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# FOR WHOM THE SCHOOL BELL TOLLS BUT NOT THE STATUTE OF LIMITATIONS: MINORS AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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*This Article explores whether claims under the federal special education statute should be tolled on account of minority. Adult disabled students typically assert this type of tolling claim when alleging statutory violations dating back ten or more years, when they were minors. However this tolling claim is decided, there may be undesired results. First, even if the student has a very strong case, the merits are never reached if the court dismisses the hearing request as untimely. Second, if the hearing request is timely and the case proceeds to the merits, the student must remain in her current educational placement, potentially at great cost, during the lengthy IDEA hearing and appeals process as mandated by the IDEA's "stay put" provision. Moreover, the school may face difficulties defending the claim on the merits because under the IDEA, schools must allow parents and adult students to request destruction of their special education records to the extent the records are not currently required in order to provide services. Finally, unique challenges arise for schools because parents help develop their child's special education program. Accordingly, schools rely on both the parents' approval of the educational program, as well as the parents' choice not to request a due process hearing for their minor child. The IDEA specifically assigns the right to make this decision to the parents of minor students, and not the minor students themselves, as part of the IDEA's panoply of procedural safeguards.*

*Congress first addressed statute of limitations issues under the IDEA in the 2004 amendments. This Article surveys the relevant case law on whether to "borrow" tolling provisions from state statutes and reveals great variation among the courts. Specifically, the courts vary in their adherence to Supreme Court precedent, their application of this precedent, and their conclusions about whether tolling on account of minority should apply in IDEA disputes. The Article concludes that, because of the unique role the IDEA assigns to parents, the correct approach under the pre-2004 amendments is not to toll claims for minors. The Article then examines the new*

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*IDEA language, which creates explicit statutes of limitation, but does not explicitly address the issue of tolling for minor students. Consequently, in future litigation, students and parents are likely to claim that tolling for minors should be judicially read into the IDEA's new statutes of limitations. However, this Article concludes, through an application of the Supreme Court's guidance in this area, that a tolling rule for legal minors should not be read into the IDEA's new statutes of limitation. Tolling for minors is inconsistent with congressional intent as evidenced by the pre-2004 amendments analysis, and further strengthened by the new amendments. Finally, the consequences of tolling are harsher than those of not tolling.*

## I. INTRODUCTION

### A. *Motivating Hypothetical*

Nearing the end of her eligibility under the Individuals with Disabilities Education Act (IDEA)—the federal special education statute—an adult, eighteen-to-twenty-one-year-old student with disabilities requests an administrative “due process” hearing. The hearing request claims that the student did not receive the free appropriate educational program (FAPE) required by the IDEA.

The hearing request seeks compensatory educational services as a remedy. The claimed IDEA violations date back more than ten years, when the student was in elementary and middle school. The student's parents participated on the team that developed the student's educational program. The parents never objected to the program as inappropriate, nor did the parents file for a due process hearing while the student was a minor.

The school argues that this student's hearing request should be dismissed as untimely. The student counters that the IDEA statute of limitations was tolled while the student was a minor, and thus her hearing request is indeed timely.

### B. *Potentially Harsh Results of Tolling*

However the tolling issue is decided, there may be harsh results. If the hearing request is dismissed as untimely, the merits of the claim are never reached. This is so even if the student has a very strong case and lacks culpability. Consequently, this student never receives the compensatory education services to which she may

have been entitled. If the school indeed denied the student FAPE, she will presumably exit the special education system with lesser skills and training than she deserves.

If, on the other hand, the hearing request is found to be timely and the case proceeds to the merits, the IDEA's "stay put" provision is triggered. This means that the student may remain in her current educational placement while the IDEA hearing request and any appeals are pending. The IDEA hearing process alone may span many months; if appeals are involved, it may take years. During this time the school is obligated to continue providing special education services to the student, perhaps even after her statutory eligibility ends at age twenty-one.<sup>1</sup> In such litigation the odds are at least equal that the school did not deny the student FAPE.<sup>2</sup> Further lessening the odds for relief, some courts limit compensatory education to gross violations of FAPE.<sup>3</sup> If the hearing officer or court ultimately determines there was no violation of the IDEA, the school has no realistic possibility of reimbursement by the student for these potentially costly services.

Moreover, defending the claim on the merits will be difficult for the school—not only in the ways that defending stale claims are generally difficult, but also because the IDEA requires schools to offer parents and adult students an opportunity to request destruction of their special education records to the extent the records are no longer currently required to provide services.<sup>4</sup> Finally, the school had relied on the parents in two additional ways: 1) their apparent agreement with the educational program provided to the student, and 2) their choice not to request a due process hearing while the student was a minor, a right which the IDEA specifically assigns to parents of minor students—and not the minor students themselves—as part of the IDEA's panoply of procedural safeguards.

Until the 2004 amendments, effective July 1, 2005,<sup>5</sup> Congress had not addressed statute of limitations issues under the IDEA. The Supreme Court also has not had occasion to address tolling or other IDEA statute of limitations issues. However, the Court has set

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1. See generally Perry Zirkel, *Compensatory Education Services Under the IDEA: An Annotated Update*, 190 EDUC. L. REP. 745, 746–47, 750–51 nn.30–31 (2004) (examining conflicting case law on this issue).

2. See generally Perry Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731, 736–37, 752 (2002).

3. Zirkel, *supra* note 1, at 746, 751 nn.32–35.

4. See discussion *infra* Part V.B.3.c.

5. *Individuals with Disabilities Education Improvement Act of 2004*, Pub. L. No. 108-446, § 302, 118 Stat. 2647, 2803.

out an analytic process for addressing these issues when they arise in a context similar to that of the IDEA.<sup>6</sup> Specifically, when federal statutes such as the pre-2004 IDEA do not contain a statute of limitations, courts should try to identify and “borrow” an existing statute of limitations, perhaps but not necessarily including tolling provisions, which is consistent with the policy underlying the federal statute for which the time limit is being adopted, and thus consonant with congressional intent. Courts faced with these issues in IDEA tolling cases have differed in their adherence to actually performing this borrowing analysis as well as in their application of this analysis. Those courts disagree about whether tolling provisions for minors in state statutes of limitations should be borrowed in IDEA disputes.<sup>7</sup>

In the 2004 amendments, Congress added explicit statutes of limitation to the IDEA. Requests for due process hearings (referred to as “Stage I” in this Article) must be filed by parents or schools within two years.<sup>8</sup> Appeals of hearing decisions to court (referred to as “Stage II” in this Article) must be filed by parents or schools within ninety days.<sup>9</sup> The statutes of limitation added by the 2004 amendments include some exceptions, but do not explicitly address the issue of tolling for minor students. Consequently, continued litigation of this issue is likely, with students and parents claiming that tolling for minors should be judicially read into the IDEA’s new statutes of limitations. To determine the tolling issue in this new post-2004 amendments context, courts will no longer look to “borrow” from analogous provisions. However, somewhat like the prior borrowing analysis, courts must ascertain “whether congressional purpose is effectuated by [judicially implied] tolling [of] the statute of limitations in given circumstances.”<sup>10</sup> The indices of Congressional intent for this purpose are “the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.”<sup>11</sup>

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6. The Court has also recognized more generally that statutes of limitation are “necessarily arbitrary,” since what the different statute of limitations approaches have in common, as this opening scenario illustrates, is that each involves unavoidably harsh results. *Johnson v. Ry, Express Agency*, 421 U.S. 454, 463–64 (1975).

7. See discussion *infra* Part IV.C.3.a–b.

8. See *infra* text accompanying note 280.

9. See *infra* text accompanying note 282.

10. *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 427 (1965); see also *infra* text accompanying note 289.

11. *Burnett*, 380 U.S. at 427.

### C. Scope of this Article

This Article examines whether minors can toll the statute of limitations for filing at the due process and judicial review stages under the IDEA. It does so for both the pre-2004 IDEA, which contained no express statutes of limitations, and the post-2004 IDEA, the amendments to which added statutes of limitation but did not expressly address the issue of tolling for minors.<sup>12</sup> The scope of this Article does not extend to other statute of limitations exceptions, such as: the continuing violation doctrine;<sup>13</sup> to tolling under other circumstances, such as disability,<sup>14</sup> incarceration, or absence from the country; and tolling under other statutes sometimes utilized by disabled students and their parents, such as Section 504<sup>15</sup> and other civil rights acts.<sup>16</sup>

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12. Thus, this Article does not address equitable tolling based on distinguishable grounds. *See, e.g.*, *Livingston Sch. Dist. Nos. 4 & 1 v. Keenan*, 82 F.3d 912 (9th Cir. 1996); *Asbury v. Mo. Dep't of Elementary and Secondary Educ.*, 29 IDELR (LRP Publications) 877 (E.D. Mo. 1999), *aff'd*, 9 F. App'x 558 (8th Cir. 2001) (attempted exhaustion); *Andalusia City Bd. of Educ. v. Andress*, 916 F. Supp. 1179 (M.D. Ala. 1996) (adequate representation by attorney). Similarly, it does not address the related issue of notice of the statute of limitations. *Compare R.R. v. Fairfax County Sch. Bd.*, 338 F.3d 325 (4th Cir. 2003) (ruling express notice not required by an educational agency, at least under some circumstances), *and Dell v. Bd. of Educ.*, 32 F.3d 1053 (7th Cir. 1994) (express notice not required), *with M.D. v. Southington Bd. of Educ.*, 16 F. App'x. 70 (2d Cir. 2001) (notice required), *C.M. v. Bd. of Educ.*, 241 F.3d 374 (4th Cir. 2001) (notice required), *and Powers v. Ind. Dep't of Educ.*, 61 F.3d 552 (7th Cir. 1995) (ruling express notice by an educational agency required), *and M.M. v. Red Clay Consol. Sch. Dist.*, 19 IDELR (LRP Publications) 967 (3d Cir. 1993) (ruling express notice by an educational agency required).

13. *See, e.g.*, *Vandenberg v. Appleton Area Sch. Dist.*, 252 F. Supp. 2d 786 (E.D. Wis. 2003); *Hammond v. District of Columbia*, No. Civ.A. 99-1723(GK), 2001 WL 34360429 (D.D.C. Mar. 1, 2001); *Butler v. S. Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414 (N.D.N.Y. 2000); *Jeffery Y. v. St. Marys Area Sch. Dist.*, 967 F. Supp. 852 (W.D. Pa. 1997).

14. Since disability is a requirement for eligibility under the IDEA, the consequences of tolling for disability are similar to those for minors. While a detailed discussion of this topic is beyond the scope of this article, much of the information and argument regarding age tolling are applicable to disability tolling. *See Wayne County Reg'l Educ. Serv. Agency v. Pappas*, 56 F. Supp. 2d 807, 817 (E.D. Mich. 1999) (permitting disability-based IDEA tolling for a single severely disabled student while rejecting it for disability generally); *see also infra* note 31 and accompanying text.

15. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000); *see, e.g.*, *M.D. v. Southington Bd. of Educ.*, 334 F.3d 217 (2d Cir. 2003); *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980 (5th Cir. 1992); *Smith v. Isle of Wight County Sch. Bd.*, 284 F. Supp. 2d 370 (E.D. Va. 2003); *Schnuerle v. Unified Sch. Dist. 211*, No. 01-1073-KMH, 2001 WL 1325952 (D. Kan. Sept. 27, 2001); *Dupre v. Roman Catholic Church of the Diocese of Houma-Thibodaux*, No. Civ.A. 97-3716, 1999 WL 694081 (E.D. La. Sept. 2, 1999); *McKay v. Winthrop Bd. of Educ.*, No. Civ. 96-131-B, 1997 WL 816505 (D. Me. June 6, 1997).

16. The Americans with Disabilities Act (ADA) is one example. 42 U.S.C. §§ 12101-12213 (2000); *see, e.g.*, *Patricia N. v. LeMahieu*, 141 F. Supp. 2d 1243 (D. Haw. 2001); *McKay*, 1997 WL 816505, at \*1. Section 1983 is another example. *See, e.g.*, *James v. Upper Arlington*

Part II of this Article briefly reviews statutes of limitation generally and various related tolling issues. Part III of this Article offers a cursory summary of the IDEA, along with a thorough review of the unique role it assigns to parents. The IDEA parent role is a central part of the IDEA policy and must be a primary consideration when “borrowing” a statute of limitations tolling provision. Part IV of this Article reviews the Supreme Court doctrine concerning “borrowing” an analogous statute of limitations’ tolling provision when laws like the IDEA do not have their own explicit time limits. Part IV then examines the body of case law addressing the issue of whether state provisions establishing tolling for legal minors should be borrowed for IDEA claims, concluding that the correct approach under the pre-2004 amendments IDEA is not to toll claims for minors. Part V of this Article sets out the new IDEA language creating explicit Stage I and Stage II time limits and reviews the Supreme Court’s guidance on whether to read a tolling rule for legal minors into a statute. Part V then applies this guidance to the IDEA and concludes that a tolling rule for legal minors should not be read into the IDEA’s new statutes of limitation. Similar to the pre-2004 amendments analysis, and strengthened by the new amendments, tolling for minors is inconsistent with congressional intent. Moreover, the consequences of tolling are harsher than those of not tolling.

## II. STATUTES OF LIMITATION IN GENERAL

### A. *Nature and Purposes of Statutes of Limitation*

Statutes of limitation are rules of law that set time limits for bringing legal claims. For example, a state statute may specify a three-year limit for filing a negligence claim. Statutes of limitation serve several purposes: imposing finality on the litigation system, giving potential defendants an end to their potential liability, and avoiding litigation of disputes involving stale evidence.<sup>17</sup> As the Supreme Court has noted, statutes of limitation also are “necessarily

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City Sch. Dist., 228 F.3d 764 (6th Cir. 2000); *Richards v. Fairfax County Sch. Bd.*, 798 F. Supp. 338 (E.D. Va. 1992), *aff’d*, 7 F.3d 225 (4th Cir. 1993).

17. See *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 428 (1965) (citation omitted) (“[Statutes of limitation] promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend . . .”).

arbitrary”<sup>18</sup> and produce harsh results. For example, a three-year negligence statute of limitations means that a car accident plaintiff can timely file her lawsuit two years, eleven months, and four weeks after the car accident. If she files her lawsuit a few days later, however, it is subject to dismissal as time-barred. This is so even if her claim is an extremely meritorious one. The Supreme Court has held that statutes of limitations thus “reflect[] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.”<sup>19</sup>

### *B. Statute of Limitations Dispute*

Not surprisingly, given the high stakes set forth above, statutes of limitation have been fodder for extensive litigation. One common area of dispute is application of the appropriate statute of limitation. For example, if a state has one statute of limitations for negligence and another for assault and battery, an issue might arise as to which applies to invasion of privacy claims. Another common area of dispute is accrual: that is, when does the statute of limitations clock begin to tick—the date of the injury, the date the plaintiff discovers the injury, the date a reasonable person would have discovered the injury, or the date when the plaintiff discovers she has a cause of action?<sup>20</sup>

### *C. Tolling Issues*

Tolling issues have also been frequently litigated. “Tolling” is the suspension or interruption of the statute of limitations—in other words, temporarily putting the statute of limitations clock on hold.<sup>21</sup> Tolling language is common in state statutes of limitation.

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18. *Johnson v. Ry. Express Agency*, 421 U.S. 454, 463–64 (1975).

19. *Id.*

20. A separate statute of repose may impose an outer time limit on bringing claims regardless of the accrual date for the statute of limitations. For example, a fifteen-year statute of repose for product liability claims that runs from the date the product was introduced into the market provides an outside limit on claims even where the statute of limitations has not run.

21. *See, e.g., William A. Harrington, Annotation, Imprisonment of Party to Civil Action as Tolling Statute Limitations*, 77 A.L.R.3d 735 (2003).



Tolling typically applies where the injured party, who would be the one to file a tort or other claim, is incapacitated from doing so, for example because of infancy, insanity, and/or imprisonment.<sup>22</sup>

Some statutes of limitation provide for tolling while the prospective plaintiff is a minor, because minors lack legal capacity to sue on their own behalf and must rely on their parents to sue for them. Examples of cases involving tolling for minors include negligence suits where a minor suffers injuries in an automobile accident<sup>23</sup> or where a child is the victim of medical malpractice,<sup>24</sup> as well as a libel case where the child is the allegedly defamed party and the parents are dilatory in suing on the child's behalf.<sup>25</sup>

Courts will also impose equitable tolling in appropriate and exceptional circumstances.<sup>26</sup> The Third Circuit noted that equitable tolling prevents a party from profiting from its own wrongdoing<sup>27</sup> when the "plaintiff in some extraordinary way has been prevented from asserting his or her rights."<sup>28</sup> This can occur when a defendant misleads the plaintiff about her claim,<sup>29</sup> extraordinary circumstances prevent the plaintiff from asserting her claim, the plaintiff files a timely claim in the wrong forum,<sup>30</sup> or where barring the claim would be inconsistent with federal policy. For example, conspiracy of a mentally incompetent person's guardian to deprive her of her rights may form the basis for equitable tolling, but mental incompetence does not automatically toll the statute of

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22. See, e.g., Jean E. Maess, Annotation, *Tolling of State Statutes of Limitations in Favor of One Commencing Action Despite Existing Disability*, 30 A.L.R.4th 1092 (2000). "Disability" is defined generically in the article to include infancy, insanity, and imprisonment. See *id.* at 1093 n.1.

23. *Id.* at 1094 (citing *Barnum v. Martin*, 219 S.E.2d 341 (Ga. Ct. App. 1975) (ruling that the statute of limitations did not begin to run until plaintiff reached the age of majority)).

24. *Id.* at 1095 (citing *Smith v. Bordelove*, 234 N.W.2d 535 (Mich. Ct. App. 1975) (ruling that the child was entitled to sue because the statute of limitations did not begin to run until she reached majority)); see also *Fancsali ex rel. Fancsali v. Univ. Health Ctr. of Pittsburgh*, 761 A.2d 1159 (Pa. 2000).

25. Maess, *supra* note 22, at 1093 (citing *McLaughlin v. Beyer*, 61 So. 62 (Ala. 1913) (dismissing the parent's suit brought on behalf of the child but ruling that the child could bring the case once she reached majority because the parent's mistake in not answering interrogatories was not the child's mistake)).

26. See generally *Bowen v. New York*, 476 U.S. 467 (1986) (stating that congressional intent dictates the scope of federal equitable tolling).

27. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1388 (3d Cir. 1994).

28. *Id.* at 1387.

29. In specific cases where the defendant conceals a material fact from the plaintiff so that the plaintiff does not realize she has a cause of action, this may be referred to as fraudulent concealment of the claim, e.g., a surgeon who sees on a post-surgical x-ray that a clamp was left in a patient but does not disclose this.

30. *Oshiver*, 38 F.3d at 1387.

limitations since normally a “guardian is expected to protect the ward’s interests.”<sup>31</sup> According to one court, the aforementioned conspiracy situation “differs from the more typical one where a third party injures a mentally incompetent person and the guardian fails to bring the claim in a timely fashion. In the latter case, tolling would be inappropriate because the guardian had failed to exercise due diligence.”<sup>32</sup>

#### *D. Laches Defense for Equitable Claims*

Where the claim is for equitable relief, the defense of laches may also be raised to assert an untimeliness bar. A successful laches defense involves the defendant proving that the plaintiff unreasonably delayed in bringing her claim for equitable relief, causing prejudice to the defendant.<sup>33</sup> Much relief sought under the IDEA, such as a placement change, tuition reimbursement, or compensatory education, is equitable in nature and thus might arguably be subject to a laches defense.

### III. THE IDEA

The Individuals with Disabilities Education Act (IDEA),<sup>34</sup> the federal special education statute, is unique in its structure and substance. It is particularly notable for the unique and central role it creates for parents.

#### *A. Overview of the IDEA*

Congress structured the IDEA as a conditional funding statute. The IDEA offers states modest<sup>35</sup> federal special education funds in

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31. *Lake v. Arnold*, 232 F.3d 360, 371 (3d Cir. 2000) (holding that a state statute of limitations does not include tolling based on mental incompetency in a § 1983 claim based on sterilization of a minor); *see also supra* note 14 and accompanying text regarding disability-based tolling.

32. *Lake*, 232 F.3d at 371.

33. *See, e.g.*, *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

34. 20 U.S.C. §§ 1401–1487 (2000).

35. The cost of educating students with disabilities is, on average, approximately twice the cost of educating nondisabled students. *See, e.g.*, Leslie A. Collins & Perry A. Zirkel, *To*

exchange for agreeing to comply with the IDEA's myriad of conditions. Hence the IDEA is not a civil rights act with an unfunded mandate, like Title VII,<sup>36</sup> which imposes a nondiscrimination mandate on private and public actors without providing any funds to meet that mandate.<sup>37</sup>

The IDEA's conditional funding structure stands in contrast to the two federal statutes that prohibit disability discrimination in schools.<sup>38</sup> Section 504 of the Rehabilitation Act (§ 504) is triggered by the receipt of any federal education funds.<sup>39</sup> Schools covered by § 504 are obligated not to discriminate against students or employees based on disability. To meet this mandate, § 504 regulations impose significant substantive affirmative obligations on schools, but there are no funds earmarked to meet these obligations.<sup>40</sup> Section 504's sister statute, the Americans with Disabilities Act (ADA),<sup>41</sup> applies without regard to federal funding. The ADA prohibits discrimination on the basis of disability by private and public employers, and places of public accommodation, specifically including private and public schools. Section 504, the ADA, and the IDEA all contain private causes of action, but with different remedies. Section 504 and the ADA make damages available, while IDEA remedies are normally equitable in nature (e.g., an order to

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*What Extent, If Any, May Cost Be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11, 11 (1992) (citing MARY MOORE ET AL., PATTERNS IN SPECIAL EDUCATION AND DELIVERY COSTS (1988) (giving a specific ratio of 2.3)); *What Are We Spending on Special Education Services in the United States, 1999-2000?*, SPECIAL EDUC. EXPENDITURE PROJECT, (Am. Inst. for Research, Wash., D.C.), June 2004, at 17, available at <http://csef-air.org/publications/seep/national/AdvRpt1.PDF> (on file with the University of Michigan Journal of Law Reform) (giving a ratio of 1.90). Yet, the federal government funds approximately only one-tenth of the excess costs. See, e.g., *id.* at 18. The recent passage of the No Child Left Behind Act will increase the gap. See, e.g., Joetta L. Sacks, *No Child Law Views for Scarce State Resources*, EDUC. WEEK, Jan. 8, 2003, at 16. Compounding the resource allocation problem, the primary dispute resolution mechanism of the Act has been not only cumbersome but also costly. See, e.g., Perry A. Zirkel, *Transaction Costs and the IDEA*, EDUC. WEEK, May 21, 2003, at 44.

