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PARENTS AS ADVOCATES: EXAMINING THE HISTORY AND EVOLUTION OF PARENTS' RIGHTS TO ADVOCATE FOR CHILDREN WITH DISABILITIES UNDER THE IDEA

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> "Parents of handicapped children all too frequently are not able to advocate for the right of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy."[1]

As this quotation illustrates, the right of parents to advocate on behalf of their children with disabilities was an important focus of the initial enactment of the Education for All Handicapped Children Act (EHCA) in 1975.[2] Since that time, Congress has amended the law four times,[3] including renaming the Act the Individuals with Disabilities Education Act (IDEA) in 1990.[4] After each legislative revision, the Department of Education has issued regulations to implement the latest iteration of the law.[5]

In addition to legislative action affecting parental rights between 1975 and 2006, the United States Supreme Court has heard ten cases requiring the justices to construe the IDEA.[6] The resulting opinions have also impacted parents' ability to advocate for

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1. Senate Report Regarding Pub. L. No. 94-142, Education for All Handicapped Children Act, S. REP. NO. 168, at 9 (1975), *as reprinted in* 1975 U.S.S.C.A.N. 1425, 1433.

2. Pub. L. No. 94-142, 89 Stat. 773 (1975).

3. Handicapped Children Protection Act, Pub. L. No. 99-372, 100 Stat. 796 (1986); Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37(1997); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 104 Stat. 2647 (2004).

4. Individuals with Disabilities Education Act, sec. 901, § 601(a), 104 Stat. 1103, 1142 (1990).

5. Originally, regulations were promulgated by the Department of Health, Education, and Welfare at 45 C.F.R. § 121a *et seq.* In 1980, Congress created the Department of Education and elevated the Secretary of Education to a cabinet level position. *See* U.S. Department of Education, The Federal Role in Education, http://www.ed.gov/about/overview/fed/role.html (last visited April 6, 2007). Since 1980, the regulations have been found at 34 C.F.R. § 300 *et seq.*

6. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Smith v. Robinson, 468 U.S. 992 (1984); Town of Burlington v. Dept. of Educ., 471 U.S. 359 (1985); Honig v

their child.

Each action, whether statutory, regulatory, or judicial has resulted in progressively more definition of precisely what rights parents enjoy, and the limitations of those rights, as they advocate for their children. As such, parental rights under the IDEA have evolved over time. With the recent 2004 reauthorization of the IDEA[7] and important Supreme Court decisions on parental rights decided in 2005 and 2006,[8] it is necessary to fully describe those rights as currently construed and to explore the implications of the rights and educational opportunities guaranteed for children with disabilities.

This study examines the evolution of parental rights under the IDEA. Specifically, it examines the question of how those rights have changed since the initial passage of the EHCA in 1975.[9] In short, the study asks: Do parents today have more, fewer, or about the same rights to advocate for their children with disabilities when compared to earlier times? What follows is an examination of that question from a historic perspective,[10] beginning with the initial enactment of the law in Part I and proceeding through four additional periods of development in Parts II through V. The patterns that emerge are then discussed with respect to robustness of parental rights as they exist today in Part VI. This paper concludes with the implications of those changes for parents and particularly for the right to equal educational opportunity to which their children are entitled.

I. THE EAHCA

The Education for All Handicapped Children Act (EAHCA) was signed into law in 1975 by President Gerald Ford. Central among the justifications for the enactment of the EAHCA was the fact that parents often had little recourse other than filing civil lawsuits in order to obtain educational services for their children with disabilities. As explained in the Senate Report accompanying the original bill:

> Whereas the actions taken at the State and national levels over the past few years have brought substantial progress, the parents of a handicapped child or a handicapped child himself must still too often be told that adequate funds do not exist to assure that child the availability of a free appropriate public education. The courts have stated that the lack of funding may not be used as an excuse for failing to provide educational services. Yet, the most recent statistics provided by the Bureau of Education for the Handicapped estimate that of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring

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Doe, 484 U.S. 305 (1988); Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999); Schaffer v. Weast, 126 S. Ct. 528 (2005); Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006), Winkleman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007).

7. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 104 Stat. 2647 (2004).

8. *Schaffer*, 546 U.S. 49; *Murphy*, 126 S. Ct. 2455.

9. 89 Stat. 73 (1975).

10. For a discussion of the history of the Act in its entirety, *see* Dixie Snow Huefner, Getting Comfortable with Special Education Law: A Framework for Working with Children with Disabilities. (2d ed. 2006).

> special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.[11]

In short, the Senate found that when states and local school districts were left to their own devices, too many provided inadequate or no educational services to children with disabilities. Congress also recognized that the educational services received by children with disabilities depended, at least in part, on parents' ability to advocate on their behalf, up to and including filing legal action to challenge denied educational services. As such, one purpose of the EAHCA was to protect the rights of children with disabilities by creating specific procedural protections that their parents could use to ensure that a free appropriate public education (FAPE)[12] is available for each child with a disability. The specific rights created by the original EAHCA included:

- The right to receive written notice of their rights under the law.[13]
- The right to receive written notice of the school's intent to evaluate for special education services.[14]
- The right to receive written notice of whenever the school initiates a change of placement or refuses to make a change of placement.[15]
- The right to be a member of any Individualized Education Program (IEP)[16] Team for their child.[17]
- The right to participate in all decisions about their child.[18]
- The right to receive information about their child's progress.[19]
- The right to obtain an independent evaluation of their child at public expense when they disagree with the school's evaluation results.[20]
- The right to challenge a school's decisions by filing a complaint which will be resolved by a hearing before an impartial hearing officer.[21]
- The right to appeal an administrative decision in a court of law.[22]

In addition to these explicit statutory rights, the regulations promulgated to

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11. S. Rep. No. 94-168, at 8, *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (1975).

12. FAPE is the central entitlement of the EAHCA and now the IDEA. FAPE was defined by the EAHCA as: "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required [for each child with a disability]." Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1401(9) (2000)).

13. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(c)(1)(D) (2000)).

14. Pub. L. No. 94-141, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(c)(1)(A) (2000)).

15. *Id.*

16. The Individualized Education Program (IEP) is a document that delineates the special education and related services a child with a disability will receive in order to receive FAPE. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1401(14) (2000)).

17. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1414(d)(1)(B)(i) (2000)).

18. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(b)(1) (2000)).

19. *Id.*

20. *Id.*

21. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(b)(6)(A) (2000)).

22. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(g)(1) (2000)).

implement the EAHCA's provisions conferred six additional related rights:

- The right to grant or deny permission to evaluate their child.[23]
- The right to grant or deny permission to provide special education and related services to their child.[24]
- The right to have all evaluation results explained to them.[25]
- The right to receive copies of IEPs written for their child.[26]
- The right to have information they have independently gathered considered by school officials.[27]
- The right to invite persons of their choosing to meetings called to discuss the child and plan for the child.[28]

As this list demonstrates, the rights parents enjoyed under the initial language of the statutes and regulations fell into four broad categories: notice, consent, participation, and challenge. The notice requirements ensured not only that parents understood when actions were being taken with respect to their child, but also that they understood their rights and their child's rights under the law. Interestingly, while the statute does not specifically use the word "consent," the regulations read the participation sections of the law to imply that parents must consent before major actions such as evaluation and placement occur with their child. Participation rights include collaborating with school personnel to construct their child's IEP and receiving the requisite information regarding their child's performance to ensure that the participation was meaningful. Participation in decision-making was so important to the original crafters of the Act that school officials were specifically barred from making any change in the child's placement without parental notification and consent. In addition, when the parents disagreed with the changes contemplated by school officials, the law required that the status quo be maintained by insisting that the child remain in his or her current placement until a resolution was reached through the administrative or judicial procedures outlined in the Act.[29] Finally, the EAHCA provided significant procedures that created a complaint process for the parents to employ whenever they believed that the school district was failing in its obligation to provide FAPE to the child. The primary mechanism, the due process hearing, whereby an impartial third party hears evidence from both parents and school officials before rendering a decision, was designed to provide a means to resolve conflicts without resorting to court action. Still, the law preserved judicial involvement,[30] including a provision which specifically

23. 45 C.F.R. 121a.504(b) (1977).

24. *Id.*

25. 45 C.F.R. 121a.344(b) (1977).

26. 45 C.F.R. 121a.345(f) (1977).

27. 45 C.F.R. 121a.504(c) (1977).

28. 45 C.F.R. 121a.344(a)(5) (1977).

29. This provision was and is commonly referred to as the "stay-put" provision of the law. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(j) (2000)); *see infra* notes 74–87 and accompanying text.

30. Considerable judicial activity to compel school districts to serve children with disabilities had occurred just prior to the enactment of the EAHCA. The two most important cases typically cited are Mills v. Bd. of Educ. of D.C., 348 F.Supp. 866 (D.D.C. 1972)) and Pa. Assoc. for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972)). For a discussion of these important cases, *see* G.M. ZELIN., THE CONSTITUTIONAL FOUNDATIONS OF SPECIAL EDUCATION LAW, (LRP PUBLICATIONS 1993).

allowed any dissatisfied party to appeal an administrative decision in civil court.[31] In addition, judges were given the explicit authority to fashion "such relief as the court determines is appropriate" when resolving the issues before them.[32] Taken together, these important procedural protections created powerful tools for parents as they advocated for access to public education for their children with disabilities.

II. THE SUPREME COURT SPEAKS

Not surprisingly, as schools implemented the EAHCA, disputes arose between parents and school districts over the application of its provisions. Judicial interpretation of the Act then became increasingly necessary to resolve those clashes and clarify the requirements of the EAHCA. Between 1982 and 1984, the United States Supreme Court heard four cases to resolve disputes between parents of children with disabilities and the school districts charged with providing FAPE.[33] Each case had a significant impact on parents' rights under the EAHCA.

A. Board of Education of Hendrick Hudson Central School District v. Rowley (1982)

The power of parents to advocate for their children by being an integral part of the development of a child's special education took root with the Supreme Court's decision in *Board of Education v. Rowley*.[34] Two central issues were presented to the court: First, the Court was asked to decide what constituted a "free appropriate public education" (FAPE) under the EAHCA and, specifically, whether Amy Rowley required the services of a sign language interpreter in order to obtain it; and, second, the *Rowley* court addressed the appropriate role of the judiciary in reviewing special education matters under a provision in the Act that opened the courts to "any party aggrieved."[35]

In response to the first inquiry, the Court held that the law ensured access and a "basic floor of opportunity," but that the services provided need not maximize a student's potential.[36] In this way, the Court attempted to strike a pragmatic balance between what parents may desire for their child and the school's obligation to fund additional services. The Court also made clear that in making that calculation, educators were owed a measure of deference as illustrated by the following discussion:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The

31. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(k)(3)(B)(i) (2000)).

