down over time, due process hearings or complaints brought by wealthier families could put pressure against that trend.

Finally, as a political matter, leveling up presents the only viable strategy, given what I have already explained about the political economy of the statute.<sup>312</sup> It is easy to see how wealthier parents of children with disabilities might advocate for statutory changes that would permit otherwise similarly situated poor children with disabilities to have access to the same benefits their own children do.<sup>313</sup> It is difficult to see how wealthier parents would advocate for changes that would simply give their own children less.<sup>314</sup> These comparative reviews could be an important strategy to tie the fates of poor children

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310 See *supra* notes 83–87 and accompanying text.

311 20 U.S.C. § 1416(a)(2) (2006).

312 See *supra* notes 231–34 and accompanying text.

313 Cf. Lester, *supra* note 231, at 26–28 (summarizing social psychology research finding that people are likely to be more generous towards members of their own social group and noting that design of programs can affect how people define what their own social group is).

314 See *supra* note 236 and accompanying text.



with disabilities to the fates of wealthier children with disabilities, but tying strategies that do not threaten the status quo of people in power are more likely to succeed.<sup>315</sup>

b. Assessment of Success and Feasibility

This proposal would go a long way to addressing intradistrict disparities in the provision of services. It would not, however, solve state-to-state or district-to-district disparities in services, and the failure to address those other disparities might cause some to complain that it is not doing enough. Children in less wealthy Boston may still receive worse special education services than children in wealthier Wellesley, while children in less wealthy Louisiana may still receive worse special education services than children in wealthier Massachusetts. Unless we are willing to give up the idea that local school systems have primary responsibility for designing their own education programs, though, there is no way to ensure that the actual services all children with like disabilities receive will be comparable. The commitment to localism in our national education policy is so strong that giving up that idea does not seem plausible. Even if it were plausible in principle, it is difficult to see how special education could be the tail that wagged the dog in this respect. To insist that children with disabilities in Boston receive the same level of services as children with disabilities in Wellesley, while resisting the idea that all children in Boston should receive the same level of services as all children in Wellesley, would likely prompt backlash against special education that it would be unwise to pursue.

There is nevertheless value in remedying intradistrict disparities. The goal of the proposal is to make sure that the law is not under-enforced, even in its local incarnations, in certain areas of the country and for certain types of students. To require districts to treat their students with disabilities equitably, regardless of their socioeconomic background, is not nothing. Indeed, this proposal is in keeping with the latest research into school finance inequities, which shows that district budgeting practices that are permitted and even encouraged by federal law are able to mask intradistrict inequities and fund richer schools at the expense of poorer schools.<sup>316</sup> Calls for federal law to

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315 See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

316 See, e.g., Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, in BROOKINGS PAPERS ON EDUCATION POLICY 201, 213–16 (Diane Ravitch ed., 2004); Marguerite Roza et al., *Strengthening Title I to Help High-*

remedy these intradistrict inequities are increasing.<sup>317</sup> The proposal for intradistrict examination of IEPs thus reaches an important new focus in education disparities.

A second concern might be that the proposal focuses only on children who are already in the special education system. It does not address those children who have been tested for special education services and improperly found ineligible or those who have never been tested at all but who would be properly found eligible if they were. This is indeed a limitation of the proposal. However, states could choose to consider evaluation data of children not currently served by special education to ensure that evaluations do not result in disparities by class. In any event, there is an already existing statutory obligation for each state to find every child with a disability,<sup>318</sup> making any effort to include this focus in the compliance reviews less crucial.

A third concern might be that private attorneys would do the job better than the state would. Assuming that providing attorneys to every child is implausible but that pilot programs in particular jurisdictions might be possible, is the proposal for state review better than that? The answer is yes. If private attorneys are offered in particular districts, their effect would remain only in those districts. While they would benefit children in those districts, their spillover effect would be limited. In contrast, state review would move from district to district and possibly back again, so it would have more potential to spur improvement in a greater number of districts. In addition, it would be harder for private attorneys than for the government to obtain all of the comparative data necessary to encourage equalization.<sup>319</sup> The state can more easily require districts to open up their data on IEPs

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Poverty Schools: How Title I Funds Fit into District Allocation Patterns 5–6 (Aug. 18, 2005) (unpublished manuscript) (on file with author).

