

SOCIOECONOMIC AND RACIAL DISPARITIES IN
PUBLIC SPECIAL EDUCATION: ALLEVIATING
DECADES OF UNEQUAL ENFORCEMENT OF THE
INDIVIDUALS WITH DISABILITIES EDUCATION ACT
IN NEW YORK CITY

By Nicholas Gumas*

After a long history of neglecting children with special needs, Congress enacted the Individuals with Disabilities Education Act (IDEA) to grant every child with a qualifying disability the right to a free and appropriate public education. To ensure local compliance, the IDEA created a private right of action through which parents may sue their school district for failing to offer an adequate education for their child. If successful, these parents, may then send their child to a private school at the expense of their local government. Private enforcement of the IDEA has helped equalize educational opportunities for wealthy children whose parents can afford to commit to the financial, emotional, and physical costs of suing the government, but children of less affluent families who cannot afford to make similar commitments are often left behind when a school district fails to adhere to the IDEA's mandate. As a result, large special educational disparities exist in segregated school districts between wealthy, predominantly white families and less affluent, predominantly non-white families.

State and local governments have mostly limited their efforts to fully achieve the IDEA's goal by implementing voucher programs, which allow only a handful of low-income

* J.D. Candidate 2018, Columbia Law School; B.A. 2015, The George Washington University. The author would like to thank Professor Michael Rebell for advising him during the writing and editing process, his family for supporting him throughout law school, and staff of the *Columbia Journal of Race and Law* for their editing assistance and contributions.

children to enjoy the educational opportunities afforded to their wealthier peers. Under Mayor Bill De Blasio, New York City took a different approach and began settling most IDEA claims to effectively lower the procedural barrier for parents. Much like vouchers, however, De Blasio's policy fails to address the underlying issue: The IDEA's reliance on private enforcement will continue to fail those who historically have been deliberately excluded from the full social and economic benefits of white citizenship. State and local governments must go beyond tinkering with the accessibility of the private enforcement mechanism and instead invest financial resources to equalize educational opportunity through public enforcement of the IDEA. This Note assesses potential state and local policy reforms to secure expanded special education opportunity and discusses how New York City can begin to effectively lead in IDEA public enforcement.

I. Introduction.....	400
II. Overview of the Individuals with Disabilities Education Act	403
A. Legislative History and Judicial Scrutiny of the IDEA	403
B. IDEA Procedural Requirements: Private Enforcement	408
1. Identifying Disability	409
2. Enforcing IDEA Rights.....	410
III. Differing Responses to IDEA Litigation in New York City	412
A. Disparities in Special Education	413
1. Special Education as a Means of Segregation.....	413
2. Educational Disparities in New York City Public Schools	417

B. Inequalities of Private Enforcement Use and Education Quality	421
1. Attending the CSE Meeting	423
2. Lack of Institutional Knowledge.....	423
3. Inability to Assess the Adequacy of Public School Placement	425
4. Time and Financial Demands	426
C. New York City Mayoral Responses to Tuition Reimbursement Claims	427
IV. Securing Quality Special Education for Each New York City Child	431
A. Vouchers	432
1. A Brief Explanation of Vouchers and School Choice .	
.....	432
2. State Special Education Voucher Programs	436
B. Publicly Funded Special Education Attorneys	440
C. Public Enforcement of the IDEA	445
1. The Need for Public Enforcement.....	445
2. Public Enforcement in New York City Through the Public Advocate	447
V. Conclusion	452

I. INTRODUCTION

The controversies and ultimate outcome of the 2016 presidential election will provide more than enough material for historians to document what our country endured over the last two years. What will probably not make the historical accounts of the presidential campaign, however, is how candidate Hillary Clinton elevated disability rights to a position of visibility the issue has not enjoyed in decades. During her speech accepting the Democratic Party's

nomination for president, Secretary Clinton outlined her early career, during which she first became involved in disability activism:

I went to work for the Children's Defense Fund, going door to door in New Bedford, Massachusetts on behalf of children with disabilities who were denied the chance to go to school. I remember meeting a young girl in a wheelchair on the small back porch of her house. She told me how badly she wanted to go to school. It just didn't seem possible in those days ... our work helped convince Congress to ensure access to education for all students with disabilities. It's a big idea, isn't it? Every kid with a disability has the right to go to school.¹

Secretary Clinton was referring to the Individuals with Disabilities Education Act (IDEA), which grants every child with a qualifying disability the right to a free and appropriate public education. The anecdote that Clinton shared was not an uncommon occurrence in the United States prior to the Act's implementation. To tackle the historic exclusion of children with disabilities from public schools, the IDEA established a collaborative framework for school districts and parents to work together to craft individualized education plans outlining the particular needs of a given child with a qualifying disability. That plan determines which public school within the district can accommodate the child's specific needs.

If the right to a free and appropriate public education granted by the IDEA is not adequately provided to a child with a qualifying disability, parents may file a due process complaint and, after exhausting available state

¹Damon Winter, *Transcript: Hillary Clinton's Speech at the Democratic Convention*, N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/us/politics/hillary-clinton-dnc-transcript.html>? [https://perma.cc/8JVY-MWV3].

administrative remedies, they may choose to sue their local school district for the cost to place their child in an appropriate private school instead of the public school system. This mechanism for parental enforcement of the IDEA, while well intentioned, has resulted in socioeconomic and racial disparities in the access to quality special education. Wealthy white families initiate such complaints, and in turn ensure better educational opportunities for their children, more frequently than non-white or non-wealthy parents. As a result, school districts are more responsive to the families that can afford the risk of pursuing such legal action, creating a socioeconomic and racial disparity in special education services. This problem is particularly pronounced in New York City.

With roughly one million students, New York City runs the largest school system in the United States. Unfortunately, it is also one of the most racially segregated.² New York's response to tuition reimbursement claims under the IDEA has changed drastically between the administrations of former Mayor Michael Bloomberg and current Mayor Bill De Blasio, with—as a general rule—the former in favor of litigating such claims against the City and the later in favor of settling them. This Note will examine whether the new policy helps further the overall mission of the IDEA to provide quality public special education to children with a qualifying disability, and consider alternative local policy reforms that may better achieve the Act's goal.

Part I summarizes Congressional action to provide students with disabilities access to public special education, discusses how federal law has evolved and how the Courts have clarified (and sometimes complicated) the scope of the law, and outlines how parents can secure and challenge special education placement through the IDEA's procedural safeguards. Part II discusses how IDEA safeguards are

² See THE CIVIL RIGHTS PROJECT, *Executive Summary - New York State's Extreme School Segregation* (2014), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/ES_NY_CRP_031014.pdf.

disproportionately burdensome for low-income families, summarizes racial segregation in the American public special education system, and explains mayoral policy changes related to procedural safeguards in the City. Part III assesses various policy reforms for strengthening the IDEA and highlights reforms that can be achieved within local government, as opposed to reforms that would require Congressional or federal agency action. Part III also discusses the merits and drawbacks of three popular reform suggestions: Voucher programs, state-funded legal assistance, and public enforcement of the IDEA.

II. OVERVIEW OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This part summarizes Congressional action to provide students with disabilities access to public special education and will include a discussion on how federal law has evolved and how the Courts have clarified (and sometimes complicated) the scope of the law. An outline of how parents can go about securing and challenging special education placement through the IDEA's procedural safeguards will follow that overview.

A. Legislative History and Judicial Scrutiny of the IDEA

Prior to Congressional action addressing educational access for children with disabilities, most disabled children "were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out."³ Middle-class white parents organized in opposition to this exclusion, demanding that their disabled children have the same educational access as their non-disabled peers.⁴ Non-white families joined the movement,

³ H. R. REP. NO. 94-332, at 2 (1975).

⁴ Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 362 (1994).

although many of their concerns focused on the use of special education as a means of segregating non-white students from regular public education classrooms.⁵ By the early 1970s, special education advocates won important legal battles in Pennsylvania and Washington, D.C. that helped legitimize their demands.⁶

Congress passed the Education for All Handicapped Children Act in 1975, later renamed in 1990 as the IDEA, 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.”⁷ States are primarily responsible for carrying out this mandate; as a condition of receiving federal education funding, states must devise and implement a plan to achieve free access for all students with disabilities as defined by the statute to a free and appropriate public special education.⁸

To qualify for the IDEA, a child must have a statutorily recognized disability that requires special educational and related services.⁹ Disability is broadly defined to include a range of physical and mental disabilities, such as learning disabilities, hearing impairments, emotional disabilities, or autism.¹⁰ The contours of a free and appropriate public education (FAPE) that a qualifying child has a statutory right to receive is determined by that child’s individualized education program (IEP), a written statement outlining the services that the child requires and

⁵ *Id.*

⁶ *See generally* *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (In the same year, the U.S. District Court for the District of Columbia held that denying children with disabilities public education violates the Due Process Clause) and *Pennsylvania Ass’n, Ret’d Child. v. Commonwealth of Pennsylvania.*, 343 F. Supp. 279 (E.D. Pa. 1972) (In 1972, the U.S. District Court for the Eastern District of Pennsylvania approved a settlement agreement that barred public schools from excluding children with mental disabilities).

⁷ 20 U.S.C. § 1400(d)(1)(A) (2012).

⁸ 20 U.S.C. § 1412(a)(1)(A); § 1413 (2012).

⁹ 20 U.S.C. § 1401(3)(A) (2012).

¹⁰ *Id.*

specifying a local public school that will be tasked with providing those services to the child over the following academic year.¹¹ Every child's IEP is unique to that child's specific needs. The IDEA's ambiguous definition of what constitutes a FAPE, and the dispute whether a specific IEP has satisfied that standard, is responsible for much of the litigation surrounding the statute.

The Supreme Court first attempted to clarify this ambiguity in the 1982 *Rowley* decision, in which the Court held that the right to a FAPE is satisfied when certain procedural and substantive requirements are met.¹² Procedural requirements consist of the step-by-step process for developing an IEP that the statute outlines, such as who must be present at the meeting to draft the IEP and the timeline for finalizing the document.¹³ Unlike the procedural requirements, which are explicitly rooted in the statutory text, substantive requirements are created by judicial interpretation of Congress' intent when passing the IDEA. To meet such requirements, an IEP must simply "confer some educational benefit" to the child in the least restrictive environment.¹⁴ Put another way, the IEP must be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."¹⁵

While the Supreme Court has "specifically rejected the contention that the 'appropriate education' mandated by [the] IDEA requires states to 'maximize the potential of handicapped children,'" much ambiguity remains about how to determine what satisfies the "some educational benefit" standard.¹⁶ Some circuits interpret the standard to mean that the school must provide a benefit that "merely [be] 'more than *de minimis*.'"¹⁷ Other circuits apply a higher standard,

¹¹ § 1401(9)(D).

¹² *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982).

¹³ 20 U.S.C. § 1415 (2012).

¹⁴ *Rowley*, 458 U.S. at 102.

¹⁵ *Id.*

¹⁶ *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998).

¹⁷ *Andrew F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338-39 (10th Cir. 2015) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)).

requiring that the school district show that the placement will result in a “meaningful educational benefit.”¹⁸ The Supreme Court resolved this split recently by rejecting the Tenth Circuit’s standard as inadequate.¹⁹ It appears that students in New York City are still subject to the “meaningful educational [benefit]” standard, which the Second Circuit adopted in 1998.²⁰

For the purposes of this Note, it is important to understand that “no public actor is tasked with reviewing on its own initiative the substance of individual children’s IEPs.”²¹ The responsibility instead falls squarely on the parent, who can ensure compliance only through the private enforcement mechanism outlined in the Section B of this Part.²² The statute provides that parents who are unsatisfied with a local school district’s compliance with their child’s IEP may, among other options like requesting a new IEP or public school placement, take their child out of the assigned public school and enroll the child in a private institution. The parent may then seek tuition reimbursement from the school district.

As parents began to take advantage of their IDEA due process rights, the Supreme Court issued a few decisions clarifying the parameters of private enforcement. In the 1985 *Burlington* decision, the Court held that if a parent can demonstrate that a school district’s placement is inappropriate (that is, the school did not satisfy the

¹⁸ See, e.g., *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-09 (5th Cir. 2003); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988).

¹⁹ See *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (holding that the Tenth Circuit’s *de minimis* standard produces a result “tantamount to sitting idly . . . awaiting the time when they were old enough to drop out.”) (internal citations omitted).

²⁰ *Walczak*, 142 F.3d at 133.

²¹ Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1422 (2011).