32. *Id.*

33. Town of Burlington v. Dept. of Educ., 471 U.S. 359 (1985); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Smith v. Robinson, 468 U.S. 992 (1984); Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). That the high Court heard four cases in this time period is impressive. Of course, they represent only the tip of the judicial iceberg as federal district and appellate courts heard dozens of other cases in the same time period.

34. 458 U.S. 176 (1982).

35. *Id.* (citing Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1415(b)(6) (2000)).

36. *Rowley*, 458 U.S. 176, at 200.

> primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to [the Act].[37]

This leads, of course, to the Court's determination of the second issue—the appropriate role of the judiciary in special education disputes. Even though the Rowleys did not prevail in their claim, the *Rowley* decision strengthened the advocacy power of parents by ensuring that parents would be included in every aspect of developing a child's special education. The *Rowley* Court placed the judicial imprimatur on the notion that parents were on equal footing in any administrative step regarding their child's special education. Indeed, *Rowley* held that procedural safeguards embedded in EAHCA were intended to ensure that parents and guardians had "a large measure of participation at every stage of the administrative process."[38]

To resolve a dispute as to whether an education agency complied with these safeguards, the Court adopted a two-part test.[39] Under this test, a court considering a challenge to an IEP must answer the following: First, has the State complied with procedures under EAHCA; and, second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?[40] In sum, while the *Rowley* Court adopted only an obligation of a district to provide FAPE that provided *some* educational benefit,[41] it did underscore the point that Congress intended parents to be essential players in the procedural development of a student's special education.[42] Thus, *Rowley* represents a significant step in the growth of parental advocacy strength because the Court's holding left no question that parents were central—and their involvement was congressionally required—at every step of the IEP administrative process.[43] In essence, it established a secure foothold for parents to negotiate with school officials over what was appropriate for their child.

B. Tatro v. Irving Independent School District (1984)

The ability of parents to advocate for their children through use of the federal courts was strengthened after *Tatro v. Irving Independent School District*, where the

37. *Id.* at 207–08.
38. *Id.* at 205.
39. *Id.* at 206–07.
40. *Id.*
41. *Rowley*, 458 U.S. at 201
42. *Id.* at 205.
43. *Id.*

Court set forth a test to define what constituted "related services" for special education purposes.[44] At issue was whether clean intermittent catheterization constituted a related service under the EHCA.[45] The Court sided with the parents and found the catheterization was a related service within the meaning of the EAHCA.[46]

The *Tatro* decision strengthened the hand of parents as advocates in two ways. First, as previously mentioned, the Court set forth a two-part test to determine if a service constituted a "related service" under the IDEA.[47] That test requires a court to ask whether a particular service is a supportive service within the meaning of related service—that is that the service is necessary for the child to benefit from special education—and, also, if that service is excluded from the definition as a "medical service" for purposes other than diagnosis or evaluation.[48] In ruling for the parents, the Court adopted a bright line test for determining whether a service fell under the medical exclusion. Namely, if the service required a doctor it was medically excluded, and if it did not it constituted a related service for which schools were responsible under the Act.[49]

The adoption of the bright line test with respect to the medical exclusion language of the EHCA was a significant victory for parents of children with disabilities. Under the applicable language of the Act, a school was required to provide "medical services" *only* for the purposes of diagnosis.[50] The District argued that the catheterization was not a related service because it was a medical service for purposes other than diagnosis, and was excluded accordingly under the medical exclusion provision of EHCA.[51] The Court, affirming the Court of Appeals' ruling on the matter, refused the invitation and adopted a bright line test to adjudicate future medical exclusion disputes. A medical exclusion, held the Court, would narrowly be applied only to services required to be administered by a licensed physician.[52] Simply because a service was medical in nature, such as the catheterization at hand, would not release a district from its obligation to provide the service, so long as it qualified as a "related service."[53]

In a second way, *Tatro* enhanced the advocacy power of parents. Specifically, the courts became available to parents as a venue to challenge a school's determination of what constituted a "related service" under special education law. The district's claim that a court was limited to adjudicating only the procedural complaints asserted by parents in *Rowley* was rejected. The court carved out its adjudicative territory on educational service issues when it wrote: "Judicial review is equally appropriate in this case [as in *Rowley*], which presents the legal question of a school's substantive obligation under 'related services' requirements" of EAHCA.[54] In sum, reading *Rowley* and *Tatro* together, parents could seek judicial relief with respect to both state

44. *Tatro*, 468 U.S. at 891.
45. *Id.* at 890.
46. *Id.* at 891.
47. *Id.*
48. *Id.* at 890.
49. *Tatro*, 468 U.S. at 891.
50. *Id.* (citing 20 U.S.C. § 1401(17) (1977)) (emphasis added).
51. *Id.* at 887.
52. *Id.* at 892.
53. *Id.*
54. *Tatro*, 458 U.S. at 890 n.6.

procedural compliance with the EAHCA and also a determination of the more substantive issue of what constituted "special education and related services" necessary to achieve an appropriate education under the EAHCA.[55]

C. Smith v. Robinson (1984)

Parental advocacy strength suffered something of a setback after *Smith v. Robinson.*[56] First, the Court narrowed the applicable legal avenues under which parents could assert claims that a district violated its constitutional obligation to provide a public education for handicapped children. The *Smith* Court held that the comprehensive scheme of protections codified in EAHCA were the "exclusive" avenues through which parents must seek relief for claims of violations of their child's right to FAPE under the EAHCA or Equal Protection Clause of the Fourteenth Amendment.[57]

In *Smith*, the parent-plaintiffs asserted multiple legal claims arising from the same nucleus of facts. They argued that the school district's failure to provide FAPE for their child at once violated the EHCA, Section 504 of the Rehabilitation Act, [58] and the Equal Protection Clause of the Fourteenth Amendment.[59] The federal district court ruled for the parents as a matter of state law and, therefore, never reached the federal statutory or constitutional questions.[60] However, the Court held that parents of a child served under the EAHCA were barred from bringing a complaint to federal court under Section 504 of the Rehabilitation Act or the Fourteenth Amendment without first exhausting the remedies available to them through the procedures of the EAHCA.[61] Echoing their decision in *Rowley* that emphasized Congressional intent in interpreting the EAHCA, the Court wrote that:[62]

> [W]here the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardians can pursue their claim.[63]

Secondly, *Smith* constrained parental rights by foreclosing any opportunity for parents to recover attorneys' fees accrued when asserting a claim for a publicly funded special education.[64] The parents in *Smith* argued that fee-shifting provisions under the Rehabilitation Act and the Civil Rights Act applied to the EAHCA.[65] They contended that, under existing law, plaintiffs would be able to recover attorneys' fees when

55. *Id.*

56. 468 U.S. 992 (1984).

57. *Id.* at 1013.

58. 29 U.S.C. § 794 (2000) (prohibiting recipients of federal assistance from discriminating on the basis of disability).

59. *Smith*, 468 U.S. at 995.

60. *Id.* at 1000–01.

61. *Id.* at 1012–13.

62. *Id.* at 995.

63. *Id.* at 1013.

64. *Smith*, 468 U.S. at 993.

65. *Id.* at 1003–05.

substantial claims under the aforementioned Acts were asserted by the plaintiffs but not addressed by the court. However, the Court disagreed and simply noted that the EAHCA did not include a fee-shifting provision as a remedy available to parents.[66] Thus, while *Rowley* and *Tatro* offered some assurance that the courts would oversee compliance with the EAHCA's procedural mechanisms, the Court's holding in *Smith* meant that it could be a costly enterprise to seek such oversight. Moreover, without the fee-shifting provision, it could be argued that *Smith* created something of a chilling effect on the willingness of attorneys to take EAHCA cases.

D. School Committee of Burlington v. Department of Education (1988)

Interestingly, while the Court was unwilling to read the EAHCA to include recovery of attorneys' fees as a remedy to a school district's denial of FAPE, the opposite result was reached in relation to the reimbursement of private school tuition in *School Committee of Burlington v. Department of Education*.[67] In *Burlington*, the Court decided whether, under the EAHCA, judges could properly order a school district to reimburse parents for private school tuition when the private school provided appropriate educational services and the public school's proposed IEP was inappropriate.[68] First, in a unanimous opinion, the Court held that a court could order a district to repay parents for private tuition if the private school placement is undertaken to obtain FAPE for the child.[69] As the Court explained, "the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[70]

Second, the Court continued to hold its position that the courts were appropriate venues for parents to seek relief with respect to tuition reimbursement. According to the Court, Congress granted the judiciary wide latitude in fashioning appropriate relief for aggrieved parents under the Act. Justice Rehnquist, writing the majority opinion, noted that: "The statute directs the court to 'grant such relief as [it] determines appropriate.' The ordinary meaning of these words confers broad discretion on the court."[71]

Thus, the *Burlington* decision is noteworthy not just for the holding that parents could obtain reimbursement for private school under certain circumstances, but also for reiterating that they could use the judiciary to seek such relief.

III. EAHCA GROWS IN THE IDEA

The next period examined extends from 1986 through 1993. During this eight-year period, Congress amended the Act twice and the Supreme Court heard two more

66. *Id.* at 1017.
67. 471 U.S. 359 (1985).
68. *Id.*
69. *Id.* at 369.
70. *Id.* at 370–71.
71. *Id.* at 370.

important special education cases.

A. Handicapped Children Protection Act of 1986

What the Court limited in *Smith*, Congress provided through its first substantive revision of the EAHCA, the Handicapped Children Protection Act (HCPA).[72] Passed in 1986, the HCPA made only one revision to the Act: the addition of a fee-shifting provision that allows parents to recover attorneys' fees expended in the course of successfully advocating for their child's right to FAPE. As the Senate explained in its report:

> The situation which has resulted from the *Smith v. Robinson* decision was summarized by Justices Brennan, Marshall, and Stevens in their dissenting opinion: "Congress will now have to take the time to revisit the matter." Seeking to clarify the intent of Congress with respect to the educational rights of handicapped children guaranteed by the EHA, the Handicapped Children's Protection Act . . . was introduced.[73]

This provision, which still exists in the current version of the Act, allows parents to recover reasonable attorneys' fees when they prevail in a challenge against school officials. It includes provisions to limit those fees if the parents reject a settlement offer substantially the same as the eventual judicial decision, if parents unreasonably protract the conflict, or if the attorneys' hourly rates are deemed excessive in comparison to community standards.[74] Clearly the HCPA marked a significant victory for parents in asserting their children's rights to an appropriate public education.