317 See, e.g., LINDSEY LUEBCHOW, *EQUITABLE RESOURCES IN LOW INCOME SCHOOLS* (2009), available at [http://education.newamerica.net/site/newamerica.net/files/policydocs/Equitable\\_Resources\\_Low\\_Income\\_Schools.pdf](http://education.newamerica.net/site/newamerica.net/files/policydocs/Equitable_Resources_Low_Income_Schools.pdf); THE EDUCATION TRUST—WEST, *CALIFORNIA'S HIDDEN TEACHER SPENDING GAP* (2005), available at <http://www.hiddengap.org/resources/report031105.pdf>; Alyson Klein, *Lawmakers Introduce Bill Aimed at "Fiscal Fairness,"* EDUC. WK: POLITICS K-12 (Mar. 31, 2011, 3:36 PM), [http://blogs.edweek.org/edweek/campaign-k-12/2011/03/salary\\_comparability\\_could\\_fin.html?qs=salary+comparability](http://blogs.edweek.org/edweek/campaign-k-12/2011/03/salary_comparability_could_fin.html?qs=salary+comparability); Alyson Klein, *Salary Comparability: Coming to an ESEA Bill Near You?*, EDUC. WK.: POLITICS K-12 (Oct. 4, 2010, 2:44 PM), [http://blogs.edweek.org/edweek/campaign-k-12/2010/10/salary\\_comparability\\_coming\\_so.html](http://blogs.edweek.org/edweek/campaign-k-12/2010/10/salary_comparability_coming_so.html).

318 See 20 U.S.C. § 1412(a)(3) (2006).

319 See Selmi, *supra* note 5, at 1458; Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 538 (1999).

for a government investigation, while private attorneys would likely face opposition against a fishing expedition.<sup>320</sup>

A fourth concern is that there is no real advantage to substituting the professional judgment of state education officials for the professional judgment of local education officials. In both cases, officials will be sensitive to cost concerns and so may try to get away with providing as little as possible. This is a variation on the previous concern, in that if this is an accurate description, only individualized advocates could get around this problem. I think this problem is not as great as it might at first seem, however, because ultimately local districts bear the costs of education. States tend to contribute to local education spending under a formula but are less sensitive to what the cost of any individual child's IEP will be, so may examine the data more dispassionately.<sup>321</sup> This would be especially true if the monitoring is conducted through a separate inspector-general-like unit of the state department of education.<sup>322</sup> States, too, are subject to withdrawal of federal funds if they do not appropriately implement the IDEA, so to the extent that the federal government reviews their work in these compliance reviews, they have an incentive to ensure that they are not simply rubberstamping local decisionmaking. Similarly, there are fewer institutional competence questions with respect to state officials reviewing IEPs than there are with district judges in a putative IDEA class action comparing IEPs, since the expertise of state agency officials would be more akin to the expertise of state hearing officers in due process hearings.

A fifth concern might point to the efforts of the Office for Civil Rights to remedy race discrimination in special education, which have not been spectacularly successful.<sup>323</sup> Both my proposal and OCR's work on this front involve examinations of school district treatment of disadvantaged populations receiving special education services, so the comparison is not unfair. While OCR's work has been stymied by a variety of structural, tactical, and administrative issues, some of these

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320 See *supra* Part III.D.

321 See, e.g., Heubert, *supra* note 141, at 316, 319. This response does not apply to the District of Columbia and the state of Hawaii, neither of which has local school districts. DAVID C. THOMPSON ET AL., *MONEY AND SCHOOLS* 89 (4th ed. 2008).

322 Cf. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429 (2009) (describing the role of inspectors general as insulated from substantive agency work and politics and thereby helping to "ensure regularity and the rule of law").

323 OCR's investigations stem from its enforcement of Title VI of the 1964 Civil Rights Act, which bans recipients of federal funds (including school districts and state education departments) from engaging in race discrimination. See *supra* note 17. OCR does not enforce the IDEA. See Glennon, *supra* note 307, at 195.

issues are specific to the design of OCR and so will not be relevant here, and others provide instructive lessons to make my proposal work more smoothly.<sup>324</sup> Among the problems OCR faced in its review were an extremely broad mission—encompassing discrimination on the basis of race, national origin, gender, disability, and age, in colleges and universities as well as in K-12 schools—and a decentralized enforcement structure, encompassing ten different regions with different priorities.<sup>325</sup> Individual state agencies with divisions focusing solely on special education enforcement will be able to be more targeted and unified in their approach. Another OCR problem lay in its enforcement authority: where it found a violation of Title VI and the school district refused to modify its practices voluntarily, its only available penalty was to cut off all federal financial assistance, an option so dramatic that its threat is rarely credible.<sup>326</sup> In contrast, states whose constituent school districts refuse to comply have many options, including actually taking over the district, and thus ultimately a good deal more power.

At the same time, some lessons from OCR's work are applicable. The impact of OCR's district-by-district reviews was not broad because OCR did not publicize its reviews or resulting agreements, post guidelines for districts that were not currently under review, or work with nongovernmental agencies who might have assisted its efforts.<sup>327</sup> It is important that state agencies conducting compliance reviews engage in these activities. In addition, inadequate resources hampered OCR's efforts to fully investigate all of the complaints it received and to proactively conduct compliance reviews.<sup>328</sup> Budgetary constraints are a concern here as well. The proposal to mandate a certain number or range of compliance reviews each year is one way to limit the potential for complaint investigation to trump such reviews.