²² 20 U.S.C. § 1415(f) (2012); see also Joseph Tulman, *Are There Too Many Due Process Cases? An Examination Of Jurisdictions With Relatively High Rates of Special Education Hearings*, 18 UDC-DCSL L. REV. 249, 250 (2015).

appropriate education standard), and show that their alternative private school placement is appropriate, that parent may recover the costs of the private school tuition from the government.²³ The rationale is that a child has a statutory right to a FAPE, so if the school district fails to provide such a right, it must at least help parents finance the means to secure that right through a private school. A few years later, the Court clarified in the *Carter* decision that a parent may seek tuition reimbursement for private school even if the private school is not on a state-approved list of institutions to provide special education services.²⁴ This decision has allowed parents more discretion in finding an alternative placement to an inadequate public school. After the Court held in *Smith* that the IDEA did not allow parents who were successful in their tuition reimbursement claims to collect attorneys' fees, Congress amended the Act in 1986 to reverse the Court's decision and explicitly permit the recovery of attorneys' fees for parents who are successful in enforcing their child's IDEA rights.²⁵

While members of Congress found that "substantial gains had been made in the area of special education" by the late 1990s, they determined that further action was necessary "to guarantee children with disabilities adequate access to appropriate services."²⁶ Congress amended the IDEA in 1997 "to place greater emphasis on improving student performance and [ensure] that children with disabilities receive a quality public education."²⁷ These amendments required states to offer a voluntary mediation session for parents who seek an administrative hearing to enforce their due process rights.²⁸ By placing a "new emphasis on the importance of mediation as an alternative method of resolving special education conflicts," Congress hoped to slow the growth of IDEA litigation and foster

²³ Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985).

²⁴ Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 (1993).

²⁵ Handicapped Children's Protection Act of 1986, PUB. L. NO. 99-372; *Smith v. Robinson*, 468 U.S. 992, 1021 (1984).

²⁶ See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

²⁷ S. REP. NO. 105-17, at 3 (1997)

²⁸ § 1415(e).

greater collaboration between parents and school districts.²⁹ In 2004, Congress again amended the IDEA to explicitly codify the right to tuition reimbursement and, absent a waiver, mandate the participation in a resolution session after a parent files a due process complaint.³⁰

The Court has issued three decisions related to private enforcement since the 2004 IDEA amendments. In *Arlington Central School District*, the Court held that while the IDEA allows parents who are successful in their claims to collect attorney fees, the Act does not allow parents to collect the costs of experts they may decide to use in the litigation to illustrate the adequacy of a school placement.³¹ Then in *Winkelman*, the Court clarified that a parent may bring a tuition reimbursement claim pro se.³² And in *Forest Grove*, clarifying ambiguity from the 1997 amendments, the Court held that a parent is entitled to reimbursement for a non-public placement even if their child did not previously receive special education services in a public school.³³

B. IDEA Procedural Requirements: Private Enforcement

Parental consent and involvement is at the heart of the IDEA, which outlines a rigid procedural framework to govern a child's access to special education. These safeguards exist "to insure the full participation of the parents and proper resolution of substantive disagreements."³⁴ States have the discretion to establish additional procedures so long as they do not conflict with the IDEA.³⁵ Given that the focus of this Note is special

²⁹ See Steve Baldrige & David Doty, *MEDIATION UNDER THE NEW IDEA: ROOM TO BE REASONABLE*, at 1 (1998).

³⁰ 20 U.S.C. § 1412(a)(10)(C)(ii); § 1415(f)(1)(b) (2012).

³¹ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).

³² *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007).

³³ *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 246-47 (2009).

³⁴ *Sch. Comm. of Burlington*, 471 U.S. at 368.

³⁵ See § 1415(a).

education access in New York City, this Section will outline the due process requirements in New York state.

1. Identifying Disability

If a school district suspects that a child may have a qualifying IDEA disability, it must first obtain the consent of the parent before evaluating the child.³⁶ Once the parent provides their consent, or requests an evaluation of their child through their own initiative, the child is evaluated (without financial cost to the parent) in a manner that includes a physical exam, psychological exam, and observations of the student's current academic performance and social behavior.³⁷ If the evaluation determines that the child has any of the qualifying disabilities outlined by the statute, and thus has a right to special education under the IDEA, the child is entitled to an IEP.³⁸ A committee on special education (CSE) develops a child's IEP.³⁹ The CSE consists of, at minimum, the child's parent, regular education teacher, a special education teacher, and a school psychologist.⁴⁰ A representative from the school district "who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" must also be present and serves as chairperson for the CSE.⁴¹ When scheduling CSE meetings, the chairperson must take great care to ensure that the parent is able to attend and participate.⁴² The CSE must produce an IEP that includes an assessment of the child's current level of performance, specific disability classification, measurable academic and functional goals, instructional benchmarks for evaluating such goals, and required educational and related

³⁶ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(a) (2017).

³⁷ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b) (2017).

³⁸ § 200.4(d)(2).

³⁹ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3.

⁴⁰ § 200.3(a)(1).

⁴¹ § 200.3(a)(1)(v).

⁴² N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(d).

services.⁴³ This process is repeated each academic year as a child's IEP serves as a governing document for that child's educational needs, and the IEP may change as the child makes progress from year to year.⁴⁴

In order to comply with the substantive requirements of a FAPE, a child's educational placement must also be in the "least restrictive environment" (LRE).⁴⁵ The LRE requirement indicates a strong preference for educating a child in a mixed public school classroom instead of segregating that student into a special education-only classroom.⁴⁶ States that do not comply with the LRE provision are in danger of losing federal funding.⁴⁷

2. Enforcing IDEA Rights

Parents unsatisfied with the educational services provided to their child have available to them procedural safeguards to address such concerns and ensure IDEA compliance.⁴⁸ A parent has two years from the date the parent knew, or should have known, about the basis of their concern to file a due process complaint with the state or local educational agency.⁴⁹ This complaint must include a description of the problem the child is facing in the assigned public school and a proposed solution, which in New York state, is usually a reimbursement request for the tuition at a private school that the parent believes will more adequately serve their child's educational needs.⁵⁰ Within the same

⁴³ § 200.4(d)(2).

⁴⁴ § 200.4(f).

⁴⁵ § 200.4(d)(4)(ii).

⁴⁶ 20 U.S.C. § 1412(a)(5)(A) (2012); *see also* T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 161 (2d Cir. 2014) (citing *Walczak*, 142 F.3d at 122) (noting LRE "requirement 'expresses a strong preference for children with disabilities to be educated, to the maximum extent appropriate, together with their non-disabled peers.'")

⁴⁷ § 1412(a)(5)(B) (2012).

⁴⁸ *See* § 1415 (2012).

⁴⁹ N.Y. EDUC. LAW § 4404 (1) (Consol. 2017); 34 C.F.R. § 300.507(a)(2).

⁵⁰ § 1415(a)(7); *see also* Gilbert McMahon, *NYS Special Education Impartial Hearing Outcomes*, <http://www.specialedlawadvocacy.com/NYS%20Special%20Education%20I>

timeframe, the parent must also request an impartial hearing, in which an impartial hearing officer (IHO) will review the parents' complaint, and the state's response to the complaint, in order to render a decision.⁵¹ The IHO cannot be an employee of the state or local educational agency and is limited in their decision-making capacity to address only the issues raised in the initial complaint, unless the parties otherwise agree.⁵²

The IHO's determination of whether a child received a FAPE is usually made on substantive grounds, including whether a child's placement is in the least restrictive environment or satisfies the "meaningful education benefit" standard.⁵³ An IHO can only find that a child did not receive a FAPE on procedural grounds if such "inadequacies (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit."⁵⁴ These issues arise in the formulation of the child's IEP.

The agency or parent may appeal the IHO's decision to a state review officer (SRO).⁵⁵ New York's two-tiered system is a rarity that adds an extra procedural step for the parent; as of 2010, forty states and Washington, D.C have only one-tiered systems for IDEA due process hearings.⁵⁶ If either party is dissatisfied with the SRO decision, the party may appeal to the New York Supreme Court or the relevant United States federal district court.⁵⁷ These procedural safeguards are included in an annual notice sent to parents

mpartial%20Hearing%20Outcomes.pdf (indicating that over half of IDEA complaints in New York state relate to tuition reimbursement claims).

⁵¹ 34 C.F.R. § 300.511 (2002).

⁵² *Id.*; § 200.5(j)(4).

⁵³ 34 C.F.R. § 300.513(a) (2002); *see also Walczak*, 142 F.3d at 130.

⁵⁴ § 300.513(a)(2).

⁵⁵ N.Y. EDUC. LAW § 4404(2) (Consol. 2017).

⁵⁶ Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010).

⁵⁷ EDUC. § 4404(3).

in their native language in an attempt to inform parents of the rights the IDEA affords them and their children.⁵⁸

Congress provided additional means of redress for parents outside of the otherwise linear due process system. Parents may decide to pursue mediation instead of an impartial hearing.⁵⁹ Mediation is voluntary and if an agreement is reached, it is legally binding in state and federal district courts.⁶⁰ Congress created the mediation option in 1997, intending for it to “become the norm for resolving special education disputes”⁶¹ and reduce the financial burden of pursuing due process under the IDEA.⁶² Apart from mediation, within fifteen days of receiving the due process complaint, the district must offer the opportunity to arrange a resolution session.⁶³ Parents may elect to waive the requirement,⁶⁴ but if they proceed and reach an agreement during a resolution session, the agreement is similarly binding in state and federal court.⁶⁵

III. DIFFERING RESPONSES TO IDEA LITIGATION IN NEW YORK CITY

IDEA safeguards disproportionately burden low-income families. In New York City, the majority of these families are non-white. This Part will summarize racial segregation in the American public special education system

⁵⁸ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(f) (2017).

⁵⁹ § 200.5(h).

⁶⁰ *Id.*

⁶¹ S. REP. NO. 105-17, at 26. In New York state, parents rarely use mediation. The most recent data provided by the U.S. Department of Education for 2014-2015 indicates that of the 5,170 due process complaints filed, only twenty resulted in a mediation session. See U.S. DEP'T OF EDUC., *IDEA Section 618 Data Products: State Level Data Files*, <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html> (“Dispute Resolution” tab under “Part B”) (last visited Apr. 12, 2018).

⁶² S. REP. NO. 104-275, at 18 (1996).

⁶³ § 200.5(j)(2).

⁶⁴ § 1415(f)(1)(B)(i)(IV).

⁶⁵ § 200.5(j)(2) (2017).

and explain mayoral policy changes related to procedural safeguards in the City.

A. Disparities in Special Education

While the U.S. Department of Education releases data on the state level, these aggregate numbers may mask inequalities on the local level. Local data is not published, and the aggregate numbers at the state level are not broken down by race for every age group or socioeconomic status for any age group.⁶⁶ Given the difficulty of collecting reliable local data, much of the existing literature relies on a patchwork of data obtained through FOIL requests and anecdotes.⁶⁷ New York City recently began releasing annual reports on the special education student population, but only two have been published.⁶⁸

1. Special Education as a Means of Segregation

There are roughly six million children in the United States who receive special educational services under the IDEA.⁶⁹ About two-thirds of these students are from families that make less than \$50,000 per year, including the two million IDEA students who live below the poverty line.⁷⁰

⁶⁶ See U.S. DEP'T OF EDUC., *supra* note 61.

⁶⁷ Pasachoff, *supra* note 21, at 1426.

⁶⁸ See N.Y.C. DEP'T OF EDUC., LOCAL LAW 27 OF 2015 ANNUAL REPORT ON SPECIAL EDUCATION SCHOOL YEAR 2014–2015 (2016), <http://schools.nyc.gov/NR/rdonlyres/6035782C-F95D-4224-8372-F2B1F7E9A226/0/LocalLaw27of20152292016FINAL.pdf>; N.Y.C. DEP'T OF EDUC., LOCAL LAW 27 OF 2015 ANNUAL REPORT ON SPECIAL EDUCATION SCHOOL YEAR 2015–2016 (2016), <http://schools.nyc.gov/NR/rdonlyres/9B4FD479-461D-4120-8185-A5EC8B548AFA/0/LocalLaw27of2015201516AnnualReportonSpecialEducation.pdf>.

⁶⁹ U.S. DEP'T OF EDUC., *supra* note 611 (see “Child Count and Educational Environments” tab under “Part B”).