B. Honig v Doe (1988)

The balance of power continued to shift toward parents following *Honig v. Doe*.[75] In *Honig*, parents challenged indefinite suspensions of their children for disciplinary infractions during pendency of administrative hearings regarding the underlying disputes. At issue for the Court was whether the district's actions violated the "stay-put" provision of the EAHCA.[76] The provision reads that a child with a disability "shall remain in his or her then current educational placement" pending the review of any proceedings unless both the parents and the local education agency agree to alter that placement.[77] Parents of the children contended that the extended suspension of their children during their challenges to proposed expulsions violated the stay-put provision.[78] In their defense, the school district urged the Court to adopt a "dangerousness" exception to the "stay-put" provision that would permit school districts

72. Pub. L. No. 99-372, 100 Stat 796 (1986).

73. S. REP. NO. 99-112, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1798, 1799.

74. Pub. L.No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415(i)(3)(B)-(F) (2000)).

75. *Honig v Doe*, 484 U.S. 305 (1988).

76. *Id.* at 308.

77. Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. §1415(j) (2000)).

78. *Honig*, 484 U.S. at 314–16.

to extend suspension during the expulsion process when the district determines a student would pose a threat at the school or an alternative placement.[79]

The Court concurred with the parents. The Court held that Congress was clear in its adoption of the stay-put provision and its purpose to redress the once unimpeded ability of a district to remove a special education student from a school setting without meaningful parental input.[80] The Court wrote, "[w]e think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students from school."[81]

Indeed, the Court reasoned that the EAHCA's stay-put provision was a crucial tool in reducing a school's almost unbridled power to remove special needs children from a classroom and balancing the relationship between a school and parents. In explaining this relationship, the Court noted that the EAHCA "provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed."[82] At the heart of enacting the EAHCA was a Congressional intent to include parents as central players in the development of their child's special education. Continuing on this theme, the Court wrote that "[C]ongress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation" in creating and assessing an IEP.[83]

Furthermore, in continuing to underscore the centrality of parents in the development and assessment of a child's special education, the *Honig* Court also read the stay-put provision to create a rebuttable presumption in favor of the child's current educational placement when a district seeks injunctive relief from the courts in a change of placement matter.[84] Thus, in sum, *Honig* foreclosed any self-help remedy for districts. It required that, prior to a change in placement, parents must be afforded their statutory right to participate in such discussions and any review proceedings, and created a legal presumption in favor of the child's current placement.[85] That said, the Court reminded school districts that they were not "powerless" to deal with students they believed threatened the safety of the school community.[86] First, removals of less than ten days did not constitute a change in placement and therefore could be unilaterally effected without parental input or consent.[87] Second, the Court noted schools could employ the due process procedures of the Act or seek injunctive relief in a court of law.[88] Still, *Honig* stands as a stern judicial reminder of the vitality of parental rights under federal disability law.

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79. *Id.* at 317.
80. *Id.* at 323.
81. *Id.*
82. *Id.*
83. *Honig*, 484 U.S. at 311.
84. *Id.* at 328.
85. *Id.* at 324.
86. *Id.* at 306.
87. *Id.*
88. *Honig*, 484 U.S. at 307.

C. Individuals with Disabilities Education Act of 1990

In 1990, the EAHCA was amended for the second time and in so doing, renamed the Individuals with Disabilities Education Act.[89] While many of the changes might be characterized as cosmetic in that the term "handicapped child" was removed from the Act's lexicon and replaced with the term "child with a disability," more substantive changes were also made. While none directly impacted the parental rights first enumerated under the original Act, the added requirements, that IEPs plan for the transition from high school to post-school life for older children[90] and include "assistive technology"[91] if needed as a part of special education and related services, can be read to increase parental rights simply because they impact children's rights in positive ways.

In addition, the regulations promulgated to implement the IDEA appear to grow in sophistication and employ considerable commentary to assist state and local officials in interpreting their obligations. One interesting note appears, appearing in the 1993 version of the regulations that appears, seems to limit parental rights by suggesting that situations may occur where the exercise of parental preferences may negatively implicate a child's right to FAPE. In relation to a denial of parental consent, provisions of the 1993 regulations read as follows:

> If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in Secs.§§ 300.506–300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent. . . .[92]

The regulations further provided:

> [A] State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.[93]

What is more, a question and answer appendix to the regulations included the following example in response to a question about "what steps should be followed" if the parents and school officials cannot agree about an IEP:

> A child in the regular fourth grade has been evaluated and found to be eligible for special education. The agency and the parents agree that the child has a specific

89. Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103, 1141–42 (1990).
90. Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. § 1401(34) (2000)).
91. Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. § 1401(1) (2000)).
92. 34 C.F.R. § 300.504(b)(3) (1993).
93. 34 C.F.R. § 300.504(c) (1993).

> learning disability. However, one party proposes placement in a self-contained program, and the other proposes placement in a resource room. Agreement cannot be reached and a due process hearing is initiated. Unless the parents and the agency agree otherwise, the child would remain in the regular fourth grade until the issue is resolved.
>
> On the other hand, since the child's need for special education is not in question, both parties might agree—as an interim measure—[to a temporary placement].[94]

This construction of an override procedure when parental consent is refused was an interesting addition to the regulations. As will be explained later, a school district's options when parents deny consent would continue to evolve in subsequent versions of the Act and its regulations.

D. Florence County School District Four v. Carter (1993)

In *Florence County School District Four v. Carter*,[95] parental rights reached their judicial highpoint and even began to show some signs of waning. In *Carter,* the Court was asked to resolve the issue as to whether parents could be reimbursed for private school tuition when the district did not provide FAPE and the parents removed their child to a school that did not meet the state approved education standards.[96] Extending its thinking in *Burlington*, the Court held that as long as the parental placement provided the FAPE denied by the school district's defective IEP, reimbursement was allowable.[97]

Although the parents prevailed in obtaining full reimbursement, the Court was careful to narrow its holding. Indeed, foreshadowing some contraction of parental rights under the IDEA, the Court set forth restrictions on entitlement to reimbursement. First, parents could receive reimbursement "only" if a federal court held that public placement violated the IDEA and that the private placement was appropriate under the law.[98] Second, the Court suggested that judges had the equitable power to tailor the amount of reimbursement in cases where a public placement violated the IDEA, but the cost of the private placement was "unreasonable."[99]

IV. THE IDEA EXPANDS

The last part of the 1990s saw considerable expansion of the IDEA and of parents' rights under its provisions. Most notable in this time period was the enactment of substantial revisions to the Act in 1997. The Supreme Court also clarified its *Tatro* ruling in a case involving one-on-one nursing services.

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94. Appendix C to 34 C.F.R. pt. 300, app. C (1993) (Question 35).
95. 510 U.S. 7 (1993).
96. *Id.* at 129.
97. *Id.* at 15.
98. *Id.*
99. *Id.* at 16.

A. Individuals with Disabilities Education Act Amendments of 1997

The 1997 amendments made to the IDEA [hereinafter IDEA 1997] affected nearly every provision of the Act in some way. With regard to parental rights, a close reading of both the statute signed on June 4, 1997 by President Bill Clinton and the 1999 regulations promulgated to implement the changes can only be read as an enhancement of parental rights under the law. In fact, Congress declared:

> Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.[100]

Congress accomplished that strengthening in several ways that impacted the domains of each of the four main rights' domains: notice, consent, participation, and complaint. In relationship to the notice requirements, new statutory and regulatory language was added (1) to specify precisely what content must be included in a notice of rights to parents;[101] (2) to require that notice be given whenever a child is referred for evaluation, an IEP team meeting is convened, the child is re-evaluated for special education eligibility or whenever the parent files a complaint under the Act;[102] and (3) that the language used be easily understandable to parents.[103] With regard to parental consent, while new statutory language merely codified earlier regulations, new regulatory language appeared to back away from an override procedure when consent is refused. Although the regulations retain the override provision when parents refuse an evaluation, no mention is made of the school's authority to use the same procedures if consent to services is denied.[104]

The major area of parental rights impacted by IDEA 1997 involved parents' participation in decision-making. A new section defines who must be on an IEP team, and lists parents first, in order to clarify their role in the process.[105] The added requirement that a regular classroom teacher be on most IEP teams can also be read to positively impact parental rights,[106] as it provides parents a mechanism by which not only to gather input from those teachers, but to ensure that the teachers are aware of the IEP and how it is to be implemented in regular classrooms. Likewise, the creation of a legal presumption that children with disabilities must be educated with their non-disabled peers unless evidence demonstrates that the child needs something else in order to obtain FAPE strengthens parents' hand when advocating for inclusive placements.[107]

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100. 20 U.S.C. § 1400(c)(5)(B) (1997).

101. 20 U.S.C. § 1415(d)(2) (1997).

102. 34 C.F.R. § 300.504(a) (1997).

103. 20 U.S.C. § 1415(b)(1) & (d)(2) (2000); 34 C.F.R. 300.504-505 (1997).

104. 34 C.F.R. § 300. 505 (1997).

105. 20 U.S.C. § 1414(d)(1)(B)(i) (2000); 34 C.F.R. § 300.344(a)(1) (1997).

106. 20 U.S.C. § 1414(d)(1)(B)(ii) (2000); 34 C.F.R. § 300.344(a)(2) (1997).

107. 20 U.S.C. § 1414(d)(1)(A)(iv) (2000); 34 C.F.R. § 300.347(a)(4) (1997).; *see also* Julie F. Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 WEST'S EDUC. L. REP. 511, 512–19 (1998).