36. 42 U.S.C. § 2000e (2000) (prohibiting race, national origin, gender, and religious discrimination by public and private employers).

37. See generally Lynn M. Daggett, *Special Education Attorney's Fees: Of Buckhannon, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. JUV. L. & POL'Y 1, 3-7 (2004) (comparing the IDEA with traditional civil rights statutes and spending clause legislation regulating education, and concluding that the IDEA is an uneasy hybrid of these two kinds of statutes).

38. See generally Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 EDUC. L. REP. 629, 630 (2003).

39. See generally PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004).

40. 29 U.S.C. § 794 (2000). For example, § 504 regulations require schools to provide reasonable accommodations to disabled employees, 34 C.F.R. § 104.12 (2004), and a free appropriate public education to disabled K-12 public school students, *id.* at § 104.33.

41. 42 U.S.C. §§ 12101-12213 (2000).

change the child's educational program, or to provide tuition reimbursement or compensatory education).

Substantively, the IDEA is also in marked contrast to § 504 and the ADA. The IDEA and its regulations are, to cite one IDEA hearing officer, "not only vast, but also detailed."<sup>42</sup> Moreover, the IDEA is couched in the language of specific positive educational rights, rather than that of nondiscrimination. Perhaps in part for this reason, the IDEA is sometimes referred to as "the last federal entitlement."<sup>43</sup> The primary substantive right the IDEA grants to eligible students is a FAPE tailored to their unique needs.<sup>44</sup> The IDEA also requires that eligible students receive their educations in the "least restrictive environment" (LRE) that is appropriate for them. To implement FAPE and LRE, teams create an "individualized education program" (IEP) for each IDEA student.

### *B. The Role of Parents Under the IDEA*

*1. Nature and Purposes of the IDEA Parent Role*—The IDEA also is distinctive in terms of providing parents with a special role that pervades the central processes of the Act, including the identification, evaluation, and placement of their child.<sup>45</sup> Where disagreements arise, the IDEA also provides parents with a key role in the primary dispute resolution mechanism of the Act.<sup>46</sup> More specifically, they—along with the school district—have the exclusive rights to file for an impartial due process hearing<sup>47</sup> and, typically after exhausting this administrative mechanism, to bring a civil action where attorneys' fees may be provided.<sup>48</sup>

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42. New Lothrop Area Pub. Sch. Dist., 41 IDELR (LRP Publications) 174 (SEA Mich. 2004). In contrast, § 504's text and its regulations for public elementary and secondary schools are quite brief. The ADA and its regulations are more lengthy, but do not contain education-specific provisions.

43. See, e.g., Margaret Tebo, *Seeking the Right Equation: Educators and Parents Seek Legal Answers on How to Balance Students' Special Needs with Broader School Goals*, A.B.A. J., Sept. 2002, at 50 (quoting Bruce Boyer of Loyola University Law School in Chicago).

44. 20 U.S.C. § 1401(8) (2000); 34 C.F.R. § 300.13 (2004).

45. See *infra* Part III.B.2.

46. 20 U.S.C. § 1415 (2000); 34 C.F.R. § 300.507 (2004). The alternative dispute resolution mechanism is the complaint resolution process that each state must provide under the IDEA. 20 U.S.C. § 1415(e) (2000); 34 C.F.R. § 300.506 (2004).

47. 20 U.S.C. § 1415(f)(1) (2000); 34 C.F.R. § 300.507(a) (2004).

48. 20 U.S.C. § 1415(i)(2)–(3) (2000); 34 C.F.R. §§ 300.512(a), .513(a) (2004). The parents's role can be inferred by the generic reference to "party." See, e.g., *Va. Office of Prot. & Advocacy v. Va. Dep't of Educ.*, 262 F. Supp. 2d 648, 659 (E.D. Va. 2003).

In its IDEA findings, Congress clearly stated that these parent rights exist for utilitarian reasons, specifically, to enhance the effectiveness of their children's educational programs, rather than as a substantive right of parenting or a special form of parents' rights to raise their children as they see fit.<sup>49</sup> These findings specify in pertinent part:

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

... (B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . .<sup>50</sup>

As these findings make clear, Congress's purpose in creating the IDEA parent role and rights was utilitarian. The IDEA parent role is specifically designed to ensure the effectiveness of each IDEA student's education program. Congress believed that parent involvement and support was essential to the success of the student's education program. Additionally, in prior litigation that in large part inspired the original enactment of the statute,<sup>51</sup> Congress recognized both the unsatisfactory treatment of disabled students by some school systems as well as the effectiveness of parents as educational advocates for their children.<sup>52</sup> The parent role Congress established in the IDEA thus acted as the check on schools that Congress thought was needed in light of the schools' past history with disabled students while serving as a workable way to enforce the IDEA.

The IDEA gives parents of disabled children a central role throughout the evaluation, identification, and placement of their child that extends well beyond the role of parents whose children

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49. See generally *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (finding a constitutional right of parenting, which includes the right to choose private schooling).

50. 20 U.S.C. § 1400(c)(5)(B) (2000).

51. See generally *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972).

52. The Supreme Court has emphasized the importance of parental participation under the IDEA, holding that Congress felt a need to emphasize the "necessity of parental participation" when enacting the IDEA, in part because in the past, parents were not consulted concerning their child's education. See generally *Honig v. Doe*, 484 U.S. 305, 309-12 (1988) (discussing the IDEA under its former name, the Education of the Handicapped Act).

are in general education. Simply put, parents are both proxies and partners. IDEA parents act as proxies, or representatives, in asserting the substantive rights and interests that the IDEA provides to their children. Parents are also full partners in making the decisions about their child's special education eligibility and program. According to the Department of Education, the agency that enforces the IDEA, parents are "expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child."<sup>53</sup>

## 2. IDEA Provisions Concerning Parents

*a. Parent Involvement in IDEA Eligibility Determinations*—More specifically, the IDEA involves parents in the threshold determinations concerning whether a child may be eligible for special education.<sup>54</sup> Specifically, parents must give informed consent before the school district may conduct an initial evaluation of a child.<sup>55</sup> Moreover, parents are required members of the group that reviews all evaluation data and ascertains the need for any additional data to determine the child's eligibility.<sup>56</sup> The parent also has a right to obtain an independent educational evaluation for their child<sup>57</sup> that the district must in some circumstances pay for and, in any event, consider.<sup>58</sup> Once all evaluations are complete, the parents, in partnership with the group of qualified professionals, are responsible for determining whether the child has a disability.<sup>59</sup>

*b. Parent Involvement in the Initial Placement in Special Education Decisions*—Once the child's IDEA eligibility is established,<sup>60</sup> the parents' special central role continues. As a second and significant threshold step, the parents must consent to the initial provision of special education, including any necessary related services.<sup>61</sup> The 2004 amendments make the parent consent role so strong and

53. 34 C.F.R. pt. 300, app. A, No. 5 (2004).

54. These provisions include a corresponding role upon the required reevaluation of the child. 20 U.S.C. §§ 1414(a)(1)–(2), 1415(a)–(c) (2000); 34 C.F.R. §§ 300.504(a)(1)–(3), .505(a)–(c), .534–.536 (2004).

55. 20 U.S.C. § 1414(a)(1)(c) (2000); 34 C.F.R. § 300.505(a)(1) (2004). If a parent refuses to consent, the educational agency may continue to pursue evaluations by filing for due process. 34 C.F.R. § 300.505(b) (2004).

56. 20 U.S.C. § 1414(c)(1) (2000); 34 C.F.R. § 300.533(a) (2004).

57. 20 U.S.C. § 1415(b)(1) (2000); 34 C.F.R. § 300.502(a)(1) (2004).

58. 34 C.F.R. § 300.502(b)–(c) (2004).

59. 20 U.S.C. § 1414(b)(4)(A) (2000); 34 C.F.R. § 300.534(a)(1) (2004).

60. Conversely, if the team determines that the child is not eligible, the parents may exercise their disagreement by challenging the determination under the Act's dispute resolution provisions. *See infra* Part III.B.2.i.

61. 20 U.S.C. § 1414(f) (2000); 34 C.F.R. § 300.505(a)(1)(ii) (2004); *see also* 20 U.S.C. § 1414(a)(1)(C)(i) (2000).

central that due process hearing officers are now forbidden from overriding the parents if they refuse such initial consent for services.<sup>62</sup>

*c. Parent Access to Student Records*—During the child's participation under the Act, the parents must have an opportunity to review all education records concerning identification, evaluation, and placement of the child as well as the provision of FAPE.<sup>63</sup> Significantly, reinforcing and customizing the Family Educational Rights and Privacy Act of 1974 (FERPA),<sup>64</sup> the right to access the child's records does not transfer from the parents to the child until the child reaches eighteen or, under the special transfer provisions of the IDEA, beyond that age.<sup>65</sup>

*d. Parent Participation in IDEA Meetings*—IDEA parents also have the special right to participate in all meetings concerning identification, evaluation, and placement of the child as well as the provision of FAPE.<sup>66</sup> Reinforcing this right, the district must also

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62. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 614(a)(1)(D)(ii)(II), 118 Stat. 2647, 2703 (to be codified at 20 U.S.C. § 1414(a)(1)(D)(ii)(II)). This was the view of the federal agency that administers the IDEA prior to the 2004 amendments. See, e.g., OSEP Letter to Yudien (Mar. 20, 2003), 38 IDELR (LRP Publications) 267 (2003); OSERS Letter to Gagliardi (Nov. 5, 2001), 36 IDELR (LRP Publications) 267 (2001); OSEP Letter to Cox (Sept. 24, 2001), 36 IDELR (LRP Publications) 66 (2001). One federal district court held to the contrary. *Garcia v. Town of Ridgefield Bd. of Educ.*, EHLR (LRP Publications) 558:152 (D. Conn. 1986) (holding that the IDEA obligations run directly from the school to the parent, and thus under some circumstances, if a school believes a student requires special education, and a parent refuses the necessary written consent, the school *must* initiate due process to attempt to override the parent's refusal). This ruling fits with the administering agency's interpretation prior to the 1997 amendments. See OSEP Letter to Williams (Sept. 20, 1991), 18 IDELR (LRP Publications) 534 (1991).