This reference to budgetary constraints marks an appropriate transition to the question of political feasibility, for just as the proposal to provide attorneys to all children with disabilities is prohibitively expensive to be realistic, the proposal for IEP compliance reviews would not be realistic if its expense is too great. There are two kinds of expenses one might consider: the cost of the compliance reviews themselves and the increased expense from additional services added to previously inadequate IEPs as a result of the compliance reviews.

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324 *See id.* at 201–09.

325 *See id.* at 202.

326 *See id.* at 203.

327 *See id.* at 204.

328 *See id.* at 206.

This latter cost would, of course, be an issue with the proposal to provide attorneys at public expense as well, so the latter cost cannot distinguish that proposal from this one.

Considering simply the cost of the compliance reviews themselves, some of the cost could piggyback on the cost of the data systems proposed in the previous subsection. Once the data are already gathered and reviewable, and given the role that state agency staff already play in district oversight, the incremental cost of investigations would likely be the cost of additional full-time employees in each state to run the investigations. As a point of comparison, OCR's annual budget is approximately ninety million dollars, funding around 600 full-time employees in twelve regional offices and the Washington, D.C. headquarters, who both process complaints and conduct compliance reviews.<sup>329</sup> Because state education department staff already exist to process complaints under the IDEA and otherwise oversee the administration of the program, perhaps roughly half this amount, or \$45 million, would be a reasonable expectation for the annual added expense of state-level education department staff to conduct compliance reviews under this proposal.

Some might argue that this is money that should better be spent on providing special education services rather than conducting compliance reviews, and the point has some force; the point is also made with respect to due process proceedings.<sup>330</sup> But where there is a danger that that money would be spent disproportionately on children from wealthier families and in wealthier areas, the idea that service provision trumps enforcement is not neutral. In addition, current spending on monitoring and enforcement is already costly, so it is not as if this kind of spending is itself a new and controversial idea. Finally, the idea of providing adequate funds to a government agency to enforce the law is likely less divisive than the idea of providing private attorneys for individuals. Thus, this incremental cost is not likely to spell the proposal's doom.

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329 U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS OF THE OFFICE FOR CIVIL RIGHTS 3 (2008).

330 See, e.g., Perry A. Zirkel, *'Transaction Costs' and the IDEA*, EDUC. WK., May 21, 2003, at 34. In that regard, however, it is worth noting that responding to the private enforcement system appears not to pose an unwieldy financial burden on school districts in comparison with expenditures on special education overall. By one calculation, school districts' expenditures on procedural activity are less than one half of one percent of total expenditures on special education. See Chambers et al., *supra* note 43, at 5 (estimating that school districts spent approximately \$146.5 million on special education mediation, due process, and litigation in 1999–2000, compared to approximately fifty billion dollars on special education overall).

Calculating the increased annual expense of adding services as a result of the compliance reviews is a trickier matter, because without data of the type I propose above, more guesswork as to the depth of inadequate service provision is required. One very rough estimate might compare the gap between what districts serving the lowest-income families spend on average each year to educate a student with a disability and what districts serving wealthier families do and multiply this gap by the approximate number of poor children with disabilities. Such a calculation would be imperfect, because my proposal envisions an intradistrict, rather than an interdistrict, comparison, and because it is unlikely that the quality of services provided to every low-income child would require such remediation. Still, as a ballpark figure, perhaps on the high side, the number is instructive: around \$2.8 billion dollars.<sup>331</sup>

Of course this is a large number in comparison with the twelve billion dollars annually spent by the federal government on special education (although less so in comparison to the fifty billion dollars spent annually on special education overall).<sup>332</sup> Put in context of the politics of special education funding, however, it is nonetheless plausible that this additional money could be forthcoming from the federal government. In contrast to the rest of federal education spending, which is often treated as suspect by Republican members of Congress, federal spending on special education has a decades-long history of widespread cross-party support.<sup>333</sup> In recent history, for example, the Bush administration oversaw significant increases in federal spending on special education, from about eight percent of total spending on special education to about eighteen percent.<sup>334</sup> Even more recently, federal funding for special education remained untouched in the proposal of the Republican Study Committee in early 2011 to reduce federal spending by \$2.5 trillion by 2021, which called for many other federal funding streams for education to be eliminated.<sup>335</sup> Similarly, the budget compromise in April 2011 kept special education intact

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331 I calculated this figure using a spending gap of \$2314 per child with a disability. See Chambers et al., *supra* note 64, at 7. Referring to estimates of the percentage of low-income children with disabilities, *supra* note 88 and accompanying text, I then multiplied this spending gap by twenty percent of six million children.