The new evaluation and IEP provisions required: (1) that parental input be gathered as part of any evaluation;[108] (2) for the first time, "measurable" annual goals[109]; (3) that copies of IEPs are to be given as a matter of course rather than upon "request;"[110] (4) that children with disabilities are to be included on any state or district-wide assessments of academic performance;[111] and (5) required that parents of children with disabilities be given information on student progress as often as parents of non-disabled children, and specifies that that such information specifically include the child's progress include advancement ontoward IEP goals.[112] Each of these additions can all be read to enhance parental participation rights, by providing mechanisms to keep parents better informed about their child's education and its effectiveness. In addition, a provision was added to clarify that charter schools must comply with the IDEA, thus making it clear that parents of disabled children enjoy the same rights as other parents to enroll their children with disabilities in charter schools as do other parents.[113]

Parents' rights to participate in the placement decisions regarding their children with disabilities were also negatively impacted by the 1997 amendments. Just as the HCPA constituted a congressional response to the Supreme Court in *Smith*, the discipline provisions of IDEA 1997 were a response to the Court's ruling in *Honig*.[114] The construction of section 1415(k) marked the first time the IDEA contained any language with regard to how a school's disciplinary authority intersected with special education delivery and students' rights. Codifying the *Honig* ruling, school authorities were granted the authority to remove children from their placements for up to ten days without it constituting a change of placement that triggered parental procedural rights.[115] However, Congress essentially created the dangerousness exception found absent in *Honig* by granting school officials the unilateral authority to remove a child for up to forty-five days to an interim alternative educational setting as a consequence for bringing a gun, any other weapon, or drugs to school.[116] In addition, school officials were given the authority to seek an order for a forty-five day removal through an expedited hearing process if they present "substantial" evidence that a child is a likely danger to self or to others.[117] Parents retained three important rights in these statutory and regulatory disciplinary provisions. First, they could challenge any forty-five day removal through due process procedures through an expedited due process review.[118] Second, regulations recognized that cumulative suspensions could constitute a change of placement, in which case all procedural protections, including parental rights, would apply.[119] Finally, and most importantly, the law crafted a process for

108. 20 U.S.C. § 1414(b)(2)(A)) (2000); 34 C.F.R. § 300.535(a)(1) (1997).
109. 20 U.S.C. § 1414(d)(1)(A)(ii)) (2000); 34 C.F.R. § 300.347(a)(2) (1997).
110. 20 U.S.C. § 1414(b)(4)(B)) (2000); 34 C.F.R. § 300.345(f) (1997).
111. 20 U.S.C. § 1414(d)(1)(A)(v) (2000); 34 C.F.R. § 300.347(a)(5) (1997).
112. 20 U.S.C. § 1414(d)(1)(A)(viii)(II)(aa) (2000); 34 C.F.R. § 300.347(a)(7)(ii)(A) (1997).
113. 20 U.S.C. § 1413(a)(5)) (2000); 34 C.F.R. § 300.241 (1999).
114. *See* Mead, *supra* note 106, at 520.
115. 20 U.S.C. § 1415(k)(1)(A)(i)) (2000); 34 C.F.R. § 300.520 (a)(1)(i) (1999).
116. 20 U.S.C. § 1415(k)(1)(A)(ii)) (2000); 34 C.F.R. § 300.520 (a)(2) (1999).
117. 20 U.S.C. § 1415(k)(2)(A) (2000); 34 C.F.R. § 300.521(a) (1999).
118. 20 U.S.C. § 1415(k)(6)(A) (2000); 34 C.F.R. § 300.525(a) (1999).
119. 34 C.F.R. § 300.519 (1999).

determining when misbehavior is actually a manifestation of the disability.[120] Parents retained their rights to be involved in this process that implicates the placement of their child[121] and, in fact, the law created a rebuttable legal presumption that the misbehavior was a related to the disability unless school personnel could demonstrate otherwise.[122] By creating this presumption, the default position would be that the child would escape expulsion for any misbehavior unless officials clearly demonstrated that the disability played no substantial role in the offense. So even when parents' rights to participate in some placement decisions were sharply curtailed, they were not completely excised from the process.

Parental rights related to complaints were also altered by IDEA 1997. The most significant change was the addition of a voluntary mediation process.[123] This change arguably has mixed effects on parental rights. On the positive side, mediation is designed to be less adversarial and less costly to both parties. Still, since mediation can result in a settlement agreed to by both parties, it is possible that parents may agree to a result that does not fully address all their rights or those of their child. In addition to the mediation provisions, other new provisions related to complaints specify what must be in a notice of complaint to the school district.[124] For example, parents could no longer simply lodge a complaint, they had to describe the "nature of the problem," the "facts of the problem," and "a proposed resolution."[125] Finally, new language also placed new limitations on the recovery of attorneys' fees.[126] Specifically, even prevailing parents in any dispute could no longer recover fees associated with attendance at an IEP meeting unless that meeting was ordered by a hearing officer or judge or if the attorney failed to assist the parents to provide the requisite notice to the school district about the nature of the complaint.[127]

In summary, the number of new provisions implicating parental rights in IDEA 1997 can only be described as significant and predominantly, if not overwhelmingly positive enhancements to the rights enjoyed under earlier iterations of the law.

B. Cedar Rapids Community School District v. Garret F. (1999)

A parent's advocacy power advanced once again following *Cedar Rapids Community School District v. Garret F.* in 1999,[128] where the court reaffirmed its *Tatro* decision. In *Garret*, the Court included as a qualified related service under the IDEA one-on-one nursing support for a student dependent on a ventilator.[129] The Court reaffirmed its two-part *Tatro* test for determining whether a service was a related

120. 20 U.S.C. § 1415(k)(4) (2000); 34 C.F.R. § 300.523-524 (1999).

121. 20 U.S.C. § 1415(k)(4)(B) (2000); 34 C.F.R. § 300.523(b) (1999).

122. 20 U.S.C. § 1415(k)(4)(C) (2000); 34 C.F.R. § 300.523(c) (1999). For a discussion, *see generally* Mead, *supra* note 106.

123. 20 U.S.C. § 1415(e) (2000); 34 C.F.R. § 300.506 (1999).

124. 20 U.S.C. § 1415(b)(7) (2000); 34 C.F.R. § 300.507(c) (1999).

125. 20 U.S.C. § 1415(b)(7) (2000); 34 C.F.R. § 300.507(c) (1999).

126. 20 U.S.C. § 1415(i)(3)(D)) (2000); 34 C.F.R. § 300.513 (c)(2) (1999).

127. 20 U.S.C. § 1415(i)(3)(D)) (2000); 34 C.F.R. § 300.513 (c)(2) (1999).

128. 526 U.S. 66 (1999).

129. *Id.*

service.[130] In doing so, the Court rejected the school district's argument that a multi-factor test that included including the financial burden on the district, and the nature and extent of the services themselves should be adopted in determining a district's obligations with respect to related services.[131]

Moreover, the bargaining hand of parents with special needs children, especially those who required more costly related services, was strengthened under *Garret F.* because of the court's rejection of the district's attempt to create an "undue burden" exception for providing related services.[132] The Court recognized a cost on districts for providing related services in certain cases, but in its rejection of the district's argument, it noted that because the IDEA's related services provision:

> does not employ cost in its definition of "'related services'" or excluded "'medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA. The statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children, and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA. But Congress intended "to open the door of public education" to all qualified children and "required participating States to educate handicapped children with non-handicapped children whenever possible."[133]

Further, parental advocacy power was strengthened in *Tatro* through the Court's reaffirmation of its bright line position regarding the exclusion of a related service on the grounds that it was a medical exemption. Under the medical exemption for related services, a district would not have be required to provide the service under the IDEA *only* if that service *required* a physician.[134] In other words, the Court's bright line test foreclosed school districts from using the medical exemption provision for services that fell within a more broad definition of the term. According to the Court, the term medical services, with respect to the exclusionary language under the IDEA "does not embrace forms of care that might loosely be described as 'medical' in other contexts...."[135] Importantly, the bright line and strict "physician-only" test makes it more difficult for districts to exercise an exemption in any border-line case where a medical service can be provided by other medical professionals or staff, such as a nurse. In sum, because *Garret F.* broadened what constituted a related service under the IDEA to include continuous care, notwithstanding consideration of cost as the sole determinant, and simultaneously limited the medical exemption for a related service, the bargaining strength of parents, especially those with children who required more extensive care, was strengthened. Indeed, *Garrett F.* closed any possible "loopholes"

130. *Id.* at 73.
131. *Id.* at 75.
132. *Id.* at 77–79.
133. *Garret F.*, 526 U.S. at 77–78 (internal citations omitted).
134. *Id.* at 76.
135. *Id.* at 74.

with which a district might use to exempt themselves from providing a related service necessary to a student's special education.

V. LIMITING THE IDEA

If the 1990s could be characterized as largely expanding parental rights through legislative and judicial activity, the first decade of the twenty-first century may well mark the point at which the pendulum shifted toward more moderated entitlements. Thus far, the decade has seen another major revision to the IDEA and two important Supreme Court cases which both affirmed the school districts' positions in relation to parental rights.

A. Individuals with Disabilities Education Improvement Act of 2004

The 2004 reauthorization of the IDEA, the Individuals with Disabilities Education Improvement Act of 2004,[136] continued the evolution of parental rights of advocacy. As with the 1997 version, provisions implicated parental rights in both positive and negative ways with regard to notice, consent, participation, and complaint. Rights related to notice only changed slightly by reducing the number of times school districts must provide actual copies of the rights to parents. Now, parents only need to be provided rights upon initial referral for evaluation, whenever a complaint is filed, when the disciplinary removal sections of the Act are invoked or upon parental request.[137] While it is unknown whether this change will have any practical effect, reducing the school district's requirements to notify parents of their rights is at least nominally a reduction in the right to notice itself. In contrast, parents' rights were enhanced by new language in both the statute and regulation enhanced parents' rights by precluding the use of due process procedures to override parental refusal to grant consent for the initial provision of special education and related services was added to both the statute and regulation,[138] thus settling an issue that first surfaced in the 1990 regulations.

Like the 1997 amendments, the 2004 revisions impacted parents' right to participate in the evaluation and programming decisions of their children. Five important changes relate to the IEP and the IEP team and appear to have mixed, if not negative, impact on parental rights. First, the law no longer requires short term objectives or benchmarks unless the child will not participate in general state and local assessments,[139] though the law still requires that the IEP include "how progress will be measured."[140] Second, the requirement that progress be reported to parents at least as often as progress is reported about children without disabilities has been was deleted.[141] Third, new language allows IEP team members to be excused from meeting attendance if they are not needed or if attendance is not possible, but the member submits written

136. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

137. 20 U.S.C. § 1415(b)(3) (2000 & Supp. 2005); 34 C.F.R. § 300.504(d) (1999).

138. 20 U.S.C. § 1414(a)(1)(D)(ii) (2000 & Supp. 2005); 34 C.F.R. § 300.300(b) (1999).

139. 20 U.S.C. § 1414(d)(1)(A) (2000 & Supp. 2005); 34 C.F.R. § 300.320(a)(2) (1999).