IDEA regulations provide that parents may revoke consent, but any such revocation is not retroactive. 34 C.F.R. § 300.500(b)(1)(iii)(A)–(B) (2004).

63. 20 U.S.C. § 1415(b)(1) (2000); 34 C.F.R. § 300.501(a)(1) (2004).

64. 20 U.S.C. § 1232g (2000); 34 C.F.R. § 99.5(a) (2004).

65. 34 C.F.R. § 300.574(b) (2004).

66. 20 U.S.C. § 1415(b)(1) (2000); 34 C.F.R. § 300.501(a)(2) (2004). "Meetings" do not include informal or unscheduled conversations on teaching methodology, lesson plans, or coordination of services if those issues are not addressed in the IEP; it also does not include preparatory activities that an agency engages in when responding to a parental proposal. 34 C.F.R. § 300.501(b)(2) (2004). Further, some courts have held that the parents' participation is so essential to IDEA that the district's failure to facilitate that participation can lead to a denial of FAPE. See, e.g., *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072 (9th Cir. 2003); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001); *Jaynes v. Newport News Sch. Bd.*, 13 F. App'x 166 (4th Cir. 2001); *Amanda S. v. Webster City Cmty. Sch. Dist.*, 27 IDELR (LRP Publications) 698 (N.D. Iowa 1998). *But see Kings Local Sch. Dist. Bd. of Educ. v. Zelazny*, 325 F.3d 724 (6th Cir. 2003); *N.L. v. Knox County Pub. Sch.*, 315 F.3d 688 (6th Cir. 2003). The 2004 amendments make explicit that an IDEA hearing officer may not find a denial of FAPE from "procedural inadequacies" generally, but only if the procedural inadequacies "significantly impeded the parents' opportunity

provide the parents with prior notice of any such meeting<sup>67</sup> and make reasonable efforts to ensure the parents' meaningful participation, including arrangements for an interpreter if the parents are deaf or non-English speakers.<sup>68</sup>

*e. Parent Involvement in Discipline Decisions*—Similarly, the special discipline provisions of the IDEA provide parents with special partnership-type rights.<sup>69</sup> For example, parents are required members of the team that determines whether the behavior subject to discipline was caused by the child's disability<sup>70</sup> and, if they disagree with the team's determination, they have the right to challenge it under the Act's impartial dispute-resolution mechanism.<sup>71</sup>

*f. Parent Role on IDEA IEP Teams*—As discussed in Section III.A *supra*, the cornerstone of the Act is the IEP, or Individualized Education Program, that is developed to provide each child with FAPE.<sup>72</sup> The IEP development team must include the child's parents.<sup>73</sup> Additionally, the IDEA provides parents with the right to bring other individuals who have knowledge or expertise regarding the child to the team's meetings.<sup>74</sup> Reinforcing the importance of the parents' participation, the school district must take special steps such as notifying parents of the meeting time and whom the school has invited, and scheduling the meeting at a mutually agreed-upon time and place.<sup>75</sup> Once the team completes the IEP, the district must provide the parents with a copy of it at no cost to them.<sup>76</sup>

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to participate in the decisionmaking process regarding the provision of [FAPE] to the parents' child." 20 U.S.C.A. § 1415(f)(3)(E)(ii) (West Supp. 2005).

67. 20 U.S.C. § 1415(b)(3) (2000); 34 C.F.R. § 300.501(b)(1) (2004).

68. 20 U.S.C. § 1415(b)(4) (2000); 34 C.F.R. § 300.501(c)(5) (2004).

69. Specifically, these provisions apply to suspensions, expulsions, or other removals that constitute a change in placement. 20 U.S.C. § 1415(k) (2000); 34 C.F.R. § 300.519 (2004). Moreover, they apply even to children not yet determined eligible under the Act in specified situations, including where the parents have formally expressed concern about the child's possible eligibility or where the parents have requested an evaluation under the Act. 20 U.S.C. § 1415(k) (2000); 34 C.F.R. § 300.527(b) (2004).

70. 20 U.S.C. § 1415(k)(4) (2000); 34 C.F.R. § 300.523(b) (2004).

71. 20 U.S.C. § 1415(k)(6) (2000); 34 C.F.R. § 300.525 (2004). Interestingly, the relevant regulation is titled "Parent appeal," not child's appeal. 34 C.F.R. § 300.525 (2004).

72. 20 U.S.C. § 1412(a)(10)(B) (2000); 34 C.F.R. § 300.340(a) (2004).

73. 20 U.S.C. § 1414(d)(1)(B) (2000); 34 C.F.R. § 300.344(a)(1) (2004). The child can also be a member of the team if it is appropriate. 20 U.S.C. § 1414(d)(1)(B) (2000); 34 C.F.R. § 300.344(a)(7) (2004).

74. 20 U.S.C. § 1414(d)(1)(B) (2000); 34 C.F.R. § 300.344(a)(6) (2004).

75. 34 C.F.R. § 300.345(a) (2004).

76. 20 U.S.C. § 1414(d)(1)(B) (2000); 34 C.F.R. § 300.345(f) (2004).



*g. IDEA Services for Parents*—The IDEA even provides that one of the “related services” the IEP may include is “parent counseling and training.”<sup>77</sup> This term is defined as “[a]ssisting parents in understanding the special needs of their child” and “[p]roviding parents with information about child development.”<sup>78</sup>

The related services and remedies under the Act further extend to parents. In several opinion letters, the Department of Education, the agency that enforces the IDEA, has stated that sign language training for the parents of a hearing-impaired child is an appropriate related service, subject of course to the recommendation of the IEP team.<sup>79</sup> Similarly, one court required that parents be trained to implement behavioral management techniques at home.<sup>80</sup> That case involved a student with an emotional disability who engaged in a number of disruptive and dangerous behaviors at home and at school.<sup>81</sup> The court ordered the school to pay for counseling for the parents to help them to manage their son’s behavior at home by “complement[ing] at home the [behavioral] training [he] receives at school.”<sup>82</sup>

*h. Parent Notice Requirements*—Additionally, the IDEA expressly provides that parents are entitled to advance written notice a “reasonable” time before any change or refusal to change their child’s identification, evaluation, placement, or FAPE.<sup>83</sup> Parents may request an IEP team meeting about their child at any time, and schools “should grant any reasonable parent request for an IEP meeting.”<sup>84</sup>

*i. Parents and IDEA Disputes*—Particularly pertinent is the role the IDEA assigns to parents if a dispute arises regarding the child’s

77. 34 C.F.R. § 300.16 (b)(7) (2004).

78. *Id.* Section 1431(e) of the IDEA establishes grants for providing training and information to parents.

79. OSEP Letter to Anonymous (Dec. 8, 1992), 19 IDELR (LRP Publications) 586 (1992); OSEP Letter to Dagley (June 3, 1991), 17 EHLR (LRP Publications) 1107 (1991); OSEP Letter to Dole (July 25, 1986), EHLR (LRP Publications) 211:399 (1986). In its earliest letter, the Department suggested the following requirement for services to parents: “Any related services provided for parents must assist the child in developing skills needed to benefit from special education or correct conditions which interfere with the child’s progress toward the goals and objectives listed in the IEP.” *Id.* (noting that parent services may be provided prior to beginning, or concurrently with, special education instruction).

80. *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990) (affirming the hearing officer’s decision and recommendations of an independent evaluator in this respect).

81. *Id.* at 923.

82. *Id.* at 933.

83. 34 C.F.R. §§ 300.504–.505 (2004).

84. 34 C.F.R. pt. 300, app. A, No. 20 (2004).

identification, evaluation, placement, or FAPE. First, to inform parents about their role in the IDEA dispute resolution process, the Act requires the school to provide parents with written notice of the parents' procedural safeguards, including their right to file for a hearing.<sup>85</sup> Only the parents (or, on the other side, the school) may initiate an impartial "due process hearing" to resolve the matter.<sup>86</sup> At that hearing, the parents have the right to have the child present, have the hearing open to the public, and receive a record, findings of fact, and decision of the hearing.<sup>87</sup> The 2004 IDEA amendments go even further by explicitly providing that the hearing officer may not find a denial of FAPE from procedural inadequacies generally, but may find a denial of FAPE if the procedural inadequacies "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child."<sup>88</sup>

The IDEA provides parents (as well as the opposing party at the hearing) with the ability to file for judicial review of the hearing officer's decision.<sup>89</sup> While the hearing and any appeals are pending, the IDEA's "stay put" provision requires in most circumstances that the student remain in her last educational placement. However, the IDEA explicitly assigns to parents the right to waive "stay put" and agree to an alternate interim placement for their child.<sup>90</sup> Finally, to encourage parents to initiate this dispute resolution process if they believe the school is violating the IDEA, the IDEA provides for reimbursement of reasonable attorney's fees to parents who prevail in IDEA proceedings.<sup>91</sup>

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85. 34 C.F.R. § 300.504(a) (2004).

86. 20 U.S.C. § 1415(f)(1) (2000); 34 C.F.R. § 300.507(a)(1) (2004). In contrast, consider the very different statutory approach for workers' compensation claims. Under several state workers' compensation statutes, the statute of limitations in workers' compensation claims does not begin to run on a minor unless a guardian is appointed. *See, e.g., Massey v. Workers' Comp. Appeals Bd.*, 854 P.2d 117 (Cal. 1993); *Benton v. ICR Elec.*, 852 So.2d 295 (Fla. Dist. Ct. App. 2003); *Mem'l Hosp. v. Szuba*, 705 N.E.2d 519 (Ind. Ct. App. 1999); *East v. W.C.A.B.*, 786 A.2d 1044 (Pa. Commw. Ct. 2001). Parents are not automatically "guardians" for this purpose. *See, e.g., Mem'l Hosp.*, 705 N.E.2d at 523; *W.C.A.B.*, 786 A.2d 1044 (holding that a minor child's case based on a deceased parent's right to workers' compensation does not begin to run until the child reaches majority). Therefore, and in marked contrast to the IDEA, parents do not have any role as to their children's on-the-job injuries under some workers' compensation statutes.

87. 20 U.S.C. § 1415(h) (2000); 34 C.F.R. § 300.509(c) (2004).

88. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(f)(3)(E)(ii)(II), 118 Stat. 2647, 2722 (to be codified at 20 U.S.C. § 1415(f)(3)(E)(ii)(II)).

89. 20 U.S.C. § 1415(i)(2)(A) (2000); 34 C.F.R. § 300.512(a) (2004).

90. 20 U.S.C. § 1415(j), (k)(7) (2000).

91. 20 U.S.C. § 1415(i)(3)(B) (2000).

