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# COMMENT

## FROM MAINSTREAMING TO MARGINALIZATION?— IDEA'S DE FACTO SEGREGATION CONSEQUENCES AND PROSPECTS FOR RESTORING EQUITY IN SPECIAL EDUCATION

*"We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."*<sup>1</sup>

—*Brown v. Board of Education*

Some judicial opinions are so iconic in their sentiment and pervasive in their reach as to become imprinted on the nation's collective conscience. Such is the case with these words from Chief Justice Warren in the Supreme Court's 1954 *Brown v. Board of Education* decision, holding that racially segregated educational facilities violate an individual's rights under the Fourteenth Amendment's Equal Protection Clause.<sup>2</sup> In the broader context, these words represent an enduring aspiration that continues to inform policy and signals the need for course correction when legal or judicial discourse strays from equality principles.

In contrast to *Brown's* powerful sentiments, other judicial rhetoric intended to invoke similar principles of equality and human dignity has been readily forgotten or invalidated by practical circumstances and situational realities. A simple observation from a 1980 Second Circuit Court of Appeals ruling belongs to this latter category: "*This case is about Amy.*"<sup>3</sup>

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1. 347 U.S. 483, 495 (1954).

2. *Id.* at 493.

3. *Rowley v. Bd. of Educ.*, 632 F.2d 945, 946 (2d Cir. 1980) (emphasis added).

With these five simple words, the Second Circuit introduced its opinion affirming a lower court judgment that directed a New York school district to provide a sign language interpreter to an eight-year-old deaf girl, Amy Rowley.<sup>4</sup> The court's pronouncement was intended to be powerful in its simplicity and similarly influential in its call to take account of the individual rights at stake. Yet in the ensuing legal narrative stemming from *Board of Education v. Rowley*, which culminated in the Supreme Court's consideration of standards for service entitlements under federal disability education law,<sup>5</sup> these words were dismissively ignored. The Supreme Court's decision in what had begun as a "case about Amy" accorded virtually no consideration to Amy's specific educational needs or achievement potential. The resulting minimalistic *Rowley* standard for determining when a school district meets its obligation to provide special needs students with appropriate educational services now stands as one of many legal, judicial, and social influences that compromised the original equity goals of disability education law, to the disadvantage of Amy and countless other special needs students.

Despite the vast difference in resonance of the two judicial pronouncements introduced above—one enduring, one essentially forgotten—they are linked at the complex and conflicting intersection of race, class, and special education rights. They reveal the inherent tensions that arise when commitments to equality and commitments to individual interests struggle to find common ground. The resulting conflict provides an ironic subtext to an ongoing crisis of conscience in special education, which is provoked by statutory procedural requirements, judicial interpretations, and social forces that fail to reinforce the equality goals on which disability education rights were founded.

The inequities that now compromise special education are all the more disturbing because special education policy originated as "one of the many equity-oriented legacies of *Brown*."<sup>6</sup> The Supreme Court's *Brown* decision resonated with families of disabled children who responded by challenging practices that segregated the disabled student population<sup>7</sup> or deprived such children of edu-

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4. *Id.* at 948.

5. See 458 U.S. 176, 209–10 (1982).

6. Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TCHRS. C. REC. 453, 456 (2005).

7. See Andrea Valentino, Note, *The Individuals with Disabilities Education Im-*

educational opportunities altogether.<sup>8</sup> The ruling cast a spotlight on the extreme disparity in educational services for disabled children, prompted federal disability education rights lawsuits,<sup>9</sup> and provoked expansive lobbying efforts by families of disabled students to improve educational resources available to them. Collectively, these initiatives resulted in the enactment of comprehensive federal disability education legislation, first in the form of the Education for All Handicapped Children Act (“EAHCA”) in 1975,<sup>10</sup> and subsequently in a series of reauthorization measures

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*provement Act: Changing What Constitutes an “Appropriate” Education*, 20 J.L. & HEALTH 139, 142–43 (2007) (portraying *Brown* as a catalyst for parents of disabled children to begin challenging school districts for the segregation of disabled students or denial of education opportunities to such children). Such challenges initially were presented in two federal district court cases that both issued rulings supporting providing disabled students access to public education. *Id.* at 143. In *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*, the district court enjoined state officials and school districts from denying or delaying “any mentally retarded child access to a free public program of education and training.” 334 F. Supp. 1257, 1258 (E.D. Pa. 1971). The following year, *Mills v. Board of Education* held that no child eligible for public education shall be excluded from a public school placement unless “such child is provided (a) adequate alternative educational services suited to the child’s needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child’s status, progress, and the adequacy of any educational alternative.” 348 F. Supp. 866, 878 (D.D.C. 1972).

8. Martha Minow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL’Y 11, 25 (2004) (“Prior to the 1970s, only seven states provided education for more than half of their children with disabilities. Those children with disabilities who did receive educational programming did so largely in classrooms or schools removed from their [non-disabled] peers.”).

9. By the early 1970s, exclusion of disabled children from public education opportunities provoked a number of federal lawsuits, most notably, *Mills v. Board of Education* and *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Pa. Ass’n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam). Although the factual basis of *Pennsylvania Ass’n for Retarded Children* and *Mills* differed somewhat, both cases yielded similar judicial findings concerning the exclusion of disabled children from public educational settings, an exclusion precipitated by the government’s lack of resources. This exclusion, however, was not related to government savings goals or any other rational state goal because uneducated citizens arguably pose an even greater burden on the state, and the intentional exclusion of children with disabilities from public schools is a violation of the Fourteenth Amendment’s Equal Protection Clause. See *Pa. Ass’n for Retarded Children*, 334 F. Supp. at 1259; *Mills*, 348 F. Supp. at 876. The resulting rulings provided that children with disabilities were to be admitted to public schools and provided with educational services as appropriate to their individual needs. See MICHAEL IMBER ET AL., EDUCATION LAW 254–55 (5th ed., 2014). In addition, schools were to follow specified procedures when classifying children and determining their placements and services in the overall educational curriculum. *Id.*

10. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; see Valentino, *supra* note 7, at 144.

known currently as the Individuals with Disabilities Education Act (“IDEA”).<sup>11</sup>

Clearly, both *Brown* and IDEA were dedicated to the successful integration of groups historically excluded from mainstream educational opportunities.<sup>12</sup> Yet, while both can be read as landmark measures in furtherance of social justice, they must also be recognized as symbols of the practical limitations of judicially led social reform.<sup>13</sup> In the case of *Brown*’s ultimate impact on public school integration, a strong argument can be made that although the ruling precluded state-sponsored segregation measures, “it did not mandate implementation of meaningful equality.”<sup>14</sup> Since *Brown*, measures to enforce the prohibition against de jure segregation by preventing government-endorsed separation of races in public schools have continued to coexist alongside practices that encourage race-based subordination.<sup>15</sup> De facto school segregation continues to be tolerated and even promoted in many communities as an outgrowth of individual choices, entrenched social norms, or demographic patterns.<sup>16</sup>

Similarly, despite the direct legacy of *Brown*’s equality principles, judicial readings of IDEA and the procedural construct of the Act itself have reintroduced class-based discriminatory practices and racial segregation into the equation, if not as overt practices, then at least as functional realities.<sup>17</sup> Since the *Brown* ruling, there has been a noted lack of progress in racial integration of schools nationwide.<sup>18</sup> This, in part, has resulted from “re-segregation” consequences of racially discriminatory educational tracking practices that counter integration initiatives.<sup>19</sup> Over-

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11. 20 U.S.C. §§ 1400–1482 (2012); see Valentino, *supra* note 7, at 145; see also *infra* Part I.A. For consistency and ease of reference, current federal disability education statutory provisions and all legacy versions of the statute will be referenced as IDEA throughout this comment.

12. Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 544 (1999).

13. See Minow, *supra* note 8, at 12.

14. Zanita E. Fenton, *Disabling Racial Repetition*, in RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 174, 182 (Arlene S. Kanter & Beth A. Ferri eds., 2013).

15. See Martha Minow, *Universal Design in Education: Remaking All the Difference*, in RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 38, 49 (Arlene S. Kanter & Beth A. Ferri eds., 2013).

16. See *id.*

17. See Ferri & Conner, *supra* note 6, at 454.

18. See *id.*

19. See generally Minow, *supra* note 15.

representation of students of color in special education programs is one of many factors that has produced a resurgence of segregated schools and an even greater incidence of segregated classrooms within schools.<sup>20</sup> The inequitable impact of this pattern is exacerbated by IDEA's procedural norms that privilege wealthier families and result in disproportionate representation of wealthier students in "advocacy successes" for special services, further segregating disabled students by privilege in private special education settings.<sup>21</sup>

As a basic construct for recommending measures to correct the prevailing inequities in special education, this comment examines the de facto segregation impact of IDEA stemming from the Supreme Court's interpretive rulings and from the Act's own enforcement norms. The analysis further identifies the equality-compromising consequences of specific IDEA provisions and considers prospects for restoring equity to special needs service delivery in these areas, with a particular focus on tuition reimbursement for private school. Respecting the historical alignment of the law of race discrimination in education and the law of disability education rights,<sup>22</sup> the analysis identifies inequities that prevail at the intersection of disability, special education service needs, and poverty.<sup>23</sup> This perspective is offered with a view toward establishing the thesis that IDEA, despite its aspirational equality premise, has been interpreted and implemented in a manner that marginalizes disabled students from minority and economically disadvantaged groups.

Part I of this comment provides an overview of IDEA provisions and implementation regulations followed by a review of judicial interpretations in landmark IDEA service delivery cases, specifically the Supreme Court's *Rowley* ruling. Drawing upon both legal and educational scholarship, this analysis then assesses how IDEA's aspirational equality goals ultimately devolved into de facto segregation in special education. Part II considers factors resulting from the Supreme Court's tuition reimbursement rulings that trend away from IDEA's original equality purpose and

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20. See Ferri & Connor, *supra* note 6, at 454.

21. See *infra* Part III.A.

22. See *infra* Part IV.B.

23. See Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 FORDHAM URB. L.J. 599, 619 (2013).

integration preference to compromise equality in four ways: creating a means-based bias in private school placement; undermining IDEA's cooperative paradigm and promoting litigation; contravening IDEA's inclusion preference; and inviting discriminatory special education resourcing practices. Part III evaluates social factors and educational perspectives that compound the adverse consequences of tuition reimbursement rulings and practices that both inform and challenge any measures to reinvigorate the IDEA equality premise. Part IV critiques how IDEA's procedural protocols and enforcement practices inadvertently or subversively introduce class-based inequities into special education programs and services, thereby creating an excessively adversarial climate that particularly disadvantages families without means. Recognizing the breadth of statutory, judicial, and societal factors that have impeded, stalled, or even reversed equality goals of disability education, the analysis concludes in Part V with recommendations for various resourcing, advocacy, and structural reforms to reintroduce prospects for equity in special education services.

#### I. STATUTORY AND JUDICIAL READINGS OF SPECIAL EDUCATION ACCESS AND SERVICE EQUITIES

*Brown v. Board of Education* provides the template for demanding both equal opportunity in procuring educational services and integration for students with disabilities.<sup>24</sup> While *Brown* established the principle that all students, regardless of race, are guaranteed equal educational opportunities, IDEA accords students with disabilities "an equal right to public education in a structure that is meaningful for them."<sup>25</sup> In this regard, federal disability education law operates as both an entitlement and an equality commitment.<sup>26</sup> The natural tensions that flow from judicial and legislative attempts to balance these competing premises have unintentionally introduced inequities and segregating forces into disability educational services. This part briefly reviews the sources of such competing tensions in disability education legislation and seminal Supreme Court rulings interpreting those legislative provisions.

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24. Minow, *supra* note 8, at 29.

25. See Alessandra Perna, Note, *Breaking the Cycle of Burdensome and Inefficient Special Education Costs Facing Local School Districts*, 49 NEW ENG. L. REV. 541, 548 (2015).

