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Special Education Cause Lawyers

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SPECIAL EDUCATION CAUSE LAWYERS

Mark C. Weber[†]

ABSTRACT

This Essay presents a study of leading U.S. lawyers who represent families in disputes involving the special education of children with disabilities. The research consists of structured interviews of selected attorneys from around the country, and tests whether the conclusions about disability cause lawyers drawn by Waterstone, Stein, and Wilkins (in *Disability Cause Lawyers*, their pathbreaking study of thirteen leading attorneys involved in disability rights work) hold true for special education cause lawyers. Following the approach in *Disability Cause Lawyers*, this study considers attorney backgrounds, practice structure and financing, connections to social movement organizations, and modes of advocacy. The study concludes that lawyers who engage in the cause of educational rights of children with disabilities, like other disability cause lawyers, face challenges of litigation financing, wary courts, and a splintered social movement. Nonetheless, they manage to avoid practices that some studies of cause lawyers have criticized: being entranced with paper victories in court, and engaging too much with legal elites and not enough with the social movement. In this way, they also resemble the attorneys in the *Disability Cause Lawyers* study. The scholarly debate on cause lawyering is extensive and contentious. This Essay makes a unique contribution to that literature as the first study of the work of lawyers who view educational rights for children with disabilities as a social cause and who see themselves as contributing to the movement for educational rights for individuals with disabilities.

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INTRODUCTION

In *Disability Cause Lawyers*, Michael Waterstone, Michael Ashley Stein, and David Wilkins reported on thirteen in-depth interviews with leading disability rights lawyers, seeking to determine whether the work of these individuals resembled that of lawyers in other fields who had been studied by scholars of cause lawyering.¹ Dean Waterstone and his coauthors described what the disability lawyers did in their professional lives and how they did it. They noted that in many respects the disability cause lawyers acted the same way as other cause lawyers, a category they had previously defined as attorneys “who spend a significant amount of professional time designing and bringing cases” that promote social change, and who have strong connections with social movements and social movement organizations.² But they also pointed out ways in which the disability lawyers’ work departed from that of cause lawyers in other fields, including the disability attorneys’ avoidance of some practices that the literature on cause lawyering has criticized.³

The goal of this study is to determine whether cause lawyers who specialize in special education work conform to the picture of the disability cause lawyers presented by Waterstone and his coauthors and to learn whether the special education lawyers, like the attorneys surveyed in *Disability Cause Lawyers*, manage to avoid the potential

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1. Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287 (2012).
 2. Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1661 (2010) (reviewing SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009)).
 3. Waterstone et al., *supra* note 1, at 1331–47.

problems of cause lawyering. It is the first study of its kind regarding lawyers who view educational rights for children with disabilities as a social cause and who see themselves as contributing to the movement for educational rights for individuals who are disabled.

The emergence of disability cause lawyers was a signal event. Early work by Professors Stein, Waterstone, and Wilkins suggested that a reason Supreme Court litigation on disability rights issues was often unsuccessful for claimants was that the lawyers who litigated the cases were not specialists in the field and had limited experience with civil rights work in general.⁴ Advocates in other areas of civil rights typically were cause lawyers, who sought to promote social change and had strong connections with social movements and social movement organizations.⁵

Like disability cause lawyering, cause lawyering for education of children with disabilities is not new. Even before the passage of the Education for All Handicapped Children Act of 1975,⁶ lawyers brought systemic litigation to advance the educational rights of children with intellectual disabilities and other disabling conditions. Lacking an enforceable disability education statute to rely upon, they brought claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, achieving major successes in the courts.⁷ These lawyers practiced in a variety of settings, including legal aid organizations, law school clinics, and private firms. Specialists in civil rights work with connections to organizations of parents of disabled children brought fundamental right-to-education cases such as *Pennsylvania Association for Retarded Children v. Pennsylvania* (*PARC*)⁸ and *Mills v. Board of Education* (*Mills*).⁹ In the period following passage of the 1975 Act (retitled in 1990 as the Individuals

4. Stein et. al., *supra* note 2, at 1670–72.

5. *Id.* at 1672–75.

6. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.).

7. Alan Abeson, *Movement and Momentum: Government and the Education of Handicapped Children—II*, 41 EXCEPTIONAL CHILD. 109, 110, 113 (1974) (noting existence of thirty-six pending lawsuits over educational rights of children with disabilities as of 1974); see Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 356–59 (1990) (describing legal developments preceding enactment of enforceable statutory duties to educate).

8. 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972). Thomas Gilhool represented the plaintiffs.

9. 348 F. Supp. 866 (D.D.C. 1972). Attorneys for the plaintiffs included Stanley Herr and Patricia Wald.

with Disabilities Education Act, or “IDEA”),¹⁰ cases that achieved major victories for the education of disabled persons were brought by sophisticated advocates with strong ties to the disability rights movement and movement organizations.¹¹ But general practitioners who lacked outside support litigated many cases as well, including some cases with far-reaching implications.¹²

This Essay presents findings from eight in-depth interviews of leading special education cause lawyers. It concludes that lawyers deeply engaged in the cause of promoting educational rights of children with disabilities, like other disability cause lawyers, confront economic challenges, ever-skeptical judges, and a social movement organized, to the extent that it is organized, largely on the basis of disability categories. But like the other disability cause lawyers, they also avoid practices that some students of cause lawyering have criticized, such as being excessively oriented towards paper victories in court, and engaging too much with legal elites and not enough with the constituents of the social movement they seek to advance.¹³ This paints a picture of socially engaged special education law practice that is not without its struggles,

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10. Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified at 20 U.S.C. §§ 1400–1482).
 11. *See, e.g.*, *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017) (Jeffrey Fisher, Pamela Karlan, and William Koski from the Youth and Education Law Project at Stanford Law School); *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017) (Samuel Bagenstos, who helped promulgate the 2010 American with Disabilities Act regulations, and others); *Spring Branch Indep. Sch. Dist. v. O.W. ex rel. Hannah W.*, 961 F.3d 781 (5th Cir. 2020) (Sonja Kerr, a nationally recognized special education lawyer, and others); *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997) (Maria Woltjen, Karen Berman, and Amy Zimmerman from the Chicago Lawyers’ Committee for Civil Rights Under Law, among others); *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998) (John Elson and Laura Miller from Northwestern University School of Law’s Special Education Project, among others); *see also Guckenberger v. Bos. Univ.*, 974 F. Supp. 106 (D. Mass. 1997) (higher education claim brought under Americans with Disabilities Act and Rehabilitation Act by Frank J. Laski and Reed Martin, among others).
 12. The intention here is not to criticize nonspecialists, but simply to note the hazards of pursuing cases with poor fact patterns that play into judges’ fears and give “ready fodder for lampoon in the media.” Waterstone et al., *supra* note 1, at 1341. Perhaps the paradigm example of a case brought by a nonspecialist, noncause attorney would be one in which an attorney-parent, without significant experience in special education or disability law, represents themselves and their child in proceedings under the IDEA, because no other lawyer would take the case. Courts have generally applied the Civil Rights Attorneys’ Fees Act precedent *Kay v. Ehrler*, 449 U.S. 432, 437 (1991), to the IDEA and have denied fees to prevailing parent-attorneys, effectively producing a disincentive to self-represent. *See, e.g.*, *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 605 (2d Cir. 2006).
 13. *See Waterstone et al.*, *supra* note 1, at 1331–47.

but is also not guilty of substituting lawyerly achievement for contributions to the educational well-being of clients and the social movement for educational rights for children with disabilities. One side effect of this new appraisal of the world of special education advocacy may be to elevate the visibility of special education practice and perhaps even draw some law students into careers in the field, an infusion of talent and energy that would be welcome.