140. 20 U.S.C. § 1414(d)(1)(A) (2000 & Supp. 2005); 34 C.F.R. § 300.320(a)(2) (1999).

141. 20 U.S.C. § 1414(d)(1)(A) (2000 & Supp. 2005); 34 C.F.R. § 300.320(a)(2) (1999).

input to other team members.[142] In either case, written parental approval for the absence of the member must be secured;[143] however, it raises the question of whether parents will have sufficient information to participate fully in decision-making if not all team members are present. In addition, it will be important to examine the implementation of these sections to ensure that parents, who may not fully understand how IEP Teams work and their rights under the law, are not pressured to excuse team members as a convenience to school personnel. Fourth, IEPs may now be amended informally without an IEP Team meeting.[144] As the regulations explain:

> (i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. (ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.[145]

There is much left unanswered by this section. Who will represent the agency in such a change? May any team member do so? If one member of the team and the parent agree to a change and another member of the team disagrees with that alteration, would the change have to be rescinded until the entire team could meet? Still, this change could make life easier for both parents and teachers by streamlining the process and reducing the need for meetings. On the other hand, this change has the potential to diminish parental participation in the child's programming, by limiting the information available to the parent concerning the proposed changes and their implications. Finally, the law now includes provisions for a limited number of demonstration projects to explore the possibility of multi-year IEPs.[146] While each of these changes was enacted in order to try to reduce the burden of meetings and paperwork on school personnel, especially teachers, whether these changes will positively or negatively impact parental rights and their ability to meaningfully participate in the IEP process remains to be seen.

Parents' rights to participate in decision-making about their child were also implicated by the revised discipline section of IDEA 2004. Three major changes in the provisions were made to the law, all of which negatively impact the rights enjoyed by parents under the previous version. First, gone is the presumption that favors the child whenever agreement cannot be reached concerning whether an offense is a manifestation of a child's disability.[147] The old language allowed the team to determine the absence of a relationship "only if" evidence supported that conclusion.[148] Now the language requires that:

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142. 20 U.S.C. § 1414(d)(1)(C) (2000 & Supp. 2005); 34 C.F.R. § 300.321(e) (1999).
143. 20 U.S.C. § 1414(d)(1)(C) (2000 & Supp. 2005); 34 C.F.R. § 300.321(e) (1999).
144. 20 U.S.C. § 1414(d)(3)(F) (2000 & Supp. 2005); 34 C.F.R. § 300.324(a)(4) (1999).
145. 34 C.F.R. § 300.324(a)(4) (1999).
146. 20 U.S.C. § 1414(d)(5) (2000 & Supp. 2005).
147. 20 U.S.C. § 1415(k)(1)(F) (2000 & Supp. 2005); 34 C.F.R. § 300.530(e) (1999).
148. *See supra* note 114 and accompanying text.

> [W]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
>
> > (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
> >
> > (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.
>
> (ii) MANIFESTATION- If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.[149]

Moreover, school districts may now unilaterally remove a child for inflicting "serious bodily injury" in addition to weapon and drug offenses.[150] Finally, long term removals to an interim alternative educational setting for one of these three offenses may now occur for forty-five *school* days, rather than forty-five calendar days.[151] Read together, these three changes to the disciplinary section of the law clearly advantage the school district over the parent whenever the two parties disagree about the propriety of consequences proposed for the misbehavior of a child with a disability.

One final change may impact parental rights in a positive way. Just as the charter school provision added in 1997 opened up choices for parents, a new provision related to private school placements have the potential to improve services for children placed in private schools by their parents. The provisions do not explicitly change anything for parents of such children, but for the first time create a mechanism for private school personnel to challenge local school districts concerning the delivery of special education services in that context.[152] Theoretically, at least, by providing this new appellate procedure, private school officials may be able to use the IDEA to improve the quality and number of services provided to children with disabilities in their schools. As such, they would be acting not only on behalf of the children with disabilities enrolled in the private school, but also the parents who enrolled them there.

Six provisions effected substantive changes to parents' right to file complaints in relation to their child's education and only one of them can be construed to enhance previously enjoyed rights. That provision makes clear that any settlement agreement

149. 20 U.S.C. § 1415(k)(1)(F) (2000 & Supp. 2005).
150. 20 U.S.C. § 1415(k)(1)(G) (2000 & Supp. 2005); 34 C.F.R. § 300.530(g)(3) (1999).
151. 20 U.S.C. § 1415(k)(1)(G) (2000 & Supp. 2005); 34 C.F.R. § 300.530(g)(3) (1999).
152. 20 U.S.C. § 1412(a)(10(A)(iii) (2000 & Supp. 2005); 34 C.F.R. § 300.130-144 (1999).

entered into as a result of mediation is enforceable by a court of law.[153] The remaining sections all appear to limit parents' right to present complaints in some way. For example, the law now sets two years as the statute of limitations for any complaint where no limitation existed previously.[154] In addition, parents who do complain must now submit to an additional process called a "resolution session" as a means to try to diminish the number of complaints that proceed to a full hearing.[155] If a hearing is held, a new provision instructs hearing officers and reviewing judges that parents may not prevail on the basis of procedural errors alone.[156] Rather, a finding that FAPE was denied may only occur if evidence demonstrates that procedural errors affected the substance of the programming received or "significantly impeded the parents' opportunity to participate in the decision-making process."[157] Recalling that attorney's fees are only available to "prevailing" parties who demonstrate that FAPE was denied, this provision will likely have the effect of reducing awards of attorneys' fees for parents. Furthermore, new provisions structure limitations on recovery in two instances: (1) whenever parents do not give ten day notice to school officials specifying their dissatisfaction prior to removing the child from the public setting and enrolling him or her in a private school, a new provision directs that reimbursement of tuition costs may be reduced;[158] and (2) if a court finds that a complaint brought by parents is frivolous or brought for some other improper purpose, courts may order parents to pay the state's costs incurred in answering the complaint.[159] Both of these provisions have the potential to create a chilling effect on parents inclined to carry forward disputes.

The collective effect of the changes made in 2004 seems to advantage school officials at the expense of parental rights to serve as advocates, when compared with the 1997 version of the law. It is, however, too early to know how much those rights have been curtailed in practice.

B. Schaffer v. Weast (2005)

In 2005, the Supreme Court heard its eighth IDEA case, *Schaffer v Weast.*[160] After *Schaffer*, parents face an additional hurdle in any challenge to their child's IEP. The Court stated the issue in *Schaffer* as the following: "At an administrative hearing to assess the appropriateness of an IEP, which party bears the burden of persuasion?"[161] Writing for the majority, Justice O'Connor applied the generally accepted rule of evidence that the plaintiff bears the ultimate burden of persuasion. In contrast to previous decisions where the Court readily interpreted a congressional intent that favored the parents' positions,[162] no such intent was apparent with respect to the burden

153. 20 U.S.C. § 1415(e)(2)(F) (2000 & Supp. 2005); 34 C.F.R. § 300.506(b)(6) (1999).
154. 20 U.S.C. § 1415(b)(6)(B) (2000 & Supp. 2005); 34 C.F.R. §300.511(e) (1999).
155. 20 U.S.C. §.1415(f)(1)(B) (2000 & Supp. 2005); 34 C.F.R. §300.510 (2006).
156. 20 U.S.C. § 1415(f)(3)(E) (2000 & Supp. 2005); 34 C.F.R. §300.513 (2006).
157. 20 U.S.C. § 1415(f)(3)(E) (2000 & Supp. 2005); 34 C.F.R. §300.513 (2006).
158. 20 U.S.C. § 1412(a)(10)(C)(iii) (2000 & Supp. 2005); 34 C.F.R. §300.148(d) (2006).
159. 20 U.S.C. § 1415(i)(3)(B)(i)(II–III) (2000 & Supp. 2005); 34 C.F.R. §300.517(a)(1)(ii–iii) (2006).
160. Schaffer v. Weast, 546 U.S. 49 (2005).
161. *Id.* at 54.
162. *See, e.g., Burlington* and *Carter, infra.*

of proof in determining the adequacy of an IEP.[163]

In fact, with respect to parental rights vis-à-vis schools, Justice O'Connor shifted the balance of power toward schools and away from parents by emphasizing that schools are in a better position to make educational decisions. For example, she noted that the IDEA "relies heavily upon the expertise of school districts to meet its goals."[164] In part based on this expertise, she rejects the parents' argument and the previous holdings of several circuit courts of appeals[165] that there should be a presumption against a district in a challenge to an IEP. Justice O'Connor wrote that "[p]etitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The act does not support this conclusion."[166]

Furthermore, Justice O'Connor's majority opinion suggests that parental rights under the IDEA are sufficient to ensure alignment with the Congressional intent of providing FAPE to all children. She cites several regulations under the IDEA relied upon in reaching her conclusion, including provisions that permit parents to access experts and to evaluate information, and require school districts to disclose expert information.[167] Indeed, Justice O'Connor reaches back to *Rowley* to conclude that parents essentially have sufficient protections under the procedural safeguards embedded in the IDEA.[168] Directly citing *Rowley*, she writes that: "Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances."[169] Ironically, while the Court used *Rowley* as a starting point to establish parental rights and power to advocate, *Schaffer* uses that same reasoning to effectively halt further growth in parents' struggle to equalize a perceived power differential in relation to school authorities.

C. Arlington Central School District Board of Education v. Murphy (2006)

Parental bargaining strength further diminished when the Supreme Court made its ruling in *Arlington Central School District Board of Education v. Murphy*.[170] At issue was whether the plaintiff-parents could be reimbursed by the school district for educational expert fees that totaled over $29,000 under the IDEA fee-shifting provisions.[171] In pertinent part, the IDEA provides that a court "may award reasonable attorneys' fees as part of the costs" to prevailing parents.[172] In a five-to-four opinion authored by Justice Alito, the Court declined to extend this provision to include reimbursement to parents for costs incurred for hiring experts.[173]

Justice Alito's opinion addressed squarely the parents' argument that the

163. *Schaffer*, 546 U.S. at 57.
164. *Id.* at 59.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Schaffer*, 546 U.S. at 60.
169. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006).
170. *Id. at* 2458.
171. *Id.* at 2458
172. 20 U.S.C. § 1415(i)(3)(B) (2000 & Supp. 2005).
173. *Murphy*, 126 S. Ct. at 2457.

overarching goals of the IDEA to enhance parental advocacy rights supported a finding that expert fees are recoverable for prevailing parents. Unpersuaded by that argument, Justice Alito's opinion found this legislative objective far too broad to be applied in this case, especially when considering the potential financial impact on districts if a decision were rendered in favor of the parents. For the Court, Alito wrote, "[t]hese goals, however, are too general to provide much support for respondents' reading of the terms of IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations."[174]

Furthermore, the Court dispensed with the parents' argument that Congressional intent supported a finding that prevailing parents could recover expert fees.[175] In support of their argument, the parents in *Murphy* pointed to the House and Senate Conference Report concerning the EHA. The Conference report stated plainly: "The conferees intent that the term attorneys' fees as part of the costs include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.'"[176] The parents argued that the adoption of the word "intent" by the conferees in their report settled the issue of expert fee reimbursement.