26. See Minow, *supra* note 8, at 26.

### A. IDEA—*Equality Premise in Principle Only?*

While IDEA has a place in assuring education access rights to disabled students, it is not fundamentally a civil rights statute, but is instead a social policy and spending clause statute.<sup>27</sup> Its primary purpose is to ensure, through federal funding,<sup>28</sup> that states can provide disabled students access to an educational program and related services tailored to meet their individual needs.<sup>29</sup> Together, the special educational program and related services define the core of IDEA entitlement—the “free and appropriate public education” (“FAPE”) to which every special needs child served by the Act is entitled.<sup>30</sup> Each child’s FAPE entitlement must be defined by an Individualized Education Plan (“IEP”), which is designed and updated annually by a collaborative team of education specialists from the school district and the child’s parents.<sup>31</sup>

IDEA requires states receiving funding to institute procedures to assure that “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . . .”<sup>32</sup> This inclusion requirement was intended to signal the end of categorizing, labeling, and segregating disabled students in special classrooms, but not the end of necessary supports and services.<sup>33</sup> IDEA’s commitment to integration of disabled students into the general education environment, to the extent feasible within the scope of a child’s IEP, prescribes instruction in the

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27. See Ruth O’Brien, *What a Difference Thirty Years—1978 to 2008—Makes in the Transformation of Disability Law*, 50 TULSA L. REV. 367, 377 (2015).

28. Christopher L. Tazzi, Note, *Incentivizing Cooperation: A Solution to Forest Grove’s Suboptimal Outcome*, 36 J. LEGIS. 423, 427 (2010).

29. See Minow, *supra* note 8, at 26.

30. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1421 (2011); see also 20 U.S.C. §§ 1400(d)(1)(A)–(B), 1401(9), 1412(a)(1) (2012).

31. Pasachoff, *supra* note 30, at 1421; see also 20 U.S.C. §§ 1412(a)(4), 1414(d) (2012).

32. 20 U.S.C. § 1412(a)(5)(A) (2012); see Stacey Lynn Sheon, Comment, *Opening the Doors to a Quality Public Education for Children with Disabilities or Slamming Them Shut: A Critique of the Supreme Court’s Treatment of Private-Tuition Reimbursement Under the IDEA*, 49 WASHBURN L.J. 599, 622–23 (2009); see also Brianna L. Lennon, Note, *Cut and Run? Tuition Reimbursement and the 1997 IDEA Amendments*, 75 MO. L. REV. 1297, 1320 (2010) (“IDEA does not require that all students remain in traditional classrooms, but it does create a continuum that intends that the degree of “inclusion” be driven by the student’s needs as determined by the IEP team, not by the district’s convenience or the parents’ wishes.”).

33. Perna, *supra* note 25, at 551.



“least restrictive environment,” a protocol typically known as mainstreaming or inclusion.<sup>34</sup>

IDEA is unique among education programs that operate under a cooperative federalism structure because no public actor is tasked with reviewing or enforcing the substance of IEPs.<sup>35</sup> Instead, parents who wish to challenge the substantive content or procedural development of their disabled child’s IEP have a formal administrative hearing process and other due process protections available to them.<sup>36</sup> Their private enforcement rights also include availability of a mediation process with the school district about special education services<sup>37</sup> and the right to file a complaint with the state education agency (“SEA”), challenging any aspect of special education service delivery.<sup>38</sup>

IDEA also includes a general relief provision, investing broad remedial authority in hearing officers or courts to order schools to take any number of “appropriate” measures to correct violations of the Act.<sup>39</sup> Remedial actions that courts can order to redress education service delivery lapses include modifying an IEP, providing a particular instructional placement or a related educational service, and various forms of compensatory education, tuition reimbursement, or direct payment for private educational alternatives and services.<sup>40</sup> Congress codified tuition reimbursement in 1997 and introduced a specific provision permitting reimbursement for the cost of enrollment in private instructional settings under specific conditions when the school district failed to provide a FAPE.<sup>41</sup>

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34. Minow, *supra* note 8, at 26.

35. Pasachoff, *supra* note 30, at 1422.

36. See 20 U.S.C. §§ 1415(f)–(g) (2012); Pasachoff, *supra* note 30, at 1422–23.

37. See 20 U.S.C. § 1415(e); Pasachoff, *supra* note 30, at 1423.

38. See 34 C.F.R. §§ 300.151–53 (2015); Pasachoff, *supra* note 30, at 1423.

39. See 20 U.S.C. § 1415(i)(2)(c)(iii); Katie Harrison, Comment, *Direct Tuition Payments Under the Individuals with Disabilities Education Act: Equal Remedies for Equal Harm*, 25 J. C.R. & ECON. DEV. 873, 882–83 (2011) (discussing IDEA’s relief provisions, specifically as it concerns tuition reimbursement).

40. See Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 120 (2011); see also 20 U.S.C. §§ 1415(e)(1)–(2)(B).

41. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 63 (codified as amended at 20 U.S.C. § 1412(a)(10)(C)(ii)); *infra* Part I.C (discussing the Supreme Court’s rulings on tuition reimbursement under both IDEA’s general relief and specific reimbursement provisions).

In principle, IDEA's fundamental protections are considered significant disability rights and equality victories.<sup>42</sup> On their face, these provisions certainly afford disabled children and their parents considerable "autonomy and control in the construction of their educational experience."<sup>43</sup> In enacting the fundamental service delivery provisions of IDEA, Congress intended an appropriate education for disabled students "to be synonymous with an equal right to learn,"<sup>44</sup> and further intended to ensure that parents could meaningfully enforce their child's rights.<sup>45</sup> However, as a practical matter, IDEA implementation has not permitted these provisions to operate as the protections they were intended.<sup>46</sup> To a considerable degree, the inequities that currently plague special education service delivery derive from misapplication or an insufficiently nuanced reading of IDEA's education service and private enforcement good intentions.<sup>47</sup>

#### B. *Access over Opportunity in Rowley—Supporting De Facto Segregation?*

Among the fundamental origins of inequitable service delivery under IDEA is the absence of a judicial standard defining appropriate special education services in a manner that accords disabled children educational opportunities equivalent to those available to students in the general education curriculum. Because special education statutes have not specifically defined an appropriate education, federal courts crafted their own definition.<sup>48</sup> The Supreme Court addressed the meaning of the "appropriate" standard in the seminal *Rowley* case in 1982, holding that an education is appropriate according to the statute only if both procedural and substantive standards are met when providing special

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42. See Pasachoff, *supra* note 30, at 1424.

43. *Id.*

44. Jennifer L. Free, Comment, *Equal Educational Opportunities and the Visually Impaired Student Under the Individuals with Disabilities Education Act*, 37 U. TOL. L. REV. 203, 232 (2005).

45. Matthew Saleh, *Your Child's Rights: 6 Principles of IDEA*, SMART KIDS WITH LEARNING DISABILITIES, <http://www.smartkidswithld.org/getting-help/know-your-childs-rights/your-childs-rights-6-principles-of-idea/>.

46. See Pasachoff, *supra* note 30, at 1463.

47. See *id.* at 1462–63 (discussing the limitations of IDEA's current private enforcement strategies).

48. Bonnie Spiro Schinagle, *Considering the Individualized Education Program: A Call for Applying Contract Theory to an Essential Legal Document*, 17 CUNY L. REV. 195, 210 (2013).

needs services under an IEP.<sup>49</sup> Critical to the Court's ruling was its finding that Congress primarily intended to accord disabled children access to education, but did not intend to ensure a particular educational outcome providing for equality of opportunity to special needs students.<sup>50</sup>

A brief overview of Amy Rowley's circumstances provides useful context to understand the consequences of the *Rowley* ruling and the extent of its departure from equality principles in defining educational service delivery obligations for disabled students. Amy Rowley was born deaf, had minimal residual hearing, and was instructed since infancy by her parents in a total communication method that integrated sign language, amplification, and lip reading.<sup>51</sup> During Amy's first grade year in a New York public school, the school district prepared an IEP for her offering some specialized services, but did not include the services of a classroom sign language interpreter as requested by Amy's parents to maximize her learning potential.<sup>52</sup> The school district's decision not to provide interpretive services was upheld by a hearing examiner and affirmed by the New York Commissioner of Education.<sup>53</sup> The Rowleys brought suit in district court, alleging that the school district's refusal to provide sign language interpretive services constituted denial of a FAPE.<sup>54</sup> Evidence introduced by the Rowleys included results of auditory speech discrimination tests documenting that without sign language interpreter services, Amy could identify only 59% of words spoken to her in the classroom, as compared with 100% of communication addressed to her with interpreter assistance.<sup>55</sup>

Considering such evidence, the district court essentially addressed the FAPE standard as an equal protection measure and assessed equality in terms that far exceeded equality of access. The court determined that without interpretive services, Amy would not have the opportunity to achieve her full academic potential commensurate with the opportunities afforded to other

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49. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203–07 (1982); Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 168–70 (2010).

50. See *Rowley*, 458 U.S. at 192; see also DeMonte, *supra* note 49, at 169.

51. See *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 529–30 (S.D.N.Y. 1980).

52. *Id.* at 530–31.

53. *Id.* at 531.

54. See *id.* at 529.

55. See *id.* at 532.

children.<sup>56</sup> Accordingly, the court found in favor of the Rowleys' position that interpretive services should have been provided under Amy's IEP.<sup>57</sup> On appeal, the Second Circuit affirmed and expressly adopted the district court's reasoning that IDEA supported providing Amy assistance "to bring her educational opportunity up to the level of the educational opportunity being offered to her non-handicapped peers."<sup>58</sup>

The Supreme Court granted certiorari and reversed the Second Circuit's decision, viewing the FAPE requirement far more restrictively.<sup>59</sup> Instead of guaranteeing any particular level of educational opportunity or any measure of parity with non-disabled students, the Supreme Court ruled that a school district satisfies its obligation under IDEA if it provides a special needs student with services under an IEP that bring about "some benefit."<sup>60</sup> The Court expressly noted that "the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"<sup>61</sup> The Court concluded, therefore, that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."<sup>62</sup> The *Rowley* decision remains the only Supreme Court ruling defining the extent of a school district's obligation to provide appropriate special education services to disabled children under IDEA and its predecessor statutes.<sup>63</sup>

Unfortunately, the *Rowley* standard compromises IDEA's equality premise in two critical respects. First, it is substantively ambiguous and thus provokes considerable litigation between parents and school districts.<sup>64</sup> Without a strong substantive standard to gauge appropriateness, parents must approach adversarial encounters with school districts with an "incalculable

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56. *See id.* at 534.

57. *Id.* at 529, 535.

58. *Rowley v. Bd. of Educ.*, 632 F.2d 945, 948 (2d Cir. 1980).

59. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982).

60. *See id.* at 200–01.

61. *See id.* at 189–90 (quoting *Rowley*, 483 F. Supp. at 534).

62. *Id.* at 192.

63. *See DeMonte, supra* note 49, at 168–70.

64. *See* Natalie Pyong Kocher, Note, *Lost in Forest Grove: Interpreting IDEA's Inherent Paradox*, 21 HASTINGS WOMEN'S L.J. 333, 352–53 (2010).

probability of success.”<sup>65</sup> This circumstance is disproportionately burdensome to and essentially marginalizes means-challenged families. Of equal significance in undermining IDEA’s equality premise is the failure of the *Rowley* standard to align with and support IDEA’s commitment to “an equal right to learn for disabled students.”<sup>66</sup> These deficiencies are noted not only to provide context to the *Rowley* ruling, but also to highlight how the departures from equality considerations in IDEA implementation have strong judicial roots, as well as legislative, social, and practical sources.

As presented in *Rowley*, the core issue concerned whether IDEA’s guarantee of an appropriate education for the disabled carries with it a right to a certain quality of education or whether Congress intended solely to eliminate the outright exclusion of disabled students from public schools.<sup>67</sup> The Supreme Court held that the FAPE guarantee was far narrower than the level of service delivery required to maximize a special needs student’s potential.<sup>68</sup> In the end, the Court set a minimal appropriate education standard in *Rowley*, indicating that a school district could meet its statutory obligation under IDEA if a FAPE provided a special needs student with access to a “basic floor of opportunity.”<sup>69</sup> The Court reasoned that, due to the absence of any references in IDEA to “equal opportunity to learn or of maximizing the learning potential of disabled students, . . . Congress did not intend to require any particular substantive level of education.”<sup>70</sup> The Court also found that equal educational opportunity was an

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65. *Id.* (“The absence of a substantive definition for an ‘appropriate’ education has caused considerable litigation between parents and school districts, and poses a significant hurdle for parents. Without the ability to gauge appropriateness, parents engaging in a cost/benefit analysis face an incalculable probability of success, and must blindly bear the risk of litigation.”).

66. *See Free*, *supra* note 44, at 205, 225–26 (noting that an evaluation of case law “demonstrates that courts looked to *Rowley*’s ‘equal access’ standard and not to the act’s substantive requirement of actual results” and explaining that although the 2004 IDEA reauthorization amendments affirmed congressional commitment to achieving demonstrable progress and measurable education results for disabled children in the regular curriculum, “this policy will likely go unrealized”).