This Essay proceeds in four parts. The first takes up the topic of cause lawyers and the scholarly context of the Essay, noting the critiques of cause lawyering, the response to the critiques regarding disability cause lawyers, and the emerging concept of movement lawyering. Part II describes the methods of the study and presents its findings concerning the lawyers' backgrounds, the economics of their practice, and their process for selecting cases and other projects. Part III goes into the social movement for educational rights of children with disabilities, describing the movement itself and the lawyers' involvement with social movement organizations and other groups. Part IV discusses the approaches of the lawyers to their actual practice: how they make decisions about filing class actions and test cases, writing amicus briefs, participating in legislative and other policy work, and making use of media resources. In each part, the Essay draws comparisons to the work of the other disability cause lawyers. The Conclusion very briefly summarizes the research and how the results compare to those of the *Disability Cause Lawyers* study.

I. CAUSE LAWYERS AND SOCIAL MOVEMENTS' DISCONTENTS

Scholars have typically coupled descriptions of cause lawyering with criticisms or defenses, or sometimes both. Most recently, a few writers have taken off from the critiques and responses of cause lawyering to develop an innovative idea dubbed "movement lawyering." The movement lawyering concept is new enough that evaluating special education cause lawyering in its framework may be premature. Nevertheless, some observations about cause lawyering's criticisms and defenses are in order, as is a word about the new direction toward movement lawyering.

A number of sources summarize the legal literature's critiques of cause lawyering, particularly when it is focused on litigation. Professors Cummings and Rhode noted a dozen years ago that there are two basic criticisms of public interest litigation: that "litigation cannot itself reform social institutions," and that "over-reliance on courts diverts effort from potentially more productive political strategies and

disempowers the groups that lawyers are seeking to assist.”¹⁴ As they summarize the critique, “The result is too much law and too little justice.”¹⁵ Much of the criticism stretches back to even before the fundamental writings of Austin Sarat and Stuart Scheingold,¹⁶ who collected and analyzed research about cause lawyers, and took up the complaint that lawyers dominate social movements.¹⁷ They collected sources raising provocative challenges to the received view that legal work was both integral to, and highly successful in, the campaign for African American civil rights.¹⁸ Their writing put forward responses to the critiques, presenting a balanced but generally favorable view of cause lawyers’ work.¹⁹

The *Disability Cause Lawyers* article summarized the cause lawyer critique and applied it to the lawyers they studied. They identified the critical threads as lawyers (1) being excessively court centered, (2) diverting movement resources, and (3) inducing movements to become too dependent on elites.²⁰ They concluded that the lawyers they studied were generally successful at avoiding these problems.²¹ As the report of the interviews of special education lawyers in this Essay will demonstrate, those studied here appear to have been similarly successful and

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14. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 604 (2009).
 15. *Id.* They conclude, however, that public interest litigation remains an indispensable, though not sufficient tool for social change. *Id.*
 16. See generally STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006).
 17. See Austin Sarat & Stuart A. Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 16, at 4 (citing JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978)).
 18. *Id.* at 4–7 (citing, inter alia, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70–71 (1991); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 *VA. L. REV.* 7, 10 (1994)).
 19. See, e.g., *id.* at 7 (“With all that said, cause lawyers were instrumental, in spite of themselves, in constituting the civil rights movement.”).
 20. Waterstone et al., *supra* note 1, at 1336–47 (collecting sources). Others have stressed lack of accountability and inefficiency at producing change as the foundations of the critique. See, e.g., Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 *FORDHAM L. REV.* 1987, 1988 (2017).
 21. Waterstone et al., *supra* note 1, at 1336–37, 1339, 1345–47.

have adopted many of the same tactics and methods that disability cause lawyers have to avoid the perceived problems of cause lawyering.

Some recent work has pivoted from more traditional studies of cause lawyering to what has been termed “movement lawyering.”²² The idea of this model is to use advocacy to build the power of social constituencies with strategies that integrate legal and political efforts.²³ Hence, the focus is less on things such as judicial or even legislative victories, and more on changing power relations in society. Movement lawyers enmesh themselves in a community but may eschew representing specific client organizations; they are content to stay in the background, trying to demystify the law and promote collective activity towards goals of people who have common interests.²⁴ Class action litigation is a viable option for a movement lawyer, but the lawyer should take steps to have members of the class actively participate in tactical decisions as well as direct the goals of the case.²⁵ Lawyers involved in movement lawyering efforts will take instructions from organized or unorganized activist groups and remain constantly on the lookout to increase popular power that can be used in any venue for reform of social institutions.²⁶ Special education cause lawyers have engaged in this kind of work. One notable example is assisting

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22. *See generally* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021) (defining movement lawyering as “an approach to lawyering in solidarity with social movements . . . to create space within public interest practice to work with movements to build grassroots power”); Ellen Yaroshefsky, *Symposium Introduction*, 47 HOFSTRA L. REV. 1 (2018) (discussing, among other things, ethical and tactical concerns faced by lawyers for social movements). Some sources discuss the movement law approach in connection with specific fields of endeavor. *E.g.*, Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 432–33 (2021). Some earlier scholarly works foreshadow this approach to lawyering. *See, e.g.*, Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2135 (2007) (suggesting that lawyers should be supporting players rather than lead operators, helping to build organizational capacity and power).
 23. *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1646, 1658–60.
 24. Yaroshefsky, *supra* note 22, at 2, 4. Law reform campaigns are not off the table, but as a study, movement law tries to move away from the silos of legal study towards the conditions of people on the ground and their relation to legal and economic structures. Akbar et al., *supra* note 22, at 843.
 25. *See* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 92 (2022) (discussing a case challenging solitary-confinement policies in the context of movement lawyering principles).
 26. Cummings, *supra* note 23, at 1652.

community participants in a public inquiry proceeding in Illinois, an activity that will be described later in this Essay.²⁷ Movement lawyering remains a work in progress in the field of education for children with disabilities as it does in other areas.

II. INTERVIEWS AND INTERVIEWEES

The study in this Essay involved semi-structured interviews of eight lawyers identified by the author as meeting the definition of attorneys who spend a significant amount of their professional time using their legal skills to benefit children with disabilities in obtaining educational rights, and who have formal or informal connections with rights organizations or other actors in the social movement for disability education rights.²⁸ The participants constituted a convenience sample—the group was composed of lawyers the author knew of or was referred to by other interviewees, and who fit the cause lawyer description.²⁹ An attempt was made to include lawyers from different parts of the country and in different practice situations. The majority were in private practice,³⁰ but others worked in settings such as an advocacy organization,³¹ a law school clinic,³² and a federally funded protection and advocacy agency.³³

27. See *infra* text accompanying notes 148–154 (discussing an Illinois public inquiry proceeding).

28. All interviews are on file with the author and *Case Western Reserve Law Review*.

29. One lawyer qualified the application of the term to their situation, stressing that the lawyer's identity as an attorney was in providing legal services, and noting that direct services work can lead to systemic change over time. The lawyer did not claim to be embedded in a community, but rather to be working on behalf of a constituency. This is different from what might be called a movement lawyer. Anonymous Interview #2. Other interviewees also emphasized that most of their work is for individual clients but that they try where possible to use the law for systemic change to improve educational opportunities for children with disabilities, selecting a limited number of cases for development along those lines. *E.g.*, Anonymous Interviews #5 & 8.