332 For these two cost figures, see *supra* notes 23, 330

333 See MELNICK, *supra* note 43, at 150; Alyson Klein, *K-12 Policy Shifts Loom in GOP Surge*, ED. WEEK, Sept. 16, 2010; Pasachoff, *supra* note 23, at 29.

334 See Pasachoff, *supra* note 23, at 27.

335 See *Spending Reduction Act of 2011*, REPUBLICAN STUDY COMMITTEE, <http://rsc.jordan.house.gov/Solutions/SRA.htm> (last visited June 13, 2011).

even as Congress cut thirty-eight billion dollars elsewhere from the federal budget.<sup>336</sup>

There is also a broad political coalition in support of so-called “full funding” of special education, a movement that refers to the stated goal (some call it a promise) in the original legislation that the federal government would provide forty percent of special education funding.<sup>337</sup> Powerful legislators of both parties have periodically (and recently) either called for or proposed legislation that would provide full funding, which, for fiscal year 2011, the 2004 reauthorization set at twenty-six billion dollars.<sup>338</sup> Some of this legislation has made it relatively far through the legislative process.<sup>339</sup> Identifying \$2.8 billion dollars as specifically intended to improve services for low-income children with disabilities might help make the need for such funds more concrete and thus more politically possible, especially if framed as a middle option between no increase in special education funding and an increase that would lead to full funding.<sup>340</sup>

One might reasonably query why any increased federal education money should be spent on special education services for the poor rather than simply on education for the poor in general. I hasten to emphasize that my purpose here is not to justify special education funding over other education funding, or indeed over other social welfare funding or other completely different uses for the public fisc; my frame of reference is internal to the IDEA rather than a comparative budgetary analysis. That having been said, several points are worth noting as to federal funding of special education in comparison to federal funding of general education for the poor.

First, increasing federal funding for special education is not entirely a zero-sum game because of a statutory provision that permits

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336 See H.R. 1473, 112th Cong. (2011); HOUSE APPROPRIATIONS COMM., SUMMARY—FINAL FISCAL YEAR 2011 CONTINUING RESOLUTION (2011), available at [http://appropriations.house.gov/\\_files/41211SummaryFinalFY2011CR.pdf](http://appropriations.house.gov/_files/41211SummaryFinalFY2011CR.pdf) (explaining that the Continuing Resolution “preserves funding for . . . special education”); Jennifer Cohen, *Congress Close to Finalizing Fiscal Year 2011 Appropriations*, ED MONEY WATCH (April 12, 2011), [http://edmoney.newamerica.net/blogposts/2011/congress\\_close\\_to\\_finalizing\\_fiscal\\_year\\_2011\\_appropriations-48348](http://edmoney.newamerica.net/blogposts/2011/congress_close_to_finalizing_fiscal_year_2011_appropriations-48348) (noting that the budget bill cut approximately \$1.3 billion from the Education Department budget but that funding for special education remained “unscathed”).

337 See Pasachoff, *supra* note 23, at 27–28.

338 See *id.* at 28; see also IDEA Full Funding Act, S. 1652, 111th Cong. (2009); Everyone Deserves Unconditional Access to Education Act, H.R. 3578, 111th Cong. (2009).

339 See Pasachoff, *supra* note 23, at 28.

340 Cf. Steven Pearlstein, *The Compromise Effect*, WASH. POST, Jan. 27, 2002, at H01 (explaining that people often select the middle option because it seems more reasonable than either extreme).

states and districts to shift some of their own spending towards general education services as federal funding for special education increases.<sup>341</sup> Poor children without disabilities may thus benefit from increased state and local spending as federal spending on special education grows.

Second, to the extent that the argument that more spending is needed for general education is rooted in a belief that spending on general education is more likely to improve educational outcomes overall, it bears observing that the vast majority of children served by the IDEA do not need the most expensive interventions in order to achieve on par with their peers. Close to fifty percent of the children served by the IDEA are classified as learning disabled, with close to twenty percent as having speech and language impairments and close to ten percent as having emotional disturbance.<sup>342</sup> Implementing appropriate services for these children could quite realistically help these children perform on grade level with relatively reasonably priced services. This is not to say that it is not important to fund expensive interventions or that performing on grade level is the only important value under the IDEA or for education more generally. But because meeting state standards is one of the goals of federal education spending, even in special education, recognizing the relatively low-cost needs of the majority of children served under the IDEA suggests the potential for dramatic improvements in a cost-effective way.

Third, implementing appropriate services for children with disabilities can have an important spillover effect for other, nondisabled children in their classrooms and their schools. Children whose educational needs are being met are less likely to act out in school, improving the educational environment for everyone.