67. *Id.* at 214.

68. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

69. *Id.* at 200 (“Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a ‘basic floor of opportunity’ consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access.”).

70. *Free*, *supra* note 44, at 219.

unworkable standard.<sup>71</sup> This part of the ruling continues to garner criticism for its sharp departure from indicators in IDEA's legislative history that equality of opportunity for disabled students consistent with that available to their non-disabled peers remains a fundamental performance benchmark of the statute.<sup>72</sup>

By holding that the appropriate education requirement did not mandate that a state "maximize each [disabled] child's potential 'commensurate with the opportunity provided other children,'" the Court expressly rejected an equal protection reading of IDEA.<sup>73</sup> The standard adopted in *Rowley* truncated the equality expectations of IDEA by defining disabled education rights in terms of access, regardless of achievement outcomes or the equality of disabled students' opportunities as compared with those available to their non-disabled peers. This standard particularly disadvantages special needs students like Amy Rowley, whose achievement without certain specialized support services falls far below their aptitude.<sup>74</sup> Under the *Rowley* standard, special needs students may be deemed to be receiving appropriate education services if they are able to advance from one grade to the next, regardless of whether their IEPs include services that would optimize their learning potential.<sup>75</sup>

In ruling that school districts satisfy their obligation to provide an appropriate education when they grant special needs students "little more than uniform access,"<sup>76</sup> the Court, in effect, authorized a special education system defined by de facto segregation.<sup>77</sup> The *Rowley* standard continues to ensure disabled students access to education without further assurance that such access is developmentally meaningful or equivalent to opportunities available in the general education system.

Under this approach, equal access, rather than equal opportunity, became and remained the standard for assessing school

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71. *Rowley*, 458 U.S. at 198.

72. *See Rowley*, 458 U.S. at 212 (White, J., dissenting); Free, *supra* note 44, at 205, 226.

73. *Rowley*, 458 U.S. at 198.

74. RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 61-62* (2013).

75. *Id.*

76. Free, *supra* note 44, at 225.

77. *Id.* at 222.

district compliance with statutory FAPE requirements.<sup>78</sup> Some circuit court decisions have attempted to expand the *Rowley* standard to ensure meaningful educational opportunities for disabled students.<sup>79</sup> However, other judicial applications of the ruling and implementation practices under IDEA present practical barriers to the notion that special education services should offer equality of opportunity commensurate with that afforded to non-disabled students.<sup>80</sup> A significant cross-section of lower court rulings continue to evaluate a disabled child's placement as requiring only the "floor of opportunity" articulated in *Rowley*.<sup>81</sup>

Although it is clear from *Rowley* that school districts are not obligated to provide the best possible special educational services,<sup>82</sup> the ruling is nonetheless resoundingly criticized for its failure to sufficiently elaborate on the intended meaning and scope of "some benefit."<sup>83</sup> The standard, which has been termed an

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78. See Philip T.K. Daniel, "Some Benefit" or "Maximum Benefit": Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities, 37 J.L. & EDUC. 347, 349 (2008).

79. See, e.g., *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 861–62 (6th Cir. 2004) (noting deference to the *Rowley* standard, but expanding the standard as much as possible within its authority by providing that "IDEA requires . . . a 'meaningful educational benefit' gauged in relation to the potential of the child at issue"); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173, 180, 182 (3d Cir. 1988) (holding that IDEA requires an individualized education plan to provide "more than a trivial educational benefit" and "significant learning"); see also DeMonte, *supra* note 49, at 169–70 (examining an array of lower court interpretations of the *Rowley* standard with interpretations ranging from "some educational benefit, no matter how insignificant" to "more than a de minimis educational benefit" to an education "designed to provide a meaningful educational benefit"); Valentino, *supra* note 7, at 152–55 (examining circuit court decisions that attempted to expand the *Rowley* ruling to the extent feasible within the bounds of that decision, by taking into account subsequent IDEA amendments that suggest an intent to provide disabled students with more meaningful benefits).

80. See, e.g., *Barber v. Bogalusa City Sch. Bd.*, 2001 WL 667829, at \*14 (E.D. La. June 12, 2001) (focusing on loss of opportunity versus equal opportunity commensurate with non-disabled students). Applying this logic to the current press for specialized support services and state-of-the-art educational environments for disabled students, a number of courts have resorted to the comparative "Chevy vs. Cadillac" analogy, noting that it is not the province of the court to seek out the availability of a "Cadillac" educational program when the school district offers an acceptable "Chevy." See, e.g., *Troy Sch. Dist. v. Boutsikaris*, 250 F. Supp. 2d 720, 735 (E.D. Mich. 2003).

81. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982); see Free, *supra* note 44, at 205 (noting that an evaluation of case law demonstrates that courts tend to look to *Rowley*'s "equal access" standard rather than IDEA's substantive requirement of actual results).

82. See, e.g., Lewis M. Wasserman, *Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004*, 21 ST. JOHN'S J. LEGAL COMMENT. 171, 194 (2006) (noting that the *Rowley* standard controls "unless the state where the child resides sets a higher standard").

83. See *id.* (commenting on the absence of elaboration in the *Rowley* opinion); Perna, *supra* note 25, at 559–61 (advocating for Congress to offer "a more focused and compre-

“abstract minimal benefit calculus,”<sup>84</sup> is widely faulted for being “far too subjective and equivocal to be applied effectively.”<sup>85</sup> To the extent the ambiguous standard provokes excessive IDEA litigation,<sup>86</sup> its equality-compromising impact is exacerbated because of the inherent bias against socioeconomically disadvantaged parents in advocacy and adversarial roles.<sup>87</sup>

### C. Tuition Reimbursement Rulings—Inviting Opportunity Discrepancy Freefall?

With *Rowley*'s minimalistic standard for assessing special educational services firmly in place, the Supreme Court introduced further potential for IDEA implementation inequities in a line of tuition reimbursement cases involving parental placement of special needs children in private schools as an alternative to public school services.<sup>88</sup> In the first of these decisions, *School Committee of Burlington v. Department of Education of Massachusetts*,<sup>89</sup> the Court interpreted IDEA's judicial relief-granting power<sup>90</sup> to allow equitable reimbursement for unilateral parental placements of disabled children in state-approved private schools<sup>91</sup> “if [a] court

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hensible legal standard” to amplify and clarify *Rowley*). Confusion surrounding the *Rowley* standard particularly is provoked by the Court's suggestion that the mandated benefit varies with the individual characteristics of the child involved, a statement that appears to conflict with the categorical “some benefit” standard. See *Rowley*, 458 U.S. at 202–03 (explaining how different students may respond differently to the same instruction).

84. Free, *supra* note 44, at 230.

85. Kocher, *supra* note 64, at 352.

86. *Id.* at 352–53 (“The absence of a substantive definition for an ‘appropriate’ education has caused considerable litigation between parents and school districts, and poses a significant hurdle for parents. Without the ability to gauge appropriateness, parents engaging in a cost/benefit analysis face an incalculable probability of success, and must blindly bear the risk of litigation.”). In this regard, it is important to note that the ambiguity and lack of guidance from the *Rowley* ruling adversely affects school districts as well as parents. See Perna, *supra* note 25, at 561 (“When the law does not offer a clear, delineated standard, it is difficult for a school district to determine what is appropriate for each disabled student.”).

87. See *infra* Part II.

88. Emily Blumberg, Recent Development, *Forest Grove School District v. T.A.*, 45 HARV. C.R.-C.L. L. REV. 163, 167 (2010).

89. 471 U.S. 359 (1985).

90. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 788 (codified at 20 U.S.C. § 1415 (e)(2)) (current version at 20 U.S.C. § 1415(i)(2) (C)(iii) (2012)) (providing, pertinently, that a court “shall grant such relief as [it] determines is appropriate” in instances where a school district has not provided appropriate education services as required by IDEA); see also *supra* Part I.A (concerning IDEA content).

91. Blumberg, *supra* note 88, at 167.



ultimately determines that the private placement, rather than the [school district's IEP], is proper under IDEA."<sup>92</sup> The Court later upheld and expanded this holding in *Florence County School District Four v. Carter*,<sup>93</sup> permitting parents to unilaterally place their child in private school, even in circumstances where the selected private school was not approved by the state.<sup>94</sup>

Amendments to IDEA in 1997 introduced a specific tuition reimbursement relief provision<sup>95</sup> that was interpreted by some circuit courts to preclude tuition reimbursement for students who had never previously received special education or related services from a school district.<sup>96</sup> The Supreme Court granted certiorari to resolve a circuit court split on this issue and in *Forest Grove School District v. T.A.*<sup>97</sup> held that the 1997 amendments did not alter the meaning or intent of IDEA's "appropriate relief" provision under which *Burlington* and *Carter* had been decided.<sup>98</sup> The Court found that reimbursement continued to be available under IDEA's general relief provision for the cost of private school tuition when the school district failed to provide a FAPE to a disabled child and the private school placement proved appropriate, "even if the child did not previously receive special education or related services from a public school" in the district.<sup>99</sup> The Court noted that reading the 1997 specific tuition reimbursement provision as an exclusive remedy (thus precluding tuition reimburse-

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92. See Sheon, *supra* note 32, at 612.

93. 510 U.S. 7 (1993).

94. See *id.* at 13.

95. Prior to 1997, reimbursement was awarded under IDEA's discretionary "appropriate relief" provision. See *supra* Part I.A (discussing the 1997 Amendments to IDEA that added a specific reimbursement provision to then 10 U.S.C. § 1412(a)(1)(C)(ii)).

96. See 20 U.S.C. § 1412(a)(10)(C)(ii) (2012) ("If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment."); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159–60 (1st Cir. 2004) (holding that "tuition reimbursement is only available for children who have previously received 'special education and related services'"); Blumberg, *supra* note 88, at 167–68.

97. 557 U.S. 230 (2009); see Sheon, *supra* note 32, at 614. The 1997 IDEA Amendments were central to the tension between public schools and parents of disabled children in terms of service delivery and tuition reimbursement when the public school is alleged not to have provided appropriate education services. *Id.* at 600 n.10 and accompanying text.

98. *Forest Grove*, 557 U.S. at 247.

99. *Id.*; Blumberg, *supra* note 88, at 171–72.

ment as a general remedial measure) would be unjust, as it would leave families without a remedy in instances where a school district had determined that a child did not meet IDEA criteria and had not developed an IEP for the child.<sup>100</sup>

In the final analysis, *Rowley* and the tuition reimbursement line of decisions interpreted IDEA in a manner that preferenced IDEA's procedural requirements and abstract standards concerning access over the equality-based intent of the law.<sup>101</sup> The rulings in both areas yield somewhat ambiguous standards,<sup>102</sup> leaving considerable "unguided power" in the hands of lower courts.<sup>103</sup> From an educational equity perspective, the Supreme Court's excessively narrow "some benefit" standard for defining special needs services and its broadly construed opportunities for tuition reimbursement coalesce to form a legacy of significant disregard for the disparate impact of such rulings on individuals with specific disability profiles.

## II. TUITION REIMBURSEMENT—INVITING SIGNIFICANT DEPARTURES FROM EQUALITY GOALS

Beyond its marginalizing impact, tuition reimbursement case law invites a chaotic and equity-compromising matrix of practical barriers and cultural biases to challenge families—particularly those of limited means—in their ability to advocate for their special needs children. This part examines specific factors in the tuition reimbursement process that materially compromise IDEA's equality goals and contribute to an opportunity discrepancy freefall within the population served.

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100. *Forest Grove*, 557 U.S. at 244–45; see Sheon, *supra* note 32, at 616.

101. See Joanne Karger, *A New Perspective on Schaffer v. Weast: Using a Social-Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 133, 177 n.198 (2008).

102. See Kocher, *supra* note 64, at 352 (discussing that the ambiguity in *Rowley* concerns assessing the threshold for appropriate educational services); Lennon, *supra* note 32, at 1315–16 (discussing that the ambiguity in *Forest Grove* concerns how courts should weigh the equities of a unilateral private placement case to determine reduction or allowance of tuition reimbursement and noting that, despite the limited guidance in *Forest Grove* itself as to how district courts should weigh equities in tuition reimbursement cases, "IDEA includes limiting circumstances that, if present in a case, guide the court in reducing, or even eliminating, a reimbursement award"). Additionally, IDEA fails to provide definitive instructions on the extent to which a court may reduce an award or what manner of parental conduct will provoke reduction or loss of reimbursement. See 20 U.S.C. § 1412(a)(10)(C)(iii) (2012).