⁷⁰ Elisa Hyman, *Keeping the Needs of Students with Disabilities on the Agenda: Current Issues in Special Education Advocacy: How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of*

While the focus of this Note is on low-income students of color who are correctly identified as requiring special education and challenges their parents face in enforcing their federal civil rights, any discussion on race and special education must first address the history of discrimination in the special education system:

Since the landmark decision of *Brown v. Board of Education* mandated desegregation in public schools, African-American students have been re-segregated within public schools through their over-placement in special education classes. The enforcement of *Brown* coincided with schools classifying African-American students as disabled and placing them in special education classes as a pretense for discrimination. 71

Although scholars began to recognize the problem,⁷² and federal courts began responding as early as the late 1960s,⁷³ Congress did not formally act until the 1997 IDEA amendments, in which Congress mandated that the National Research Council study minority representation in special education and acknowledged “that ‘more minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.’”⁷⁴ This issue has also reached the attention of the U.S. Department of Education, under which

Special Education Lawyering, 20 AM. U.J. GENDER SOC. POL’Y & L. 107, 112-13 (2011).

⁷¹ Robert A. Garda, Jr., *The New Idea: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072 (2005).

⁷² Lloyd M. Dunn, *Special Education for the Mildly Retarded--Is Much of It Justifiable?*, 35 EXCEPT. CHILD. 5 (1968).

⁷³ In 1968, the U.S. District Court for the District of Columbia held that disproportionate representation of African American students in special education constituted an equal protection violation. *Hobson v. Hansen*, 269 F. Supp. 401, 498 (D.D.C. 1967).

⁷⁴ Garda, Jr., *supra* note 71, at 1076-77 (quoting PUB. L. NO. 105-17, § 601(c)(8)(B) (1997)).

the Office of Special Education Programs (OSEP) described minority overrepresentation in the late 1990s as a “national problem” of “high priority” and acknowledged “placement in special education classes may be a form of discrimination.”⁷⁵

What is particularly troubling about African American overrepresentation in special education is that it occurs most frequently in categories that require a subjective determination of disability, suggesting that the issue is one of individual and systematic bias, and not of legitimate health issues facing the community.⁷⁶ African American children are more than twice as likely to be identified as mentally retarded as are white children,⁷⁷ more likely to be identified as having a severe emotional disturbance,⁷⁸ and over twice as likely to be identified as having a broad development delay.⁷⁹ The consequences of overrepresentation are harmful to these students: African American children are concentrated in low-income school districts, where they usually receive lower-quality special education in large class sizes and are more likely to be placed in an overly restrictive environment that stunts their educational growth.⁸⁰ Critically, African American parents – due to a variety of factors discussed in Section B of this Part – are also less likely to be successful advocates for their children through the IDEA due process procedures, and as a result, African American students placed in special education do not receive benefits equivalent to their white peers.⁸¹

⁷⁵ Jane Burnette, *Reducing the Disproportionate Representation of Minority Students in Special Education ERIC/OSEP Digest # E566* (Mar. 1998), <http://files.eric.ed.gov/fulltext/ED417501.pdf>.

⁷⁶ Daniel Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 440 (2001).

⁷⁷ NAT'L RESEARCH COUNCIL COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., *Minority Students in Special and Gifted Education*, at 44 (2002), <https://www.nap.edu/read/10128/chapter/1>.

⁷⁸ *Id.* at 50.

⁷⁹ *Id.* at 60-64.

⁸⁰ Losen & Welner, *supra* note 76, at 427.

⁸¹ Garda, Jr., *supra* note 71, at 1084.

While “there is no correlation between race and disability,” “there is a strong correlation between race and poverty, and poverty and disability.”⁸² Still, “distortions in the representation of racial groups cannot be explained simply because minority groups are disproportionately represented among the poor.”⁸³ It is hard to explain the racial disparity in special education without discussing the history of racism in this country. Evidence of this is illustrated by the fact that “five of the seven states with the highest overrepresentation of African Americans labeled ‘mentally retarded’ are in the South (Mississippi, South Carolina, North Carolina, Florida, and Alabama) where intentional racial discrimination in education was once required by law.”⁸⁴ And so even if discrimination in special education is waning, the residual effects are still at play.

Cultural misunderstandings between white teachers and their African American students, for example, “may result in those teachers perceiving students to be oppositional or incapable of understanding what is required of them.”⁸⁵ Various studies have confirmed “teachers view the exact same behavior by white and black students differently” resulting in “a referral for special education assessment, and almost certainly placement, to remove the culturally different – or ‘disruptive’ – behavior from the classroom.”⁸⁶ As the research indicates, “teachers tend to more frequently refer students from backgrounds different than their own”,⁸⁷ resulting in white teachers referring African American students to special education at a higher

⁸² Garda, Jr., *supra* note 71, at 1086 (citing H.R. REP. NO. 108-77, at 99 (2003)).

⁸³ Losen & Welner, *supra* note 76, at 415.

⁸⁴ *Id.* at 414; See also NAT’L RESEARCH COUNCIL COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., *supra* note 77, at 63 (finding “clearly there is overrepresentation for these two minorities in the LD category in some states”).

⁸⁵ Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1320 (1995).

⁸⁶ Garda, Jr., *supra* note 71, at 1091-92.

⁸⁷ Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 BYU EDUC. & L. J. 179, 190 (2001).

rate than do their non-white colleagues. And so, while many of the problems in special education correlate with socioeconomic status, racism has made those problems worse for students of color.

2. Educational Disparities in New York City Public Schools

New York state has one of the most racially segregated public school system in the country.⁸⁸ In New York City, as of 2014, 19 out of the 32 Community School Districts had a student body of which less than 10% were white.⁸⁹ Of the City's charter schools, 73% have less than 1% white enrollment and 90% have less than 10% white enrollment.⁹⁰

Despite a reputation of inclusivity and progressivism, the City, along with most of the American Northeast, has a complicated history with integration. Prior to the start of the school integration movement in 1954, the most recent report on issues facing minority students in City public schools was published in 1915.⁹¹ The City Board of Education took its first concrete steps to initiate integration in 1954 by issuing a strong statement pledging to eliminate de facto segregation in public schools and creating positions within the Board responsible for carrying out that mission.⁹² A study published in the fall of 1955 illustrated that roughly eight percent of City public schools were 90 percent or more non-white, and compared to schools that were over 90 percent

⁸⁸ THE CIVIL RIGHTS PROJECT, *supra* note 2; *See also*, Niraj Chokshi, *The most segregated schools may not be in the states you'd expect*, WASH. POST (May 15, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/15/the-most-segregated-schools-may-not-be-in-the-states-you-d-expect-2/?utm_term=.84fc1dabff70 [https://perma.cc/97VA-NNAZ].

⁸⁹ THE CIVIL RIGHTS PROJECT, *supra* note 2.

⁹⁰ *Id.*

⁹¹ Diane Ravitch, *A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS*, 251 (Johns Hopkins Univ. Press, 3rd ed. 2000); *See also* Frances Blascoer, *Colored School Children in New York*, NEW YORK: PUBLIC EDUCATION ASSOCIATION (1915).

⁹² Ravitch, *supra* note 91, at 252-53.

white, the majority non-white schools were older, more poorly maintained, and staffed with less experienced teachers.⁹³ When the Board began measures to integrate schools, white parents strongly resisted, including one demonstration in Queens that resulted in almost half of the white student body skipping school to protest a new busing policy.⁹⁴ Parental protests resulted in decentralizing education policymaking authority and halting integration efforts.⁹⁵ The failure to better integrate students of diverse backgrounds amplifies the problems in the City's special education system.

New York City Department of Education officials "responsible for IDEA compliance consistently fail in this basic mission" and the district is "fraught with enormous organizational obstacles to effective and efficient change."⁹⁶ The problem is compounded by the fact that disability classification in New York state is higher than the national average: As of 2014, 13% of the American student population have a qualifying disability under the IDEA, while the number in New York state is 15.7%.⁹⁷ In New York City, as of 2017, about 25% of the student population have a qualifying IDEA disability.⁹⁸ In addition to the above-average levels of disability classification, New York also makes up a disproportionately large share of IDEA procedural safeguard activity: Due process complaints filed in New York state make up almost one-third of the total due

⁹³ *Id.*, at 253.

⁹⁴ *Id.*, at 259.

⁹⁵ Clarence Taylor, *KNOCKING AT OUR OWN DOOR: MILTON A. GALAMISON AND THE STRUGGLE TO INTEGRATE NEW YORK CITY SCHOOLS*, at 120-23, 157, 180-207 (Colum. Univ. Press 1997).

⁹⁶ Tulman, *supra* note 22, at 266.

⁹⁷ Identification of Children with Disabilities, New York (2014), <http://www.p12.nysed.gov/specialed/spp/osepdeterminations/NY-acc-statedatadisplay-2014.pdf>.

⁹⁸ According to the 2017 Preliminary Mayor's Management Report, out of the 1,134,000 students age 3-21 in New York City, 283,017 receive special education services. This number includes the 31,262 children who receive special education services in pre-school. *THE CITY OF NEW YORK, PRELIMINARY MAYOR'S MANAGEMENT REPORT*, at 191-92 (February 2017), http://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2017/2017_pmmr.pdf.

process complaints filed in the United States.⁹⁹ Put another way, parents file due process complaints in New York over four times as much as they do nationally.¹⁰⁰ By one estimate, New York City makes up 94.8% of those filed within the state.¹⁰¹

There are several factors that may contribute to New York's outlier status in IDEA activity. New York City is engaged in a nearly four decade-long legal battle with a group of parents and non-profit organizations seeking to alleviate the City's history of neglect towards children with special needs pertaining to their evaluation, transportation, and placement.¹⁰² Under a 1982 order from the *Jose P.* litigation, the City must offer a family of a child with special needs a placement in a state-approved nonpublic school at the City's expense if the City fails to provide a free and appropriate public education placement within sixty days of that child's referral to special education.¹⁰³ In effect, the order operates as a de facto voucher program.¹⁰⁴ The City must also pay for the independent evaluation of the child if the City fails to do so within 30 days of referral.¹⁰⁵ In

⁹⁹ The exact figure is 30.22% for the 2014-2015 school year, during which parents in New York filed 5,170 due process complaints, while the number on the national level was 17,107. U.S. DEPT OF EDUC., *supra* note 61 ("Child Count and Educational Environments" and "Dispute Resolution" tabs under "Part B").

¹⁰⁰ For the 2014-2015 school year, 1.03% of students in New York state filed complaints under the IDEA (5,170 complaints for the 499,551 students in special education within the state) while only 0.25% of students filed complaints nationally (17,107 complaints for the 6,814,410 students in special education in the entire country). U.S. DEPT OF EDUC., *supra* note 61 ("Child Count and Educational Environments" and "Dispute Resolution" tabs under "Part B").

¹⁰¹ McMahon, *supra* note 50. This statistic is based on data from 2002-2003 school year through the 2009-2010 school year that the author obtained through Freedom of Information Law requests in New York state.

¹⁰² For list of relevant stipulations and orders from the litigation over the last 40 years, see ADVOCATES FOR CHILDREN, *JOSE P. V. MILLS*, http://www.advocatesforchildren.org/litigation/class_actions/jose_p_vs_mills.

¹⁰³ *Jose P. v. Ambach*, 557 F. Supp. 1230, 1241 (E.D.N.Y. 1983).

¹⁰⁴ Unlike New York, several states have formally established state special education voucher programs. These are discussed in Part III of this Note.

¹⁰⁵ *Jose P.*, 557 F. Supp. 1230 at 1241.

addition to the 1982 order, the City's "historical refusal to enter into multi-year settlements" is likely another factor contributing to the high levels of IDEA activity.¹⁰⁶ A parent who successfully litigated a tuition reimbursement claim for one year would have to relitigate the issue for the following year, even if their child's IEP had not significantly changed.¹⁰⁷

New York's higher-than-average IDEA activity is not distributed equally: The educational geographic districts that have the most due process activity are significantly more wealthy and more white than the City as a whole; such districts encompass neighborhoods like the Upper East Side, the Upper West Side, the West Village, and Park Slope.¹⁰⁸ Parents in the City experience great success in pursuing their due process complaints at the initial level with an Impartial Hearing Officer: 72% win the entirety of their complaint while an additional 11% win a partial victory.¹⁰⁹ At the second level with the State Review Officer, however, the City wins 80% of the time.¹¹⁰ Parental success at the IHO level does not seem to follow from recent Congressional reforms as 35% of parents went straight to an impartial

¹⁰⁶ Tulman, *supra* note 22, at 270.

¹⁰⁷ Mayor De Blasio ended this practice in 2014, and it will be interesting to observe what effects, if any, this decision will have on the level of IDEA activity. Al Baker, *De Blasio Offers Easier Access to City Money for Special Education*, N.Y. TIMES (June 24, 2014), http://www.nytimes.com/2014/06/25/nyregion/de-blasio-offers-easier-access-to-city-money-for-special-education.html?_r=0 [https://perma.cc/G7GZ-XEBH].