*j. Parents of Adult IDEA Students*—Of additional, special significance, the IDEA not only specifies that each of these rights belongs to the parents,<sup>92</sup> including that of filing for a hearing and judicial appeal, but also provides that these rights do not automatically transfer to the child upon reaching the age of majority. More specifically, the IDEA authorizes states to transfer from the parent to the child the related records<sup>93</sup> and other rights formerly belonging to the parent when the child reaches majority.<sup>94</sup> However, the ambiguous statutory language suggests that the student only obtains these rights if the state enacted transfer legislation.<sup>95</sup>

Moreover, even where the state enacts such transfer legislation, the IDEA does not extinguish the parents' role. Instead, the IDEA requires the district to notify them of any meetings or evaluations until the child is no longer IDEA-eligible due to having graduated or having reached the statutory ceiling of twenty-one.<sup>96</sup> Further, where the state provides transfer rights, the IDEA makes an exception for those students deemed incompetent or incapable of providing informed consent.<sup>97</sup> In any event, to whatever extent the IDEA permits or prohibits the transfer of rights at age eighteen, obviously these special rights and corollary responsibilities belong to the parents during the child's minority. This time constitutes most, if not all of the typical period for the "hearing officer" and "judicial review" steps under the Act.

*k. IDEA Provisions for Appointing Surrogate Parents*—To ensure that each IDEA student has a person who can exercise this parental role, the IDEA contains special provisions for appointing surrogate parents where the parents are unknown or unavailable, or where the IDEA student is a ward of the state.<sup>98</sup> To facilitate their role in representing the child at various steps, including Stages I and II of the dispute resolution process, the 2004 amendments provide

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92. The role is so central that the IDEA defines the term broadly and has special provisions for appointing surrogate parents where necessary. 20 U.S.C. §§ 1401(19)(B), 1415(b)(2) (2000); 34 C.F.R. §§ 300.20(a)(4), .515 (2004).

93. See 20 U.S.C. § 1415(k)(4), (k)(6) (2000); 34 C.F.R. §§ 300.523(b), .525 (2004).

94. 20 U.S.C. § 1415(m) (2000); 34 C.F.R. § 300.517 (2004). These provisions effectively reverse the usually rebuttable presumption that children assume their own rights and responsibilities upon reaching the age of majority.

95. See, e.g., Deborah Rebores & Perry Zirkel, *Transfer of Rights Under the Individuals with Disabilities Act: Adulthood With Ability or Disability*, 2000 BYU EDUC. & L.J. 33, 34.

96. *Id.* at 38.

97. *Id.* at 38–39.

98. 20 U.S.C. §§ 1401(19)(B), 1415(b)(2) (2000); 34 C.F.R. §§ 300.20(a)(4), .515 (2004).

additional provisions for surrogate parents while broadening the definition of parents.<sup>99</sup>

1. *Parent Provisions in the 2004 IDEA Amendments*—The 2004 IDEA amendments further strengthen the role of parents in the IDEA, even to the point where schools must defer to certain (possibly wrong) parent choices about their child's special education. Enacting guidance from the Department of Education,<sup>100</sup> and overriding at least one court decision,<sup>101</sup> the 2004 amendments provide that if a parent refuses to give the necessary consent for initial placement in special education, the school may not initiate due process to attempt to override the lack of parental consent and get a hearing officer to order placement in special education.<sup>102</sup> While reasonable people may disagree about the wisdom of this approach,<sup>103</sup> Congress has made it clear that a parent's wish to keep her child in general education overrides a school's reasonable belief that the student needs special education, and thereby the child's receipt of an appropriate education. This new provision and others<sup>104</sup> also make it clear that Congress recognized that on occasion an eligible student would not receive FAPE as the result of a parent choice.

3. *Court and Hearing Officer Interpretations of the IDEA Parent Role*—In its first IDEA case, the United States Supreme Court emphasized the importance of the parental role. In that case, the

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99. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, §§ 602(23), 615(b)(2), 118 Stat. 2647, 2657, 2716.

100. See *supra* note 62 and accompanying text.

101. See *Garcia v. Town of Ridgefield Bd. of Educ.*, EHLR (LRP Publications) 558:152 (D. Conn. 1986) (explaining that IDEA obligations run directly from the school to the parent, and thus, under some circumstances, if a school believes that a student requires special education, and a parent refuses the necessary written consent, the school *must* initiate due process to attempt to override the parent's refusal); cf. OSEP Letter to Williams (Sept. 20, 1991), 18 IDELR (LRP Publications) 534 (1991).

102. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 614(1)(D)(ii), 118 Stat. 2647, 2703 (to be codified at 20 U.S.C. § 1414(a)(1)(D)(ii)).

103. The authors themselves do not all agree with this policy solution. For example, Dagggett encountered several situations in practice where a parent of an obviously emotionally disturbed child refused to consent to initial placement in special education. Without special education, many emotionally disturbed students are not able to benefit academically, and some are disruptive and even dangerous to themselves and others. In some of these cases, the parents seem to have their own problems, such as denial of their child's disability, or emotional problems themselves. In these situations, Dagggett found that the school's threat to file for due process went a long way toward resolving the dispute about special education placement.

104. See, e.g., Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 612(a)(25), 118 Stat. 2647, 2691 (to be codified at 20 U.S.C. § 1412(a)(25)) (prohibiting schools from conditioning school attendance, evaluation, or provision of services on a student getting, and presumably taking, certain prescription medications).

Court established a two-part standard for judicial review of special education disputes.<sup>105</sup> First, the reviewing court must determine if “the individualized educational program developed through the Act’s procedures [is] reasonably calculated to enable the child to receive educational benefits?”<sup>106</sup> Second, the court must determine if the school complied with the IDEA’s procedural requirements.<sup>107</sup> The Court characterized the IDEA’s procedural safeguards as “Congress’ effort to maximize parental involvement in the education of each handicapped child.”<sup>108</sup> These procedural safeguards and parent participation specifically were deemed of crucial importance, leading the Court to state that: “It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the . . . substantive standard.”<sup>109</sup>

The Court went on to assert that parents “will not lack ardor” in seeing that their children get all the benefits of the IDEA,<sup>110</sup> thus appearing to recognize that the IDEA’s effectiveness depends on parents’ involvement in their children’s special education, specifically including the exercise of the procedural safeguards assigned to them on behalf of their children.

Since then, courts and hearing officers have routinely recognized the important and special role that parents play under the IDEA.<sup>111</sup> First, many cases have recognized that parents are to have a meaningful opportunity to participate in their child’s education under the IDEA.<sup>112</sup> This includes the right to participate in the development of the IEP<sup>113</sup> as well as to participate in any IEP meetings held for the child.<sup>114</sup> One court held that an IEP is meant to be a

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105. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982).

106. *Id.* at 207.

107. *Id.* at 206–07.

108. *Id.* at 182 n.6.

109. *Id.* at 205–06 (citation omitted).

110. *Id.* at 209.

111. *See, e.g.*, *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir. 2003); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001); *Jaynes v. Newport News Sch. Bd.*, 13 F. App’x 166 (4th Cir. 2001); *Amanda S. v. Webster City Cmty. Sch. Dist.*, 27 IDELR (LRP Publications) 698 (N.D. Iowa 1998). *But see* *Kings Local Sch. Dist. Bd. of Educ. v. Zelazny*, 325 F.3d 724 (6th Cir. 2003); *N.L. v. Knox County Sch.*, 315 F.3d 688 (6th Cir. 2003).

112. *See, e.g.*, *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 34 (2d Cir. 2000); *Bd. of Educ. of the Canastota Cent. Sch. Dist.*, 27 IDELR (LRP Publications) 419 (SEA N.Y. 1997); *Grapevine-Colleyville Indep. Sch. Dist.*, 24 IDELR (LRP Publications) 574 (SEA Tex. 1996).

113. *Bd. of Educ. of the Canastota Cent. Sch. Dist.*, 27 IDELR (LRP Publications) at 423.

114. *Grapevine-Colleyville Indep. Sch. Dist.*, 24 IDELR (LRP Publications) at 575.

“joint product of discussions among the child’s parents, teachers, and local school officials.”<sup>115</sup> This “meaningful participation” may mean giving special accommodations to the parent, such as an interpreter.<sup>116</sup> Parents must be treated as equal partners in the IEP development and meetings due to the legislative emphasis on a full opportunity for parent participation.<sup>117</sup> The reason for this emphasis on participation is the “unity of interest” between a parent and their child in securing FAPE.<sup>118</sup>

Case law and administrative decisions specifically support the identified parent role as proxy and partner as a means to the ends of educational effectiveness. For example, one federal appeals court has held that parent hostility is a valid factor in determining placement.<sup>119</sup> Although “continued and extreme,” the appeals court found that the parents’ hostility to the proposed placement—hostility that they had expressed to their child—would prevent the student from receiving educational benefits in that placement. The majority acknowledged that its decision might reward parents for intransigence, but found that the relevant consideration was not the impact on the parents, but the educational benefit to the child:

Under the [IDEA] . . . our concern is not rewarding or punishing parents. The appropriate concern is finding a program which will be of educational benefit to the child. Were we to adopt the school district’s position . . . this would in effect be punishing children for the actions of their parents. . . . The [IDEA] makes clear whose interest must be paramount.<sup>120</sup>

Occasionally, a court has suggested that IDEA rights belong to the child and thus may not be waived by the parent.<sup>121</sup> According to

115. *Waller v. Bd. of Educ.*, 234 F. Supp. 2d 531, 536 (D. Md. 2002) (quoting *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 456–57 (D. Md. 1999)).

116. *See supra* text accompanying note 68.

117. *Mason City Cmty. Sch. Dist.*, 21 IDELR (LRP Publications) 248, 256 (SEA Iowa 1994).

118. *Goleta Union Elementary Sch. Dist. v. Ordway*, 248 F. Supp. 2d 936 (C.D. Cal. 2002).

119. *Bd. of Educ. v. Ill. State Bd. of Educ.*, 938 F.2d 712, 718 (7th Cir. 1991), *noted in* Perry A. Zirkel, *A Special Education Case of Parent Hostility*, 73 EDUC. L. REP. 1 (1992).

120. *Id.* at 717. The majority also suggested that hearing officers could detect parent opposition that was feigned in order to achieve the placement the parent preferred. *Id.* at 718.

121. *See generally* *Shook v. Gaston County Bd. of Educ.*, 882 F.2d 119, 121 n.2 (4th Cir. 1989) (citing *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982) (finding that disability suits can be brought by both the child and her parents)).

this reasoning, failure of the parents of a child to initiate the IDEA dispute resolution process should not act as a bar to the child bringing the claim years later as a legal adult.