103. Lennon, *supra* note 32, at 1315.

The Supreme Court's tuition reimbursement cases build on IDEA's commitment to provide education designed to meet disabled students' needs<sup>104</sup> and to protect their rights to such services through equitable remedies.<sup>105</sup> However, tuition reimbursement also has vast policy implications that are largely out of sync with IDEA's fundamental equality goals and equity principles.<sup>106</sup> More than any other IDEA provision, private school tuition reimbursement has introduced a structural and procedural bias into special education resourcing. This bias disproportionately benefits special needs children from high socioeconomic groups, while marginalizing students from lower socioeconomic groups in terms of the instructional resources and settings available to them.<sup>107</sup>

### A. *Creating a Means-Based Bias*

Perhaps the most complicating factor of IDEA, and the one with the most direct potential to compromise service equality, is the differential access to the parental tuition reimbursement remedy.<sup>108</sup> While the Supreme Court's broad reading of IDEA's equitable remedies in tuition reimbursement cases could potentially advantage special needs students from all backgrounds, the rulings particularly privilege families with sufficient means to assume the substantial financial risk of "fronting" private school tuition payments in the hope of reimbursement.<sup>109</sup> A majority of families with students eligible for IDEA services are economically challenged<sup>110</sup> and are unlikely to be able to take advantage of this

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104. See, e.g., *Forest Grove*, 557 U.S. at 239 (quoting *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359, 367 (1985)). In its *Forest Grove* ruling, the Supreme Court noted that the *Burlington* and *Carter* cases involved children for whom school districts had offered inadequate special education plans and services, in contrast to T.A., the affected child in this case, for whom the school district had failed to offer special education or related services altogether. *Id.* at 238. However, the Court found these distinctions "insignificant" in light of the controlling IDEA language and due to the practical consideration that "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." *Id.* at 238–39.

105. Blumberg, *supra* note 88, at 173.

106. *Id.* at 176.

107. See Hyman et al., *supra* note 40, at 121.

108. See Cari Carson, Note, *Rethinking Special Education's "Least Restrictive Environment" Requirement*, 113 MICH. L. REV. 1397, 1406 (2015).

109. See Blumberg, *supra* note 88, at 176.

110. See Hyman et al., *supra* note 40, at 112–13 (explaining that of the almost seven million children receiving services under the IDEA, most come from families of limited resources and that approximately two million of the eligible children live below the poverty line). Nearly 20% of the IDEA-served population lives in households with an annual

option.<sup>111</sup> *Forest Grove* and its predecessor reimbursement rulings thus invite a gross imbalance in the practical availability and use of equitable remedies.<sup>112</sup>

### B. *Undermining IDEA's Cooperative Paradigm and Promoting Litigation*

At the core of IDEA is an elaborate collaborative process, intended to support good faith negotiations between schools and parents to develop IEPs for disabled children<sup>113</sup> and to identify instructional alternatives if the school's plan does not achieve an education appropriate to a child's needs.<sup>114</sup> IDEA's cooperative framework presumes that educators and parents will have a full opportunity to determine whether a school district's plan is appropriate before the parents withdraw the child in favor of an alternative instructional environment.<sup>115</sup>

To the extent that parents have the means to pursue private placement and elect to do so without first exposing their child to public school special education resources, the Court's interpretation of IDEA in *Forest Grove* disincentivizes cooperation and undermines the premise that parents and educators should jointly design and manage education plans.<sup>116</sup> While this concern may be somewhat overstated in light of the substantive and equitable findings that must support a tuition reimbursement award under IDEA,<sup>117</sup> it is nonetheless reasonable to attribute to *Forest Grove* a

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income of \$15,000 or less. *Id.* at 113.

111. Blumberg, *supra* note 88, at 176 (noting that less advantaged students will be left with the "inferior remedy of compensatory education"); see *infra* Part V.C (discussing the limitations of compensatory education and advocating for enhancements to this remedial area).

112. Blumberg, *supra* note 88, at 178.

113. See *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); H.R. REP. NO. 105-95, at 82 (1997).

114. See Brief for Nat'l Sch. Bds. Ass'n et al. as Amici Curiae Supporting Petitioner at 11, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (No. 08-305); Sheon, *supra* note 32, at 622.

115. See Brief for Nat'l Sch. Bds. Ass'n et al., *supra* note 114, at 11; E. Chaney Hall, Note, *Public School Obligations to Pay Private School Tuition: Reinterpreting the I.D.E.A. in Forest Grove School District v. T.A.*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 409, 419-20 (2009).

116. See Sheon, *supra* note 32, at 622; see also Brief for Nat'l Sch. Bds. Ass'n et al., *supra* note 114, at 22 (noting that at the appellate level, the Ninth Circuit's interpretation of IDEA also "allows, and even encourages, parents and their attorneys to sit back and never even try to obtain an IEP").

117. *Forest Grove* included language suggesting that a court should take into account equitable considerations about the parents' engagement with the school district to develop

legacy that encourages an adversarial culture in IDEA implementation.<sup>118</sup>

### C. *Undermining IDEA's Inclusion Preference*

When enacting IDEA, Congress acknowledged the parallel principles of disabled childrens' right to educational opportunities and their right to receive those opportunities in an integrated setting with non-disabled students.<sup>119</sup> Consistent with this premise, IDEA's least restrictive environment preference encourages greater access for disabled children to mainstream classrooms or other inclusive settings.<sup>120</sup>

Research on inclusion practices<sup>121</sup> supports the view that the paired goals of individual educational achievement and association with non-disabled peers mutually support strong outcomes in special needs service delivery.<sup>122</sup> The benefits of integrated learning environments for minority and socioeconomically disadvantaged disabled students, in particular, are especially strong.<sup>123</sup> To

an educational plan for their child before exercising the unilateral private placement option, making it appear highly unlikely that a court would favorably rule on a tuition reimbursement petition if a parent had not attempted to cooperate with the school district to procure educational resources for a child before removal to a private alternative. See Kocher, *supra* note 64, at 354 ("As *Forest Grove* clarifies, in a hearing for reimbursement, judges must consider the level of cooperation between the school and parents when awarding damages. As a result, only meritorious claims will result in damage awards. This gives parents an incentive to cooperate with school districts to attain appropriate services before unilaterally placing their child into a private placement."). The Court noted that "[p]arents 'are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act.'" *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2009) (quoting *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993)). *But see* Sheon, *supra* note 32, at 622 (positing that *Forest Grove* "permits parents to remove their child from the public-school environment and to obtain public funds to finance a private education without ever working with the public school").

118. See *infra* Part IV.A.

119. See DeMonte, *supra* note 49, at 161–62, 165 (discussing background that led to the enactment of IDEA).

120. See *supra* Part I.A; see also *infra* Part III.B (discussing least restrictive environment).

121. IDEA expresses an intent for inclusive education, but requires that children with disabilities be educated in the least restrictive environment without specifically indicating a preference for any educational method to assure this. See 20 U.S.C. § 1412(a)(5)(A) (2012). Thus, the term "inclusion" is used categorically in this comment without the intent to specify any particular method of integrating the disabled student into the general education setting.

122. Jennifer M. Saba, Comment, *Undue Deference: Toward a Dual System of Burdens Under the Individuals with Disabilities Education Act*, 57 DEPAUL L. REV. 133, 149 (2007).

123. See Crockett, *supra* note 12, at 546; see also Saba, *supra* note 122, at 149–50. *But*

the extent that tuition reimbursement facilitates the removal of special needs students from inclusive instructional settings and into private programs targeted to particular disabilities or service needs, there is reason for concern that the equality outcomes of integrated learning will suffer.

Although tuition reimbursement may reduce reliance on inclusive public instructional settings, it does not necessarily adversely impact educational quality for disabled students. Increasingly, school district resourcing decisions demonstrate a lack of commitment to inclusion, considering it a costly and ineffective alternative.<sup>124</sup> Research suggests that, at least in some circumstances, segregated placements may be educationally preferable for disabled students.<sup>125</sup> Some go so far as to argue that “IDEA promotes inclusion as a civil right, despite very weak data supporting it as a ‘best practice’ for many students with disabilities.”<sup>126</sup> Therefore, integrated learning environments for special needs students are not universally preferred—either by educators or parents in IDEA deliberations.<sup>127</sup> Although the tuition reimbursement remedy on its face has been challenged as a measure that encourages segregation and undermines IDEA’s own least restrictive environment requirement,<sup>128</sup> it is important to note that rigid adherence to integrated learning settings can mistakenly place “emphasis on inclusion over instruction . . . .”<sup>129</sup>

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*see infra* Part III.B (discussing conflicting perspectives on the value on inclusion in disability education).

124. While the common wisdom is that inclusive placements for disabled students are more cost-effective than segregated environments, this presumption may not fully account for the supplemental services and other costs required to render a general education environment conducive to integrated learning by disabled and non-disabled students. *See, e.g.*, Perna, *supra* note 25, at 564–65 (discussing the various accommodations or modifications necessary to maintain the placement of a special needs student in a general classroom and to make inclusion work).

125. Ferri & Conner, *supra* note 6, at 467; *see also* Perna, *supra* note 25, at 559 (noting the trend of “overreferral and overplacement in restrictive settings” and attributing this pattern to factors such as a chronic lack of support services in general education settings to accommodate integration of disabled students and state aid incentives that encourage restrictive placements).

126. Perna, *supra* note 25, at 563–64. Nonetheless, most disabled students are educated in inclusive settings and receive general education services and resources, supplemented by special education support as directed by their IEPs. *Id.* at 555.

127. *See* Michael L. Perlin, “Simplify You, Classify You”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 618 (2009); *infra* Part III.B.

128. *See* Carson, *supra* note 108, at 1405–06.

129. Crockett, *supra* note 12, at 544.

Nothing in this critique of *Forest Grove's* potentially adverse impact on IDEA's inclusion preference detracts from the very real possibility that a segregated private instructional setting may be the most reasonable, and even the least restrictive, environment for a disabled child's needs.<sup>130</sup> Indeed, there is no certainty that a private placement for a disabled student necessarily means that the student is in a segregated instructional environment with only similarly disabled children.<sup>131</sup>

Nonetheless, *Forest Grove's* broad parameters encouraging alternative placement in private settings contradict the procedural underpinnings of IDEA, anticipating that any decision to segregate a disabled child in a special educational environment will occur only after the collaborative best efforts of educators and parents have demonstrated that a more inclusive public setting with appropriate support services is not reasonable.<sup>132</sup> Thus, a paradox is embedded in the interplay of IDEA and *Forest Grove*—while providing parents (at least those with means) increased options in selecting their child's special education environment, the tuition reimbursement alternative may also contribute to resegregation of disabled children in private, special needs settings.<sup>133</sup>

#### D. Adverse Equality Implications for Special Education Resourcing

In analyzing *Forest Grove's* potential for disrupting the equality premise of special education, it is important to keep in mind that resourcing special education is a zero sum game. With finite

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130. See Sheon, *supra* note 32, at 623.

131. See JANET R. BEALES & THOMAS F. BERTONNEAU, MACKINAC CTR. FOR PUB. POLICY, DO PRIVATE SCHOOLS SERVE DIFFICULT-TO-EDUCATE STUDENTS? ANALYSIS AND MICHIGAN CASE STUDIES OF HOW NONGOVERNMENT SCHOOLS EDUCATE DISABLED, AT-RISK, AND INCARCERATED YOUTH 25 (1997), <https://www.mackinac.org/archives/1997/s1997-03.pdf> ("More research is needed about the impact of full inclusion on student performance, and the extent to which regular private schools accommodate students with disabilities."); Shanon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?*, 34 J.L. & EDUC. 1, 23 (2005) ("Information on the special education practices of private schools is needed on a large scale.").

132. See *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000); Sheon, *supra* note 32, at 623 ("Under the IDEA, the school district and the parents should contemplate segregation of a child with disabilities only if, after best efforts, the inclusion is not reasonable.").

133. See Lennon, *supra* note 32, at 1299; see also Perna, *supra* note 25, at 565 (noting that parents most frequently litigated under IDEA to remove their disabled child from an inclusive public setting to a private special education school that educates only disabled students and offers no inclusion).

and consistently stretched funding available to school districts for special education, any measure that facilitates private school placements will generally impact the resources available for educational program delivery.<sup>134</sup> To the extent that the private education alternatives made more broadly available by *Forest Grove* are utilized disproportionately by families of relative means, the equality imbalance becomes even more apparent.<sup>135</sup>

Under the best of fiscal circumstances, extreme cost disparities remain between private and public school systems to educate disabled students.<sup>136</sup> The average per student expenditure for instruction in a private special education program approaches five times that of the average per student cost in a public school environment.<sup>137</sup> When private tuition reimbursement involves students who have not previously received public education services, the fiscal impact is particularly adverse because schools have no reliable mechanism for calculating costs when they cannot reasonably anticipate private placement eligibility and demand patterns.<sup>138</sup>

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134. See Brief of the Council of the Great City Schs. as Amicus Curiae Supporting Petitioner at 3–4, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (No. 08-305); Hall, *supra* note 115, at 420.