Finally, given the unusual politics of special education funding,<sup>343</sup> it may simply be easier as a political matter to obtain more federal funding for special education that could then be used to improve services for low-income children with disabilities than it would be to obtain more federal funding for general education for low-income children without disabilities. The broad coalition of those supporting full funding of the IDEA suggests that organizations that are not specifically devoted to special education nonetheless see little conflict between supporting full funding of the IDEA and caring about poor children more generally.<sup>344</sup> For all of these reasons, directing addi-

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341 See 20 U.S.C. § 1413(a)(2)(C), (j) (2006); Pasachoff, *supra* note 23, at 28.

342 See U.S. DEP'T OF EDUC., *supra* note 23, at 30.

343 See *supra* note 333 and accompanying text.

344 See Pasachoff, *supra* note 23, at 29.



tional funds into compliance reviews to ensure better services for low-income children with disabilities seems not only worthwhile but also realistically possible.<sup>345</sup>

### 3. Financial Incentives

#### a. Design Details

The premise of a spending clause program like the IDEA is that Congress can impose conditions on the states in exchange for providing funding and can take those funds away when it is dissatisfied with the states' performance.<sup>346</sup> Targeted use of this carrot-and-stick power could improve enforcement of the Act for poor children.

Congress has given enforcement authority under the IDEA to the Office of Special Education Programs (OSEP) in the Department of Education.<sup>347</sup> OSEP has the authority to target the funds it wishes to withhold from the particular programs, projects, or agencies that are not in compliance, rather than withholding funds from the state as a whole.<sup>348</sup> OSEP is also subject to a series of statutory triggers that mandate OSEP enforcement activity upon certain findings. Under these triggers, if OSEP determines that a state needs assistance in implementing the IDEA, needs intervention, or needs substantial intervention (all terms of art), it must choose from a limited range of options, which include directing the use of state funds, withholding or recovering federal funds, and referring the matter to the Department of Justice for enforcement action.<sup>349</sup>

Congress could require that a state providing (or permitting its districts to provide) worse special education services to poor children than to wealthier children would not be in compliance with the law. This directive could take either of two forms. One option would be to

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345 Even if the current budgetary climate makes a large increase in federal spending on special education less likely in the immediate future, the long arc of the politics of special education funding suggests that increased federal funding for special education is a favored priority. Moreover, because of the vast difference in administrative costs between providing individual advocates for private enforcement and creating these proposed monitoring and compliance reviews, such reviews remain a more realistically possible proposal.

346 See *South Dakota v. Dole*, 483 U.S. 203 (1987). See generally James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in *WHO'S IN CHARGE HERE?* 42 (Noel Epstein ed., 2004) (discussing power of the Spending Clause in federal education programs).

347 See 20 U.S.C. § 1402a.

348 See *id.* § 1416(e)(6)(A) (2006 & Supp. IV 2010); see also Hehir, *supra* note 254, at 229.

349 See 20 U.S.C. § 1416(e)(1)–(3); Ramanathan, *supra* note 254, at 283–84.

require the same degree of excellence in special education services in every district around the state. To avoid the concern of leveling down, it could instruct that the services provided to wealthier children are the baseline and should not be lessened. This would be akin to the “maintenance of effort” provisions included in the IDEA and other federal education programs, ensuring that states and local districts do not substitute additional federal dollars for their own spending by requiring that they maintain their level of spending.<sup>350</sup> Another, weaker alternative would require only that individual districts not provide better services to wealthier children than to poor children. This alternative would be in keeping with the Act’s focus on local control, accepting that districts are permitted to provide more than FAPE if they want, but underscoring that within a district, what constitutes FAPE should not be worse for poor children than for wealthier children.

Although it is not a necessary outgrowth of the two previous proposals, such a mandate could fit easily with them. States providing data demonstrating harmful disproportionality for poor children would have to demonstrate improvement or be subject to the statutory triggers. Similarly, states conducting good faith compliance investigations into the substance of IEPs would meet part of their burden under the mandate; if they continually had difficulty ensuring equalization, they might be characterized as needing assistance, intervention, or substantial intervention, subject to the statutory triggers. States not conducting good faith investigations or permitting recalcitrant districts to avoid their duties under the mandate would face the statutory triggers earlier.

Alternatively, instead of threatening to take funds away, Congress could provide additional funds to states (and through them districts) that are taking steps to ensure that poor children are provided with services as good as those provided to wealthier children—for example, by reporting annual declines in measures of disproportionality. This proposal would be in line with recent attention to the way the IDEA federal funding stream reaches children in poverty. In 2004, Congress revised the formula for awarding IDEA funds to the states to include a small measure of poverty, so that a percentage of any additional funds over the previous year’s award is dependent on each state’s relative share of children living in poverty.<sup>351</sup> The formula does not take into account specific state efforts to serve those children equitably, however. A new incentive grant could do so. One model

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350 See 20 U.S.C. §§ 1412(a)(18)(A), 1413(j)(5) (2006).