30. Anonymous Interviews #1, 3, 4, 6, 7 & 8. The inclusion of a larger number of private practitioners was intentional. As indicated below, part of the mission of the research was to help answer the question often posed by students, "Can I actually make a living doing this?" The question is acute for law graduates who cannot obtain, or do not want, jobs in the nonprofit or government sectors.

31. Anonymous Interview #1. This lawyer also works in private practice.

32. Anonymous Interview #2.

33. Anonymous Interview #5. A protection and advocacy agency is an independent state agency or private nonprofit organization dedicated to providing protection and advocacy services for persons with disabilities. These entities are supported by the federal government under the

Interviews were conducted via Zoom during the summer and fall of 2022, and lasted between forty-five and ninety minutes.

The preliminary questions ranged from how the lawyers got interested in special education law and what background they had, to how the economics of their practices worked, and what considerations went into the selection of cases and other projects to become involved in. The answers bear a similarity to the answers in the *Disability Cause Lawyers* survey, but the two sets of results are hardly identical.

A. Origin Stories

A question asked of the research participants was how the lawyers got started in the special education law field.³⁴ One mentioned serving as a social worker with individuals with disabilities before making the decision to attend law school.³⁵ Another spoke of the experience of seeing students with disabilities and other students from marginalized groups encountering discrimination when the future attorney was in high school, and becoming determined to change the situation.³⁶ Still another talked of work with clients with disabilities in a public institution as part of a clinical program in law school.³⁷ Several who were in private practice had previously worked for civil legal assistance programs, either as students or attorneys,³⁸ or had practiced at public interest firms focused on areas other than education of children with disabilities.³⁹ Some moved into special education law after having worked in areas like employment discrimination, community-based poverty law, or government.⁴⁰ General civil practice and personal injury

Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15021–15029, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801–10827, though some have other funding sources as well. The Supreme Court has ruled that even a protection and advocacy agency that is a state agency may sue the state under federal law for injunctive relief and will not face the barrier of state sovereign immunity in doing so. *Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 (2011).

34. This, too, was in part to satisfy the interest of law students in potential career paths, and the respondents in the study by Waterstone et al. provided information of this type. *See* Waterstone et al., *supra* note 1, at 1297, 1299.
35. Anonymous Interview #3.
36. Anonymous Interview #6.
37. Anonymous Interview #1.
38. Anonymous Interviews #1, 2, 4 & 6.
39. Anonymous Interview #7.
40. Anonymous Interviews # 2, 3, 4, 5 & 8.

work also featured in some lawyers' backgrounds.⁴¹ As with the sample in the Waterstone article, a number of the lawyers graduated from elite law schools including University of Michigan, Columbia, University of Pennsylvania, and Harvard, but as in the disability cause lawyers sample, educational backgrounds varied greatly.⁴²

B. Economics of Practice

Working in a law school clinic or for a disability organization helps solve the problem of economic survival for a special education cause lawyer. Challenges may remain even for those lawyers. Scholars recognize that foundation funding and other sources of support may induce lawyers to pursue cases or other projects that do not advance what they consider their highest priorities or the highest priorities of a cause they want to promote.⁴³ In addition, incomes of those in the nonprofit sector may trail those in private practice.⁴⁴

For lawyers in private practice, the issue of finances is unavoidable. Two participants were essentially solo practitioners with no long-term employees, and they mentioned having a mix of flat-fee work, hourly cases, and work that was fundamentally on a contingent-fee basis, taken with the expectation of compensation through settlements or court-awarded fees.⁴⁵ One of those lawyers also had a job with an advocacy

41. Anonymous Interviews #4 & 8.

42. Waterstone et al. *supra* note 1, at 1297, 1299.

43. See David L. Trowbridge, *Beyond Litigation: Policy Work Within Cause Lawyering Organizations*, 56 LAW & SOC'Y REV. 286, 296–98 (2022) (describing problem as surmountable, “constraining but not determinative of agendas”). One of the respondents in the sample pointed out that fee awards can be an important source of revenue for an organization and may create a fund for litigation expenses in future cases, notably expert witness fees or costs of providing a professional evaluation of a student's educational needs. Anonymous Interview #2. The Supreme Court interpreted the IDEA prevailing-party-fees provision to not include fees for expert witnesses in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 302–04 (2006), extending Civil Rights Attorneys Fees Act precedent from *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), despite the fact that in *Casey* the Court expressly contrasted the Civil Rights Attorneys Fees Act with the IDEA. *Id.* at 91 n.5. See generally *infra* note 61 and accompanying text (discussing impact of fees on case selection).

44. Debra Cassens Weiss, *Does “Martyr Mentality” of Nonprofit Lawyers Keep Salaries Low?*, AM. BAR ASS'N J. (Jan. 14, 2015, 2:49 PM) https://www.abajournal.com/news/article/does_martyr_mentality_of_nonprofit_lawyers_keep_salaries_low [<https://perma.cc/9437-GDGL>] (answering yes to the question in the title).

45. Anonymous Interviews #1 & 4.

organization.⁴⁶ Another attorney mentioned the problem of feast-or-famine in relying on contingent work,⁴⁷ and one reported trying to avoid working for contingent fees.⁴⁸

Delegation of responsibilities is one way to keep a practice going. Two participants headed law firms, with arrangements that assigned much of the work to associates or nonlawyer advocates who received payment under various structures.⁴⁹ These private practitioners stressed the need to be entrepreneurial in building up a client base;⁵⁰ one acknowledged that some community education activities generated business as a byproduct.⁵¹ Several lawyers said that their work for systemic reform often was supported financially by the more mundane service work they and their firm members performed for fees.⁵² A lawyer who is not in private practice also includes social work services as part of the practice model.⁵³ Obtaining those services might be more easily accomplished by a lawyer working in a law school clinic or advocacy organization setting than for a private practitioner, who might have to put the cost on the client or come up with creative ways to fund the services.

The author came to the project with the impression that most private practitioners doing special education work have at least one additional area of practice where the economic rewards are greater, or at least steadier. That hypothesis held true for some members of the sample but not others. The additional areas included employment and public accommodations discrimination, estate planning, guardianship, family law, mental health court proceedings, even commercial law.⁵⁴ That work might be done by the lawyers who were part of the sample themselves, or it might be done by partners or associates. Perhaps

46. Anonymous Interview #1.

47. Anonymous Interview #4.

48. Anonymous Interview #3.

49. Anonymous Interviews #3 & 6.

50. Anonymous Interviews #3 & 6.

51. Anonymous Interview #6.

52. Anonymous Interviews #4 & 6. Prevailing-party attorney fees are a possibility, as are fees that are part of a settlement. *See* 20 U.S.C. § 1415(i)(3)(B) (permitting court-awarded fees for prevailing parties in IDEA administrative and court proceedings). But some cases worth bringing may not be successful, and successful cases may yield fee awards that are smaller than expected.