135. See *infra* Part IV.B.

136. There has not been a definitive study comparing the frequency or fiscal impact of post-*Forest Grove* tuition reimbursement awards with tuition reimbursement awards prior to the *Forest Grove*'s expansive reading of the IDEA tuition reimbursement option. Most research concerning the outcome of tuition reimbursement rulings was conducted prior to completion of the Supreme Court's full series of tuition reimbursement rulings in *Burlington* through *Forest Grove*. See Harrison, *supra* note 39, at 900–01 (reporting that at least one study has documented that although "the number of court decisions concerning special education has increased," the percentage of rulings favoring parents has not appreciably changed since the inception of IDEA in 1975, and that a follow up study revealed no statistically significant change in the outcome distribution of published tuition reimbursement decisions in the wake of *Burlington* and *Carter*, further noting that those decisions had not made courts more inclined to rule in favor of parents). Despite the scarcity of current statistical data to confirm the impact of expansive judicial readings of IDEA's tuition reimbursement provision, it is important to note that some educational commentators maintain that *Forest Grove* will reach a relatively narrow category of case, and therefore will not have the fiscally adverse impact projected by its critics. See, e.g., Kocher, *supra* note 64, at 348–50 (arguing that *Forest Grove* was an "illusory win for parents" because its actual impact is limited by the significant number of requirements parents must continue to meet under IDEA).

137. Sheon, *supra* note 32, at 624; see also Lennon, *supra* note 32, at 1320 (discussing findings that school districts are not prevailing in tuition reimbursement legal actions at an overwhelming rate over parent litigants, thus indicating that the financial strain on public schools as a result of *Forest Grove* may be greater than anticipated).

138. Sheon, *supra* note 32, at 624.



The reality is that private tuition reimbursement expenditures by school districts will not occur in the best of fiscal circumstances by any measure. Funding shortfalls under IDEA occur perennially in all jurisdictions.<sup>139</sup> School districts must confront the fiscal reality that any service delivery, accommodation, or private placement decision that benefits one student necessarily is subsidized by funds that would otherwise bring special needs resources to another disabled child who remains behind in the public special education setting.<sup>140</sup> Further, private placement decisions may provoke other families—statistically most likely those of higher socioeconomic standing<sup>141</sup>—to advocate for comparable benefits, exponentially increasing the fiscal impact of such decisions.<sup>142</sup>

Although the expansive judicial reading of tuition reimbursement options clearly introduces a means-based bias into the instructional resources available to special needs children, the equity-compromising consequences of unrestrained private placement subsidies under IDEA are far more vast. Tuition reimbursement solutions to deficiencies in special education service delivery, if not judiciously exercised, offer the prospect for detracting from the very features of IDEA that were intended to serve and balance the interests of all special needs students—cooperatively developed and fully mediated education plans, appropriately inclusive instructional environments, and balanced resourcing of special and general educational services.

### III. SOCIAL NORMS AND EDUCATIONAL FACTORS INFLUENCING IDEA EQUALITY GOALS

The distinct departures from IDEA's equality foundations encouraged by tuition reimbursement already examined here have been exacerbated by social norms that encourage de facto segre-

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139. See *infra* Part V.A. But see Perna, *supra* note 25, at 556 (noting that “[a]ccurate accounting of spending on the state, district, and school level for special education does not exist”).

140. See Judith DeBerry, Comment, *When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 507 (2003).

141. See *infra* Part IV.B.

142. See DeBerry, *supra* note 140, at 507 (“[S]chool districts must also face the reality that if they provide one student with specific accommodations, other students will want the same benefit. In an effort to control costs, school districts must balance the value and effectiveness of a given service for an individual student against the cost of the service and the likelihood other students may demand the same service.”).

gation of disabled students and, further, by conflicting educational views on inclusive approaches to special needs instruction. Before identifying measures to restore equality to special education service delivery,<sup>143</sup> it is important to understand the social context and educational inclusion constructs that inform and challenge corrective efforts. The following discussion examines critical influences in this regard.

### A. *Racially Differentiated Use of Special Education*

Since *Brown*, racialized notions of ability have become so culturally entrenched that separating disabled students for instruction has actual racial segregation consequences.<sup>144</sup> Recent studies support the view that being identified as disabled results in vastly disparate outcomes for white students as compared to students of color.<sup>145</sup> White students identified as disabled are more likely to receive access to supplemental classroom support services, but by contrast, a disability label for students of color is more likely to result in decreased access to general education settings, separation in specialized classrooms out of the mainstream, or placement in isolated facilities, even when the students do not require intensive supplemental services.<sup>146</sup> As a result, disability labelling has developed into a more socially acceptable marginalization category for students of color, producing a covert form of racial segregation premised on special education practices.<sup>147</sup>

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143. See *infra* Part V.

144. See Ferri & Connor, *supra* note 6, at 454; Nicole M. Oelrich, *A New "IDEA": Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. REV. 9, 22 (2012) (noting that after factoring both race and gender into the comparative equation, African American males are six times more likely than white females to be identified by schools as having emotional disturbance under IDEA).

145. See, e.g., PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., *A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES* 26 (2002).

146. See U.S. DEP'T OF EDUC., 27TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, VOL. 1, at 48 (2005); Ferri & Connor, *supra* note 6, at 458–59. *But see* Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1463 (2007) (conceding that while there is legitimate reason to be concerned about the overrepresentation of African American male students in "dead end" self-contained special education classrooms, limited resources, rather than the segregated nature of these classrooms, may be the cause).

147. See Ferri & Connor, *supra* note 6, at 454.

In sum, disability labels continue to further exclude historically marginalized minority students in special education settings.<sup>148</sup> Special education, despite its design to meet the learning needs of diverse groups, has been used to segregate individuals based on interconnected, yet highly conflated, notions of race and educational ability.<sup>149</sup> To the extent that such practices derive from systemic cultural biases among teachers, they represent a particularly sensitive area for concern in evaluating the social climate adversely impacting IDEA's equality goals.<sup>150</sup>

### B. *Conflicting Perspectives on Value of Inclusion in Disability Education*

School districts and courts may have strayed away from equality by broadly accommodating tuition reimbursement remedies, but it is important not to over-correct when addressing the inclusion consequences of such policies. Although IDEA has produced a substantial body of legal discourse based on the integration preference, many educators caution against assuming the superiority of integrated learning environments.<sup>151</sup>

As concerns grew regarding the stigma and reduced expectations associated with segregated special needs settings, the inclusion principle found its way into IDEA.<sup>152</sup> Some educational scholars suggest that separate instructional settings for disabled students have a labeling and stigmatizing impact that violates the Fourteenth Amendment's equal protection guarantees, particularly when the racial overrepresentation factors in such settings are considered.<sup>153</sup>

Concerns about the potentially stigmatizing impact of a special needs designation, and even more so segregation in a special education learning environment, should not be discounted. However, an overly simplistic reading of legal and judicial demands for inclusion may "miscalibrate the balance between equality and justice" and inappropriately preference integration over educational

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148. *Id.* at 459 (noting that, conversely, gifted labels denoting special academic abilities have permitted schools to "protectively segregate certain classes of White students").

149. *Id.* at 461.

150. See Oelrich, *supra* note 144, at 27, 32.

151. See Colker, *supra* note 146, at 1430 (2007).

152. See DeMonte, *supra* note 49, at 171.

153. See Marcia C. Arceneaux, *The System and the Label of Special Education: Is It a Constitutional Issue?*, 32 S.U. L. REV. 225, 233 (2005).

quality goals.<sup>154</sup> An inappropriate placement in the regular classroom does not afford equal educational opportunities if it does not adequately serve the student.<sup>155</sup>

In fact, considerable confusion surrounds what a special education learning environment is restricting in the first place.<sup>156</sup> Private special needs instructional settings should not be presumed in all circumstances to isolate the disabled and to produce adverse academic and social consequences on par with the invidious segregation at issue in *Brown*.<sup>157</sup> Substantial research documents that efforts to integrate disabled students into general educational settings may not optimize learning opportunities in all circumstances.<sup>158</sup> Placement decisions should resolve the logical tension as to whether a segregated learning setting enhances educational opportunity for disabled students or deprives them of valuable social integration with their non-disabled peers.

Advocating for more highly nuanced assessments of special needs segregating practices, disability education scholar Ruth Colker urges a move beyond the mantra “separate is inherently unequal” and toward a more sophisticated understanding of separation and inequality in special education service delivery.<sup>159</sup> Colker argues that separation of disabled students into learning environments targeted to their disabilities “need not result in inequality if . . . accompanied by adequate services and positive recognition; it need not be the equivalent of invidious segregation.”<sup>160</sup> She cautions that overemphasis on the degree of integration in special education service delivery actually may deflect appropriate focus from the quality of services provided.<sup>161</sup>

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154. Colker, *supra* note 146, at 1483.

155. *See id.*

156. Crockett, *supra* note 12, at 563.

157. *See* Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 796 (2006) (arguing that the integration presumption has led school districts to presumptively favor educating disabled children in regular classrooms over other educational configurations such as pull-out programs, resource rooms, or segregated special education classes and questioning the advisability of this approach as hindering educational development in some instances).

158. *See, e.g.*, Crockett, *supra* note 12, at 562 (suggesting that under certain circumstances, mainstreaming and inclusion practices may expose disabled students to a different, but very real, type of segregation—the exclusion from a basic right to learn because they do not have the ability to keep pace with the curriculum in the manner it is structured in the general education classroom).

159. Colker, *supra* note 146, at 1420, 1422.

160. *Id.* at 1420.

161. *Id.* at 1463.

In regards to the equality-compromising impact of tuition reimbursement, the presumed stigmatizing consequences associated with segregated learning environments may be undergoing somewhat of a reversal. Although dedicated learning environments for the disabled and segregation of students with different disabilities in settings targeted to their conditions have historically been equated with stigma, competing educational theories support the view that segregated private instructional options may in fact help reduce that stigma in certain instances.<sup>162</sup> Educators and parents often believe that students thrive in instructional environments exclusively for peers with similar disabilities and challenges.<sup>163</sup> Because mainstreaming and inclusion practices may introduce their own differentiating and segregating consequences, there is merit in shielding disabled students from lack of acceptance by non-disabled classmates.<sup>164</sup> This may, in turn, allow them to address their challenges with greater privacy and empathy in an alternative setting.<sup>165</sup>

Ultimately, any indictment of segregating practices in special education should be tempered by recognizing the fundamental distinction between disability and race as concerns the strength of the inclusion preference. In the case of disability, there may be compelling reasons for differentiating the instructional methods and setting for a special needs child or even removing that child from the regular educational setting altogether.<sup>166</sup> Evaluating the issue of tuition reimbursement for special needs programs in private settings purely from an integration bias perspective mistakenly overlooks the fact that such segregated options actually may reduce stigma and enhance learning. Federal law, judicial interpretations, and any measures proposed to restore equity to special education service delivery should remain focused on provid-

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162. *Id.* at 1470.

163. *See, e.g.,* *Town of Burlington v. Dep't of Educ. of Mass.*, 736 F.2d 773, 789 (1st Cir. 1984).

164. *See* Perlin, *supra* note 127, at 618 (discussing case law that supports the view that there are negative side effects of mainstreaming, such as suggesting that a child may suffer interpersonally if unable to keep pace with non-disabled peers).

165. *See* Colker, *supra* note 146, at 1470.