In fact, the IDEA and case law recognize that parents may, in at least four scenarios, waive FAPE for their child; rejecting tolling for minors thus would not result in a consequence not already specifically contemplated under the IDEA. First, as discussed earlier in the Article, parents may refuse to consent to the initial placement of their child in special education.<sup>122</sup> If the child needs special education, this refusal obviously results in the child not receiving FAPE. Second, parents may withdraw their disabled child from the public schools and place her in a private school where special education may or may not be provided<sup>123</sup> because they believe that the public school is not meeting its IDEA obligations (a unilateral placement). In unilateral placement cases, parents may be entitled to reimbursement of tuition and expenses, but only if the program is appropriate and the school has not offered an appropriate program.<sup>124</sup> "Appropriate" is defined in part as meeting "the standards of the State educational agency,"<sup>125</sup> and thus schools may not place students in private facilities unapproved for special education.<sup>126</sup> The Supreme Court has held, however, that parents may place their child in a private program that is not approved by the state, and may obtain public reimbursement if it is otherwise "appropriate" and the school has not offered an appropriate program.<sup>127</sup> Third, parents may enroll a disabled child in a private school when FAPE is available through the public schools (perhaps, for example, because the parent prefers a religious education for her

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122. See discussion *supra* Part III.B.2.1.

123. Students placed in private schools by their parents are entitled to an equitable opportunity to participate in IDEA-funded services. See 20 U.S.C. § 1413(a)(4)(A) (2000); 34 C.F.R. §§ 76.651-.662, 300.450-.452 (2004). This does not mean that each such child is entitled to FAPE. See 20 U.S.C. § 1412(a)(10)(i) (2000).

124. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). This standard was codified and embellished in the IDEA. 20 U.S.C. § 1412(a)(10) (2000). Specifically, reimbursement may be denied if the court finds "unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (2000).

125. 20 U.S.C. § 1401(8)(B) (2000).

126. See OSEP Letter to Green (Feb. 8, 1995), 22 IDELR (LRP Publications) 639, 641 (1995).

127. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12-16 (1993). The school was not approved because not all of its teachers were certified, and it did not develop IEPs. *Id.* at 14. In addition, the Carters had had no notice of which private schools were approved for special education. *Id.* The Court did not decide whether parents could be reimbursed for placement in an unapproved school if they had prior notice of its status and a list of approved facilities. Finally, the Court limited this right to reasonable reimbursement considering program costs. *Id.* at 16.

child). In such cases, the child loses the legal right to FAPE.<sup>128</sup> Fourth, parents who initiate IDEA due process claims may settle them in a way which results in less than full FAPE for their child.<sup>129</sup> In each of these four scenarios, Congress and the courts have contemplated that parents may take actions that result in less than FAPE for their child.

These scenarios illustrate that tolling for minors is not required to avoid a result that is already part and parcel of the statutory scheme. Moreover, for the Congressional choice of a unique IDEA parent role to be workable and effective, a result of less than FAPE for a given child must be accepted. For example, if parents could not waive IDEA claims as part of a settlement, or if such a waiver did not bind the child, schools would have no incentive to settle claims.

Case law also interprets the IDEA parent role in the event of divorce so as to ensure its workability and hence its effectiveness. When there is a divorce and the divorced parents disagree about their child's special education, they lose the ability to be effective advocates for their child. While the IDEA does not expressly address this issue, the prevailing judicial interpretation is that the custodial parent has the right to file for a hearing under the IDEA.<sup>130</sup> In such cases, however, the IDEA parent role is important

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128. 20 U.S.C. § 1412(a)(10) (2000).

129. See, e.g., *W.B. v. Matula*, 67 F.3d 484, 497-99 (3d Cir. 1995) (holding that parent settlements waiving IDEA and related claims are not per se invalid, and adopting a civil rights standard for review and approval of such settlements). The 2004 IDEA amendments encourage settlements by establishing pre-hearing meetings and enabling state and federal courts to enforce any settlements entered into at these meetings. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(f)(1)(B), 118 Stat. 2647, 2720-21.

130. See, e.g., *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002); *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th Cir. 2001); *Schares v. Katy Indep. Sch. Dist.*, 252 F. Supp. 2d 364 (S.D. Tex. 2003); *Carpenter v. Pennell Sch. Dist. Elementary Unit*, Nos. CIV.A. 01-6270 & CIV.A. 02-625, 2002 WL 1832854 (E.D. Pa. Aug. 9, 2002); *Tustin Unified Sch. Dist.*, EHLR (LRP Publications) 507:120 (SEA Cal. 1985); *Upper Darby Sch. Dist.*, 36 IDELR (LRP Publications) 285 (SEA Pa. 2002); *Hazelton Area Sch. Dist.*, 36 IDELR (LRP Publications) 30 (SEA Pa. 2001); *N. Allegheny Sch. Dist.*, 26 IDELR (LRP Publications) 774 (SEA Pa. 1997); *In re S.B.*, 28 IDELR (LRP Publications) 813 (SEA Vt. 1998); *In re T.C.*, 25 IDELR (LRP Publications) 1245, 1246-47 (SEA Vt. 1997) ("[I]t is [the custodial parent] who has the sole right and responsibility to 'determine and control various matters affecting [the child's] welfare and upbringing,' including, specifically, his 'education.'"); *Randolph Sch. Dist.*, EHLR (LRP Publications) 509:183 (SEA Vt. 1987). There is some authority to the contrary. See, e.g., *Fauconier v. Comm. on Special Educ.*, No. 02 CIV.1050 RCC RLE, 2002 WL 31235786 (S.D.N.Y. Oct. 2, 2002), *aff'd*, 112 F. App'x 85 (2d Cir. 2004).

One court reasoned that if a parent is deprived of custody, then that parent also is deprived of decision-making power. *Hazelton Area Sch. Dist.*, 36 IDELR (LRP Publications) at 122. One federal court held that the definition of "parent" in the IDEA did not exclude the



enough that the non-custodial parent retains other rights on a secondary basis unless the custody agreement or divorce decree specifies the allocation of authority for such educational decisions. Two such rights are the right to participate in IEP meetings and to be present at due process hearings. As an example, the Seventh Circuit held that a non-custodial parent retained the right to be involved in their child's education but that the custodial parent's decisions involving the child's education will prevail.<sup>131</sup>

Somewhat similarly, case law and administrative decisions interpret the nature of the parents' right to file for a due process hearing and their role in the IDEA dispute resolution process as a proxy for their child. For example, one hearing officer held that "a request for [a] due process [hearing] may be—and usually is—filed by the parent . . . on behalf of the student."<sup>132</sup> That hearing officer reasoned that some students who have an IEP do not have the level of knowledge necessary to understand IDEA procedural safeguards.<sup>133</sup> Not all courts recognize this. One court interpreted the right to file for due process hearings as belonging to the parents even if they do not have actual custody of the child.<sup>134</sup> Moreover, some courts have held that the parents' right to file for a hearing continues even when the authorities appoint surrogate parents.<sup>135</sup> One court reasoned that parents, legal guardians, and surrogates have the right to initiate due process hearings.<sup>136</sup>

Similarly, courts have held generally that parents have standing to request due process hearings and file for judicial review under the IDEA,<sup>137</sup> but are split on whether standing is based solely on the

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non-custodial parent. *Fuentes v. Bd. of Educ.*, No. 01 CV 1454, 2002 U.S. Dist. LEXIS 12378, at \*6 (E.D.N.Y. July 10, 2002).

131. See *Navin*, 270 F.3d at 1149. That court further stated that it is "doubtful that a non-custodial parent may use the next-friend device to seize control of the child's educational decision making, when a divorce decree has given those choices to the custodial parent." *Id.* at 1148–49.

132. *Apache Junction Unified Sch. Dist.*, 39 IDELR (LRP Publications) 49 (SEA Ariz. 2003).

133. In light of this right and the related procedural safeguards granted to them, the Second Circuit characterized the IDEA as a "bill of rights for parents." *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982) (emphasis added) (quoting *Stemple v. Bd. of Educ.*, 623 F.2d 893, 898 (4th Cir. 1980)).

134. *W.T. v. Andalusia City Sch.*, 977 F. Supp. 1437, 1444 (M.D. Ala. 1997).

135. See, e.g., *John H. v. MacDonald*, EHLR (LRP Publications) 558:366 (D.N.H. 1987). Unless the rights are transferred at the age of majority, parents, rather than the child, have the right to file for a hearing. *Id.* at 558:370.

136. See *id.*

137. See, e.g., *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272 (3d Cir. 1996); *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995); *Mylo v. Bd. of Educ.*, No. 91-2563, 1991 U.S. App. LEXIS 27029 (4th Cir. Nov. 18, 1991); *Vander Malle*, 673 F.2d 49; *Matthew M. v. William Penn Sch.*

parent's "proxy for the child" role, or rather to assert her own rights as a parent. A minority of the courts view the IDEA as providing for separable rights exclusive to parents. One federal court reasoned that the purpose of the IDEA was to assure that the rights both of children with disabilities and their parents are protected.<sup>138</sup> Another held that parents are within the "zone of interests" of the IDEA.<sup>139</sup> However, that court was faced with the special situation of a tuition reimbursement, where a parent, acting on behalf of her child, spent her own money to send the child to private school when the public school allegedly was not providing their child with FAPE, the parents did incur injury by spending their own funds to remedy an IDEA violation.<sup>140</sup> Another court held that, because the IDEA granted parents certain rights, the parents have the right to sue to enforce those rights.<sup>141</sup> This minority view merely removes the tolling question for the separable parental rights, leaving unaffected the issue of whether tolling applies to the remaining child rights where the parent serves as proxy. The majority view, and the more well-reasoned approach, is that while parents have standing to sue on behalf of their child, they do not have standing to sue in their own right.<sup>142</sup> Hearing officers also have held that the parents' standing to bring suit ceases when the child reaches majority, when the right to file for a due process hearing may transfer to the student,<sup>143</sup> thus recognizing that the rights belong to the student rather than to the parent.<sup>144</sup> One hearing officer has held that the even when the rights transfer to the adult student, in an appeal, it is at times too difficult to divide the rights of the parent and the child.<sup>145</sup> Because their interests are aligned, the purpose of the IDEA is best served when both the parents and the child are allowed to pursue

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Dist., No. 01-7177, 2002 U.S. Dist. LEXIS 10385 (E.D. Pa. June 11, 2002); *Bernard v. Sch. Bd.*, 58 F. Supp. 2d 669 (E.D. Va. 1999); *John H.*, EHLR (LRP Publications) 558:366; *Appleton Area Sch. Dist.*, 35 IDELR (LRP Publications) 87 (SEA Wis. 2001); *Unified Sch. Dist. of De Pere*, 21 IDELR (LRP Publications) 1206 (SEA Wis. 1994).

138. *Mylo*, 1991 U.S. App. LEXIS 27029, at \*2.

139. *Bernard*, 58 F. Supp. 2d at 674.

140. *See id.* The Supreme Court has held that in this situation, the federal courts' equitable jurisdiction encompasses reimbursement of expenditures on private special education. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

141. *John H.*, EHLR (LRP Publications) at 558:370.

142. *See, e.g., Irene B. v. Phila. Acad. Charter Sch.*, No. Civ.A. 02-1716, 2003 WL 24052009 (E.D. Pa. Jan. 29, 2003); *Matthew M.*, 2002 U.S. Dist. LEXIS 10385, at \*12.