53. Anonymous Interview #2.

54. Anonymous Interviews #3, 4, 6 (to supplement income during the early years), 7 (participant's partner engaging in commercial litigation and estate planning) & 8. These areas might also be highly variable as sources of income, of course.

surprisingly, one lawyer said that the special education cases provided a more profitable source of income for their firm than the firm's employment discrimination work.⁵⁵

C. Selection of Cases and Other Projects

Several lawyers stressed that taking on a large number of individual service cases gave them a sense of the community's needs, and enabled them to select for greater development a limited number of cases that could have an important systemic impact.⁵⁶ One lawyer pointed out that sometimes it is impossible to know that a case might have systemic implications until well into the dispute.⁵⁷ Others spoke of screening individual service cases for those that might have a broader impact,⁵⁸ or considering systemic effects of a case in making a decision to "escalate" the case from advocacy to litigation.⁵⁹ Yet another spoke of law reform cases that "bubbled up" from the legal problems shared by a range of individual clients.⁶⁰

Unsurprisingly, economic considerations affect private practitioners' case selection. One attorney mentioned the need to be more careful in taking a case if the client does not have the resources to provide funding, though they said they will take cases they consider worthwhile even if the client cannot pay and the prospect of a fee

55. Anonymous Interview #8. A question that merits further research is whether this is widely true, and if so, why. On the face of things, the comprehensive damages awards available under 42 U.S.C. § 1981 and § 1981a would appear to provide more monetary relief for the employment discrimination client, and thus more funds to pay the lawyer in addition to any court ordered fees, than relief in a special education case under the IDEA. *See Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 168 n.8 (2017) (noting that IDEA hearing officers may not award money damages for emotional injury); *Smith v. Robinson*, 468 U.S. 992, 1020 n.24 (1984) (noting consensus among lower courts that IDEA's predecessor statute generally does not permit damages awards), *superseded by statute on other grounds*, 20 U.S.C. § 1415(l). Remedies provided by section 504 of the Rehabilitation Act, 29 U.S.C. § 794a, may also be more limited. *See Cummings v. Premier Rehab Keller, PLLC.*, 142 S. Ct. 1562, 1576 (2022) (holding that emotional distress damages are not recoverable under section 504.). The IDEA and section 504 are two main statutes relied on in special education cases.

56. This phenomenon is found in other areas of cause lawyering as well. *See Trowbridge*, *supra* note 43, at 294 (citing comment by a Lambda attorney that selection is "based in part about what people are calling us about . . . [and] in part what we hear from people on the streets").

57. Anonymous Interview #4.

58. Anonymous Interview #8.

59. Anonymous Interview #5.

60. Anonymous Interview #2.

recovery is dim.⁶¹ The lawyer mentioned that pursuing a case against a district on an issue might lead that district and others to adopt practices that meet the needs of similarly situated students and avoid litigation that could otherwise ensue.⁶²

Lawyers in various practice settings mentioned having special priorities that they tried to pursue through individual or systemic work or a combination of the two. To list a few: achieving successful placements for students in least restrictive settings by obtaining enhanced supports and accommodations;⁶³ obtaining services for high-achieving students who have social or emotional needs;⁶⁴ expanding options for students with attention-deficit problems;⁶⁵ securing needed services for educational losses during the COVID-19 pandemic;⁶⁶ trying to advance the use of restorative practices;⁶⁷ addressing bullying and harassment;⁶⁸ achieving educational success for English Language Learners;⁶⁹ pursuing placements to meet the extraordinary needs of students with severe impairments;⁷⁰ meeting mental health needs of students with emotional disabilities to keep them in school and out of the criminal justice system;⁷¹ expanding post-secondary opportunities and support;⁷² working for better allocation of funding for needed services and personnel;⁷³ and reforming the practices of a specific school district or other educational agency.⁷⁴

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61. Anonymous Interview #6. The impact of funding on selection of cases affects public interest lawyers in general. *See Cummings & Rhode, supra* note 14, at 605 (“[M]oney matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact.”). Availability of fees affects public interest lawyers in other ways. A practitioner in the current study mentioned that the difficulty with obtaining fees makes for a shortage of private lawyers working in the special education field, which creates service needs for organizational actors to address. Anonymous Interview #5.
62. Anonymous Interview #6.
63. Anonymous Interviews #1.
64. Anonymous Interview #6.
65. *Id.*
66. Anonymous Interview #4.
67. Anonymous Interview #3.
68. Anonymous Interview #8.
69. Anonymous Interviews #2 & 8.
70. Anonymous Interview #7.
71. Anonymous Interviews #2, 5, 7 & 8.
72. Anonymous Interview #5.
73. Anonymous Interview #3.
74. Anonymous Interviews #2 & 5.

The lawyers said that they advanced their priorities both by litigation efforts and by taking on other projects.⁷⁵ Disability rights organizations and agencies make use of surveys and advisory boards in determining which priorities to pursue, and the special education lawyers who work with those agencies orient their litigation and other advocacy efforts around those priorities.⁷⁶

D. Comparison to Disability Cause Lawyers

Regarding origins and backgrounds, the lawyers in this study appear to have had fewer personal connections to disability than those in the *Disability Cause Lawyers* study. Eight of the thirteen in the disability cause lawyer sample identified as a person with a disability, and one more was married to someone with a disability.⁷⁷ While not self-identifying in the interviews, the special education lawyers had some similar background experience, notably antidiscrimination work.⁷⁸ The disability cause lawyer sample appears to have included a slightly higher percentage of elite law school graduates, but the difference may not be meaningful.⁷⁹

More of the special education lawyers were with private law firms than the lawyers in the disability cause lawyer sample.⁸⁰ For that reason, the economics of the practice formed a larger share of the concerns they discussed, though both groups stressed the importance,

75. *See infra* Part IV.C (discussing nonlitigation activities).

76. *See, e.g., Our Priorities*, EQUIP FOR EQUALITY (Illinois Protection and Advocacy agency), <https://www.equipforequality.org/about/what-we-do/priorities/> [<https://perma.cc/H9GN-8LHT>] (Oct. 2, 2023) (listing agency's priorities and noting that it adopts priorities every three years, reviews them annually, and regularly holds public forums and surveys legal needs of individuals with disabilities).

77. Waterstone et al., *supra* note 1, at 1299.

78. *E.g.*, Anonymous Interview #8; Waterstone et al., *supra* note 1, at 1299, 1312.

79. *See* Waterstone et al., *supra* note 1, at 1299 (“Almost uniformly, these lawyers came from elite backgrounds, with most graduating from what are universally considered top-ranked national law schools.”). This could reflect the larger number of lawyers who worked for entities other than private firms in the *Disability Cause Lawyers* sample. The public interest law firms and other organizations may select people with degrees from highly ranked schools, whereas lawyers in their own firms need not have an elite credential.