166. Colker, *supra* note 157, at 820. *But see* Mark C. Weber, Response, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. ONLINE 174, 174-75 (2007), <http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-61.pdf> (addressing Colker's position and advocating for a response to parental and school district resistance to integration focusing on intensity of services to facilitate success in mainstreaming disabled students in integrated settings).

ing disabled students the configuration of resources and services appropriate to their individual needs. This will ensure that the quality of education, rather than the degree of integration, is the measure of success.<sup>167</sup>

#### IV. IDEA'S STRUCTURAL AND IMPLEMENTATION FLAWS COMPROMISING EQUALITY

Beyond the social and educational norms that inform special needs service delivery, the equality premise of IDEA also continues to be challenged and undermined by structural flaws in the statute's private enforcement provisions that create inequitable power imbalances.<sup>168</sup> Various structural features of IDEA establish a paradigm for both school and parent engagement premised on unrealistic and unworkable presumptions about parental access and resource factors. While commendable in its collaborative aspirations, this framework disproportionately marginalizes families without financial resources.<sup>169</sup>

##### A. Parent "Capture" in Adversarial Personal Enforcement Procedures

Despite the structural premise of IDEA that parents and schools will collaboratively oversee a child's educational plan, the law actually puts in place an awkward, often unworkable paradigm where parents, as enforcers and advocates for their children, necessarily are postured in opposition against the school district.<sup>170</sup> Although initially envisioned as a means of leveling the educational services playing field for disabled children, the statute fosters a virtually irreconcilable tension between parents seeking the best possible services for their special needs child and educators seeking to provide the best possible education for all students.<sup>171</sup>

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167. Cf. Colker, *supra* note 146, at 1464.

168. See Valverde, *supra* note 23, at 619.

169. Hyman et al., *supra* note 40, at 112-15.

170. Perna, *supra* note 25, at 561-62.

171. LaDonna L. Boeckman, Note, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 DRAKE L. REV. 855, 880 (1998).

In casting parents in an advocacy role that often requires adversarial duties, IDEA presents fundamental barriers that limit the success of this relational model.<sup>172</sup> To begin, as compared with school districts, parents have informational challenges concerning diagnostic criteria for special needs identification, educational programs, and available support services.<sup>173</sup> Perhaps even more challenging, once parents assume advocacy roles, they become captives in a system that requires them to navigate complex procedural requirements and confront school officials with specialized expertise, all the while doing so without compromising relationships that must continue for the duration of their child's educational career.<sup>174</sup>

IDEA has been resoundingly criticized for the inequities presented by its attenuated and complex due process protections.<sup>175</sup> Although intended to support the Act's goal of encouraging open communication between educators and parents, these procedural requirements are "practically indecipherable without legal assistance, and the likelihood of prevailing is remote without expert witness testimony."<sup>176</sup> While the Act on its face accords parents and school districts procedural safeguards, vast discrepancies exist in the parties' respective capacities to avail themselves of such protections.<sup>177</sup> This imbalance subverts IDEA's concept of partnering to identify special needs services.<sup>178</sup>

*Rowley's* relatively low "some benefit" standard for establishing service entitlements under IDEA gives school districts a distinct upper hand in due process hearings and litigation involving special needs placements. In virtually every IDEA hearing, parents bear the burden of proof as the party initiating action and the

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172. Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1828 (2008).

173. *Id.*

174. *Id.* at 1828–29; see also Cali Cope-Kasten, Comment, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 516–17 (2013) (stating that "the effects of a poisoned relationship are often most severe for the student" and can impede development of subsequent IEPs and escalate conflict in future educational placement negotiations).

175. Kocher, *supra* note 64, at 350, 352.

176. *Id.* at 350.

177. Cope-Kasten, *supra* note 174, at 526.

178. Kevin D. Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 64 U. DET. L. REV. 129, 147 (1986).

party seeking change in an IEP or alternative placement.<sup>179</sup> Furthermore, studies of state-level education hearings identify relatively few rulings favoring educational methods or placement alternatives other than those proposed or in use by the school district.<sup>180</sup>

Clearly, there is an inevitable disparity between school districts replete with resources and experience to support their defense and parents who lack resources or experience.<sup>181</sup> But beyond the inherent expertise and relational challenges most parents face, there are also legal representation and cost factors that disproportionately impact parents with fewer resources and lower levels of education.<sup>182</sup> Under IDEA's adversarial paradigm, legal representation is one of the most significant determinants of success in advocating for special education services.<sup>183</sup> But the cost of legal representation invites the reality that wealthy parents are able to exercise private enforcement more frequently and more successfully than lower-income parents.<sup>184</sup>

The pervasive shortage of free or low-cost legal services in special education matters forces parents to proceed without legal representation or hire an attorney at their own expense, leaving no effective alternative to those with limited means who seek to advocate for their child.<sup>185</sup> Although attorney representation is not required at IDEA due process hearings, the complexity of such proceedings pose considerable obstacles to parents lacking legal counsel.<sup>186</sup> Their circumstances are further complicated by IDEA regulations that exclude non-attorney advocates from serving as

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179. Cope-Kasten, *supra* note 174, at 520–21; *see also* Schaffer v. Weast, 546 U.S. 49, 51 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP rests with the party seeking relief, unless the burden is shifted by operation of state law).

180. *See* Laura C. Henry, Note, *Crippling the Education for All Handicapped Children Act*, 12 STETSON L. REV. 791, 811 (1983). Further evidence of the impediments parents encounter in exercising the enforcement rights under IDEA's due process procedures is found in the stunningly low use of said procedures. *See* Hyman et al., *supra* note 40, at 120 (“[O]ut of almost seven million children receiving special education services through IDEA . . . only 2,033 families participated in hearings that resulted in a final decision.”).

181. Cope-Kasten, *supra* note 174, at 526.

182. *See, e.g.*, Phillips, *supra* note 172, at 1833.

183. *See, e.g.*, MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS 1997–2002, at 7 (2002), <http://www.dueprocessillinois.org/Access.pdf>.

184. Valverde, *supra* note 23, at 623.

185. *See* Blumberg, *supra* note 88, at 178.

186. *See id.*



parental representatives absent state law provisions authorizing them to do so.<sup>187</sup>

The extent to which due process hearings or litigation require parents to aggressively support their claims with expensive diagnostic testing, expert witnesses, and other supporting evidence to counter school district findings cannot be overstated.<sup>188</sup> These burdens are further exacerbated by a Supreme Court ruling preceding *Forest Grove* that denied expert witness fees to prevailing parents in IDEA litigation.<sup>189</sup>

Cumulatively, these dynamics introduce a persistent inequity theme into IDEA private enforcement: higher quality and more responsive special education services tend to be provided to privileged students whose parents can assume the expected advocacy roles and costs.<sup>190</sup> Introducing an even more egregious slant on the inequitable enforcement playing field, school districts may strategically contain special education expenses by considering the socioeconomic status of disabled students as a predictor of their likelihood of legal representation and, thus, successful pursuit of IDEA remedies.<sup>191</sup> Employing this calculus invites a practice in some districts of “limiting or reducing services for those with the quietest voices.”<sup>192</sup>

In sum, the burdens of advocating for special educational services—whether in a private setting or otherwise—clearly present hurdles to most families and outright barriers to those without

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187. See C.F.R. § 300.512(a)(1) (2015) (stating that any party to a hearing has the right to be accompanied and advised by counsel and individuals with special knowledge or training relating to children with disabilities, but whether parties have the right to be represented by non-attorneys at due process hearings is determined by state law).

188. Boeckman, *supra* note 171, at 876 (“[I]t is often only after testing, diagnosis, lobbying schools for placement, working through the creation of an IEP, monitoring to measure the success or effectiveness of the program, making certain all the steps of the program are carried out, and hiring an attorney to challenge the IEP, that a system is created [to support personal enforcement under IDEA]. It is a system that favors those parents that have the time and money to hire someone to represent their position and get either expensive medical testing or expert testimony ‘to make certain a school district lives up to its responsibilities under the IDEA.’”).

189. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293–94 (2006). Of the 7 million children estimated to be receiving special education services under IDEA, approximately 36% are from households with incomes under \$25,000 and 32% are from households with incomes between \$25,000 and \$50,000. Kocher, *supra* note 64, at 351.

190. See Valverde, *supra* note 23, at 619.

191. See *id.* at 622–23.

192. *Id.* at 623.

means.<sup>193</sup> Although IDEA affords all parents legal rights, it disproportionately confronts families of limited means with expensive,<sup>194</sup> time-intensive, resourcing challenges beyond the virtually insurmountable burdens<sup>195</sup> required to prevail on the merits in an IDEA action.<sup>196</sup> A disturbing corollary to this reality is IDEA's inherent paradox that more affluent families are the primary force holding schools accountable, while families without means are marginalized as both advocates for, and beneficiaries of, special education services.<sup>197</sup>

### B. *Inequitable Structural Norms of Private Enforcement Mechanisms*

While there is no comprehensive research presenting a definitive means-based metric of IDEA private enforcement, the Act's enforcement mechanisms reveal a problematic, equality-defeating pattern that limits the utility of such devices for those without means.<sup>198</sup> Means-linked private enforcement disparities inform any credible analysis of departures from special education equality goals and equity principles. Although Congress intended IDEA to serve as a universal, rather than means-based, program, its in-

193. Such barriers become an exceptional equality-compromising concern when the socioeconomic statistics are examined—parents of special needs children tend to earn less than parents of non-disabled children. See Kocher, *supra* note 64, at 351.

194. In this context, it is also important not to lose sight of the overall expenses of IDEA litigation—to school districts, as well as families, and to render an accounting of the fiscal toll the adversarial IDEA process takes on a school district's education resources as a whole. See Lennon, *supra* note 32, at 1318–19 (quoting 20 U.S.C. § 1415(i)(3)(B)(i)(II)–(III) (2006)) (“By the time the Supreme Court reached its decision against Forest Grove, the District had already spent \$244,000 on the case, with another \$4,400 needed for the trial court disposition . . . Had the district court also sided with T.A.’s parents, the District would also have been liable for another \$65,000 in tuition reimbursement and \$400,000 for the parents’ court costs. It is important to note that, while IDEA requires schools to pay all court costs when parents win, prevailing school districts only receive costs if the parents filed a suit that is ‘frivolous, unreasonable, or without foundation’ or if the suit is ‘presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.’”).

195. See Kocher, *supra* note 64, at 352. *But see* Lennon, *supra* note 32, at 1320 (noting that although school districts prevailed in more tuition reimbursement disputes than parents, the schools did not do so at a significant rate).

196. See Kocher, *supra* note 64, at 350–51 (comparing the parental burden of establishing that the school district failed to provide their child with a FAPE and that the private placement was appropriate with that of the better-resourced school district which must establish only that a student's IEP was “reasonably calculated to enable the child to receive educational benefits”).

197. Blumberg, *supra* note 88, at 178.

198. Pasachoff, *supra* note 30, at 1419.

tent to pay special attention to disadvantaged and underserved populations is clear.<sup>199</sup> Moreover, as IDEA has evolved through various reauthorization cycles, Congress and the U.S. Department of Education have revised the Act and its regulations with the intent of making IDEA's private enforcement mechanisms more accessible to means-challenged families.<sup>200</sup> The reforms intended to serve this purpose include a provision permitting prevailing families to collect the cost of attorney's fees from school districts in successful challenge cases,<sup>201</sup> an introduction of a less adversarial mediation option apart from the formal IDEA due process hearing for resolving disputes,<sup>202</sup> a broad information dissemination requirement concerning complaint mechanisms available to aggrieved parties, and a requirement that, when correcting an IDEA violation, states extend the correction to all affected parties.<sup>203</sup>

Despite such measures to strengthen IDEA's equality goals, a fundamental advocacy inequity persists; wealthy parents simply use private enforcement mechanisms more than poor parents.<sup>204</sup> Means-based inequities in private enforcement are all the more disconcerting because of the compounding effect of other IDEA structural provisions, creating bargaining inequities that further disadvantage parents without means. For example, key to the IDEA service model is development of the IEP for each child. But because this form of service delivery is highly individualized, parents with greater educational and financial resources generally are in a better position to negotiate IEPs with school officials. Their higher level of engagement ensures that they receive more services than originally proposed by the school system and certainly more than socioeconomically disadvantaged parents would have.<sup>205</sup>

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199. *Id.* at 1430–31; *see also* 20 U.S.C. § 1400(c)(1) (2012) (“Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”). IDEA further mandates special initiatives for minority children with disabilities. 20 U.S.C. § 1400(c).

200. Pasachoff, *supra* note 30, at 1431.

201. *Id.* at 1424.

202. *Id.* at 1425 (noting that this option was specifically introduced “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”).

203. *Id.*

204. *Id.* at 1418.

205. *Id.* at 1436–38.