¹⁰⁸ The data from McMahan, *supra* note 50 identifies the most active school districts. To match the district number with the corresponding neighborhood, see N.Y.C. DEP'T OF EDUC., SCHOOL SEARCH, <http://schools.nyc.gov/schoolsearch/>. To compare data on socioeconomic status and race within City neighborhoods, see Emma Whitford, *Interactive Maps Show Racial & Socioeconomic Segregation Of NYC Schools*, GOTHAMIST (Dec. 16, 2015), http://gothamist.com/2015/12/16/education_segregation_map.php#photo-1 [https://perma.cc/34HH-2479].

¹⁰⁹ Tulman, *supra* note 22, at 268.

¹¹⁰ Geoff Decker, *Advocates say city is agreeing to pay special ed costs less often*, CHALKBEAT (Aug. 28, 2013), <http://www.chalkbeat.org/posts/ny/2013/08/28/advocates-say-city-is-agreeing-to-pay-special-ed-costs-less-often/> [https://perma.cc/C7E2-A9PN].

hearing because the city failed to schedule a resolution session within the required time, and an additional 41% of parents waived the resolution session.¹¹¹ The rate at which parents avoid resolution sessions in the City is higher than other jurisdictions, which may be due to the City's failure to comply with the IDEA requirement that the district representative in a resolution hearing have settlement authority.¹¹² The rate of parental failure with State Review Officers illustrates the financial barrier facing parents: In order to be successful in an appeal of a SRO decision to the courts, a parent will likely need to hire an attorney and pay upfront retainer fees.

B. Inequalities of Private Enforcement Use and Education Quality

The increased level of IDEA activity in New York warrants scrutiny of whether the mechanism is properly working to ensure every child with a qualifying disability has access to a FAPE as Congress desired. There are two main criticisms of the operational reality of the private enforcement system, each reinforcing each other: Primarily, only wealthy families can afford, or have the institutional knowledge and personal time to pursue, private enforcement of the IDEA, and their success in doing so drains resources out of the public education system from which less affluent, disproportionately non-white, students then receive even lower quality care.¹¹³

The notion that tuition reimbursement claims drain public resources is hotly contested. Many argue that the reimbursement is nearly analogous to the amount the City would be paying anyway had the child remained in public school or that the resources diverted to private institutions will only motive public schools to be more efficient in their

¹¹¹ Tulman, *supra* note 22, at 268.

¹¹² *Id.* at 269.

¹¹³ Pasachoff, *supra* note 21, at 1419; Jennifer Rosen Valverde, *A Poor Idea: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 *FORDHAM URB. L.J.* 599, 623 (2013).

budgeting.¹¹⁴ Even if this is true, the argument fails to address the fixed costs of running a large public education system, or that private schools may pick and choose which services they want to offer while the public system must provide services for a wide range of disabilities, from those that require a minor cost to those that are more expensive.¹¹⁵

Regardless of the debate over resources, the layers of bureaucracy that make up the IDEA procedural safeguards, while designed to empower parents, carry burdens that disproportionately impact low-income parents. Academic criticism of the disparities created by the private enforcement system is not new; studies began raising this concern as early as the 1980s.¹¹⁶ In order to understand why disparities exist in the private enforcement system, it may be helpful to walk through the challenges of successfully navigating through the IDEA's procedural safeguards and discuss how each of those challenges are more difficult for less affluent parents who, in New York City, are disproportionately non-white.¹¹⁷

¹¹⁴ Jay P. Greene, *The Case for Special Education Vouchers*, THE MANHATTAN INST. (Oct. 7, 2009), <https://www.manhattan-institute.org/html/case-special-education-vouchers-2055.html> [<https://perma.cc/JM95-48KN>].

¹¹⁵ NAT'L EDUC. ASS'N, *Vouchers? No, There are Better Alternatives* (2009), http://www.nea.org/assets/docs/PB07a_Vouchers_Alternative09.pdf (noting that "[b]ecause school districts are unable to reduce fixed costs such as salaries and benefits for staff, transportation services, maintenance, utilities, and supplies, they do not benefit financially when a few students spread across different grade levels leave a public school for a voucher school. Instead, those students take their entire per pupil expenditure with them, leaving the school to fund its programs and staff with fewer public dollars."); Jay P. Greene, *Fixing Special Education*, 82 PEABODY J. EDUC. 703, 709-710 (Oct. 2007) (noting that in special education, "most administrative expenses are fixed costs that do not increase with every new child. Schools need administrators, secretaries, psychologists, speech therapists, and other specialists, whether their special-education caseload is low or high.").

¹¹⁶ See, e.g., David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63 (Winter 1985).

¹¹⁷ N.Y.C. DEP'T OF CITY PLANNING, SOCIOECONOMIC CHARACTERISTICS BY RACE/HISPANIC ORIGIN AND ANCESTRY GROUP, at 15 (2005)

1. Attending the CSE Meeting

The contents of an IEP strongly influence a child's educational outcome. It is perhaps the most consequential opportunity for parental involvement under the IDEA, as the IEP will govern where the child goes to school and what services should be provided to that child. But in order to secure a better outcome for their child with a strong IEP, parents must first have the scheduling flexibility to attend the CSE meetings. Unfortunately, instead of reaching out to parents to coordinate a mutually convenient time to schedule a CSE meeting, school administrators will "frequently" "send home written notice, often in a child's backpack, that a meeting has been scheduled at a time pre-selected by the school."¹¹⁸ Law professors involved in special education clinical work note that if the parent is not able to attend, "it is not uncommon for the meeting to be held without his or her participation," but there does not appear to be formally published data to assess the validity of this claim in New York City.¹¹⁹ Still, even if a school administrator does reach out to a parent to schedule a mutually acceptable time, doing so is difficult, particularly for low-income parents who may need to work multiple jobs to financially support themselves and their children, and as a result have inflexible schedules.¹²⁰

2. Lack of Institutional Knowledge

Instead of robust dialogues about what is in the best interest of the child between parties with the sufficient information to have such a discussion, as the IDEA envisions, "conferences have become highly formal, non-

https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/acs/acs_socio_05_nyc.pdf.

¹¹⁸ Yael Cannon, Michael Gregory, & Julie Waterstone, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 *FORDHAM URB. L.J.* 403, 452 (2013).

¹¹⁹ *Id.*

¹²⁰ *Id.*

interactive, and replete with educational jargon.”¹²¹ If the parent is able to attend the CSE meeting, they must have the institutional knowledge necessary to craft a strong IEP for their child. Part of that responsibility includes being able to identify suboptimal programming when it is offered and push back against it, but many parents lack sufficient training to assess the merits of various options.

The informational asymmetry is debilitating for parents. Administrators’ frequent participation in this process has allowed them to develop a level of expertise, while parents are usually participating for the first time.¹²² Given this reality, “parents are often not fully aware of educational options available for their children and therefore have a difficult time forming accurate expectations of schools and teachers.”¹²³ Given that IEPs are protected student records under the Family Educational Rights and Privacy Act (FERPA),¹²⁴ the services that one child receives is not available to other parents for which to compare their own child’s services, making it “hard for an unknowledgeable parent to determine the universe of services to ask for.”¹²⁵ Here again, socioeconomic status sets a divergent course as “parents are left to call on their own informational networks to determine what services to ask for and when bringing a claim is necessary to enforce their rights effectively.”¹²⁶ Wealthier parents have broader geographical networks from which they can request information and assistance through this process, while the networks of less affluent parents are generally limited by geography and to other people of lower socioeconomic status who are likely to have less knowledge or expertise on the subject.¹²⁷

¹²¹ Kotler, *supra* note 4, at 364 (internal citation omitted).

¹²² Pasachoff, *supra* note 21, at 1442.

¹²³ Erin Phillips, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1830 (2008).

¹²⁴ *Matter of Huseman v. N.Y.C. Dep’t of Educ.*, No. 30959, slip op. at 12-13 (N.Y. Sup. Ct. 2016).

¹²⁵ Pasachoff, *supra* note 21, at 1437 (2011).

¹²⁶ *Id.*

¹²⁷ John Field, SOCIAL CAPITAL, at 82-91 (2d ed. 2008).

Even if a parent does have the necessary information to be an informed advocate, the CSE meeting is an intimidating experience. Parents enter a room with unfamiliar experts and bureaucrats, and then must challenge their expertise to secure an outcome that the parent thinks is best. Many parents “describe themselves as terrified and inarticulate.”¹²⁸ There are also important interpersonal constraints as “parents often feel hindered in challenging the school district’s services due to a fear of injuring their relationships with the educators who are likely to remain a part of their child’s education on a daily basis, whether they win or lose the challenge.”¹²⁹

3. Inability to Assess the Adequacy of Public School Placement

It is difficult for parents to properly assess if the services that their child is receiving are sufficient to constitute a FAPE. Frequently, parents, to no fault of their own, are “incapable of judging outcomes” of their child’s educational progress.¹³⁰ Most parents are not trained in special education policy. If a parent has unrealistically high expectations, they may be unable to appreciate the extent to which their child is progressing if the outcomes do not meet the parent’s expectation.¹³¹ Conversely, and “[m]ore commonly, parents are too accepting of poor outcomes, tending to praise even poor programming, since they lack the awareness of what constitutes good programming.”¹³² Here, strong informational networks can again assist parents in determining if there is a problem that should be addressed, but as explained above, less affluent families have weaker informational networks on which to rely.

¹²⁸ Phillips, *supra* note 123, at 1834.

¹²⁹ Elizabeth Adamo Usman, *Reality Over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. U. L. REV. 53, 61 (2014).

¹³⁰ Kotler, *supra* note 4, at 373-74.

¹³¹ *Id.*

¹³² *Id.*

4. Time and Financial Demands

Even if a parent does determine that their child's public school placement is inadequate, filing a due process complaint to secure a remedy is a time-consuming and expensive endeavor. Put simply, lower income "parents of disabled students are much more likely to have difficulty advocating effectively for their children" as "impoverishment forces parents to work more jobs and spend more time outside the home," leaving less time to navigate through the bureaucratic maze that is the IDEA due process procedure.¹³³

The financial costs are two-fold: First, there are upfront financial costs in hiring an attorney to litigate a case (as well as the risk of having to pay those costs in full if the parent loses) and any relevant experts a parent may need to testify throughout process. Second, if a parent does unilaterally take their child out of the public school system, they must have the funding to pay for the initial deposit for a private school and the financial stability to risk doing so in case their claim for tuition reimbursement fails. This is a significant financial risk as tuition at several New York City private special education schools can exceed \$80,000 a year.¹³⁴

Congress and the Supreme Court have acted to ease the financial burden on parents, but the efforts have had limited practical effect. A parent may recover attorney fees, but only if they are successful in their reimbursement

¹³³ Phillips, *supra* note 123, at 1834-36.

¹³⁴ In a recent federal case in New York, a parent made a successful tuition reimbursement claim against the City for the expense of a private school that charged an annual \$84,900 tuition fee. *A ex rel. D.A. v. N.Y.C. Dep't of Educ.*, 769 F. Supp. 2d 403, 430 (S.D.N.Y. 2011). The City argued that the parent could not make such a claim because the parent had only made a nominal contribution to the tuition bill, but the Court disagreed, holding that the parent may make a claim for retroactive tuition reimbursement, even if the parent did not yet actually make the payment. This case is significant because it is the first federal court in the City to endorse the legality of tuition reimbursement for private schools, like the one at issue in the case, that seek to provide flexibility for parents in creating payment plans.

claim.¹³⁵ The cost of hiring experts necessary to effectively make the parent's case, however, cannot be recovered.¹³⁶ Further, the scope of attorney fees that are recoverable is limited. Parents can collect for services during litigation, but not for attorney services during the CSE meetings, during which the crucial formulation of the IEP occurs.¹³⁷ As a result, families that can afford to hire an attorney for the CSE meeting may receive stronger IEPs for their children, while parents who cannot do so are without recourse.

C. New York City Mayoral Responses to Tuition Reimbursement Claims

Prior to the election of Bill De Blasio as Mayor of New York City in 2013, the City government was publicly hostile to tuition reimbursement claims under the IDEA. Harold Levy, the Chancellor of the City's Board of Education during the first several months of Mayor Michael Bloomberg's tenure, criticized the use of the IDEA private enforcement mechanism by wealthy parents during his testimony for an April 2002 hearing of the President's Commission on Excellence in Special Education.¹³⁸ According to Levy, wealthy parents who pursue private enforcement "drained resources that are critically needed" for the public education system, resulting in an inequitable distribution of services; summarizing his dissatisfaction, and perhaps intentionally drawing on racial overtones, Levy said, "You cannot give one kid the Cadillac and the others the back of the bus."¹³⁹

Members of the Bloomberg administration claim to have "scrutinized requests to weed out families who were

¹³⁵ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).