80. Anonymous Interviews #1, 3, 4, 6, 7 & 8; *see* Waterstone et al., *supra* note 1, at 1300 (“[F]ive of the lawyers were at private law firms, six were at public interest law firms, and two were in government and academia.”). As noted, including a higher proportion of private practitioners in the special education survey was purposeful. *See supra* note 30 (noting students' career-related interests).

and often the difficulty, in obtaining court-awarded fees.⁸¹ Case- and project-selection considerations resonated between the two samples, and some members of the disability cause lawyer group seemed quite similar to the special education lawyers in doing work for individual clients seeking discrete legal goals,⁸² even as the lawyers kept a lookout for clients whose cases might have systemic implications or provide occasions for pushing for widespread legal change. One of the special education lawyers mentioned concentrating efforts toward particular school-side defendants that continually failed to meet their obligations.⁸³ The survey of disability cause lawyers did not find that there was much in the way of repeat players among the defendants the respondents faced.⁸⁴

III. CONNECTIONS TO SOCIAL MOVEMENTS AND SOCIAL MOVEMENT ORGANIZATIONS

In an effort to avoid the detachment from social movements that has been a failing of some cause lawyers, contemporary cause lawyers have made strenuous efforts to connect with leading entities that constitute the social movements they hope to advance. To describe these efforts in the field of special education law, it is helpful first to explain the movement for educational rights for children with disabilities, then to discuss the involvement of this study's respondents with the movement and social movement organizations. The connections of the special education lawyers to professional organizations and the comparison of their activities to the those of the lawyers studied by Waterstone and his coauthors also merit explication.

A. Educational Disability Rights as a Social Movement

The social movement for disability rights is unique. As Waterstone pointed out in a 2015 article, the movement did not encounter quite the resistance that a number of other social movements have, and that has limited the public awareness of disability issues.⁸⁵ The part of the

81. See Waterstone et al., *supra* note 1, at 1352.

82. *Id.* at 1343.

83. Anonymous Interview #2.

84. Waterstone et al., *supra* note 1, at 1335.

85. Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 591 (2015). Views about the prominence of the social movement differ, with some saying that a strong movement did not exist prior to the passage of the Americans with Disabilities Act, *e.g.*, Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 527–28 (2008), and others stressing militant social movement activity stretching back at least to the 1930s, *e.g.*, Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and the*

disability rights movement concerned with education of children with disabilities has had public salience, however, and has encountered some major resistance. Sources from around the time of the passage of the 1975 Education for All Handicapped Children Act note that leading up to that landmark legislation, a coalition of parents and educators took inspiration from *Brown v. Board of Education*⁸⁶ and the African American Civil Rights Movement to make demands for educational equality for children with disabilities.⁸⁷ They turned to school boards, state legislatures, Congress, and the courts to accomplish their goals.⁸⁸ Some of their demands, particularly the demand for children with disabilities to be in integrated settings with children without disabilities, met spirited opposition, even long after the Education for All Handicapped Children Act enacted that priority.⁸⁹

As *Disability Cause Lawyers* pointed out, the disability rights movement has different constituencies, which all have discrete lived experiences; although there are some effective cross-disability groups and coalitions, there are also significant numbers of disability-category silos.⁹⁰ The special education respondents gave fairly similar descriptions to the disability rights social movement, and extended the description to the movement for educational rights for children with disabilities.

Great Depression, in WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 53, 54, 70 (Paul K. Longmore ed. 2003), Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1145 & n.112 (2010). See generally *infra* note 102 (reporting the view of some scholars that significant disability rights mobilization did not occur until after passage of statutes advancing disability rights).

86. 347 U.S. 483 (1954).

87. See David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 723–24, 749–50 (1973). Others have pointed out the role of professionals in advancing at least some of the interests of people with disabilities, sometimes in alliance with disability activists. See David Pettinicchio, *Elites, Policy and Social Movements, in ON THE CROSS ROAD OF POLITY, POLITICAL ELITES AND MOBILIZATION* 155, 162 (Barbara Wejnert & Paolo Parigi eds., 2017).

88. See Abeson, *supra* note 7, at 113–14.

89. E.g., Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 796–99 (2006); Sy DuBow, “*Into the Turbulent Mainstream*”—*A Legal Perspective on the Weight to Be Given to the Least Restrictive Environment in Placement Decisions for Deaf Children*, 18 J.L. & EDUC. 215, 227–28 (1989).

90. Waterstone et al., *supra* note 1, at 1333–34.

B. Involvement with Social Movement Organizations

Some study participants are on staff or act as cooperating attorneys for disability rights groups supported by organization members who have disabilities and their parents, representatives, or allies.⁹¹ As noted, others work in clinical education settings or for organizations such as a state protection and advocacy agency.⁹² These entities typically have a focus on legal advocacy, though not necessarily on impact litigation. The lawyers in those settings and others maintained relations with parent organizations and other community-based groups.⁹³ One lawyer described such a group as grassroots but not driven by an agenda, and considered the connection with the group to be valuable.⁹⁴

Private practitioners have a variety of formal and informal connections to non-litigation-oriented disability rights groups. Some but not all of the groups they listed focus on special education.⁹⁵ One lawyer spoke of a case in which conflicts emerged among the groups involved in broad-based law-reform litigation and said the case proved the virtues of having a cohesive entity to represent even if it led to a narrower focus for the litigation.⁹⁶ Lawyers in all practice settings mentioned connections with organizations that could be characterized as social movement organizations but that have a specifically legal or litigation focus, such as the Bazelon Center and the National Center for Youth Law, or local lawyer groups.⁹⁷ One lawyer mentioned working with parent groups whose orientation is not on law itself so much as on self-education and peer guidance and encouragement.⁹⁸ A lawyer observed that social movement activity was critical to the passage of

91. Anonymous Interviews #1 & 2.

92. Anonymous Interviews #2 (clinic) & 5 (protection and advocacy agency).

93. Anonymous Interviews #1, 2, 5, 6, 7 & 8.

94. Anonymous Interview #2.

95. Groups mentioned included The Arc, CHADD (Children and Adults with Attention Deficit/Hyperactivity Disorder), the Learning Disabilities Association, and NAMI (National Alliance on Mental Illness). *E.g.*, Anonymous Interviews #6 & 7 (describing work with a public interest firm doing special education law). Some groups mentioned were more focused on anti-poverty efforts or community building in general than specifically on education for children with disabilities.

96. Anonymous Interview #7. *Cf.* Waterstone et al., *supra* note 1, at 1350–51 (noting that no disability cause lawyer interviewed had a concrete strategy for a cross-disability litigation campaign, although many thought the goal was admirable). The difficulties encountered by the special education attorney may sound a cautionary note on cross-disability litigation and help explain why it is difficult to pursue.

97. Anonymous Interviews #1 & 4.

98. Anonymous Interview #2.

legislation such as the Americans with Disabilities Act in 1990,⁹⁹ and a main task of lawyers now is to use the law to advance opportunities for disabled people and preserve the gains they won.¹⁰⁰

C. The Role of Professional Organizations

Some attorneys mentioned connections with organizations sometimes characterized as those responsive to legal elites rather than social movement grass roots, such as the American Civil Liberties Union and the American Bar Association.¹⁰¹ The lawyers with those ties stressed the importance of mobilizing the knowledge and other resources available from those entities¹⁰² to respond to well-financed and well-organized adversaries.¹⁰³ The lawyer who mentioned teaming with attorneys from advocacy organizations or large firms¹⁰⁴ declared that attorneys for some well-funded opponents were quite happy to stretch out litigation and run up their hourly fees, creating a need for additional support on the parents' side.¹⁰⁵

A professional organization that also has some features of a grassroots entity is the Council of Parent Attorneys and Advocates (COPAA), which the surveyed lawyers mentioned as a vital source of information, encouragement, and assistance in their special education work.¹⁰⁶ The organization sees itself as working to protect civil rights and achieve excellence in special education services and supports.¹⁰⁷ By broadening the membership to include lay advocates as well as lawyers, COPAA stays closer to the base of families with disabled children than would be true for an organization composed only of attorneys.¹⁰⁸ Lay

99. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213).