Such inequities are far less subject to cure than the invidious racial segregation circumstances addressed in *Brown*. Advocacy victories for individual families under IDEA differ markedly from, and are less likely to produce, positive externalities than school segregation cases “where one person’s enforcement of her right . . . effectuates the full extent of that right [for others] . . . .”<sup>206</sup> Where less privileged parents already suffer from the bargaining limitations that depreciate their advocacy posture under IDEA, it is unlikely they will be equipped to seize upon the advocacy successes of others and press for comparable services.<sup>207</sup>

IDEA’s structural norms prioritize awareness, information, and means as predictive measures of successful private enforcement outcomes. In doing so, the Act preordains that its enforcement matrix disproportionately burdens families of low socioeconomic status.<sup>208</sup> Special education service delivery thus aligns against the very demographic groups most vulnerable to special needs diagnoses.<sup>209</sup> In this respect, the Act’s private enforcement processes fundamentally disrupt its own goal of equitably distributing special needs services.<sup>210</sup>

#### V. MEASURES TO RESTORE IDEA’S EQUITY PRINCIPLES AND REVITALIZE EQUALITY GOALS

This part introduces proposals to address specific equity lapses in special education service delivery. In examining measures to revitalize the equality goals of IDEA, it is important to bear in mind that the retreat from IDEA’s equality principles has been provoked by a myriad of judicial perspectives, statutory implementation norms, cultural biases, and social preferences. Just as no one factor purposefully or unilaterally introduced inequities or re-segregation consequences into IDEA, no single reform initiative can restore equality to special education service delivery. Rather, a broad amalgam of reforms is necessary to address the many departures. Each of the proposed reforms individually offers prospects for revitalizing specific equity premises of IDEA

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206. *Id.* at 1440.

207. *See id.* at 1442–43 (noting that IDEA’s state complaint system requirements attempt to ensure that individual advocacy successes will be expanded to more broadly applied externalities benefitting other disabled students).

208. *See id.* at 1416.

209. *See Oelrich, supra* note 144, at 24–28. *See generally supra* Part III.A.

210. *See Pasachoff, supra* note 30, at 1417.

and cumulatively presents the most realistic prospects for ensuring disabled students meaningful educational opportunities equivalent to those offered to non-disabled students.

### A. *Increased Funding for IDEA*

Increased funding for IDEA is an essential foundation for any reform package to restore equity in service delivery. Although the most heavily regulated of all federal education mandates and programs, the American special education system remains chronically underfunded.<sup>211</sup> IDEA's 2004 reauthorization provided for specific funding levels to ensure that the federal share of special education service delivery would grow from 17.73% of total funding to 40% by 2012.<sup>212</sup> In actuality, however, Congress never appropriated sufficient funding to meet the levels specified as funding to states averaged only 15% of their per-pupil expenditures.<sup>213</sup> As a result, local and state budgets must compensate for the shortfall.<sup>214</sup> While funding deficiencies adversely affect services to all disabled students, socioeconomically disadvantaged groups are particularly vulnerable to negative resourcing consequences. Perennial funding shortfalls essentially transform IDEA into a "bill of rights . . . [more] available to children who attend resource-rich schools" that can compensate for federal funding deficiencies.<sup>215</sup>

With the reality that federal funding has never kept pace with congressional commitments or with the increasing special education costs at the local level,<sup>216</sup> one logical means of addressing special education service inequalities involves converting IDEA from a discretionary funding item to a mandatory one in the federal budget.<sup>217</sup> While this proposal has garnered broad bipartisan sup-

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211. Perna, *supra* note 25, at 562.

212. *Id.* at 565.

213. Phillips, *supra* note 172, at 1824.

214. Perna, *supra* note 25, at 565–66 (noting that in 2014, for example, IDEA federal funding accounted for only 16% of the estimated excess costs of educating disabled students, representing a reduction from the 17% federally funded in 2008 and a substantial reduction below the 2009 federal funding levels of 33%, which were also supplemented by the American Recovery and Reinvestment Act).

215. COLKER, *supra* note 74, at 106.

216. Perna, *supra* note 25, at 566 (noting that if IDEA had been fully funded from 1975 to 2006, local schools would have received an additional \$381.8 billion to devote to additional special education services).

217. *See id.* at 567.

port,<sup>218</sup> prospects for congressional enactment of this measure are far from certain in light of the thirty-one-year history of consistently deficient discretionary funding. For purposes of this analysis, the mandatory 40% funding “solution” must reside as a highly desirable fiscal resolution that could (but likely would not in the near term)<sup>219</sup> facilitate other measures recommended here to resolve IDEA’s culture of inequity. Absent funding increases, school districts will never be able to respond fully to IDEA’s promises.<sup>220</sup> The remaining reform proposals in this comment are considered independently of more global fiscal reforms, but with the cautionary awareness that continuing funding deficiencies will impede the availability, or at least the reach of, other reforms.

### B. *Expanded Advocacy Resources*

A key initiative to strengthen access and service remedies under IDEA, particularly for low-income students, involves providing legal representation resources to supplement and support the problematic parental advocacy role.<sup>221</sup> One promising model for providing parents external support in navigating IDEA’s personal enforcement terrain is the Education Services Advocate (“ESA”) approach. This approach, which has been variously proposed using different constructs,<sup>222</sup> introduces a third participant into the private enforcement dialogue—a party with expertise in IDEA, special education, and public school resources and procedures. This third-party ESA can inform the parental advocacy role, but

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218. *Id.* at 568 (“More than fifty-five national organizations, including the National Conference of State Legislatures, the National Association of Counties, and the National League of Cities, along with all education groups that are part of the IDEA Funding Coalition, strongly support this guaranteed full funding.”).

219. Prospects for full funding of IDEA are analyzed by various sources, but the most positive assessment comes from theorists who point out that in contrast to education spending generally, special education has a long history of broad, cross-party support. *See, e.g.,* Pasachoff, *supra* note 30, at 1482–83 (discussing how federal funding for special education has survived other recent aggressive spending cuts, even ones that specifically targeted other educational funding streams for elimination or reduction).

220. *See* Megan McGovern, Note, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117, 135 (2015).

221. *See* Valverde, *supra* note 23, at 623; *see also*, COLKER, *supra* note 74, at 245 (“It is crucial for parents to be provided with the free services of an educational advocate as soon as there is reason to believe that their child may qualify for special education services.”).

222. *See, e.g.,* Phillips, *supra* note 172, at 1847–52 (considering three alternative models for a program of supplemental advocacy for special education: public defender model employing full-time advocates, community volunteer model, and parent advocacy resource centers).

is neither invested in, nor constrained by, financial and resource considerations in the same way a school official would be.<sup>223</sup> Availability of an ESA to advise parents and support IDEA negotiations would address the major deficiency in the Act's private enforcement construct—the erroneous presumption that a broad cross section of parents have sufficient knowledge, informational access, process acumen, and resources to assume an advocacy role to secure appropriate services for their disabled children.<sup>224</sup> At the same time, the ESA's empowering influence on parental participation would benefit school districts by focusing negotiations on meaningful and informed considerations, thus expediting IDEA's complex procedural due process construct.

The advocacy model that seems most effective in "fill[ing] the gap left by the IDEA's team formulation"<sup>225</sup> is a public defender-style team of full-time, state-employed special education advocates. Under this model, when fully deployed, an ESA would be appointed to each child evaluated for IDEA services and would consult with parents about their child's special needs, accompany parents to IEP meetings, and support them in due process proceedings.

The most realistic funding source for this resource-intensive program in the near term would draw upon an IDEA provision that authorizes the Secretary of Education to award discretionary grants to "parent training and information centers."<sup>226</sup> As an interim measure, until more robust funding sources could be secured for external advocacy, ESAs could be resourced out of such information centers to provide selective support to parents on a means-tested basis. This approach might be further enhanced by engaging a volunteer corps of special education advocates, modeled after guardian ad litem services for juveniles in the judicial system,<sup>227</sup> to supplement ESA resources.

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223. *See id.* at 1852.

224. *See id.* at 1828–29, 1852.

225. *Id.* at 1852.

226. *Id.* at 1845. In view of the history of deficient federal funding for IDEA, prospects are bleak for allocation of additional funding in general appropriations to support external advocacy services. *See id.* at 1845–46.

227. *See id.* at 1849.

### C. Codification of Compensatory Education Remedy

Because tuition reimbursement offers no realistic form of redress for parents financially incapable of paying the costs of unilateral private placement up front, the compensatory education remedy has taken hold in many jurisdictions as a discretionary remedy ordered by hearing officers and judges under IDEA's general relief provision.<sup>228</sup> This approach, often referenced as "the poor man's tuition reimbursement,"<sup>229</sup> takes the form of various instructional enhancements or supplemental educational programming to help a student recoup when progress lags due to a school district's failure to provide appropriate services.<sup>230</sup> It has become the primary means of redress for disabled children denied a FAPE, but who must remain in an inappropriate or inadequate educational setting because their parents cannot cover the costs of removing them to a private school while negotiations continue.<sup>231</sup>

Unlike tuition reimbursement, however, the compensatory education remedy is not expressly codified in IDEA.<sup>232</sup> It is thus currently relegated "to a second class status with significant implications" for limiting the range of remedial measures available to low-income disabled students.<sup>233</sup> For example, absent a prescribed compensatory services remedy in IDEA, school districts have no

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228. Valverde, *supra* note 23, at 628; *see, e.g.*, Lester H. *ex rel* Octavia P. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990) (allowing compensatory education services and reasoning that Congress "did not intend to offer a remedy only to those parents able to afford an alternative private education"). *See generally* Terry Jean Seligmann & Perry A. Zirkel, *Searching Through the Legal Quagmire: Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 311 (2013) (emphasizing the importance of maintaining flexibility when utilizing compensatory education to cure IDEA violations).

229. Seligmann & Zirkel, *supra* note 228, at 296.

230. Valverde, *supra* note 23, at 628.

231. *Id.* at 628; *see also* Seligmann & Zirkel, *supra* note 228, at 292–96 (noting that the Supreme Court's *Burlington* ruling that IDEA authorized tuition reimbursement as an equitable remedy within the court's discretionary power to grant "appropriate" relief provides the foundation for compensatory education remedies); T. Daris Isbell, Comment, *Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOK. L. REV. 1717, 1743 (2011) ("Following the *Burlington* and *Miener* decisions, courts began to adopt compensatory education as an 'appropriate' remedy available for students who had been denied a FAPE. Courts reasoned that Congress would not have intended the availability of a remedy to depend on a parent's ability to front the costs of private education.").

232. *See* Valverde, *supra* note 23, at 629–30 ("In fact, the only reference to compensatory services as a remedy appears in the IDEA 2004 federal implementing regulations as a potential remedy within a state's internal complaint resolution process.").

233. *Id.*



duty to disclose this avenue of redress in materials explaining procedural safeguards to parents.<sup>234</sup> Further, even when parents successfully pursue this remedial alternative, they are disadvantaged in comparison to those who can pursue tuition reimbursement because they do not receive the equivalent “immediacy of benefits” that unilateral private school placement allows.<sup>235</sup> Despite any compensatory services that may ultimately be awarded, it is virtually impossible for students to fully recoup lost educational opportunities from such “back end” awards.<sup>236</sup> This is particularly so when the service deficiencies have occurred at developmentally critical times.<sup>237</sup>

#### D. *Special Needs Voucher Programs*

The special needs voucher represents a further step along the financial support spectrum to assist disabled students in procuring educational services in a private setting. Under the voucher approach already available in an increasing number of states, parents receive state-disbursed funds to enroll their special needs children in private school. Although the specific voucher provisions in state statutes vary widely, most permit disabled students who attended school under an active IEP plan during the preceding school year to receive a voucher.<sup>238</sup> The voucher is used to fund tuition at any private school of choice by approximating the state-funded cost of their education.<sup>239</sup>

In terms of access, equity, and overall educational quality, special needs vouchers offer some distinct advantages over both tuition reimbursement and direct tuition payment options when properly constrained by oversight controls. First, they remove adversarial proceedings from the equation and thus provide a service-driven “exit strategy” to families of disabled children who are

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234. *Id.* at 630, 663 (noting that this inequity is compounded by the fact that, although parents are not provided notice in IDEA of the availability of compensatory education as a remedy, they are nonetheless subject to requirements and limitations, such as statutes of limitations provisions, for accessing the remedy).

235. *Id.* at 630.

236. *See id.* at 631 (noting that students awarded compensatory services are disadvantaged by the measurement methodology applied to this remedy, as compared with tuition reimbursement).

237. Wasserman, *supra* note 82, at 235.

238. Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 292 (2010).