¹³⁶ *Id.*

¹³⁷ 20 U.S.C. § 1415(i)(3)(D)(ii) (2012).

¹³⁸ Yilu Zhao, *Rich Disabled Pupils Go to Private Schools at Public Expense, Levy Says*, N.Y. TIMES (April 17, 2002), <http://www.nytimes.com/2002/04/17/nyregion/rich-disabled-pupils-go-to-private-schools-at-public-expense-levy-says.html> [https://perma.cc/V2CJ-7WH3].

¹³⁹ *Id.*

simply trying to get free private schooling, when public schools could meet their needs.”¹⁴⁰ By the end of 2007, the City under Bloomberg began “significantly ramping up its effort to challenge cases in which it pays for private school tuition of children with disabilities whose parents say they are ill-served by the public schools.”¹⁴¹ The City Department of Education enlisted the help of a consulting firm to cut \$200 million from the budget, in part by more rigorously defending tuition reimbursement claims.¹⁴² Special education advocates argued, “the more combative process has created a scenario in which only parents with means, resources, and knowledge of the system are most prepared to handle a gauntlet of steps.”¹⁴³ In response to the contention that the City’s reimbursement budget had significantly increased due to a poorly staffed legal team, executive director of Advocates for Children, Kim Sweet, said “I don’t think they are paying private school tuition because they don’t have good lawyers ... I think they lose these hearings because they don’t have good programs ... I would rather see them pour resources into special education services than lawyers.”¹⁴⁴

Mayor De Blasio has taken a different approach to the issue than his predecessor. In April 2014, the Mayor announced reforms to ease the burden on parents of children with disabilities in pursuing their due process rights.¹⁴⁵ While noting that the City still reserves the right to litigate meritless claims, De Blasio announced that the City will now seek to resolve disputes through settlement within fifteen

¹⁴⁰ Al Baker, *Balancing Special-Education Needs with Rising Costs*, N.Y. TIMES (July 28, 2014), <https://www.nytimes.com/2014/07/28/nyregion/28specialed.html> [https://perma.cc/JV2L-F7BT].

¹⁴¹ Elissa Gootman, *In Special Education Cases, City Is Fighting Harder Before Paying for Private School*, N.Y. TIMES (Dec. 12, 2007), <http://www.nytimes.com/2007/12/12/nyregion/12consultants.html> [https://perma.cc/UYC3-YTDJ].

¹⁴² *Id.*

¹⁴³ Decker, *supra* note 110.

¹⁴⁴ Gootman, *supra* note 141.

¹⁴⁵ Baker, *supra* note 107.

days of receiving a complaint.¹⁴⁶ Further, parents who do receive reimbursement need only resubmit relevant paperwork every three years, instead of annually, and so long as a child's educational needs do not change significantly, that child can remain in their non-public placement without the parents having to file a new complaint for each academic year.¹⁴⁷ According to De Blasio, Bloomberg's approach may have been a "good litigation strategy, but it was not a humane way to run a school system."¹⁴⁸ Instead, De Blasio called for a more "family-friendly, respectful approach that didn't matter how good your lawyers were, or how much money you had to spend on lawyers, but actually tried to address the family's needs."¹⁴⁹ When asked about the potential increase in spending that would result, De Blasio replied, "if there is an additional cost, it's appropriate because we're serving the families more fairly."¹⁵⁰

The increase in spending has indeed been significant.¹⁵¹ In 2016, the City paid \$256 million in tuition reimbursement claims, which is over six times the roughly \$40 million amount the City paid in 2009 when De Blasio

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Patrick Wall, *City Agrees to Ease Process for Special Needs Students Seeking Private School Tuition*, CHALKBEAT (June 24, 2014), <http://www.chalkbeat.org/posts/ny/2014/06/24/city-agrees-to-ease-process-for-special-needs-students-seeking-private-school-tuition/>.

¹⁴⁹ Alex Zimmerman, *The City is Paying for more Students with Disabilities to Attend Private School; Advocates Say Problems Persist*, CHALKBEAT (July 8, 2016), <http://www.chalkbeat.org/posts/ny/2016/07/08/the-city-is-paying-for-more-students-with-disabilities-to-attend-private-school-advocates-say-problems-persist/>.

¹⁵⁰ Wall, *supra* note 148.

¹⁵¹ Determining the exact dollar amount that the City pays out for tuition reimbursement claims is difficult. There is a large discrepancy between figures published in the newspapers, by the City Council, and by the City's Comptroller's Office. Given that the Comptroller has the authority to settle or adjust all claims against the City, this Note will use figures from the Comptroller's Annual Claims Report. See New York City Charter § 93(i).

was first elected mayor.¹⁵² The 2009 figure may be artificially depressed by Bloomberg's aggressive push to decrease such spending, but the 2016 figure is still nearly double the roughly \$130 million the City paid in 2014,¹⁵³ and significantly more than the \$106 million the City paid in 2013.¹⁵⁴ Due process complaints are also on the rise. The number of claims filed in the City doubled between 2013 (2,097 claims) and 2015 (4,475 claims), before plateauing in 2016 (4,091 claims).¹⁵⁵ The oddity of this situation is that while reimbursements and claims may be on the rise, the number of IDEA tuition reimbursement claims against the City that are actually litigated in federal court is decreasing.¹⁵⁶ This suggests that parents may be becoming more successful in the state administrative hearing level with either the IHO or SRO, perhaps an indirect effect of De Blasio's policy.

Despite these changes, problems still persist. During the 2014-2015 school year, 35% of students were only partially receiving the services proscribed in their IEP and an additional 5% of students were not receiving any services proscribed by their IEP.¹⁵⁷ During the following year, those numbers were 33% and 8%, respectively.¹⁵⁸

¹⁵² OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2016, at 23 (Feb. 10, 2017),

<https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2016.pdf>; OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEARS 2009 & 2010, at 64 (June 15, 2011), https://comptroller.nyc.gov/wp-content/uploads/documents/2011_Claims_Report.pdf.

¹⁵³ OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2015, at 23 (June 15, 2016), https://comptroller.nyc.gov/wp-content/uploads/documents/Claims_Report_FY_2015.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ OFFICE OF THE N.Y.C. COMPTROLLER, *supra* note 152, at 22 (Feb. 10, 2017).

¹⁵⁶ According to a search of the U.S. Federal District Court docket in the Southern and Eastern Districts of New York in Bloomberg Law, only one tuition reimbursement claim was filed against the City between April 2014, when De Blasio first announced his new policy, to March 2017, the time at which this Note was completed.

¹⁵⁷ N.Y.C. DEPT OF EDUC., *Local Law 27 of 2015 Annual Report on Special Education School Year 2014-2015*, at 23 (Feb. 29, 2016),

Even more concerning, “the department said that its data systems were so unreliable that it was not exactly sure what percentage of students were not receiving the services.”¹⁵⁹ De Blasio’s reforms may have eased some of the financial burdens facing parents who have initiated IDEA due process procedures, but the changes have not alleviated the structural disadvantages of the process, nor have they solved the deficiencies in the City’s public special education system. Apart from reforms the City could initiate to improve the quality of such programs and improve the means of collecting reliable data to track those programs’ progress, the City should improve parental experience with the IDEA’s procedural safeguards, so that quality special education is more equitably distributed among children in need.

IV. SECURING QUALITY SPECIAL EDUCATION FOR EACH NEW YORK CITY CHILD

The purpose of this Note is to highlight how issues stemming from the IDEA’s private enforcement mechanism manifest on the municipal level in New York City. This Part will highlight reforms that can be achieved within local government, as opposed to a reform that would require Congressional or federal agency action. Additionally, this part will discuss the merits and drawbacks of three popular reform suggestions: voucher programs, state-funded legal assistance, and public enforcement of the IDEA.

<http://schools.nyc.gov/NR/ronlyres/6035782C-F95D-4224-8372-F2B1F7E9A226/0/LocalLaw27of20152292016FINAL.pdf>.

¹⁵⁸ N.Y.C. DEP’T OF EDUC., *Local Law 27 of 2015 Annual Report on Special Education School Year 2015–2016*, at 24 (Nov. 1, 2016), <http://schools.nyc.gov/NR/ronlyres/9B4FD479-461D-4120-8185-A5EC8B548AFA/0/LocalLaw27of2015201516AnnualReportonSpecialEducation.pdf>.

¹⁵⁹ Kate Taylor, *Thousands of New York City Students Deprived of Special-Education Services, Report Says*, N.Y. TIMES (March 1, 2016), <https://www.nytimes.com/2016/03/02/nyregion/thousands-of-new-york-city-students-deprived-of-special-education-services-report-says.html> [<https://perma.cc/E4V3-HLFY>].

A. Vouchers

Few areas of education policy are as controversial as the issue of publicly funded school vouchers, but for reasons discussed in this section, establishing a formal state education voucher program is not the best way to achieve the IDEA's statutory goals within New York City.

1. A Brief Explanation of Vouchers and School Choice

The nomination and confirmation of Betsy DeVos as Secretary of Education reignited the school voucher debate on the national level. The confirmation hearing, notoriously, went very poorly.¹⁶⁰ DeVos' remarks on special education were perhaps the most troubling aspect of her hearing, as it illustrated the now-Secretary's lack of awareness of basic protections for students with special needs under the IDEA.¹⁶¹ In response to the criticism, DeVos claims to have simply been "confused" by the question.¹⁶²

Senator Maggie Hassan of New Hampshire, who is the mother of a son with a qualifying disability under the IDEA, asked DeVos on her view of special education voucher programs; specifically, whether or not private institutions that accept vouchers should be allowed to waive IDEA protections so that students no longer have recourse in the

¹⁶⁰ Kate Zernike & Yamiche Alcindor, *Betsy DeVos's Education Hearing Erupts Into Partisan Debate*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/betsy-devos-education-senate-hearing.html> [<https://perma.cc/QY87-ADCG>].

¹⁶¹ Aimee Ortiz, *Hassan Questions Betsy DeVos's Knowledge of Civil Rights Disabilities Law for Students*, BOS. GLOBE (Jan. 18, 2017), <https://www.bostonglobe.com/news/politics/2017/01/18/devos-unfamiliarity-with-civil-rights-law-for-students-with-disabilities-concerns-hassan/eaRGm1bAzUy9PG2RC15Q8M/story.html> [<https://perma.cc/48JA-4EGN>].

¹⁶² Valerie Strauss, *Betsy DeVos Apparently 'Confused' About Federal Law Protecting Students with Disabilities*, WASH. POST (Jan. 17, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/17/betsy-devos-confused-about-federal-law-protecting-students-with-disabilities/?utm_term=.cd11453f1925 [<https://perma.cc/7RP6-BN6V>].

courts to enforce their federal special education rights.¹⁶³ Senator Tim Kaine of Virginia, who Hillary Clinton selected to be her Vice Presidential nominee during the 2016 election, asked DeVos, “Should all schools that receive taxpayer funding be required to meet the requirements of the Individuals with Disabilities Education Act?”¹⁶⁴ DeVos replied that the matter is best left to the states.¹⁶⁵ Both of DeVos’ answers appeared to indicate that she was unaware of the procedural safeguards under the IDEA and that, as a federal law, those safeguards preempt a state’s ability to provide protections less than what the federal statute requires.¹⁶⁶

Despite these troubling exchanges, DeVos is now the Secretary of Education and will presumably serve in the position for at least the next four years.¹⁶⁷ As a result, the issue of vouchers is likely to become more prominent as DeVos, a champion of the so-called school choice movement, leads the U.S. Department of Education. Discussions on special education reform must at least acknowledge this reality.

Members of the school choice movement, like DeVos, are eager to point out the shortcomings of public education. They argue that children caught up in public schools that fail

¹⁶³ Senator Maggie Hassan, *DeVos Refuses to Answer Senator Hassan’s Question on Protecting Students with Disabilities*, YOUTUBE (Jan. 17, 2017), <https://www.youtube.com/watch?v=fftskn5HFdA>.

¹⁶⁴ Tim Kaine, *Betsy DeVos Refuses to Answer Kaine’s Questions on Her Level of Support for Public Education, Equal Accountability Standards & Trump’s Financial Conflicts of Interest*, *TIM Kaine: UNITED STATES SENATOR FOR VIRGINIA* (Jan. 17, 2017),

<http://www.kaine.senate.gov/press-releases/betsy-devos-refuses-to-answer-kaines-questions-on-her-level-of-support-for-public-education-equal-accountability-standards-and-trumps-financial-conflicts-of-interest> [<https://perma.cc/4LVR-3NXD>].