351 See *id.* § 1411(a)(2)(B).

might be the Education Finance Incentive Grants under No Child Left Behind, which provide an additional amount on top of the base grant in part by taking into account how equitably school funding is distributed across districts in a state.<sup>352</sup> These grants were first authorized in 1994, in the predecessor statute to NCLB, but they were not funded until NCLB was passed in 2001.<sup>353</sup> Since then, these grants have been growing dramatically, now constituting almost a quarter of all Title I funding.<sup>354</sup>

b. Assessment of Success and Feasibility

Mandating equalization of special education services across districts in a state seems politically implausible for a variety of reasons, including longstanding commitments to local control and experimentation in education. More promising is the proposal for a mandate that districts do not provide better services to their wealthier students than to their poor students without educational justification, a principle of fairness that raises few concerns on its face. Given Congress's growing interest in including a poverty factor in IDEA funding and an equity factor in Title I funding, providing incentive grants for equalization might be politically plausible, as might the more traditional threat of a funding cut-off.

One potential objection might be that for other demographic factors for which the IDEA requires disaggregated data, there is no threat of a funding cut-off if findings of disproportion are found. In fact, for disparities in gender and Limited English Proficiency status, no repercussions are mandated at all; where disparities in race and ethnicity are found, the only repercussions are that the state should review and possibly revise the district's policies and require the district to reserve the maximum amount of funding possible to provide early intervention services to children before they begin school.<sup>355</sup> It might not make sense to let poverty be a trigger for a funding cut-off if these other demographic factors are not. One response is that the Office for Civil Rights, through its enforcement of Title VI, has, in fact, threatened funding cut-offs based on racial disproportionality in special education, so perhaps the absence of this threat in the IDEA sim-

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352 See *id.* § 6337.

353 See New Am. Found., *Federal Education Budget Project: No Child Left Behind Act—Title I School Funding Equity Factor*, FED. EDUC. BUDGET PROJECT, <http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-school-funding-equity-factor> (last visited June 13, 2011).

354 See *id.*

355 See 20 U.S.C. § 1418(d).

ply represents a division of labor between the agencies.<sup>356</sup> Another response might be that effective enforcement of the IDEA should actually require funding cut-offs based on unjustified disproportion in all of these demographics, and that a funding cut-off for poverty disproportion could be a useful beginning.

A separate concern might be that historically, OSEP has not used its enforcement power particularly broadly, permitting states to be in violation of the IDEA for years.<sup>357</sup> Adding yet another factor that OSEP could consider and yet take no action on would not likely produce change. However, the triggers mandating action based on certain findings (which were put in place in the 2004 reauthorization) combined with the ability to withhold targeted funds instead of funds from an entire state (which was put in place in the 1997 reauthorization) make it easier for OSEP to take action.<sup>358</sup> Moreover, there might be value in a mandate towards which state systems can strive, regardless of the likelihood of a formal OSEP enforcement action. Even imperfect implementation of the mandate could be better for children in poverty than not having the mandate at all.

## V. ENFORCING STATUTORY RIGHTS BEYOND THE IDEA

The enforcement problem I have identified in the IDEA is generalizable. Where a statute shares certain features with the IDEA, heavy reliance on private action can lead to predictable disparities in enforcement to the detriment of people without financial resources. These features include the distribution of resources among a socioeconomically diverse group; an individualized right that depends on bargaining to be effectuated; discretion in determining the contours of the right; and a lack of transparency in that determination.

Two broad lessons emerge from this insight. First, where the relevant public policy does not intend for wealthier beneficiaries to obtain a greater share of the statute's distributed resources than poor beneficiaries do, public enforcement mechanisms focusing on both

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356 See Glennon, *supra* note 323, at 195.

357 See NAT'L COUNCIL ON DISABILITY, *supra* note 237, at 7, 53; Hehir, *supra* note 254, at 222; Ramanathan, *supra* note 254, at 290.