239. *Id.*

either financially unable or unwilling to litigate IDEA claims beyond the school level.<sup>240</sup> This not only relieves parents of the expense and expertise challenges of IDEA's adversarial procedures, but also significantly reduces the public resources school districts must commit to litigation. The resulting fiscal gains can be dedicated to providing overall educational resources to the special needs children who remain in the public system and to education services generally. The voucher approach further enhances special education resources because it induces private schools to compete for voucher-supported enrollments through programmatic enhancements that heighten educational achievement of disabled students consistent with the academic and social needs identified by parents.<sup>241</sup>

While there are clear equity and service bases for using special needs vouchers to help course-correct the drift away from IDEA's equality principles, several cautionary considerations must inform the practical use of this approach. If not implemented with adequate educational quality controls and oversight, special needs vouchers risk compromising the fundamental adequacy premise of IDEA by encouraging removal of disabled students to instructional settings where they may be neither monitored for receipt of services nor assessed for achievement progress and needs adjustments, as would be the case under traditional IEPs.<sup>242</sup>

Accounting for these potentially problematic consequences of special needs vouchers, this alternative is recommended to help restore equality to special education service delivery, but with highly specific limitations. To ensure that state legislatures design and implement voucher programs as educational quality-

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240. See *id.* at 294–95.

241. See *id.* at 292 (“Supporters argue that voucher programs offer a superior approach to traditional reform because they will increase competition among schools for children with disabilities and thereby enhance the educational achievement of these students.”).

242. See *id.* at 293 (noting that most states that have implemented special needs voucher programs require students receiving such vouchers to waive all rights under IDEA as a condition precedent to receiving state funds for private tuition); see also Elizabeth Adamo Usman, *Reality Over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. U. L. REV. 53, 76–77 (2014) (examining a major criticism of special needs voucher programs focusing on the lack of government oversight of private programs and discussing how, unlike public schools, private schools are not subject to special education teacher training standards, are not required to implement the equivalent of IEPs to ensure that student needs are being addressed, and are not required to evaluate student progress—all factors that leave parents vulnerable to enrolling their special needs child in a school that cannot meet those needs).

motivated measures responsive to disabled students' instructional and developmental needs, the programs must include control factors differentiating them from politically motivated "school choice" voucher programs.<sup>243</sup> This anticipates that special needs vouchers should not be disbursed to families who agree to sever their relationship with the IDEA structure and all the service delivery assessments it portends, as traditionally has been the case. Rather, IDEA must be revised to specify that special needs vouchers, if provided by states, must be conditioned upon specific assessment and oversight requirements to ensure that private institutions are offering services consistent with otherwise applicable special education service delivery standards.

#### E. *Integrating an "Educational Opportunity" Standard into IDEA*

To fully reconcile the confusing, inconsistent, and litigation-inducing lower court readings of *Rowley* and to reinvigorate IDEA's equality premise, one further reform would amend IDEA to embed a revised standard for FAPE service delivery into the current statute. Absent such reform, the *Rowley* decision continues to hang as an outmoded and limiting threat to the equality goals that should inform special education access and accountability. *Rowley's* minimalist understanding of what is required to provide special needs students with an appropriate education not only robs IDEA's FAPE guarantee of meaningful equality assurances, but it also spills over into broader service delivery decisions and limits full and fair consideration of when alternative placements would best serve special needs students' interests.

Congress should act to correct a missed opportunity in the 2004 IDEA reauthorization, when it neither measurably revised the definition of FAPE nor elected to overrule the *Rowley* holding interpreting that definition.<sup>244</sup> Other post-*Rowley* amendments to

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243. See Hensel, *supra* note 238, at 348 ("If the genuine goal of voucher programs is to enhance the educational advancement of students with disabilities, they must be grounded in meaningful evidence of programmatic superiority for this population rather than long-standing political arguments on the merits of school choice."); see also Usman, *supra* note 242, at 96 (urging consideration of special needs voucher programs as responses to problems surrounding delivery of special education services and in isolation from the politically charged debate over universal voucher programs).

244. See Free, *supra* note 44, at 229 (noting that "Congress left the definition of FAPE virtually unchanged from the prior law"). Compare 20 U.S.C. § 1401(9)(A)–(D) (2004), with 20 U.S.C. § 1401(8)(A)–(D) (2000).

IDEA<sup>245</sup> support the view that appropriate education for disabled students has acquired “a higher substantive meaning,”<sup>246</sup> one that renders *Rowley’s* “some benefit” standard “no longer viable.”<sup>247</sup> IDEA’s most recent reauthorization requires development of IEPs that allow students “to progress academically as measured by the regular curriculum.”<sup>248</sup> This invites a standard that eluded the *Rowley* majority, suggesting that appropriateness in special education service delivery is intended “to be synonymous with an equal right to learn” as compared with non-disabled peers.<sup>249</sup> Further, the re-focused emphasis in IDEA on measurable outcomes in disability education services undermines the *Rowley* view that access to education services, without meaningful results, is sufficient to satisfy special education entitlements.<sup>250</sup>

It is imperative that special needs students have the benefit of a new standard for educational service obligations that can sustain the equitable and meaningful educational opportunities intended by IDEA.<sup>251</sup> The most viable and meaningful replacement standard would be in keeping with the educational opportunity standard suggested in *Rowley’s* concurring and dissenting opinions and would replace IDEA’s ambiguous and problematic “appropriate” terminology with a requirement that disabled students be guaranteed an educational opportunity commensurate with that given to non-disabled children.<sup>252</sup> This approach would accommodate the equality principles of the original IDEA legislation and respond to the more expansive amended provisions focusing on functional performance and meaningful results, not merely minimal outcome.<sup>253</sup>

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245. Valentino, *supra* note 7, at 157–58 (noting that, in particular, the 2004 IDEA reauthorization amendments introduced two significant revisions that had the effect of increasing the standard of what constitutes appropriate education—both related to accountability of the education service delivery system for improving a child’s functional performance and progress).

246. *Id.* at 155.

247. *Id.* at 157.

248. Free, *supra* note 44, at 231.

249. *Id.* at 232.

250. *See id.* at 231.

251. *See supra* note 80 and accompanying text.

252. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 214 (1982) (White, J., dissenting); *see also* Valentino, *supra* note 7, at 165–66 (“The educational opportunity standard fulfills both congressional and societal expectations of equality in educational opportunities for the disabled and the non-disabled, and, therefore should be the accepted standard in this country.”).

253. Valentino, *supra* note 7, at 165.

F. *Coordinated Implementation and Realistic Limitations of Reform Measures*

Introducing into IDEA a meaningful standard for appropriate special education service delivery will in turn pave the way for more equitable placement determinations under the Act's inclusion and tuition reimbursement principles. However, conceptualizing the issue of revitalizing IDEA's equality goals as one of righting the means-based disparities of reimbursement and inclusive placement practices is far too limiting to guarantee meaningful reform.<sup>254</sup> Nor will increased IDEA funding, without more fundamental structural reforms to the Act's private enforcement and service delivery protocols, resolve the privileging of families with means in advocating for special needs children.

Therefore, the amalgam of reforms advocated here is also dependent on external measures to support and inform parental advocacy (special education advocates) and to expand means of resourcing alternative placements (compensatory education services, direct tuition payments, and vouchers). If implemented individually, any of these recommended reforms would offer measurable equality-leveling benefits. If realized cumulatively, they offer the most promising prospect for course correction in the interest of educational equality for special needs students.

Despite their collective promise, it would be fair and reasonable to argue that the reforms proposed here cannot fully restore the equality underpinnings on which IDEA was founded. Incremental adjustments to invite improved resourcing, advocacy support, more equitable access to private educational alternatives, and service delivery standards responsive to individual students' needs rather than merely their foundational access rights can only go so far in remediating the equality lapses that currently define IDEA implementation and private enforcement. As has been noted concerning specific reforms advocated here, resourcing the necessary changes is costly, requires oversight and control safeguards, and, in some instances, reintroduces inequities by supporting special education service delivery in a manner that may detract from overall public education quality. Critics of measures that enhance and equalize access to special needs education are not wholly misguided in voicing the concern that such initiatives

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254. COLKER, *supra* note 74, at 244-45.

necessarily divert resources from the general public school population,<sup>255</sup> expand program and service access routes for special needs students that potentially undermine the inclusive school movement,<sup>256</sup> or encourage use of private school resources as to defeat promoting integration across the disability line.<sup>257</sup>

Certainly, in designing a practical and workable reform paradigm, we cannot limit our gaze to special needs beneficiaries only. Finite resources, fiscal realities, and the inevitable social tensions between responsive special needs service delivery and the benefits of the integration presumption demand that we apply a more balanced perspective to designing solutions that support IDEA's equity legacy.

We also cannot overlook the reality of social context and resource limitations. Admittedly, the success of any of these reform measures will be constrained by prevailing social norms, cultural biases, and demographic inequities that permit misclassification and overrepresentation of certain minority populations in isolated special needs settings or invite gross disparities in per-pupil educational funding resources among school districts.<sup>258</sup> At the same time, the reforms proposed here offer realistic prospects for correcting IDEA's fundamental departure from its intended equality course. Each measure advanced here reroutes IDEA more in alignment with ensuring service delivery to *each* individual disabled student, rather than preferencing selected individual students whose parents have the time, financial means, education, and expertise to attain the benefits offered under the statute.<sup>259</sup>

In the final analysis, none of the reforms urged here will take the place of more expansive resolution of the social and fiscal structural limitations that have challenged educational equality

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255. See *id.* at 242.

256. See Ani B. Satz, *Disability, Vulnerability, and Fragmented Protections: Accessing Education, Work, and Health Care*, in *RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION* 265, 288 (Arlene S. Kanter & Beth A. Ferri eds., 2013) (discussing the benefits of "inclusive schools" that provide an approach to learning where educators work with all students in integrated groups regardless of perceived or diagnosed disabilities).

257. See Minow, *supra* note 15, at 53.

258. See COLKER, *supra* note 74, at 245 ("Quite simply, children in middle-class school districts should not be receiving more expensive special education services than children in poor school districts. Our system of funding public schools through property taxes must end in order to create more education equity.").

259. See *id.* at 240–41.

pursuits from *Brown* through all reauthorizations of IDEA. But each area of reform identified will go far toward recognizing special education as the realistically available continuum of services it was intended to be for meeting individualized needs of disabled children, rather than an inequitably monitored and service deficient destination for problem students.<sup>260</sup>

## CONCLUSION

Just as the disability education rights movement was propelled forward by the equality rationale of *Brown v. Board of Education*,<sup>261</sup> so too has special education paralleled the post-*Brown* re-segregation patterns, experiencing significant retreat from the equality principles on which it was founded. The Supreme Court's *Rowley* decision, the Court's ensuing rulings on tuition reimbursement, and IDEA's own private enforcement construct have provisioned a special education service delivery culture that neither consistently responds to nor furthers IDEA's fundamental equality principles.<sup>262</sup>

IDEA's emphasis on the individual with disabilities puts in place a construct under which education plans and enforcement mechanisms are both intended to be personalized and individually executed.<sup>263</sup> Somewhat ironically, this focus has a distinct downside. In the mechanics of manipulating IDEA's provisions to effect desired results, the individual children who benefit from the law are those who have parents equipped with expertise and resources to attain the benefits offered by the statute.<sup>264</sup>

While IDEA has produced undeniable gains in both education access and quality for students with disabilities, special needs students remain "those most at risk of being left behind."<sup>265</sup> And although special education has acquired a solid base of "civil

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260. See Wendy F. Hensel, *The Case for Inclusive Eligibility Under the Individuals with Disabilities Education Act*, in *RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION* 242, 262 (Arlene S. Kanter & Beth A. Ferri eds., 2013).

261. McGovern, *supra* note 220, at 118.

262. See generally Free, *supra* note 44, 204–06 (arguing that in order to provide for an equal opportunity intended by the IDEA, Congress should overrule the *Rowley* decision and give clear guidance).

263. See *id.* at 203–04.

264. See COLKER, *supra* note 74, at 241.

265. PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 145, at 4.

rights and legal protections,”<sup>266</sup> the special needs population it serves remains exceedingly vulnerable to legislative, judicial, and social lapses in vigilance that undermine the equality premise of special education reform. Only with strategic implementation of substantive, structural, and fiscal reforms as proposed here can the fundamental equity principles of IDEA be restored to meaningfully equalize educational opportunity within the full special needs demographic.

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266. *Id.*

\* J.D. Candidate 2017, University of Richmond. B.A. 2014, Wake Forest University. I would like to thank my family for their love and support and for consistently validating the importance of education. I would also like to thank Professor Kimberly Robinson for her inspirational perspective that highlights the prevailing inequities in the American education system. Finally, I would like to express my gratitude to the *University of Richmond Law Review* Editorial Board and Staff for affording me the opportunity to explore this important issue and supporting me throughout the development of this comment.



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