¹⁶⁵ *Id.*

¹⁶⁶ Senator Maggie Hassan, *supra* note 163.

¹⁶⁷ Emma Brown, *With Historic Tiebreaker from Pence, DeVos Confirmed as Education Secretary*, *WASH. POST* (Feb. 7, 2017), https://www.washingtonpost.com/local/education/senate-to-vote-today-on-confirmation-of-betsy-devos/2017/02/06/fd4b7e9c-ec85-11e6-9662-6eedf1627882_story.html?utm_term=.9123acbff00

[<https://perma.cc/T6K4-MNQT>].

to adequately perform cannot wait until the public education system is reformed. Instead, they argue that the government should fund many of these students' education at a private or charter institution through school vouchers to ensure the students can obtain the best education possible.¹⁶⁸ Some in the school choice movement may have an ideological opposition to public education, and to the restrictions on the inclusion of religion in public school curriculums.¹⁶⁹ Other supporters of the movement claim to have a more time-focused perspective rooted in a sense of urgency: There exists a finite window of time where a child will benefit from a quality education, and if that opportunity passes, the damage may be difficult to undo. This argument becomes more pronounced for students with disabilities, particularly those with autism. Like all children, those with autism "will benefit from early and appropriate services," although for children with autism, "the window of opportunity is widest when the child is young, and the damage to the child's development if this opportunity is not seized can never be undone."¹⁷⁰ Underfunded public schools may lack sufficient resources to meet this need as services "tend to be scattered, fragmented, and poorly coordinated."¹⁷¹

The degree to which the school choice debate has become contentious is difficult to overstate. Teachers Unions, for example, view the increased use of vouchers as an existential threat; schools that accept vouchers, unlike New York City public schools, often do not have a unionized

¹⁶⁸ Greene, *supra* note 114.

¹⁶⁹ See, e.g., Tammy Harel Ben Shahr, *Race, Class, and Religion: Creaming and Cropping in Religious, Ethnic, and Cultural Charter Schools*, 7:1 COLUM. J. RACE & L. 1, 20 (2016) (noting "religious communities have adopted practical alternatives to fund religious schooling, such as voucher programs that direct public funding to private schools through parental choice.").

¹⁷⁰ Amicus Curiae Brief of Autism Speaks as Amicus Curiae in Support of Respondents at 25, Bd. of Educ. of the City Sch. Dist. of the City of New York v. Tom F., 552 U.S. 1 (2007) (No. 06-637)..

¹⁷¹ *Id.*, at 17 quoting Autism Spectrum Disorder Expert Working Group, Interagency Autism Coordinating Committee, National Institute of Mental Health, Department of Health and Human Services, *Autism Spectrum Disorders Roadmap* (May 16, 2005) at 3.

faculty.¹⁷² But the opposition to vouchers goes beyond organized interest groups. Some maintain an ideological opposition to the use of vouchers, arguing they undermine the promise of universal public education.¹⁷³ Research appears to support this argument: Recently, “[t]hree consecutive reports, each studying one of the largest new state voucher programs, found that vouchers hurt student learning.”¹⁷⁴ Even in the instances where proponents can point to the success of school vouchers, it is important to remember that the pool of students within these schools are self-selected by highly motivated parents who are already likely to be very involved in their child’s education. Securing a spot in many of the prized charter schools or obtaining a voucher requires diligent effort on the part of the parent, so that “those who are better educated, involved and motivated, and those who are better connected, make better educational choices for their children.”¹⁷⁵ And so even if a voucher program is successful, it is difficult to scale up a program that relies so heavily on a self-selected pool of parents and children.¹⁷⁶

Funding for vouchers come from the general public education budget, so not only do the use of vouchers further partition access to education by dividing the student population between public school students and voucher

¹⁷² NAT’L EDUC. ASS’N, *supra* note 115.

¹⁷³ Strauss, *supra* note 162.

¹⁷⁴ Kevin Carey, *Dismal Voucher Results Surprise Researchers as DeVos Era Begins*, N.Y. TIMES (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/upshot/dismal-results-from-vouchers-surprise-researchers-as-devos-era-begins.html?_r=0 [<https://perma.cc/JNX4-VW8V>]; Emma Brown & Mandy McLaren, *How Indiana’s School Voucher Program Soared, and What It Says About Education in the Trump Era*, WASH. POST (Dec. 26, 2016), https://www.washingtonpost.com/local/education/how-indianas-school-voucher-program-soared-and-what-it-says-about-education-in-the-trump-era/2016/12/26/13d1d3ec-bc97-11e6-91ee-1addfe36cbe_story.html?utm_term=.ec8e9b29523c [<https://perma.cc/XS4S-QDVD>].

¹⁷⁵ Harel Ben Shahr, *supra* note 169, at 43-44.

¹⁷⁶ See, e.g., Piet Van Lier, *Analyzing Autism Vouchers in Ohio*, POLICY MATTERS OHIO, at 16 (2008), http://www.policymattersohio.org/wp-content/uploads/2011/09/AnalyzingAutismVouchers2008_0319.pdf.

students, “vouchers divert much-needed resources away from public schools and re-route it to private and religious schools.”¹⁷⁷ This claim echoes the criticism of the private enforcement mechanism under the IDEA.

2. State Special Education Voucher Programs

During DeVos’ confirmation hearing, both she and Senator Hassan cited state special education voucher programs in furtherance of their respective policy visions. DeVos mentioned a program in Ohio as a model of success for state special education voucher programs, and even brought an alumnus of the school to her hearing.¹⁷⁸ Senator Hassan noted a program in Florida that requires students to sign away IDEA rights upon receipt of the voucher, which the Senator described as “fundamentally wrong.”¹⁷⁹

Over half a dozen states run special education voucher programs, and similar proposals exist in an additional dozen states.¹⁸⁰ While “these programs differ in various respects, the essential element in each program is the ability of children with special needs to leave their public school and use funds otherwise intended for their public education to attend a private school of their choice.”¹⁸¹

Proponents of increased use of special education vouchers cite parental satisfaction as a primary rationale for expanding similar programs. In defending the McKay scholarship program to Senator Hassan, for example, DeVos cited a statistic showing overwhelming parental approval.¹⁸² DeVos is correct: Studies of special education voucher

¹⁷⁷ Valerie Strauss, *The Case Against School Vouchers: Sen. Patty Murray Takes a Stand on Senate Floor*, N.Y. TIMES (July 8, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/07/08/the-case-against-school-vouchers-sen-patty-murray-takes-a-stand-on-senate-floor/> [<https://perma.cc/AH2Z-DVK2>].

¹⁷⁸ Senator Maggie Hassan, *supra* note 163.

¹⁷⁹ *Id.*

¹⁸⁰ Adamo Usman, *supra* note 129, at 63.

¹⁸¹ *Id.* at 64.

¹⁸² Senator Maggie Hassan, *supra* note 163.

programs in Utah and Florida have produced “clear evidence suggesting that special needs vouchers are popular with many parents of children with disabilities, and the overwhelming majority of voucher participants are pleased with these programs.”¹⁸³ Advocates argue that parents, not educational bureaucracies, are best situated to evaluate their children’s progress, and thus parental satisfaction of voucher programs illustrate the need to expand them:

Parents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances. In contrast, the state’s knowledge of and commitment to any particular child is relatively thin.¹⁸⁴

As discussed earlier in this Note, however, parents may not always be best suited to make evaluative determinations, particularly those who do not have the luxury of time to devote to such an important task or the strong informational networks to inform their conclusions. But even if every parent had the necessary time and institutional knowledge to effectively advocate on behalf of their child, many private institutions do not provide the same evaluative tools as do public institutions, meaning that parents are left to make their evaluations on subjective determinations that are often irrelevant to their child’s educational progress.¹⁸⁵ Many private institutions, for instance, do not administer standardized testing to monitor student educational progress or even require that their teachers complete training in

¹⁸³ Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 333 (2010).

¹⁸⁴ Emily Buss, “Parental Rights”, 88 VA. L. REV. 635, 647 (2002).

¹⁸⁵ Adamo Usman, *supra* note 129, at 76.

special educational services,¹⁸⁶ although New York state does require both.¹⁸⁷

Florida runs the oldest special education voucher program in the United States, the McKay Scholarship Program for Students with Disabilities, and “there are reports of McKay scholarship students who received high grades in private schools only to find that they were several grade levels behind when returning to public school.”¹⁸⁸ School choice advocates argue such problems can be alleviated with additional legislative reforms and are not inherent to voucher programs generally. The McKay Program was fraught with corruption and fraudulent activity in the early years of its operation, but legislative reforms subsequent to the program’s inception have mitigated the extent to which such problems exist.¹⁸⁹ Still, the lack of sufficient oversight is merely a part of the problem with expanding special education voucher programs.

A larger issue with voucher programs is the implications they have on students’ federal IDEA rights. In 1990, the Office of Civil Rights (OCR) under the U.S. Department of Education indicated that students who participate in state voucher programs that are not funded with federal special education funding waive the protections afforded to them under the IDEA, that is, they are no longer entitled to a free and appropriate education or a program that conforms with their IEP.¹⁹⁰ The OCR reiterated this position in 2004, noting that if a school district offers a free and appropriate education under the IDEA but a parent still elects to send their child to private school, that child has “no individual entitlement to a free appropriate public education including special education and related services in

¹⁸⁶ *Id.*

¹⁸⁷ § 200.7(b)(6); U.S. DEP’T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS, at 196 (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf>.

¹⁸⁸ Hensel, *supra* note 183, at 335.

¹⁸⁹ Adamo Usman, *supra* note 129, at 65.

¹⁹⁰ OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., STAFF MEMORANDUM, 22 IDELR 669, 670 (July 27, 1990).

connection” with that private school.¹⁹¹ This decision means that by accepting a special needs voucher, a parent “effectively waives all meaningful protection under the IDEA for his or her child.”¹⁹²

The waiver of IDEA rights is not insignificant. Once such rights are waived, “if the education the student receives at the private school is not adequate, the student has no legal recourse under the IDEA against either the private school or the state.”¹⁹³ Some proponents of these programs note the option parents have to always re-enroll their child back in public schools to regain IDEA rights, if desired.¹⁹⁴ But such an argument is somewhat circular, as it undermines the time urgency rationale at the heart of the school choice movement. Furthermore, this is exactly the situation that Senator Hassan warned about in DeVos’ confirmation hearing, when the Senator noted that such situations would result in “turning our public schools into warehouses” for the kids with the most challenging disabilities or the “kids whose parents cannot afford to make up the difference between the voucher and private school’s tuition.”¹⁹⁵

Creating a special education voucher program in New York is the wrong solution for the problems outlined in this Note. The informal system created by the *Jose P.* litigation, while effectively a de facto voucher program, is different from other existing state programs for two important reasons. First, when the City fails to provide a school placement for a child in a timely manner, under *Jose P.*, the City must then pay for that child’s education at a state-approved non-public school.¹⁹⁶ These institutions are critically different from other private institutions, at which parents pay to send their children with their own money, a successful tuition reimbursement claim, or in states that have such programs,

¹⁹¹ OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., LETTER TO BOWEN, 35 IDELR 129, 130 (March 23, 2001).

¹⁹² Hensel, *supra* note 183, at 317.

¹⁹³ Adamo Usman, *supra* note 129, at 80.

¹⁹⁴ *Id.*

¹⁹⁵ Senator Maggie Hassan, *supra* note 163.

¹⁹⁶ *Jose P.*, 557 F. Supp. at 1241.

a school voucher. State approved non-public schools, unlike other private schools, are more heavily regulated and students maintain their IDEA rights while attending.¹⁹⁷ Second, *Jose P.*, was established as a temporary response to a failing, underfunded system.¹⁹⁸ By establishing a formal special education voucher program, the City would essentially be admitting that it cannot comply with the expectations set by *Jose P.*, let alone the mandate set by the IDEA.

B. Publicly Funded Special Education Attorneys

Another reform that would not require the assistance of either Congress or the U.S. Department of Education is the creation of an office similar to a public-defender system that would offer legal advice during CSE meetings and litigation assistance for low-income parents for children with qualifying disabilities. Acknowledging the vital need for low-income parents to access affordable legal representation in these matters is present throughout academic literature on the IDEA.¹⁹⁹ The attorneys in this new office would provide the same legal assistance that many non-profit organizations already do on a pro bono or reduced-rate basis for low-income parents, such as the Partnership for Children's Rights or Advocates for Children.²⁰⁰ The program would offer support for low-income parents in crafting their child's IEP, during which attorneys' fees are not currently recoverable, as well as in any litigation that may be necessary to ensure that their child receives a quality education.²⁰¹

¹⁹⁷ U.S. DEP'T OF EDUC., *supra* note 187.