143. *Appleton Area Sch. Dist.*, 35 IDELR (LRP Publications) 87 (SEA Wis. 2001).

144. *See, e.g., Dublin Unified Sch. Dist.*, 32 IDELR (LRP Publications) 107 (SEA Cal. 2000); *Willamette Educ. Serv. Dist.*, 32 IDELR (LRP Publications) 22 (SEA Or. 2000); *Appleton Area Sch. Dist.*, 35 IDELR (LRP Publications) at 87; *Unified Sch. Dist. of De Pere*, 21 IDELR (LRP Publications) 1206, 1207 (SEA Wis. 1994).

145. *Unified Sch. Dist. of De Pere*, 21 IDELR (LRP Publications) at 1207.

an appeal.<sup>146</sup> This relevant right illustrates that although the substantive rights belong to the child, the parent has the right and, more importantly, the responsibility to initiate Stage I and Stage II of the dispute resolution process to safeguard their disabled child's educational well-being.<sup>147</sup>

Courts and hearing officers faced with non-attorney parents acting as lay advocates for their child in court have interpreted the parent role so as to maximize its effectiveness, consistent with the parent role as proxy for their child's rights, rather than as advocates for their own rights. In litigation in which a plaintiff is asserting her own rights (perhaps seeking damages for her injuries sustained in a car accident), the plaintiff may choose to proceed pro se. In contrast, under the IDEA, most courts thus hold that non-attorney parents may not act pro se on behalf of their children in court proceedings.<sup>148</sup> The Third Circuit has specifically held that non-attorney parents may not act pro se due to the importance of the *children's* rights at issue.<sup>149</sup> That court reasoned that, although the IDEA grants parents varied procedural rights to stay involved in their children's education, it did not grant them substantive rights such as acting pro se.<sup>150</sup> Another federal court reasoned that it would be wrong to bind the interests of children who lack experienced counsel.<sup>151</sup> The Eleventh Circuit similarly held that the IDEA allows parent to bring suit on behalf of their children but does not give them authority to act as their counsel.<sup>152</sup>

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146. *Id.*

147. Courts have rejected arguments that persons other than parents or schools have standing, since the IDEA grants standing exclusively to them. *Gehman v. Prudential Prop. & Cas. Ins. Co.*, 702 F. Supp. 1192 (E.D. Pa. 1989) (holding that an insurer lacked standing to invoke EHA claim against a school district); *Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ. of Putnam County*, 24 F. Supp. 2d 808 (M.D. Tenn. 1998) (holding that an advocacy group lacked standing to bring suit directly against a school district).

148. *See, e.g., Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998); *Shevtsov v. L.A. Unified Sch. Dist.*, 134 F.3d 379 (9th Cir. 1998); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124 (2d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 582 (11th Cir. 1997); *Carter-Thomas v. Dallas Indep. Sch. Dist.*, No. Civ.A.3:02CV1853-P, 2003 WL 22304949 (N.D. Tex. July 23, 2003); *Welch v. Bd. of Educ.*, 35 IDELR (LRP Publications) 247 (W.D. Mich. 2001); *Scott M. v. Governor Wentworth Reg'l Sch. Dist.*, 26 IDELR (LRP Publications) 1012 (D.N.H. 1997); *Hayes v. Bd. of Educ.*, 38 IDELR (LRP Publications) 98 (D. Del. 1993). *But see Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 247 (1st Cir. 2003); *Matthew V. v. DeKalb County Sch. Sys.*, 244 F. Supp. 2d 1331, 1331 (N.D. Ga. 2003).

149. *Collinsgru*, 161 F.3d at 231.

150. *Id.* at 227.

151. *Welch*, 35 IDELR (LRP Publications) at 248.

152. *Devine*, 121 F.3d at 581.

The treatment of parents acting as advocates in IDEA administrative hearings is consistent with the court-imposed limits on pro se parents in IDEA judicial proceedings. One federal court used the language of the statute, or in this case, the lack of language, to hold that non-attorney parents cannot represent their children in IDEA lawsuits.<sup>153</sup> That court reasoned that the statute expressly mentions that parents can represent their child at the administrative phase of dispute resolution, yet makes no mention of representation at the judicial stage, which is of course significantly more legally complex.<sup>154</sup> These cases reiterate that the underlying, substantive rights at issue are the child's rather than the parent's.

Following through with this model of the parent in an IDEA hearing serving as a proxy for the child's important substantive interests, a parent who is also an attorney may be able to effectively serve as advocate at the less formal administrative hearing. But in this situation, the parent/attorney is not truly acting as an attorney but rather as hybrid advocate/proxy for the child. Thus, most courts that have faced this issue hold that parents who are attorneys may represent their children in proceedings but cannot receive attorney's fees if they prevail.<sup>155</sup> As an example, the Fourth Circuit held that although parents have rights under the IDEA, the real party in interest is the child,<sup>156</sup> and the role of parents is an accommodation of the child's incapacity.<sup>157</sup> This court held that the parent is not acting pro se because the substantive rights belong to the child, not the parent.<sup>158</sup> The court found that the language of the statute in providing fees "to the parents of a child or youth with a disability who is the prevailing party" shows that the child is the focus of IDEA.<sup>159</sup> The parent in that case was not awarded fees because of the nature of a parent-child relationship.<sup>160</sup> Another

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153. *Collinsgru*, 161 F.3d at 232.

154. *See id.*

155. *See Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998); *Matthew V. v. Dekalb County Sch. Sys.*, 244 F. Supp. 2d 1331 (N.D. Ga. 2003); *Rappaport v. Vance*, 812 F. Supp 609 (D. Md. 1993); *Mayerson v. DeBuono*, 694 N.Y.S.2d 260 (N.Y. App. Div. 1999). *But see Miller v. W. Lafayette Comm. Sch. Corp.*, 665 N.E.2d 905 (Ind. 1996). Note, however, that a close relative other than a parent may be awarded attorney's fees if acting on behalf of the child. *See Amy M. v. Timberlane Reg'l Sch. Dist.*, No. 99-269-B, 2000 U.S. Dist. LEXIS 20937, at \*17 (D.N.H. 2000).

156. *Doe*, 165 F.3d at 263.

157. *See id.* The court also reasoned that attorney's fees should not be paid because attorney parents will be zealous advocates for their children without an award, making fees unnecessary to ensure effective counsel. *Id.*

158. *See id.*

159. *Id.* (quoting 20 U.S.C. § 1415(e)(4)(B) (2000)).

160. *See id.*

federal court held that Congress envisioned an agency relationship, and not a parent-child relationship, when creating a provision for reimbursement of attorney's fees.<sup>161</sup> This court reasoned that because the language of IDEA extends protections to both the parent and the child and because of the close relationship between a parent and a child, the attorney/parent is essentially acting pro se in the matter.<sup>162</sup>

In sum, the IDEA itself and the bulk of the case law interpreting it recognize the unique nature of the IDEA parent role. That role is not one of exercising a set of substantive parenting rights. Instead, IDEA parents are given a set of procedural safeguards for utilitarian reasons: they can act both as a proxy to enforce the educational rights of their child and as a partner jointly making decisions with the school in order that their child actually receive FAPE. This parent role is central to the IDEA's primary goal of providing eligible students with effective educational programs. Adoption or rejection of tolling for minors for IDEA claims must be consistent with this special IDEA parent role and the educational effectiveness goal it seeks to promote.

#### IV. BORROWING ANALOGOUS STATUTES OF LIMITATIONS PROVISIONS UNDER THE PRE-2004 IDEA

A number of federal statutes do not include explicit time limitations for bringing claims.<sup>163</sup> In such instances, courts must first determine if the general federal default statute of limitations applies. If it does not, courts must then attempt to determine Congress's intent, which often but not always is to borrow an analogous state statute of limitations. Any borrowed statutes of limitation must be consistent with the policy underlying the federal statute at issue. Once a general statute of limitations (for example a two-year tort statute of limitations) is borrowed, the borrowing

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161. *Rappaport v. Vance*, 812 F. Supp 609, 611 (D. Md. 1993).

162. *See id.* at 612.

163. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985) (citations omitted) (referring to the commonplace congressional practice of writing statutes without specific statutes of limitation). One commentator has noted that "[o]f the many gaps in the scheme of federal law, few have so vexed the federal judiciary as those that result when Congress creates a federal cause of action but fails to specify a period of limitations. . . . Such congressional omissions have occurred with monotonous regularity . . ." Abner Mikva & James Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 393 (1987).

analysis must be performed again to determine if a tolling provision in that statute of limitations will also be adopted.

*A. The "Default" Federal Statute of Limitations for Claims Under Statutes Enacted After 1990*

For federal statutes enacted after 1990 that do not include their own time limits, Congress has enacted a general statute of limitations, which requires claims to be brought within "4 years after the cause of action accrues."<sup>164</sup> This default federal statute of limitations does not include language addressing tolling. As the IDEA was enacted in 1975, it is not governed by this general default federal statute of limitations.

*B. Gap-Filling by Borrowing Analogous Statutes of Limitation*

Enforcement of § 1983<sup>165</sup> and certain other federal civil rights statutes is governed by 42 U.S.C. § 1988, which provides that claims

shall be exercised and enforced in conformity with the laws of the United States, . . . but in all cases where they are . . . deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the [federal] court . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .<sup>166</sup>

The Supreme Court has applied this language to statute of limitations issues arising under § 1983 claims, noting in one case that to determine the applicable time limit "the settled practice has been to adopt a local time limitation as federal law *if it is not inconsistent with federal law or policy to do so*."<sup>167</sup> With regard to tolling, the

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164. 28 U.S.C. § 1658 (2000).

165. Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000).

166. 42 U.S.C. § 1988 (2000).

167. *Wilson v. Garcia*, 471 U.S. 261, 266–67 (1985) (emphasis added) (citations omitted). In that case, the Court also noted that this "borrowing analysis" inquiry involves both

Court has specifically found that while normally a borrowed state statute of limitations would include its tolling rules,<sup>168</sup> a separate borrowing and policy analysis was required for tolling issues.<sup>169</sup>

For the IDEA and other statutes not governed by § 1988, the Court has performed a borrowing analysis quite similar to that performed under § 1988. As a general matter in identifying an appropriate statute of limitations in such cases, the Court held that:

[O]ur task is to “borrow” the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law. . . . In some circumstances, however, state statutes of limitations can be unsatisfactory vehicles for enforcement of federal law. . . . Hence, in some cases we have . . . instead used timeliness rules drawn from federal law—either express limitations periods from related federal statutes, or such alternatives as laches.<sup>170</sup>

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“length of the limitations period, and closely related questions of tolling and application.” *Id.* at 269 (citations omitted).

168. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485–86 (1980).