358 Because funding cutoffs to an entire state were so draconian, OSEP had been reluctant to use this option; the option for partial withholding was supposed to make using this option more palatable. Because the threat of withholding often brought political controversy, where state officials would lobby their federal representatives to put pressure on the administration to stop any withholding consideration, the mandatory triggers, part of the 2004 reauthorization, were designed to insulate OSEP from political pressure. See NAT'L COUNCIL ON DISABILITY, *supra* note 357, at 11; Hehir, *supra* note 254, at 224–30; Ramanathan, *supra* note 254, at 289–91.

adequacy and equity may be necessary in order to effectuate the statute's goals. Consider, for example, access to non-means-tested government-sponsored health care programs, such as Medicare (serving individuals over the age of sixty-five)<sup>359</sup> and the Military Health System and Veterans Health Administration (serving military personnel, veterans, and their families).<sup>360</sup> The structure of these programs may contain the potential for unintentional inequitable distribution of services without medical justification (and without additional payment according to means). At least in theory, differential bargaining power, professional discretion over appropriate treatment, and a lack of transparency in what services are provided may lead to better services for wealthier individuals. In turn, it may be hard for low-income individuals to know what services similarly situated wealthy individuals have received; there may be few positive externalities from wealthy patients' individual advocacy<sup>361</sup> while the pool of available money may limit services for low-income patients; and the transaction costs associated with pursuing claims over denials may be more difficult to overcome for low-income patients than for wealthy patients. It might therefore be useful to consider ways to develop public enforcement strategies such as informational regulation, monitoring and investigation, and economic incentives to ensure that the poor are appropriately provided for where the government is involved in providing or paying for health care services. Scholars and policymakers should also pay close attention to enforcement strategies as the new federal overhaul of the health insurance industry is implemented.<sup>362</sup>

Second, the goal of crafting enforcement mechanisms so that they will protect all of a statute's intended beneficiaries should inform the way the rights and remedies in a statute are constructed in the first place. Where robust public enforcement is not likely to be forthcoming, the question becomes how to design the right and remedy to best

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359 See 42 U.S.C. § 1395 (2006).

360 See generally 38 U.S.C. § 1710 (2006) (defining extent of health benefits); *id.* § 5100 (providing process to bring private claims respectively); Michael J. Jackonis et al., *War, Its Aftermath, and U.S. Health Policy: Toward a Comprehensive Health Program for America's Military Personnel, Veterans, and Their Families*, 36 J.L. MED. & ETHICS 677 (2008) (detailing the history and current state of military health services).

361 As with the IDEA, there is likely a difference between private action to obtain certain services for an individual and private action to change the law more generally. In each instance, private action in the latter context has the potential to provide positive externalities to those without financial means, even though private action in the former context does not.

362 See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

achieve the statute's goals. The IDEA demonstrates that there are particular distributional problems associated with relying primarily on private action to enforce a highly individualized right whose remedies are also individualized and are determined through significant agency discretion. There exist other statutory design choices that may reduce such distributional problems in enforcement.

For example, one can envision a more generalized right, for which one person's private action to effectuate that right achieves the full extent of the right for everyone else. In the special education context, such a right might be the right to a certain number of specially trained teachers in a school or district, or even a more abstract requirement to provide appropriate education for children with disabilities generally. One can also envision an individualized right that nonetheless cabins agency discretion in providing remedies. Again in the special education context, agency officials could conceivably have a preapproved list of services to offer for certain disability diagnoses. One can also envision an individualized right resulting in a discretionary remedy that affects more students than only the individual complainant. Again in the special education context, such remedies might be systems or services that improve the classroom or school for everyone, rather than a publicly funded private school placement or increased services for the particular child who filed the action.<sup>363</sup>

I do not advocate changing these basic features of institutional design in the IDEA. For reasons I have already explained, my goal is to address enforcement disparities without upsetting the statute's political economy. I mention these examples only to illustrate that it is possible to adjust different elements of a statute's design to minimize the disparities associated with a private enforcement regime.

This observation provides a frame of reference to help evaluate several proposals in the education context to create universal (rather than means-tested) private rights and private rights of action without creating any public enforcement mechanisms. First, consider a pro-

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363 See, e.g., HEHIR, *supra* note 64, at 55–120 (describing the “universal design” movement in special education, which promotes teaching strategies, materials, and technologies that will benefit a wide variety of individuals, not just those with disabilities); see also Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008) (discussing societal benefits of individual disability accommodations under the Americans with Disabilities Act); cf. Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 208 (1985) (noting that one approach to providing special education services for a hearing-impaired child would be to instruct all students, not simply the disabled one, in sign language).

posal to provide IEPs to every child, whether disabled or not.<sup>364</sup> Because this suggestion mimics the design features of the IDEA, leaving it to parents to enforce the right to an individualized FAPE would raise the same set of distributional concerns that private enforcement in the IDEA does. If part of the goal of this proposal is to address the needs of poor children, the proposal may not be the best way to achieve that goal.

Next, consider a proposal to amend No Child Left Behind to permit individuals to file lawsuits alleging that a state, district, or school is failing to comply with some provision of the law, such as offering students in failing schools the opportunity to transfer to another school or to receive supplemental educational services such as tutoring.<sup>365</sup> This proposal is likely less problematic from a distributional perspective, because the right is less individualized and discretion is absent; a successful private lawsuit would result in the offending public actor making these opportunities available to everyone.