¹⁹⁸ *Jose P.*, 557 F. Supp. at 1241.

¹⁹⁹ See, e.g., Kerrigan O'Malley, *School Inequality: Challenges And Solutions: Allen Chair Issue 2016: Federal Role In The Governance Of Public Schools: From Mainstreaming To Marginalization? – IDEA's De Facto Segregation Consequences And Prospects For Restoring Equity In Special Education*, 50 U. RICH. L. REV. 951, 988 (2016); Valverde, *supra* note 113, at 623; Phillips, *supra* note 123, at 1849.

²⁰⁰ PARTNERSHIP FOR CHILDREN'S RIGHTS, SERVICES WE PROVIDE, <http://www.pfcr.org/services-we-provide>; ADVOCATES FOR CHILDREN, WHO WE SERVE, http://www.advocatesforchildren.org/who_we_serve.

²⁰¹ § 1415(i)(3)(D)(ii).

While “legal representation is one of the greatest determinants of success” in utilizing the procedural safeguards under the IDEA, “parents of children with disabilities from low-income households are less likely to receive legal assistance in pursuing special education challenges against school districts.”²⁰² A program that offered publicly funded special education attorneys would help alleviate this problem and also remove many of the institutional barriers in IDEA due process procedures that disproportionately affect low-income families, such as the necessary financial resources and institutional knowledge. Ensuring that the children of low-income families have stronger IEPs will result in stronger educational outcomes.

The difficulty in enacting this reform is the requisite costs, which would be a double-edged sword for the City. Establishing the program would require one sum of money to pay the salaries of the program’s lawyers and another sum of money to be paid out once those lawyers are successful in securing tuition reimbursement claims from the City government, although it is fair to argue that stronger IEPs may reduce the need for tuition reimbursement claims later on. Commentators have described such costs as “prohibitive” and “expensive,”²⁰³ requiring “robust funding sources,”²⁰⁴ and therefore “not likely to gain traction” among policymakers.²⁰⁵

Despite the dismissive language, there does not appear to be a detailed estimate for creating such a program in New York City, although available data can help provide some clarity on the necessary start-up costs. While the City does not release socioeconomic data on the special education student population, it does release data on the number of students who qualify for the free or reduced price lunch program, which can serve as a proxy for socioeconomic status.²⁰⁶ In the 2015-2016 school year, 12,052 students who

²⁰² Valverde, *supra* note 113, at 622.

²⁰³ Phillips, *supra* note 123, at 1848-49.

²⁰⁴ O’Malley, *supra* note 199, at 988.

²⁰⁵ Pasachoff, *supra* note 21, at 1455.

²⁰⁶ For the 2016-2017 school year, a two-parent household with one child would need to earn less than \$26,208 annually to qualify for free lunch. The same family would need to earn less than \$37,296 to qualify for a

qualify for the lunch program were newly determined to be eligible for an IEP under the IDEA.²⁰⁷ In the 2014-2015 school year, that number was 12,329.²⁰⁸ Assuming this number remains consistent from year to year, this new program would need to hire enough lawyers to handle an annual case load of roughly 12,000 students each year.

The size of a given lawyer's caseload varies depending on an individual lawyer's capacity and the type of legal work in which they are engaged. According to American Bar Association guidelines for lawyers working in matters related to child-welfare agencies, a caseload of 40-50 clients is considered to be reasonable.²⁰⁹ Given that special education lawyering is a similarly fact-intensive and emotionally taxing endeavor as child-welfare casework, we can assume this new program would need to hire lawyers to manage at least 50 cases each, which would come out to a need of 240 lawyers to accomplish the program's objectives each year. Attorneys at the New York City Law Department, who are tasked with defending the City against tuition reimbursement claims under the IDEA, earn a starting salary of roughly \$60,000.²¹⁰ Similarly, starting salaries for other publicly funded attorneys, like in the New York District Attorney's Office or in Manhattan Legal Services, are also about \$60,000.²¹¹ If we assume lawyers in

reduced price lunch. HUNGER SOLUTIONS NEW YORK, 2016-2017 INCOME GUIDELINES FOR FREE AND REDUCED PRICE SCHOOL MEALS, <http://hungersolutionsny.org/information-resources/hunger-resources/2016-2017-income-guidelines-free-and-reduced-price-school>.

²⁰⁷ N.Y.C. DEP'T OF EDUC., *supra* note 158, at 6.

²⁰⁸ N.Y.C. DEP'T OF EDUC., *supra* note 157, at 5.

²⁰⁹ A.B.A., STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES, at 20 (Aug. 2004), http://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.authcheckdam.pdf.

²¹⁰ N.Y.C. LAW DEP'T, CAREERS, http://www.nyc.gov/html/law/html/careers/students_salary.shtml.

²¹¹ THE NEW YORK COUNTY DIST. ATTORNEY'S OFFICE, SALARY AND BENEFITS, <http://manhattanda.org/salary-and-benefits>; While Manhattan Legal Services does not publicize attorney salaries, one legal blogger put together an estimate based on leaked information from contract negotiations. Sam Wright, *Legal Aid Strike Offers Window Into NY Public Interest Compensation*, ABOVE THE LAW (Feb. 12, 2015),

this new program would earn about the same salary as their counterparts in other City government agencies, the cost of the new program, when only considering attorney salaries, would be roughly \$14,400,000 each year.²¹²

This estimate comes with many caveats. First, using the number of students who qualify for the free or reduced price meal program is helpful for identifying students with greater than average financial needs, but it likely is under inclusive of the number of families that would need assistance obtaining a lawyer given that parents cannot recover attorney fees obtained during a CSE meeting.²¹³ Second, the number of cases an individual lawyer can manage will greatly affect the estimate, and this estimate is only based on the number of students entering the special education system each year, as opposed to all students within the system. Third, the estimate only considers salary expenses when, presumably, a variety of other expenses would also be required to establish the program, ranging from acquiring the necessary office space and supplies, to the benefits and salary increases to which these public employees would be entitled. Still, while this estimate may appear large, it is less than 6% of the \$256 million the City paid in tuition reimbursement claims last year.²¹⁴

Absent a grant from the U.S. Department of Education, New York City would need to secure the necessary funding on its own. De Blasio could raise taxes to fund the program, but tax rate changes in the City require the approval of the New York Governor and of the state legislature, both of which have traditionally showed hostility to the City and its various mayors.²¹⁵ With a tax increase

<http://abovethelaw.com/2015/02/legal-aid-strike-offers-window-into-ny-public-interest-compensation/> [<https://perma.cc/FCC8-X8VT>].

²¹² The algebra is as follows: 12,000 new referral students in the reduced price lunch program each year divided by 50 cases for each lawyer to manage, comes out to 240 lawyers, which when multiplied by a salary of \$60,000, equals an annual cost of \$14,400,000.

²¹³ § 1415(i)(3)(D)(ii).

²¹⁴ OFFICE OF THE N.Y.C. COMPTROLLER, *supra* note 152, at 22.

²¹⁵ A recent De Blasio effort to reform education policy in the City illustrates this problem: One of the Mayor's central campaign promises was to establish universal public pre-school, which was to be paid for by a

unlikely, the City could fund the program with existing resources, but doing so would also be difficult. Federal funding assistance for the City, and many other cities in the country, now face uncertainty with the impending legal battle over sanctuary status for undocumented immigrants.²¹⁶ Further, the City bears the burden of being President Trump's hometown, which means the City is responsible for the security bill for protecting Trump Tower.²¹⁷

While the City has already prepared for budget cuts, there are still two unknowns that may offer financial hope. First, tuition reimbursement spending has significantly increased since the De Blasio policy went into effect, but it is unclear if this spending will continue on an upward trajectory. If it plateaus, or even starts to decline, additional funding may be available. Second, there is significantly less litigation in special education occurring in the City because of the De Blasio policy. It is unclear how much the City is saving on what would have otherwise been spent on attorneys to defend against such claims. And so despite the financial barrier of the new program, it is clear that it could neutralize many of the barriers disproportionately impacting low-income families discussed in this Note.

tax increase on wealthy New York City residents. De Blasio got the program, but did not get the tax increase to fund it. Instead, the Mayor was able to work out a deal with Governor Andrew Cuomo to secure the additional funding through other means. Cuomo only acquiesced after significant lobbying and public pressure, factors that unfortunately are not present in the fight for special education access for low-income individuals. See Michael M. Grynbaum & Thomas Kaplan, *Pre-K Plan Puts Cuomo at Odds With de Blasio on Funding*, N.Y. TIMES (Jan. 21, 2014), <https://www.nytimes.com/2014/01/22/nyregion/cuomo-prekindergarten-proposal.html> [<https://perma.cc/2N8Y-4M42>].

²¹⁶ Liz Robbins, *'Sanctuary City' Mayors Vow to Defy Trump's Immigration Order*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/nyregion/outraged-mayors-vow-to-defy-trumps-immigration-order.html> [<https://perma.cc/3JST-44JF>].

²¹⁷ *It Cost New York City \$24 Million to Secure Trump Tower From Election to Inauguration*, FORTUNE (Feb. 22, 2017), <http://fortune.com/2017/02/22/trump-tower-security-costs-taxpayer/> [<https://perma.cc/N9TQ-7VCN>].

C. Public Enforcement of the IDEA

Most of the proposed and accomplished reforms related to the IDEA correctly focus on addressing the financial and information barriers that families face in pursuing private enforcement. Whether it is the Supreme Court expanding the grounds on which a parent may bring suit for tuition reimbursement,²¹⁸ Congress allowing parents who successfully litigate their tuition reimbursement claims to collect attorneys' fees,²¹⁹ or even De Blasio's 2014 settlement policy,²²⁰ each of these changes implicitly affirm the private enforcement system. A truly novel approach to IDEA reform would be to look beyond a reliance on individuals to guard and enforce their federal special education rights, and instead look to the government.

1. The Need for Public Enforcement

Professor Eloise Pasachoff produced a comprehensive summary on American special education, deficiencies in the IDEA private enforcement system, and existing proposals for improvement.²²¹ She provides a persuasive rationale for exploring IDEA public enforcement:

Where a statute is enacted to effectuate a particular public policy and private enforcement is insufficient to effectuate that policy, it is reasonable to suggest that public enforcement is necessary if the statute is to be properly administered. For example, if private enforcement actions are disproportionately brought by one segment of a statute's intended beneficiaries with particular demographic characteristics, there is likely to be underdeterrence of the wrong the statute seeks to redress with respect to other

²¹⁸ *Forest Grove Sch. Dist.*, 557 U.S. at 246-47.

²¹⁹ Handicapped Children's Protection Act of 1986, PUB. L. NO. 99-372.

²²⁰ Baker, *supra* note 107.

²²¹ Pasachoff, *supra* note 21, at 1413.

demographics... The need for public enforcement may be particularly acute where distribution of government funding or resources is at issue, for where there is underdeterrence, there may also be undercompensation of the individuals the public policy seeks to protect. ²²²

The above passage aptly describes the phenomenon occurring in special education. Wealthy, generally white, families disproportionately initiate private enforcement actions, resulting in what Pasachoff describes as an underdeterrence of providing poor quality special education for low-income, generally non-white, students: “When poor children enforce their rights at lower rates than wealthier children, the dynamics tend to lead to better services for wealthier children.”²²³ Unsurprisingly, “school districts seek to contain expenses by limiting or reducing services for those with the quietest voices.”²²⁴

Public enforcement of the IDEA is not a radical proposal. The mechanism for government oversight in this area already exists, theoretically, at the federal level. The U.S. Department of Education has the power to withhold federal funding from states that fail to comply with IDEA guidelines. Yet, despite the fact that “the federal agency charged with IDEA enforcement repeatedly found states in violation of the IDEA, it has almost never taken any formal action to withdraw funds, limiting its involvement to negotiation and acceptance of minimal improvements”²²⁵ DeVos’ confirmation as Secretary of Education is again relevant, for at least as long as the next four years, this practice of inaction at the federal level is unlikely to change under her leadership. States and localities can step in to fill the leadership vacuum.

²²² *Id.* at 1462.

²²³ *Id.* at 1419.

²²⁴ Valverde, *supra* note 113, at 623.

²²⁵ Pasachoff, *supra* note 21, at 1462.