The majority of the Court rejected the parent's legislative "intent" argument. Despite the conferees adoption of the word "intent," the Court's opinion determined that this report reflected a legislative *history* of the IDEA, rather than legislative *intent.*[177] In the larger "historical" context, the singular adoption by the conferees of the word "intent" was insufficient to find that expert fees were recoverable. This conclusion was especially true, the Court reasoned, in a case covered by the Spending Clause—which *Murphy* was, according to the Court—where states must be "clearly told the conditions that go along with the acceptance" of funds.[178] The IDEA, according to the holding in *Murphy*, did not give clear notice to the states because text of the Act itself did not include a provision for recovery of expert fees for the prevailing party.[179] Thus, the court refused to construe the IDEA as permitting recovery for expert fees.[180]

D. Winkleman v. Parma (2007)

Discussion of the evolution of parental rights would be incomplete without accounting for the most recent iteration of those rights found in *Winkleman v. Parma.*[181] The issue facing the Court was stated as "whether parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel through they are not trained or licensed as attorneys."[182]

By way of factual history, the parents in this case initially challenged a proposed IEP for their son who has autism. The parents were unsuccessful at the initial

174. *Id.*
175. *Id.* (quoting H.R. Conf. Rep. No. 99-687, at 5, *reprinted in* 1986 U.S.S.C.A.N. 1807, 1808.
176. *Id.*
177. *Id.*
178. *Murphy*, 126 S. Ct. at 2457.
179. *Id.*
180. *Id.*
181. 127 S. Ct. 1994.
182. *Id.* at 1998.

administrative hearing.[183] The parents proceeded to file, on their own behalf and on behalf of their son, a complaint in federal district court.[184] The district court granted the defendant's motion for judgment on the pleadings and held that the defendants had provided a free appropriate education for the Winklemans' son, Jacob.[185] The Winklemans filed an appeal, without an attorney, to the Sixth Circuit.[186] The Sixth Circuit rejected the notion that the IDEA allows non-lawyer parents to proceed *pro se*. In doing so, the Sixth Circuit held that right to FAPE rests with a child alone, not to both the child and his parents.[187] Accordingly, the Sixth Circuit ruled that parents bringing IDEA claims could not appear on their own behalf, nor litigate their child's claims without an attorney.[188] Because the Sixth Circuit's ruling directly conflicted with the First Circuit's ruling on the issue as to whether a non-lawyer parent of a child with a disability may assert IDEA claims *pro se*, the Supreme Court granted *certiorari* to the parents in *Winkleman*.[189]

The Supreme Court reversed the Sixth Circuit and found in favor of the parents. The Court's opinion, written by Justice Kennedy, concluded that the "IDEA grants parents independent, enforceable rights. These rights . . . encompass the entitlement to a free appropriate public education for the parents' child."[190] Furthermore, in enforcing these rights, parents could proceed *pro se*. The Court held: "Parents enjoy rights under IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf."[191] The Court refrained from deciding the second issue in the case as to whether parents could proceed *pro se* on behalf of their children.[192]

The holding that parents may, on their own behalf, assert a claim for denial of FAPE, may turn out to be something of a hollow victory. While *Winkleman* entitles parents to a new right, it also opens a legal trap door: *pro se* representation. *Pro se* representation carries with it a host of pitfalls and unintended consequences. Parents choosing to enforce their own rights on their own behalf will no doubt be up against experienced legal counsel for the school district. In unmatched contests, parents face a real prospect of losing more often than winning, as the Winklemans did in this case. The difficulties are considerable, especially under the *Schaeffer* holding, which lay the burden of persuasion on the parents in any challenge to a district's recommendation.[193] Moreover, *pro se* representation will only extend the time line for resolution of the underlying dispute with potential negative impact on the child who is caught in the dispute. If parents represent themselves to enforce their right to the child's FAPE, and in the meantime do not pull their child out of the school for private placement (in itself a potentially costly and risky move), a child may be left in the lurch as his parents

183. *Id.*
184. *Id.*
185. *Id.*
186. *Winkleman*, 127 S. Ct. at 1998.
187. *Id.* at 1999 (citing Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (2005)).
188. *Id.*
189. *Id.*
190. *Id.* at 2005.
191. *Id.* at 2006.
192. *Winkleman*, 127 S. Ct. at 2007.
193. *See Schaeffer v. Weast*, 546 U.S. 49 (2005)

navigate through the court system. Accordingly, the practical implications of the *Winkleman* decision are unclear.[194]

VI. DISCUSSION

As the above description illustrates, parental rights have evolved considerably since the EAHCA's enactment in 1975. In addition, it is clear that the rights parents enjoy today are significantly greater than those enjoyed by parents of children with disabilities educated under the earliest iteration of the Act. As mentioned earlier, the rights enjoyed by parents fall into four general areas: notice, consent, participation, and complaint. Using those four broad categories, Table 1 delineates the rights currently enjoyed by parents.

194. The Court also recently issued a per curiam decision in Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007). The Court was evenly divided with Justice Kennedy electing not to participate. Therefore, the decision of the Second Circuit was affirmed without discussion. The question before the Court was whether a child must first be enrolled in a public school in order for the parents to collect reimbursement for private school tuition costs even if the parents prevail in a due process hearing that alleges that the public school district failed to make FAPE available. The Second Circuit Court of Appeals, taking the side of the parents, ruled that parents' right to receive reimbursement was still available if they could demonstrate that the IEP offered would not provide FAPE. However, since the Supreme Court's decision sets no precedent beyond the Second Circuit, it is not included in this analysis.

Table 1: Current Parental Rights under the IDEA

	Parents have the right to . . .
Notice Provisions:	▪ Receive written notice of their rights under the law ▪ Receive written notice of the school's intent to evaluate for special education services ▪ Receive written notice of whenever the school initiates a change of placement or refuses to make a change of placement
Consent Provisions:	▪ Grant or deny permission to evaluate their child ▪ Grant or deny permission to provide special education and related services to their child
Participation Provisions:	▪ Be a member of any Individualized Education Program (IEP) Team for their child ▪ Have access to all records about their child ▪ Have all evaluation results explained to them ▪ Participate in all decisions about their child ▪ Receive copies of evaluations and IEPs regarding their child ▪ Receive information about child's progress ▪ Have information they have independently gathered considered by school officials ▪ Invite persons of their choosing to meetings called to discuss the child and plan for the child ▪ Obtain independent evaluation of their child at school expense when they disagree with the school's evaluation results
Complaint Provisions:	▪ Be offered mediation at school expense as means to settle a dispute with the school ▪ Challenge school's decisions in front of an impartial hearing officer ▪ Appeal the decision of the hearing officer in state court or federal district court ▪ Receive reimbursement of attorney's fees and educational costs if the district fails to provide an appropriate education

Analysis of the various legislative revisions and judicial interpretations that resulted in the evolution of listed rights suggests that parental rights under the IDEA appear to have had two zeniths: one legislative and one judicial.

To examine the legislative revisions to parental rights, Table 2 (see Appendix A) provides a side-by-side comparison of parental rights and their treatment under each version of what is now the IDEA. As indicated, changes in the law and regulations

sometimes enhanced parental rights, limited parental rights, had a mixed effect, or had a neutral effect. To summarize those changes, Table 3 reports only the number of provisions that changed with regard to the four domains of parental rights prescribed by the EAHCA (notice, consent, participation, and complaint) and whether those changes were positive (+), negative (-), mixed (+/-) or neutral (0).

Table 3: Effect of Statutory & Regulatory Revisions on Parental Rights

	HCPA				IDEA 1990				IDEA 1997				IDEA 2004			
	+	-	+/-	0	+	-	+/-	0	+	-	+/-	0	+	-	+/-	0
Notice Provisions									3					1		
Consent Provisions						2			1			1	1			
Participation Provisions									10	2		7	1	5	2	
Complaint Provisions	1							1		2	1		1	5		2
Totals	**1**	**0**	**0**	**0**	**0**	**2**	**0**	**1**	**14**	**4**	**1**	**8**	**3**	**11**	**2**	**2**

As this tabulation shows, with the notable exception of the addition of the attorneys' fee provision in the HCPA, little substantive change occurred until 1997. In addition, Table 3 demonstrates that the 1997 revisions contained numerous provisions that could be read to augment parental rights. As such, the passage of IDEA 1997 may be seen as the high point of congressional action that can be said to champion parental rights. In contrast, IDEA 2004 appears to have the overall effect of restraining the rights gained in earlier provisions as parental rights were significantly diminished from the 1997 version.

Turning to judicial activity, the ten decisions rendered by the U.S. Supreme Court regarding the educational rights of children with disabilities and their parents under the federal disability law also implicated parental rights in meaningful ways. Table 4 summarizes those decisions and the results they had for the exercise of parental rights under the Act.