100. Anonymous Interview #5.

101. Anonymous Interview #4.

102. Some authorities contend that with regard to disability rights, political elites and independent entrepreneurs produced legislation, and the entrepreneurs then promoted mobilization and development of social movement groups around those laws. *See Pettinicchio, supra* note 87, at 165 (collecting sources).

103. *E.g.*, Anonymous Interview #4.

104. *E.g., id.*

105. *Id.*

106. Anonymous Interviews #5 & 6.

107. The organization's mission and primary activities can be found at *COPAA Mission*, COUNCIL OF PARENT ATT'YS & ADVOCS., <https://www.copaa.org/page/Mission> (last visited Feb. 26, 2024), and *Our Work*, COUNCIL OF PARENT ATT'YS & ADVOCS., <https://www.copaa.org/page/Work> (last visited Feb. 26, 2024).

108. *Who Are COPAA Members?*, COUNCIL OF PARENT ATT'YS & ADVOCS., <https://www.copaa.org/page/WhoWeAre> (last visited Feb. 26, 2024).

advocates are frequently parents of children with disabilities who learned by experience how to obtain services for their children from schools and other public agencies.¹⁰⁹ The closeness to the base of families provides a sharper insight into the community's priorities. In addition, the training the organization offers elevates the quality of the work that the lay advocates can perform.¹¹⁰ Survey respondents also reported highly favorably on their collaboration with the Disability Rights Bar Association, which promotes and facilitates the practice of claimant-side disability rights law by operating as an information and resources exchange.¹¹¹

Of course, connections with social movement organizations do not guarantee that cause lawyers will advance what is best for a cause, assuming that what is best for the cause is knowable. In the area of special education, critics have charged that the educational rights established by the law are more likely to benefit families who have resources than those who do not,¹¹² and in particular that the dispute resolution mechanisms in the law—the tools that lawyers are uniquely qualified to use—function better for parents who have financial, social, and informational wealth.¹¹³ A response to those concerns should acknowledge that disparities in allocation of social goods, including those of the legal and educational systems, are characteristic of America's neoliberal society.¹¹⁴ It should be noted, however, that some

109. *Id.*

110. *Our Work*, *supra* note 107.

111. *See, e.g.*, Anonymous Interview #3. The organization's website is found at DISABILITY RTS. BAR ASS'N, <https://disabilityrights-law.org/> [<https://perma.cc/XXV9-JBSM>]. For a valuable recent article on lawyer organizations involved in social reform efforts, see Trowbridge, *supra* note 43, at 286–88.

112. *See, e.g.*, Sarah E. Redfield & Theresa Kraft, *What Color Is Special Education?*, 41 J.L. & EDUC. 129, 149–50 (2012).

113. *See, e.g.*, Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1417–18, 1426–27, 1438, 1443–50 (2012). A valuable new work surveying special education lawyers' perceptions of the due process hearing system reports that the lawyers favor reforms such as publication of more comprehensive and uniform standards for procedure, discovery, and admissibility of evidence, rather than abolition of the system. Jane R. Wettach & Bailey K. Sanders, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys*, 20 CONN. PUB. INT. L.J. 239, 239–42, 280 (2021).

114. One participant made the comment that the law is made by the wealthy for the wealthy, and that “regular people” and “children are at the bottom of the totem pole.” Anonymous Interview #3. For an engaging discussion on the interplay between American capitalism and disability legislation, see Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 215–20 (1997).

aspects of special education law, such as the universality of the entitlement to services,¹¹⁵ duties on public schools to act affirmatively to seek out all children in need of services,¹¹⁶ and regular monitoring by state and federal authorities,¹¹⁷ all work to benefit families without means. Specifically with regard to dispute resolution, benefits flow to all families with children with disabilities, from the availability of mediation and administrative hearing procedures¹¹⁸ (though that system is not without its difficulties),¹¹⁹ the prospect of attorney fees to parents who prevail at hearings or in court,¹²⁰ and the prospect that programs and services established in the wake of successful legal efforts by a given set of parents may benefit other families.¹²¹

D. Comparison to Disability Cause Lawyers

Waterstone, Stein, and Wilkins reported that “[n]early all these lawyers, public and private, viewed themselves as lawyers for the entirety of, or at least various segments of, the disability community.”¹²² The special education lawyers seemed a bit more circumspect with regard to their self-images. Perhaps the intervening years have instilled some caution about the ability of lawyers to actually be lawyers for a community as a whole or the entirety of a cause. But the methods the two groups of lawyers employed bore close similarity: using relationships with organizations to determine community needs, trying to

115. *See, e.g.*, Timothy W. v. Rochester, N.H. Sch. Dist., 875 F.2d 954, 961–62 (1st Cir. 1989) (affirming principle that the duty to provide appropriate education applies to all children with disabilities, including a child with severely limited cerebral functioning).

116. 34 C.F.R. § 300.111(a)(i) (2018) (imposing duty to identify, locate, and evaluate all children with disabilities, including those who are homeless or are wards of the state); *see, e.g.*, Spring Branch Indep. Sch. Dist. v. O.W. *ex rel.* Hannah W., 961 F.3d 781, 793–95 (5th Cir. 2020) (finding violation of child-find duty with respect to a student with a history of mental illness).

117. 34 C.F.R. §§ 300.601–300.609 (2018) (establishing federal and state monitoring of compliance with IDEA obligations).

118. 20 U.S.C. §§ 1415(e), (f).

119. *See generally* Erin R. Archerd et al., *The Ohio State University Dispute Resolution in Special Education Symposium Panel*, 30 OHIO ST. J. ON DISP. RESOL. 89 (2014) (discussing controversies and trends).

120. 20 U.S.C. § 1415(i)(3)(B).

121. For a detailed discussion of the benefits of the IDEA dispute resolution process even for families of limited resources, see Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 503–08 (2014).

122. Waterstone et al., *supra* note 1, at 1304.

transcend disability categories, and relying on clients in the relevant community to set goals for litigation and other projects.¹²³

IV. STRATEGIES AND TACTICS

A major criticism of cause lawyering is an overemphasis on litigation. Waterstone and his coauthors point out that the disability cause lawyers they interviewed had a measured approach to filing litigation.¹²⁴ They appeared to take to heart the conclusion of Professors Cummings and Rhode that “litigation is an imperfect but indispensable strategy of social change.”¹²⁵ The participants in the present survey expressed caution about overreliance on courts. Two lawyers had a nuanced reaction to the lack of success in some court cases. They said that cases that do not succeed may provide a road map for how to win subsequent cases.¹²⁶ The academic literature points out other potentially beneficial side effects even from litigation that loses:

[S]avvy advocates may use litigation loss (1) to construct organizational identity and (2) to mobilize outraged constituents. Externally, these advocates may use litigation loss (1) to appeal to other state actors, including courts and elected officials, through reworked litigation and nonlitigation tactics and (2) to appeal to the public through images of an antimajoritarian judiciary.¹²⁷

The *Disability Cause Lawyers* article further notes that “litigation losses” may help “create leverage in legislatures.”¹²⁸

Relevant litigation and nonlitigation tactics for special education cause lawyers include major court filings like class actions and test cases; amicus practice; activities such as legislative advocacy, commenting on proposed regulations, and participating in public hearings; and

123. *See id.* at 1304–06.