Finally, consider a proposal to turn the education clauses in state constitutions into a kind of school choice provision.<sup>366</sup> While this is not a question of statutory design but constitutional interpretation, legislatures frequently pass statutes to effectuate constitutional commands, so the design features of this proposal are relevant to the subject of this Part.<sup>367</sup> As mentioned earlier, state constitution education clauses are written at a high level of generality, requiring states to provide, for example, “a thorough and efficient education” or a “uniform system of free public schools.”<sup>368</sup> Over the last four decades, plaintiffs have brought lawsuits under these clauses seeking the remedy of increased funding, and courts have largely interpreted these clauses to impose obligations on school systems rather than to grant any individualized benefit to a particular child.<sup>369</sup> In recent years, however, some plaintiffs have attempted to seek a different remedy: the opportunity

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364 See, e.g., NAT'L COUNCIL ON DISABILITY, *ACHIEVING INDEPENDENCE* 53–54 (1996); Rosenbaum, *supra* note 306; cf. KELMAN & LESTER, *supra* note 17, at 157–58 (justifying the value of IEPs for all low-achieving students, not simply those diagnosed with learning disabilities).

365 See COMM'N ON NO CHILD LEFT BEHIND, *supra* note 268, at 182.

366 RYAN, *supra* note 92, at 237–38.

367 Indeed, one justification for the IDEA was that states needed a federal statute to provide greater clarity for their obligations to children with disabilities than did the lawsuits under the federal Constitution that prompted and provided a model for the legislation. See, e.g., MELNICK, *supra* note 43, at 138–44; Neal & Kirp, *supra* note 51, at 345–51.

368 McUsic, *supra* note 107, at 320–26.

369 See *id.*

to attend better schools, whether public or private.<sup>370</sup> No case has yet succeeded, but the argument is not implausible.<sup>371</sup>

Setting aside the distributional concerns associated with school choice programs as a substantive matter—the danger of “skimming” alluded to previously<sup>372</sup>—the question remains whether this litigation strategy has the potential to create better educational opportunities for poor children in failing schools, as its proponents suggest, as a matter of process. It seems to me that the answer depends in part on whether the right and remedy are framed at an individual or a general level. If a court determines that the remedy of school choice is available only to the named plaintiff(s), then it is likely that the neediest children are not likely to benefit much, as it is not likely they who will by and large be bringing suit. If, in contrast, a court determines that the remedy is available to the class as a whole, then the neediest children are more likely to benefit from the advocacy of relatively more advantaged children. This is not merely a theoretical concern. In the early days of implementing *Brown v. Board of Education*, courts frequently ordered integration for the few African-American students who filed lawsuits without requiring any broader injunctions.<sup>373</sup> Those who advocate for this proposal in the name of both equality and serving poor children should pay close attention to this design question.

There are trade-offs, to be sure, between, on the one hand, a broad right and remedy with poor or inequitable enforcement and, on the other hand, a narrower right and remedy with better or more equitable enforcement. How to assess these trade-offs may well be context specific. I do not mean to argue that one is always better. My point is only that where the goal of a particular reform is to further equality, and large amounts of public enforcement are unlikely, it is important to understand the distributional consequences of how the specific details of the statute’s rights and remedies are designed.

#### CONCLUSION

Decades of concern about disparities in the use of the IDEA’s private enforcement mechanisms have produced a host of changes to those mechanisms with very little reduction in disparities. Because the

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370 See RYAN, *supra* note 92, at 237.

371 The argument actually finds some support in the judicial interpretation of the IDEA’s guarantee of a “free and appropriate public education” to include private school placements at public expense. See *supra* note 143.

372 See *supra* note 151.

373 See RYAN, *supra* note 92, at 52–53.



basic features of the IDEA's institutional design—features that are not politically likely or are otherwise undesirable to change—unintentionally promote these disparities, further tinkering with those mechanisms is not likely to improve enforcement of the law for the poor. Public enforcement strategies are needed in order to ensure that the IDEA is adequately and equitably enforced for children in poverty.

More generally, the example of the IDEA demonstrates that the value of private enforcement can be oversold, both with respect to the extent to which its availability empowers a statute's beneficiaries and with respect to the extent to which it can adequately and equitably help achieve a statute's goals. In designing enforcement mechanisms and in calling for their reform, policymakers and advocates ought not let the value of private conduct distract them from acknowledging the hard work that only public actors can do. Where public enforcement is unlikely to be available in sufficient quantity to alleviate distributional problems, those interested in avoiding such problems should consider how a statute's other design features may promote or reduce them.