Table 4: Supreme Court Decisions in Relation to Parental Rights

	Results Favoring Parental Rights	**Results Favoring Schools**
Board of Education v. Rowley (1982) [Whether a FAPE required a sign language interpreter]	▪ Established centrality of parental role in decision-making process	▪ FAPE is a "floor of opportunity" ▪ Explicitly states that educational decisions deserve deference & established test that defers ***Held for the School District***
Irving Independent School District v. Tatro (1984) [Whether clean intermittent catheterization was a related service or was medically excluded]	▪ Read law to require a service whenever it could be performed by someone other than a doctor ***Held for the Parents***	
Smith v. Robinson (1984) [Whether attorneys' fees could be recovered]		▪ Determined that parents could not recover attorney's fees if they prevailed in a complaint that showed school failed to provide FAPE ▪ Determined that administrative remedies under EAHCA had to be exhausted before parents could bring a complaint to court ***Held for the School District***

	Results Favoring Parental Rights	**Results Favoring Schools**
School Committee of Burlington v. Department of Education (1985) [Whether parents could recover tuition costs if private school enrollment occurred because school denied FAPE]	▪ Determined that parents could recover private school costs including tuition, if they prevailed in a complaint that showed school failed to provide FAPE ***Held for the Parents***	
Honig v. Doe (1988) [Whether due process protections applied in the case of disciplinary removals]	▪ Refused to read the law to include an exception to procedural requirements when a student is "dangerous" ***Held for the Parents***	▪ Specifically suggested that schools could use court injunctions to remove students deemed "dangerous"
Florence County School District Four v. Carter (1993) [Whether parents could recover tuition costs if private school was not "approved" by the state]	▪ Determined that parents could recover private school costs including tuition, if they prevailed in a complaint that showed school failed to provide FAPE and the school they selected was appropriate even if not approved by the state ***Held for the Parents***	▪ Noted that reductions could be made for tuition costs deemed "unreasonable" by the court
Cedar Rapids v. Garret F. (1999) [Whether one-to-one nursing services were required as a related service or was medically excluded]	▪ Reiterated bright-line doctor/no-doctor test from *Tatro* ▪ Refused to consider cost in the calculation of whether a service could be medically excluded ***Held for the Parents***	

	Results Favoring Parental Rights	**Results Favoring Schools**
Schaffer v. Weast (2005) [Whether the parents or the school bore the burden of persuasion regarding appropriateness of an IEP]		▪ Established that the burden of persuasion rests with the party challenging the decision ***Held for the School District***
Arlington Central School Dist. v. Murphy (2006) [Whether expert witness fees could be recovered if parents prevail]		▪ Determined that parents could not recover expert fees if they prevailed in a complaint that showed school failed to provide FAPE ***Held for the School District***
Winkleman v. Parma City School District (2007) [Whether nonlawyer parents have an enforceable right under the IDEA which they may prosecute *pro se*]	▪ Parents enjoy rights under IDEA and may prosecute these rights *pro se* ***Held for Parents***	

As the table shows, six of the ten decisions held for the parents. It also shows that two of the three most recent decisions have held for school districts against parents. Examining the cases, their outcomes and their impact suggests that the Court's decision in *Carter* marks a judicial zenith for parental rights. It is the last decision to substantively expand parental rights. While *Garret* and *Winkleman* both ruled in parents' favor, neither did so dramatically. *Garret* merely reiterated the test set forth in *Tatro*, while *Winkleman*'s extension of the ability to appear *pro se* has the practical limitations outlined above. In contrast, *Schaffer* and *Murphy* can be read to have the effect of limiting parents' ability to advocate for their children in more dramatic and generally applicable ways.

To fully understand the import of this narrowing of parental rights under the IDEA, it is also necessary to examine the intersection of the IDEA with the No Child Left Behind Act (NCLB).[195] In light of the NCLB's emphasis on parental rights[196] and empowerment, this analysis presents something of a paradox. The central assertion in this paper—that parental rights under the IDEA reached judicial and legislative zeniths

195. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered portions of 20 U.S.C.); 20 U.S.C. 6301 (2000 & Supp. 2005).

196. *See* Four Pillars of NCLB, *available at* http://www.ed.gov/nclb/overview/intro/4pillars.html (last visited Sept. 6, 2007).

and have begun to wane—appears contrary to a main thrust of the NCLB. The power the NCLB seemingly confers upon parents to direct their children's education is a foundational "pillar" of that legislation.[197] How can this purported empowerment be reconciled with the suggestion that parental rights under the IDEA have diminished from their zenith?

A careful consideration of the parental rights under both IDEA and NCLB shows that limitations on parental rights outlined in this paper effectively undermine any real or imagined power the NCLB may offer parents of special education students. This result occurs because provisions under the IDEA outlined in this paper more directly affect individual students and parents, whereas the NCLB empowerment provisions are more systemic in nature. Indeed, the IDEA's limits on parental involvement strike at the core of parents' ability to affect substantive delivery of an education to *their* individual child. In contrast, the NCLB's "empowering" provisions have a larger, more systemic goal that may or may not affect parents' ability to leverage school districts to pursue parental interpretations of FAPE.

To understand this phenomenon it is first necessary to comprehend the NCLB provisions that can be read to empower parents. First the NCLB's emphasis on school accountability is intended to vest parents with additional rights over the direction of their child's public education. Increased parental oversight and control is a guiding principle of the law.[198] President Bush made this point literally moments before signing the legislation into law when he said,

> There must be a moment in which parents can say, "I've had enough of this school." Parents must be given real options in the face of failure in order to make sure reform is meaningful. And so, therefore, the bill's second principle is, is that we trust parents to make the right decisions for their children. Any school that doesn't perform, any school that cannot catch up and do its job, a parent will have these options: a better school, a tutor, or a charter school.[199]

In sum, achieving the NCLB's promise of improving student performance by 2014 is closely linked to increased parental involvement and power.[200]

There are a number of provisions embedded in the NCLB that appear to strengthen parental rights.[201] The most potent of these permits parents to transfer their child from a failing school into a school or district that is satisfying state standards.[202] In brief, under the structure of the NCLB, states create proficiency standards that all schools must satisfy by 2014.[203] In addition, each school must demonstrate that all pupils are making adequate yearly progress (AYP) toward realization of universal proficiency each school year. If a school does not satisfy these standards for two consecutive years,

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197. *See id.*

198. *See* Statement by President of the United States, 2002 U.S.C.C.A.N. 1614, 1615 (Jan. 8, 2002).

199. *Id.* at 1616–17.

200. *Id.*

201. For an outline of the major provisions of NCLB, see Perry A. Zirkle, Commentary, *NCLB: What does it mean for Students with Disabilities?*, 185 EDUC. LAW REP. 805 (2004).

202. *See* 20 U.S.C. § 6301 (2000 & Supp. 2005); 34 C.F.R. pt. 200 (2002).

203. 20 U.S.C. § 6311(b)(2)(E)–(H) (2000 & Supp. 2005).

parents may transfer their child to a school within the district or, in some circumstances,[204] to other districts, that are making AYP.[205] Further, parents also enjoy the right to supplemental services, free of charge, in the event that their child's school fails to make AYP for a third consecutive year.[206] Thus, it would appear that the NCLB actually expands parental rights in one very significant way: Ultimately, it could provide parents the option of choosing a school for their child and, at the very least, provides parents some discretion to enlist supplemental services and outside educational providers—but only for those parents with children enrolled in schools deemed in need of improvement for two or more consecutive years.

In other respects, the NCLB also appears to confer parental rights. Safety provisions in the law afford parents additional rights of school choice in schools that are considered dangerous environments. For example, parents may exercise the option of transferring their child from a school when that school is deemed dangerous or the child has been a victim of violent crime.[207] Furthermore, the NCLB contains sections that establish parental rights to be involved in the programmatic workings of Title I programs.[208] Finally, schools are required to apprise parents of their AYP standing[209] and the qualifications of the staff with respect to the highly certified teacher requirements of the NCLB.[210] These "sunshine" provisions appear to be in accord with President Bush's attempt to use the NCLB to increase parental power and oversight authority to direct their child's public education.[211] This perceived expansion of parental rights appears to contrast the general trend identified here that such rights, at least with respect to parents of special education students, are being diminished. How does one explain the seemingly contradictory trend?

The answer appears to lie in the distinction between individual and systemic accountability. The NCLB's parental rights provisions provide little, if any, insulation from restrictions on rights of special education parents that have resulted from judicial interpretations of the IDEA and its most recent reauthorization. Specifically, the diminishment of parental rights under the IDEA that have most recently manifested in *Schaeffer*, *Murphy* and IDEA 2004 constrain any advocacy power that may be conferred to parents under the NCLB. Notwithstanding the fact that special education parents may choose, in certain cases, their child's school placement under the NCLB's accountability structure, they are in no better position in controlling their child's day-to-day special education services. The exercise of parental strength in the "trenches"—at IEP meetings or in administrative hearings—continues to be governed by the limitations on parental rights as outlined in this paper.

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204. *Id.* § 6316(b)(11). To the extent practicable, school districts are authorized to establish a cooperative agreement with other districts that would permit students to transfer from failing school districts into districts that are satisfying AYP. If no agreement exists, a student would not be permitted to transfer.

205. 20 U.S.C. § 6316(b)(1)(E) (2000 & Supp. 2005).

206. *Id.* § 6316(b)(6)–(10), (e).

207. *See id.* § 7912.

208. *See id.* § 6318(a)(2), (c)–(e).

209. *See id.* § 6311(h)(1)(B)(ii).

210. *See* 20 U.S.C. § 6311(h)(2)(B), (h)(2)(E) (2000 & Supp. 2005).

211. *See supra* note 197, at 1616. ("No longer is it acceptable to hide poor performance. No longer is it acceptable to keep results from parents.")

The Supreme Court's *Schaffer* and *Murphy* decisions underscore the notion that the NCLB's choice provisions are limited by a restriction of parental power under special education law. A hypothetical example illustrates this point. Assuming parents have a child receiving special education services in a school that fails to meet AYP, the family now seeks to exercise the right under the NCLB to remove their child from a failing school to a school that is meeting AYP in the district. Such parents have utilized the most extreme right they have under the NCLB. Still, while the new school succeeds as a whole based on objective measurements and state standards, if the parents become unsatisfied with the programming needs for their particular child's special education, they stand in no better stead vis-à-vis the IEP process than they would have been absent the NCLB provisions. At this point in the hypothetical, when substantive disputes concerning particular special education needs and services bubble to the surface, limitations on parental advocacy kick in, even in a context where parents have exercised their most powerful right under the NCLB. The same limitations on their rights that would have operated in their child's "failing" school, limit their power in the "successful" school. Indeed, their newly minted right to choose a "passing" school under the NCLB does nothing to enhance their advocacy power under the IDEA.

For example, under *Schaeffer*, the hypothetical parents bear the burden of persuasion to show the proposed IEP is inadequate.[212] Further, the family may enjoy the right to mount experts to persuade the decision-maker and satisfy their burden, but this effort is not without cost. Under the rule in *Murphy*, even if they prevail, they will not recover expert fees.[213] To be sure, parents may be able and willing to pay expert fees and bear their burden. However, it is reasonable to assume that the prospect of paying those fees, even when they believe they will prevail, will give pause to parents as they consider taking legal action. Furthermore, even under *Winkleman*, parents may assert their own rights under the IDEA *pro se*, but as this paper points out, *pro se* litigation is problematic.