124. *See id.* at 1337–39.

125. Cummings & Rhode, *supra* note 14, at 604.

126. Anonymous Interviews #1 & 3.

127. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 947 (2011); *see also* Cummings & Rhode, *supra* note 14, at 944 (“Court victories may lend legitimacy to a cause, mobilize constituents, and provide much-needed publicity. Litigation wins may also generate elite support, pressure adversaries, and increase a social movement’s bargaining power.”) (footnotes omitted) (further noting indirect benefits such as producing a favorable environment for broader reform).

128. Waterstone et al., *supra* note 1, at 1326. One of the participants also spoke of the impact of a planned litigation campaign on the legislature. Anonymous Interview #3.

working with the news media. The comparison to disability cause lawyers in these undertakings is a close one.

A. Class Actions and Test Cases

Even apart from cause lawyers' critics' challenges to the efficacy of class action cases, legal obstacles to the use of the class action procedure have multiplied. The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*¹²⁹ casts a shadow over class action civil rights litigation by transforming the requirement of a common question of law or fact into a demand for "commonality" that the Court said was not satisfied in the challenge by a million and a half female employees to Wal-Mart's policies on salary and promotion decisions.¹³⁰ Despite the importance of class action litigation in establishing special education rights in the first place,¹³¹ some courts have read *Wal-Mart* broadly to reject class action status for various cases asserting claims under the IDEA.¹³² Although some IDEA class actions have succeeded despite *Wal-Mart*,¹³³ the lawyers in this study expressed grave caution about using the device.¹³⁴ They noted problems with satisfying the courts' interpretations of *Wal-Mart*, as well as practical difficulties with the cases being drawn

129. 564 U.S. 338 (2011).

130. *Id.* at 342, 352, 359–60. "Commonality" is a misnomer. What the rule actually requires is "questions of law or fact common to the class," hardly the uniformity of class member injury that the term "commonality" suggests. *See* FED. R. CIV. P. 23(a)(2). *See generally* Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 U. TOLEDO L. REV. 471 (2014) (discussing class certification in special education cases and alternative approaches to systemic litigation).

131. The Supreme Court commented on the impact of the successful class cases *PARC* and *Mills* on Congress in enacting the Education for All Handicapped Children Act. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 192–94 (1982) (referencing Pa. Ass'n for Retarded Child. v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

132. *See, e.g.*, *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 497–98 (7th Cir. 2012); *T.R. v. Sch. Dist. of Phila.*, No. 15-4782, 2019 WL 1745737, *6, *17 (E.D. Pa. Apr. 18, 2019), *aff'd*, 4 F.4th 179 (3d Cir. 2021). On the importance of early class action litigation to the development of statutory rights to special education, see *supra* notes 7–11 and accompanying text (identifying *PARC* and *Mills* as fundamental right-to-education cases brought by attorney specialists).

133. *See, e.g.*, *A.R. v. Conn. State Bd. of Educ.*, 5 F.4th 155, 166–67 (2d Cir. 2021); *DL v. District of Columbia*, 860 F.3d 713, 731–32 (D.C. Cir. 2017). Some attorneys pursue class administrative complaints that do not involve court proceedings. *E.g.*, Anonymous Interview #6.

134. Anonymous Interviews #1 & 8. One lawyer mentioned having success doing class action work in areas other than special education, specifically on government benefits issues. Anonymous Interview #4.

out by interlocutory appeals.¹³⁵ One lawyer also stressed the risk of “paper wins” that are difficult to “monitor on the ground to make sure [they] actually made a difference.”¹³⁶

Several lawyers talked about prospects for success with what might be described as individual test cases that are not class action suits.¹³⁷ One mentioned a case in which a court ordered a school district to fund a last-resort placement for a child in a school that had not received state educational agency approval, which led to a change in state regulations and ultimately to state legislation permitting such an “unapproved” placement pursuant to a school district decision or hearing officer order, under specified circumstances.¹³⁸

A participant expressed doubt about trying to take cases to the Supreme Court, commenting that the Court’s majority is not favorably disposed to disability rights¹³⁹ and the risk of making bad law is significant.¹⁴⁰ The attorney pointed out that cases with a strong basis in statutory text may obtain a favorable hearing from the current Court,¹⁴¹ however, and also mentioned that there is no way to prevent opponents in a case from litigating all the way to the Supreme Court when the claimants win.¹⁴²

135. *E.g.*, Anonymous Interview #1. *See generally* FED. R. CIV. P. 23(f) (providing for discretionary interlocutory appeal of class action grants and denials).

136. Anonymous Interview #8. Another participant rejects cases that would result in “symbolic victories” but create no “tangible results.” Anonymous Interview #6.

137. Anonymous Interviews #4, 5, 6 & 7.

138. Anonymous Interview #6; *see* Act of Apr. 22, 2022, Pub. Act 102-703, 2022 Ill. Laws 2657 (codified at 105 ILL. COMP. STAT. 5/14-7.02).

139. Anonymous Interview #4.

140. *Id.* Another attorney, however, expressed the general view that the law is so unfavorable that advocates should not fear making it worse. Anonymous Interview #3.

141. Anonymous Interview #4. An example would be the recent special education case *Perez v. Sturgis Public Schools*, in which the plaintiff’s parent persuaded the Court to adopt an interpretation of the administrative exhaustion requirements consistent with the text of the IDEA found in 20 U.S.C. § 1415(l) and opposed by the school district, which insisted on a less textual interpretation that would have required dismissal of the parent’s claim. 143 S. Ct. 859, 863–66 (2023).

142. Anonymous Interview #4. The lawyer also mentioned the likelihood that more lawyers will turn to state courts as an alternative. Another respondent discussed the benefit of basing litigation on state law and staying out of the federal courts altogether. Anonymous Interview #8.

B. Amicus Briefs

More than one attorney devoted significant effort to amicus briefs in important cases brought by other lawyers.¹⁴³ COPAA, the special education parent lawyers and advocates organization described above,¹⁴⁴ is active in arranging and assisting amicus brief filings in cases of significance before the courts of appeals and the Supreme Court. Participants commented on the important role the organization plays and the value of support from COPAA amicus briefs.¹⁴⁵

C. Nonlitigation Activities

Lawyers in this study described active involvement in nonlitigation efforts such as research reports, legislative advocacy, commenting on proposed regulations, and participating in public hearings.¹⁴⁶ The attorneys acted either as independent operators or on behalf of organizations. Legislative advocacy and other nonlitigation cause work was described as typically done pro bono.¹⁴⁷

One attorney stressed the importance of participating in a “public inquiry” proceeding conducted by the Illinois State Board of Education in connection with special education service delivery failures on the part of the Chicago Public Schools after the city public schools adopted a number of new policies and programs and effectively decreased the special education services provided.¹⁴⁸ The inquiry process began when

143. Anonymous Interviews #1 & 4.

144. *Supra* notes 107–110 and accompanying text.

145. *E.g.*, Anonymous Interviews #4 & 5. As one of numerous examples, COPAA filed a brief in *Perez v. Sturgis Public Schools*, described *supra* note 141. *See* Brief for Amici Curiae The Arc of the United States et. al. in Support of Petitioner, *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859 (2023) (No. 21-887), https://www.supremecourt.gov/DocketPDF/21/21-887/246668/20221116141113015_21-887%20Perez%20v%20Sturgis%20Brief%20for%20Amici%20Curiae%20The%20Arc%20of%20the%20US%20et%20a.pdf [<https://perma.cc/2FAD-7S8W>]. The *Disability Cause Lawyers* study also mentioned amicus practice. Waterstone et al., *supra* note 1, at 1302.