Pasachoff extensively explores the potential weaknesses of public enforcement, including “inefficiency, inadequate resources, and capture,” but correctly notes that such pitfalls are “design challenges rather than insurmountable limitations.”²²⁶ Using this framework, we can assess the benefit of adopting a public enforcement model in New York.

2. Public Enforcement in New York City Through the Public Advocate

New York City’s government structure is uniquely suited for adopting the public enforcement model. The City would not need to heavily invest in creating a new agency and fund a new army of special education lawyers. Instead, the City Council could expressly confer oversight responsibility of public special education to the City’s public advocate by amending the City Charter. After the Mayor and the Speaker of the City Council, the public advocate is the most visible elected official in New York City. The position serves as “a ‘watchdog’ over City government and a counterweight to the powers of the Mayor”²²⁷ by providing “a voice to everyday New Yorkers.”²²⁸ Given that the public advocate has increasingly pursued lawsuits to combat local administrative failures, adding special education litigation to her portfolio appears to be a simple way to make a big difference without a significant funding allocation.

The City Council established the public advocate in 1993 by renaming the now non-existent position of President of the City Council.²²⁹ While the renaming was designed to

²²⁶*Id.* at 1462 (internal citations omitted).

²²⁷ *Green v. Safir*, 174 Misc. 2d 400, 403 (Sup. Ct. 1997) (internal citations omitted).

²²⁸ Samar Khurshid, *James Wins Battle in Long War Over Public Advocate’s Legal Standing*, GOTHAM GAZETTE (Sept. 9, 2016), <http://www.gothamgazette.com/city/6518-james-wins-battle-in-long-war-over-public-advocate-s-legal-standing> [https://perma.cc/RR3L-Z85Q].

²²⁹ James C. McKinley Jr., *A New Job for Stein, Without a Race?*, N.Y. TIMES (Feb. 23, 1993), <http://www.nytimes.com/1993/02/23/nyregion/a-new-job-for-stein-without-a-race.html> [https://perma.cc/UF46-EHFS].

decrease the influence of the office holder, the opposite has occurred: The four individuals who served as public advocate have each used the position as an opportunity to highlight important issues in the City to encourage reform and, in doing so, bolster their own public profile.²³⁰ The relationship between the public advocate and the Mayor is generally fraught with political calculation and tension, which may be the best rationale for entrusting the public advocate with more oversight responsibility for public special education. If a given public advocate has ambitions for higher office, then they have the political incentive to uncover institutional failures of City government and work to impose reforms. As an independently elected position, the public advocate is insulated from the type of capture Pasachoff discussed, to which many administrative offices staffed with non-elected, appointed positions are more susceptible.

The two greatest obstacles to public enforcement of the IDEA through the public advocate's office are the existing budgetary constraints on the office and the legally uncertain grounds on which the public advocate may bring lawsuits against the City. Despite the inherently adversarial relationship between the public advocate and the City, it is the Mayor and City Council who control the public advocate's budget. A hostile Mayor or City Council Speaker can weaken a public advocate through budget cuts. Mayor Bloomberg cut the office's budget from \$2.9 million to \$1.8 million (a cut of roughly 40% of the total budget) in 2010²³¹ and publicly stated that he believes the position to be "a total waste of money."²³² Public advocate Betsy Gotbaum called the move

²³⁰ Public advocates are generally considered by the local media to be presumptive future mayoral candidates, as two of the four individuals who held the position have run for mayor: Mark Green and, current mayor, Bill De Blasio. See Khurshid, *supra* note 228.

²³¹ David W. Chen, *Gotbaum Budget Is Cut 40%; She Calls It Political Payback*, N.Y. TIMES (June 19, 2009), http://www.nytimes.com/2009/06/20/nyregion/20advocate.html?_r=1&hpw [https://perma.cc/ZF7R-RGEN].

²³² *Mayor Bloomberg Doesn't Want Public to Have an Advocate*, STATEN ISLAND ADVANCE (Oct. 12, 2009), http://www.silive.com/news/index.ssf/2009/10/mayor_bloomberg_outlines_some.html [https://perma.cc/CJE6-J625].

“political payback” and Gotbaum’s predecessor, Mark Green, described the cut as “a complete abuse of power.”²³³ While De Blasio has since partially restored the office’s funding to \$2.3 million, the fiasco underscores that, under this model of public enforcement, Pasachoff’s concern of inadequate resources is valid.²³⁴

The question of the public advocate’s standing in a given lawsuit against the City or the State is sufficiently interesting and controversial to deserve its own Note, and acts as the other large barrier to effectuating this reform vision. While “the public advocate’s ability to sue is narrowly defined and isn’t actually a power expressly given to the office in the city’s charter,” the officeholder has increasingly relied on litigation as a governing tool.²³⁵ But because of the lack of explicit statutory authority in the City Charter, “the ability of the public advocate to pursue litigation has been crafted through decades of case law and precedents that have defined a narrow path for the office’s actual legal powers.”²³⁶

Current public advocate, Letitia James, made her governing vision clear at a 2016 rally: “I want all of you to know that this is a new office of the public advocate ... and now we’re going to use the office of the public advocate to sue.”²³⁷ Keeping her word, James has filed more lawsuits

²³³ Chen, *supra* note 231.

²³⁴ Pasachoff, *supra* note 226, at 1463; Jill Colvin, *De Blasio Nearly Doubles Budget for His Old Office*, OBSERVER (Feb. 12, 2014), <http://observer.com/2014/02/de-blasio-nearly-doubles-budget-for-his-old-office/> [<https://perma.cc/8K7J-4X63>].

²³⁵ Laura Nahmias, *James Removed from Another Lawsuit Over Lack of Standing*, POLITICO (Apr. 12, 2014), <http://www.politico.com/states/new-york/city-hall/story/2016/04/james-removed-from-another-lawsuit-over-lack-of-standing-033386> [<https://perma.cc/8EAS-VC6F>].

²³⁶ Laura Nahmias, *Court Strengthens Public Advocate’s Capacity to Sue*, POLITICO (Sept. 1, 2016), <http://www.politico.com/states/new-york/city-hall/story/2016/09/court-strengthens-public-advocates-capacity-to-sue-105116> [<https://perma.cc/C93X-Q4MJ>].

²³⁷ See Laura Nahmias, *Tish James Pushes Limits of Office, Gets Pushed Back*, POLITICO (Feb. 24, 2016), <http://www.politico.com/states/new-york/city-hall/story/2016/02/tish-james-pushes-limits-of-office-gets-pushed-back-031562> [<https://perma.cc/YWJ4-TFDM>].

than all of her three predecessors combined.²³⁸ But James owes her recent successes to the first elected public advocate, Mark Green, who established the necessary precedent on which his successors have built. In 1997, the New York County Supreme Court granted Green's request to access police officer disciplinary files and affirmed that Green had legal standing to make such a claim.²³⁹ An appellate court affirmed the ruling, and the New York Court of Appeals denied the police department's appeal.²⁴⁰ In 2000, the New York County Supreme Court again affirmed this power, holding that the "public advocate is an independently elected official with capacity to sue."²⁴¹

While courts have appeared sympathetic to the public advocate's ability to bring claims, much to the frustration of other City officials, the record of success is mixed.²⁴² The City Council could easily ameliorate this ambiguity by amending the City Charter to expressly confer such powers on the public advocate. Amending the City Charter, while rare, is not unheard of in City politics.²⁴³ A special Home Rule allows the City to amend its governing document without the input of legislators in Albany.²⁴⁴ The administrative inefficiencies that Pasachoff feared in

²³⁸ Nikita Stewart, *Letitia James's Ease in the Courtroom Informs Her Role as Public Advocate*, N.Y. TIMES (Aug. 23, 2015), https://www.nytimes.com/2015/08/24/nyregion/letitia-jamess-ease-in-the-courtroom-informs-her-role-as-public-advocate.html?_r=0 [<https://perma.cc/K5D9-B7VM>].

²³⁹ *Green*, 174 Misc. 2d at 405-06.

²⁴⁰ *Green v. Safir*, 93 N.Y.2d 882 (1999); *Green v. Safir*, 255 A.D.2d 107, 108 (App. Div. 1998).

²⁴¹ *Green v. Giuliani*, 187 Misc. 2d 138, 144 (Sup. Ct. 2000).

²⁴² Nahmias, *supra* note 235; Nahmias, *supra* note 236; Khurshid, *supra* note 228.

²⁴³ Sewell Chan & Jonathan P. Hicks, *Council Votes, 29 to 22, to Extend Term Limits*, N.Y. TIMES (Oct. 23, 2008), <https://cityroom.blogs.nytimes.com/2008/10/23/council-to-debate-term-limits-change/> [<https://perma.cc/CP68-C8BP>].

²⁴⁴ Douglas Muzzio, *Bloomberg Moves to Change the City Charter, but How?*, GOTHAM GAZETTE (Mar. 8, 2010), <http://www.gothamgazette.com/index.php/archives?id=467:-bloomberg-moves-to-change-the-city-charter-but-how-&catid=67:city-homepage> [<https://perma.cc/G7FD-WXEW>].

creating a public enforcement model could certainly manifest through protracted litigation over standing, but the City Council can easily fix this problem.

Once granted such powers, the public advocate should not take up individual tuition reimbursement claims, but should rather pursue larger class action lawsuits against the City that take aim at widespread deficiencies in public special education. The goal is to improve the delivery of services, thereby mitigating the need for future tuition reimbursement claims. Still, the *Jose P.* litigation provides a cautionary tale for this reform. After 40 years of conference negotiations, the City is still struggling to keep up with the order: During the 2015-2016 school year, almost a third of students who were first deemed to have a qualifying IDEA disability had their IEP meeting 60 days after the child's initial referral.²⁴⁵ The 60-day marker is significant because it is the period after which the *Jose P.* order applies.²⁴⁶ The number was about the same for the previous school year.²⁴⁷ Imposing more high profile class actions against the City may incentivize reform, but the benefits of such action may take over 40 years to happen. The primary benefit of public advocate action is the publicity her actions would bring to the issue and, if she is successful, the legal force of any judicial order she may secure. This reform certainly carries the risk of administrative inefficiencies and would not, alone, be sufficient to solving the City's special education inequality problem.

²⁴⁵ Of the 15,447 students who received their first referral for evaluation and who were found to be eligible for the IDEA during the 2015-2016 school year, 4,583 of them had their IEP meeting held after 60 days of the parent's consent for evaluation. N.Y.C. DEPT OF EDUC., *supra* note 158, at 6.

²⁴⁶ *Jose P.*, 557 F. Supp. at 1241.

²⁴⁷ Of the 15,567 students who received their first referral for evaluation and who were found to be eligible for the IDEA during the 2014-2015 school year, 4,770 of them had their IEP meeting held after 60 days of the parent's consent for evaluation. N.Y.C. DEPT OF EDUC., *supra* note 157, at 5.

V. CONCLUSION

Despite the proposals discussed in this Note, reforming the special education system so that it can adequately provide every qualifying child with a free and appropriate education will likely require reform at the federal level. Much of the academic literature on this subject focuses on demanding that the U.S. Department of Education more forcefully enforce the IDEA and calling on Congress to fully fund the IDEA's mandate on state and localities, something on which President Barack Obama campaigned but was not able to achieve.²⁴⁸

Absent such action, there is still opportunity for states and localities to act. Over the long-term, creating a new public defender-like agency can level the playing field for low-income, mostly non-white, families in New York City. While the program would be costly, it would effectively neutralize many of the barriers posed by the IDEA procedural safeguards that disproportionately impact low-income families. Until the funding for such a program is secured, in the short-term, the public advocate could use the bully pulpit of her office to rally public opinion and force reform through class action lawsuits.

When discussing issues in American special education and potential reforms to the IDEA, it is important not to shame parents who are successful in their tuition reimbursement claims. Parents only want what is best for their children, and parents who are able to secure tuition reimbursements do not deserve scorn for doing so. It is not their fault that the system has created socioeconomic and racial disparities; it is the government's fault for failing to create a system that takes into account how socioeconomic status may affect a parent's ability to enforce their rights, and, because of a history of institutional racism, that prevents such a system from disproportionately impacting

²⁴⁸ POLITIFACT, *The Obamameter - Fully fund the Individuals with Disabilities Education Act (IDEA)*, <http://www.politifact.com/truth-ometer/promises/obameter/promise/89/fully-fund-the-individuals-with-disabilities-educa/> [<https://perma.cc/9UGU-TN5C>].

communities of color. The reforms discussed in this Note can help mitigate these problems and New York City should lead the way in ensuring that every qualifying child, regardless of class or race, is afforded a free and appropriate public special education.