Still, it could be argued that the NCLB's accountability provisions create a press for what may be called systemic appropriateness. In other words, since FAPE, by definition, is necessary for an individual child with a disability to receive meaningful educational benefit, then FAPE for each individual child with a disability in a given school becomes the necessary predicate for the school to achieve AYP under the NCLB. While ensuring that FAPE is provided for each child does not ensure that AYP will be met, providing something less than FAPE for one or more children would likely undermine that objective.[214] As such, regardless of whether a child's parents assert the rights they enjoy to challenge an insufficient IEP or placement, NCLB's accountability demands may create an additional incentive for the system to get it right, so to speak.

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212. *Schaffer*, 546 U.S. at 62.

213. *Murphy*, 548 U.S. at 29.

214. This raises another interesting issue at the intersection of IDEA and the NCLB. Recall that if parents refuse consent to provide initial services, the school district is prohibited from challenging the decision. This parental decision effectively hampers a school's efforts to help the child obtain meaningful educational benefit, yet the school is still held accountable for that child's progress under the AYP provisions of NCLB. In other words, if school officials are right and the child should be receiving special education in order to achieve FAPE, but are prohibited from providing those services by the parents, it raises an issue of fundamental fairness if the parents' unappealable decision negatively impacts a school's ability to meet AYP under NCLB.

Accordingly, even if parental rights to advocate for their child under the IDEA appear constrained in relation to previous versions of the Act, the requirements schools face to demonstrate instructional effectiveness under the NCLB may mitigate the need to assert those rights.

VII. CONCLUSION

Children with disabilities are part of the "public" served by the country's public schools. Delivery of educational services is largely governed by federal disability law, in particular, the IDEA. Parents' rights to be informed, consent to special treatment, participate in decision making and challenge the system whenever they believe their child has been denied equal educational opportunity are important means of holding schools accountable for meeting the needs of children with disabilities.

While this paper traced the evolution of those rights to the present day, it is by no means a complete process. Considerable judicial activity continues with respect to the IDEA and schools' obligations to the children they serve. In addition to this pending judicial activity, it is likely that legislative action will continue to develop the contours of the rights enjoyed by parents as they advocate for their children with disabilities. Major parent and education organizations routinely lobby Congress and the Department of Education to consider altering the language or interpretation of the IDEA. For example, the Department of Education reported that 5500 separate parties (organizations and individuals) submitted comments through the formal rule-making process after proposed regulations were published in the Federal Register.[215]

As this iterative process continues, this study raises several questions. Will parents see their rights to advocate for their children with disabilities continue to diminish through subsequent legislative and judicial action? How will a narrowing of parental rights affect parental influence in the educational opportunities and results enjoyed by their children? Will any of the recent judicial interpretations spur Congress to revisit the law to correct decisions they or their constituents find inequitable? Will the pending reauthorization of the NCLB alter parents' rights as advocates? And most importantly, will the system of parents' procedural rights created by the IDEA provide sufficient protection for children with disabilities such that the IDEA realizes its primary purpose "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"?[216]

215. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540; 46,547 (2006).

216. 20 U.S.C. 1400(d)(1)(A) (2000 & Supp. 2005).

APPENDIX A

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Receive written notice of their rights under the law**	**Receive written notice of the school's intent to evaluate for special education services**
EAHCA 1975	Statute Regulations	Statute Regulations
HCPA 1986	Statute Regulations	Statute Regulations
IDEA 1990	Statute Regulations	Statute Regulations
IDEA 1997	Statute Regulations New Statutory and Regulatory language that specifies both the content of the notice in detail and the circumstances when notice must be provided and requires that the rights be written in a parent friendly language (+)	Statute Regulations New Statutory & Regulatory language that specifies both the content of the notice in detail and the circumstances when notice must be provided (+)
IDEA 2004	Statute Regulations New Statutory and Regulatory language reduces the number of times when parents must be provided a copy of their rights (-)	Statute Regulations

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Receive written notice of whenever the school initiates a change of placement or refuses to make a change of placement**	**Grant or deny permission to evaluate their child.**
EAHCA 1975	Statute Regulations	Regulations
HCPA 1986	Statute Regulations	Regulations
IDEA 1990	Statute Regulations	Regulations New Language that specifies override procedures if consent is denied (-)
IDEA 1997	Statute Regulations	Statute Regulations New Statutory language that codifies previous regulatory language (0)
IDEA 2004	Statute Regulations	Statute Regulations

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Grant or deny permission to provide special education and related services to their child**	**Be a member of any Individualized Education Program (IEP) Team for their child**
EAHCA 1975	Regulations	Statute Regulations
HCPA 1986	Regulations	Statute Regulations
IDEA 1990	Regulations New Language that specifies override procedures if consent is denied (-)	Statute Regulations
IDEA 1997	Statute Regulations New Statutory language specifies that consent must be given—a codification of earlier regulations (0) New regulatory language becomes silent on override procedure if consent is denied (+)	Statute Regulations New statutory and regulatory language: ▪ makes clear that parents must be involved and lists them first (+) ▪ requires a regular educator on most IEP teams (+)
IDEA 2004	Statute Regulations New Statutory and Regulatory language explicitly states that school officials may not use any administrative procedures to override refusal to consent to initial services (+)	Statute Regulations New Statutory and Regulatory language: ▪ allows some IEP Team members to be absent if parents approve in writing. (+/-) ▪ allows IEPs to be amended without a full meeting (+/-) ▪ creates a provision for the examination of multi-year IEPs (+/-)

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Have access to all records about their child**	**Have all evaluation results explained to them**
EAHCA 1975	Regulations	Regulations
HCPA 1986	Regulations	Regulations
IDEA 1990	Regulations	Regulations
IDEA 1997	Statute Regulations New language codifies former regulatory language (0)	Statute Regulations New language codifies former regulatory language (0)
IDEA 2004	Statute Regulations	Statute Regulations

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Participate in all decisions about their child**	**Receive copies of evaluations and IEPs regarding their child**
EAHCA 1975	Statute Regulations	Regulations
HCPA 1986	Statute Regulations	Regulations
IDEA 1990	Statute Regulations	Regulations

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Participate in all decisions about their child**	**Receive copies of evaluations and IEPs regarding their child**
IDEA 1997	Statute Regulations New language: ▪ makes clear that parents must be involved in placement decisions (0) ▪ establishes a legal presumption of placement in regular education (+) ▪ codifying *Honig*, grants school officials unilateral authority to remove a child for up to 10 days as a disciplinary consequence (0) ▪ grants school officials unilateral authority to remove a child for guns, other weapons, or drugs (-) ▪ describes a procedure for removing a child deemed "dangerous" (-) ▪ establishes a legal presumption of a relationship between the misbehavior and disability (+) ▪ makes clear that charter schools must serve children with disabilities consistent with IDEA (+)	Statute Regulations New Language specifies that the copy should be provided at no cost and drops phrase "at request" (+)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Participate in all decisions about their child**	**Receive copies of evaluations and IEPs regarding their child**
IDEA 2004	Statute Regulations New language: ▪ removes legal presumption of a relationship between the misbehavior and disability (-) ▪ adds serious bodily injury to the list of offenses for which school officials have unilateral authority to order long term removals (-) ▪ specifies that 45-day removals may now be made for 45 *school* days (-) ▪ establishes new requirements for school districts to communicate with private schools about procedures including the right of a private school to complain (+)	Statute Regulations

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Receive information about child's progress**	**Have information they have independently gathered considered by school officials**
EAHCA 1975	Statute Regulations	Regulations
HCPA 1986	Statute Regulations	Regulations
IDEA 1990	Statute Regulations	Regulations
IDEA 1997	Statute Regulations New Language requires: ▪ "measurable" annual goals (+) ▪ participation on statewide and district-wide assessments (+) ▪ that parents of children with disabilities be given information on student progress as often as non-disabled children and specifies what that information should include (+)	Statute Regulations New statutory language: ▪ codifies older language (0) and ▪ makes clear that an evaluation must gather parental input (+)
IDEA 2004	Statute Regulations New language: ▪ that drops requirement of progress reports as often as non-disabled children (-) ▪ eliminates requirement for short term objectives and benchmarks for most children (-)	Statute Regulations

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Invite persons of their choosing to meetings called to discuss the child and plan for the child**	**Obtain independent evaluation of their child at school expense when they disagree with the school's evaluation results**
EAHCA 1975	Regulations	Statute Regulations
HCPA 1986	Regulations	Statute Regulations
IDEA 1990	Regulations	Statute Regulations
IDEA 1997	Statute Regulations New Statutory language codifies former regulatory language (0)	Statute Regulations New Regulatory Language delineates what happens if district challenges parents' right to have an independent evaluation (0)
IDEA 2004	Statute Regulations	Statute Regulations

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Be offered mediation at school expense as means to settle a dispute with the school**	**Challenge school's decisions in front of an impartial hearing officer**
EAHCA 1975		Statute Regulations
HCPA 1986		Statute Regulations
IDEA 1990		Statute Regulations
IDEA 1997	Statute Regulations New provision that adds the right to mediation as an alternative to due process (+/-)	Statute Regulations New Statutory language that specifies what must be in a parental complaint (-)
IDEA 2004	Statute Regulations New Language about settlement agreements and their enforceability (+)	Statute Regulations New language: ▪ requiring a resolution session before proceeding (-) ▪ sets a 2-year statute of limitations on complaints (-) ▪ establishing hearing officer requirements (0) ▪ requiring that any procedural errors must deny FAPE in order for parents to prevail (-)

Table 2: Comparison of Parental Rights under Each Iteration of the IDEA (EAHCA)

Key: Impact on parental rights + positive - negative +/- mixed 0 neutral	**Appeal the decision of the hearing officer in state court or federal district court**	**Receive reimbursement of attorney's fees and educational costs if the district fails to provide an appropriate education**
EAHCA 1975	Statute Regulations	
HCPA 1986	Statute Regulations	Statute Addition of Provision for Recovery of Attorney's Fees (+)
IDEA 1990	Statute Regulations	Statute Regulations New Regulations regarding Attorney's Fees (0)
IDEA 1997	Statute Regulations	Statute Regulations New statutory language establishes some limits on when parents may collect fees. (-)
IDEA 2004	Statute Regulations	Statute Regulations New language: ▪ codifies that tuition costs may be reimbursed if parents prevail (0) ▪ limits reimbursement of tuition if parents do not give 10-day notice (-) ▪ specifies that courts may order parents to pay state costs in frivolous complaints (-)