146. Anonymous Interviews #1, 2, 4, 5, 6 & 7.

147. Anonymous Interview #4. Funding is an important concern for lawyers who want to be involved in policy work. *See* Trowbridge, *supra* note 43, at 297 (noting some cause lawyer entities’ avoidance of policy work is due to limited resources, among other factors).

148. Anonymous Interview #6. *See* Memorandum from Nancy Krent, Facilitator of the Pub. Inquiry Team, Richard Cozzola, Advoc. Rep. of the Pub. Inquiry Team & Rupa Ramadurai, ISBE Rep. of the Pub. Inquiry Team, to Tony Smith, State Superintendent of Educ. & Stephanie Jones, ISBE Gen. Couns., 2, 36–40 (Apr. 18, 2018), https://www.isbe.net/Documents/Public_Inquiry_Final_Report.pdf [<https://perma.cc/3RQV-B4J9>] [hereinafter ISBE Public Inquiry Memo]; *ISBE Monitor*, ILL.

public education advocates sent an open letter to the State Board of Education reporting systemic failures in provision of special education and requesting that the State Board open an investigation.¹⁴⁹

The general counsel of the State Board appointed an inquiry team, which issued information requests and conducted meetings and interviews, then public hearings.¹⁵⁰ The team responded to claims that electronic processes for generating Individualized Education Programs for students resulted in unlawful denial and delay of required services as well as limits on services students needed, that documentation and data collection requirements led to delay or denial of identification of students as children with disabilities and provision of services to them, that the budgeting system also delayed or denied needed services, and that transportation policies caused unlawful delay or denial of needed transportation.¹⁵¹ The investigation team found systemic problems in all of these areas, and the State Board appointed a monitor to ensure that the systemic deficiencies were corrected and remedial services provided to students.¹⁵² The attorney reported spending significant time developing evidence for the inquiry and advocating before the investigation team.¹⁵³ The attorney saw the inquiry as highly successful in correcting policies and causing increased resources to be devoted to

STATE BD. OF EDUC., <https://www.isbe.net/monitor> [<https://perma.cc/QL7Q-T7G7>].

149. ISBE Public Inquiry Memo, *supra* note 148, at 1.

150. *Id.* at 1–3. The Board relied on authority under state law, 105 ILL. COMP. STAT. ANN. 5/2-3.8 (West 2020); 105 ILL. COMP. STAT. ANN. 5/14-5.01 (West 2020); 105 ILL. COMP. STAT. ANN. 5/14-8.02e (West Supp. 2023); as well as the IDEA and its regulations, 20 U.S.C. § 1411; 34 C.F.R. §§ 300.151–300.153.

151. ISBE Public Inquiry Memo, *supra* note 148, at 2, 37–40.

152. Memorandum from Stephanie Jones, ISBE Gen. Couns. & Heather Calomese, Exec. Dir. Special Educ. Servs., to Tony Smith, Ph.D., Ill. State Bd. of Educ. Superintendent, 2–5 (May 16, 2018), <https://www.isbe.net/Documents/Corrective-Action-Report.pdf> [<https://perma.cc/66NP-DUZP>]. For the most recent monitoring report see ILL. STATE BD. OF EDUC., 2018 PUBLIC INQUIRY INTO SPECIAL EDUCATION POLICIES AT CPS—2021 ANNUAL MONITORING REPORT (2021), <https://www.isbe.net/Documents/2021-ISBE-Monitoring-Report.pdf> [<https://perma.cc/2G78-TSDT>]; *see also* Memorandum from Trisha Olson, Legal Officer & Laura Boedeker, Assistant Legal Officer, to Ill. State Bd. of Educ. & Dr. Carmen I. Ayala, State Superintendent of Educ., 3–4 (May 19, 2021), <https://www.isbe.net/Documents/2021-Expanded-Corrective-Action-Report.pdf> [<https://perma.cc/T5U4-NBNF>] (providing for continuing monitoring and reports).

153. Anonymous Interview #6.

hiring teachers and related service personnel.¹⁵⁴ Somewhat more limited success was also achieved in remedying individual service denials.¹⁵⁵

D. Media and Public Relations

Attorneys reported relying on advocacy organizations as well as their own initiatives in getting word out to news media about cases and other advocacy activity.¹⁵⁶ One discussed the difficulty of putting the message across to the general public that families demanding needed education services were not seeking unfair advantage or special privileges, but rather accommodations needed for equal treatment.¹⁵⁷ A participant noted that some advocacy organizations are highly skillful at presenting an accurate picture.¹⁵⁸

E. Comparison to Disability Cause Lawyers

Waterstone and his coauthors stated that disability cause lawyers “view litigation as one form of a larger mobilization strategy, [to] engage in multiple forms of advocacy, and have real, sustained connections to the communities they serve.”¹⁵⁹ That description fits special education cause lawyers as well. The *Disability Cause Lawyers* article comments that “disability cause lawyers are exceptional for the extent to which they eschew the [Supreme] Court,”¹⁶⁰ and were wary of class actions.¹⁶¹ Like the disability cause lawyers, the special education lawyers hoped to change the behavior of actors who were not the immediate parties to the litigation they brought, and were skeptical about the chances of success in the Supreme Court.¹⁶² The efforts of the special education lawyers in reaching mediated settlements and participating in projects such as the Public Inquiry evoke the comment of one of the disability cause lawyer study participants that “her firm was not creating legal precedents; rather, the firm was ‘[c]reating industry precedent.’”¹⁶³ Like

154. *Id.*

155. *Id.*

156. Anonymous Interviews #6 & 7.

157. Anonymous Interview #4.

158. Anonymous Interviews #2.

159. Waterstone et al., *supra* note 1, at 1292.

160. *Id.* at 1294; *see also id.* at 1321 (reporting a disability cause lawyer’s opinion that the Supreme Court should be an option only when the other side pursues the appeal).

161. *Id.* at 1295.

162. *See* text accompanying notes 140–142 (discussing the Supreme Court and the risk of making bad law); *cf.* Waterstone et al., *supra* note 1, at 1305–06, 1348–51.

163. Waterstone et al., *supra* note 1, at 1311.

the special education lawyers,¹⁶⁴ the disability cause lawyers engaged in amicus practice.¹⁶⁵ Media activities also seem similar between the two samples.¹⁶⁶

CONCLUSION: SPECIAL EDUCATION CAUSE LAWYERS AND
(OTHER) DISABILITY CAUSE LAWYERS

Dean Waterstone and his coauthors stressed the “relentless pragmatism” of the cause lawyers they studied,¹⁶⁷ and the same description applies to the lawyers in the current study. No doubt, aspects of their work could be criticized, but their efforts are attuned to the disability education rights movement that they support. In particular, the special education lawyers appear to realize that the lawyer is not the star performer, and what matters is the success of clients and the larger population of families with disabled children.

164. *See supra* text accompanying note 145 (discussing amicus work).

165. Waterstone et al., *supra* note 1, at 1319.

166. *See id.* at 1326–27.

167. *Id.* at 1358.