169. *Id.* at 487. In this case, the plaintiff made the inconsistency argument, arguing that the applicable state law’s failure to toll while she pursued a related claim should not be borrowed. *Id.* at 482–83. Emphasizing “[t]he importance of policies of repose,” the Court found lack of tolling while related claims were pursued was not inconsistent with federal law or policy and thus determined the claim to be time-barred. *Id.* at 488. Specifically, the Court noted that “a state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.” *Id.* (citation omitted). The Court also noted that the “deterrence and compensation” policies underlying § 1983 are not thwarted by applying time bars since plaintiffs can still, by filing timely and meritorious claims, be compensated and thereby deter civil rights violations. *Id.* The Court rejected uniformity and principals of federalism as grounds for judicially adding the tolling feature to the state time bar scheme. *Id.* at 489–90; *see also Hardin v. Straub*, 490 U.S. 536, 544 (1989) (holding that in a § 1983 claim brought by an inmate, borrowing analysis supported application of a state tolling provision for period of disability that included incarceration); *Chardon v. Soto*, 462 U.S. 650 (1983) (finding in a § 1983 class action that borrowing analysis supported application of a territorial tolling law related to certification of the class).

The Court also has found that a single state statute of limitations should be borrowed for all claims under a federal statute. *Wilson*, 471 U.S. at 272–80 (holding that the relevant state’s three-year personal injury statute of limitations, rather than the two-year statute of limitations for tort claims against government agencies, should be borrowed for federal civil rights claims under § 1983, whether those claims were based on alleged search and seizure, free speech, due process, or other constitutional or statutory violations).

170. *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 158, 160–62 (1983) (citations omitted).

In these cases, similar to the borrowing analysis under § 1988, the Court has instructed that the primary goal is to ascertain Congressional intent,<sup>171</sup> and has told courts to be sure that the statute of limitations identified for a federal statute is consistent with the policies underlying that federal statute.<sup>172</sup> The difference between this analysis and that under § 1988 is that in the former instance, federal as well as state statutes of limitation may be borrowed.<sup>173</sup> Indeed, in some cases involving non-§ 1988 federal statutes and other laws, the Court has in fact borrowed a statute of limitations from an analogous *federal* statute rather than turning to state law.<sup>174</sup> Some academic commentary suggests another approach: that federal courts, as a matter of federal common law, borrow from the default four-year federal time limit as well as other explicit federal time limits rather than from state law.<sup>175</sup>

### C. Statutes of Limitation Under the Pre-2004 IDEA

1. *Lack of Textual Time Limits in the IDEA*—Prior to its amendment in 2004, the IDEA and its regulations contained very little language concerning time limits for plaintiffs initiating and

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171. See *id.* at 158.

172. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367–71 (1977) (refusing to apply a short state statute of limitations to claims brought by the EEOC to enforce Title VII because doing so would frustrate effective enforcement of Title VII).

173. For example, in *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454 (1975), the Court performed this analysis for tolling issues asserted in a § 1981 civil rights claim. Although § 1981 is governed by § 1988, the Court mentioned § 1988 only to the extent that it rejected the argument that there is “anything peculiar to a federal civil rights action that would justify special reluctance in applying state law.” *Id.* at 464. The Court cited its prior decisions, some of them pre-§ 1988, borrowing state statute of limitations for claims under various federal statutes not governed by § 1988. *Id.* at 462 (citing cases applying state statutes of limitation to claims under federal labor, banking, antitrust, and patent statutes). In *Johnson*, the Court held that the borrowed state time bar included its tolling provisions, which meant that the plaintiff’s claim was time-barred. *Id.* at 462–63. However, the Court noted that “considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration.” *Id.* at 465.

174. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987); *West v. Conrail*, 481 U.S. 35 (1987); *DelCostello*, 462 U.S. at 162. When asked to determine the appropriate statute of limitations for the federal common law duty of fair representation claims by workers against unions, the Court identified the 180-day statute of limitations in the federal labor relations statute as the most analogous one. *DelCostello*, 462 U.S. at 162. The Court rejected an analogy to legal malpractice claims, in large part because analogizing to legal malpractice would frustrate the prompt dispute resolution policies underlying federal labor law, *Id.* at 167–68, and potentially render the labor grievance arbitration system unworkable. *Id.* at 169.

175. Mikva & Pfander, *supra* note 163, at 396.



prosecuting the IDEA's dispute resolution provisions. There was no time limit for filing for due process hearings, nor for appealing hearing decisions to court, nor for bringing civil actions generally. Regulations set out a one-year deadline for initiating a complaint with the state; three years if the claim is for compensatory services.<sup>176</sup> Courts were permitted to reduce or deny tuition reimbursement for a unilateral placement if the court found the parents acted "unreasonably."<sup>177</sup> This presumably would include unreasonable delay in seeking tuition reimbursement.

2. *The Courts' General IDEA Gap-Filling Approach*—In the absence of textual statutes of limitation, courts faced with IDEA statute of limitations defenses are to follow the Supreme Court's analysis described above to ascertain congressional intent. This often takes the form of 1) borrowing from an analogous state statute of limitations, 2) borrowing in appropriate cases from an analogous federal statute of limitations, perhaps including the four-year general federal statute of limitations, or 3) equitable principles when equitable remedies are sought, as is usually the case under the IDEA. Courts must make this determination of congressional intent for each borrowing issue, whether considering the appropriate general time limit or the more specific issue of tolling for minors.<sup>178</sup>

A detailed review of the various courts' analysis of the length of time for bringing IDEA administrative or judicial claims is beyond the scope of this Article. In general, however, the result has been a crazy-quilt pattern varying from state to state.<sup>179</sup> In large part, courts have tended to identify and adopt the analogous state torts<sup>180</sup> stat-

176. 34 C.F.R. § 300.662(c) (2004). The regulation allows a longer reasonable time if the violation is continuing, and specifies a three year period for requests for compensatory education. *Id.*

177. 20 U.S.C. § 1412(a)(10)(C)(iii) (2000); 34 C.F.R. § 300.403(d) (2004).

178. In fact, most courts faced with IDEA statute of limitations issues apparently have not considered borrowing from federal statutes or equitable principles. *See infra* Part IV.C.3.b. Even more distressingly, some courts have performed no borrowing analysis. *See, e.g.,* Jeffery Y. v. St. Marys Area Sch. Dist., 967 F. Supp. 852, 855 (W.D. Pa. 1997); *see also infra* notes 218–221 and accompanying text. Others seemingly have followed automatically the Court's borrowing analysis for § 1983 and other claims governed by § 1988, identifying the most analogous state statute of limitation and then adopting it for IDEA claims if it is consistent with IDEA law and policy. *See, e.g.,* Shook v. Gaston County Bd. of Educ., 882 F.2d 119, 121 n.2 (4th Cir. 1989); *see also infra* notes 210–237 and accompanying text. A number of these courts have not performed a separate analysis for tolling provisions, although it is clearly required. *See, e.g.,* McKellar v. Pa. Dep't of Educ., No. 98-CV-4161, 1999 WL 124381, at \*4 (E.D. Pa. Feb. 23, 1999); *see also infra* notes 218–237 and accompanying text.

179. Perry Zirkel & Peter Maher, *The Statute of Limitations under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1, 6–7 (2003).

180. It is not obvious that tort statutes of limitations are analogous to IDEA claims. First, tort claims are based on common law, while IDEA claims are statutory. Second, and more

utes of limitation (typically two to three years) for Stage I beginning the IDEA dispute resolution process by filing for an IDEA due process hearing.<sup>181</sup> A recent state-by-state compilation shows sixteen of twenty-three states addressing this issue adopting a two- or three-year Stage I period. But, courts varied in adopted periods from sixty days to five years.<sup>182</sup> Courts have tended to identify and adopt the state's statute of limitations for appealing administrative decisions (typically thirty to 120 days) for Stage II appeals of IDEA due process hearing officer decisions. The same recent state-by-state compilation shows twenty of thirty-four states addressing this issue adopted a 30-to-120-day Stage II period, but also varied in adopted periods from thirty days to six years.<sup>183</sup>

While varying greatly, states thus typically provide several years for resolution before further judicial appeal. Moreover, the timeline for resolution of IDEA disputes involves not only Stages I and II, but also the administrative decision-making period in between Stage I and Stage II, as well as the judicial decision-making period

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importantly, the parents in torts cases exercise only general parental roles as proxies for the child, while under the IDEA, they partner with districts and exercise an exclusive role in filing for hearings and judicial review. States that borrow these statutes as "analogous" are not taking into consideration the difference in the role of the parents in a civil suit versus the role of parents under the IDEA.

181. See generally JAMES RAPP, EDUCATION LAW § 10.03[21][d] (2004); Allen Osborne, *Statutes of Limitation for Filing a Lawsuit Under the Individuals with Disabilities Education Act: A State By State Analysis*, 191 EDUC. L. REP. 545 (2004); Allen Osborne, *Statutes of Limitation for Filing a Lawsuit Under the Individuals with Disabilities Education Act*, 106 EDUC. L. REP. 959 (1996) (focusing on Stage II time limits); Zirkel & Maher, *supra* note 179, at 6-7; Francis Dougherty, Annotation, *What Statute of Limitations Applies to Civil Actions Brought in Federal Court Under Education of the Handicapped Act (20 U.S.C. §§ 1400 et seq.) to Challenge Findings and Decisions of State Administrative Agencies*, 107 A.L.R. FED. 758 (2003).

182. Zirkel & Maher, *supra* note 179, at 6-7. In the eighteen states that have published pertinent court decisions, only North Carolina has a sixty-day period, while the states comprising the Third Circuit have a relatively open-ended period. *Id.* Courts also have taken a variety of approaches with regard to time limits for direct IDEA court claims—that is, those that are filed without first filing for due process, such as attorney fee requests and claims where administrative exhaustion is not required. *Id.* Most courts have held that the statute of limitations borrowed from an analogous statute begins to run when the student or parent has notice that the educational program designed for the child is not providing FAPE. See, e.g., *James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764 (6th Cir. 2000); *Providence Sch. Dep't v. Ana C.*, 108 F.3d 1 (1st Cir. 1997); *Dell v. Bd. of Educ.*, 32 F.3d 1053 (7th Cir. 1994); *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228 (9th Cir. 1994); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186 (1st Cir. 1993); *Gray v. Metts*, 203 F. Supp. 2d 426 (D. Md. 2002); *Essen v. Bd. of Educ. of Ithaca City Sch. Dist.*, No. 92-CV-1164(FJS)(GJD), 1996 WL 191948 (N.D.N.Y. Apr. 15, 1996); *G.D. v. Westmoreland Sch. Dist.*, 783 F. Supp. 1532 (D.N.H. 1992). In some jurisdictions, the parents also must have notice that the statute of limitations began to run against them in order for a school district to raise the claim that the limitations period had expired. See Zirkel & Maher, *supra* note 179, at 4 & n.24.

183. Zirkel & Maher, *supra* note 179, at 6-7. The limitations period is generally longer for attorneys' fees than for other issues. *Id.*

after Stage II. The intervening period between Stages I and II consists of the hearing officer proceedings and, in seventeen states, a second tier of administrative proceedings.<sup>184</sup> At the other end, the period from judicial filing to final decision—given the congested courts and their IDEA authorization to take additional evidence<sup>185</sup>—can add years to resolution of these individually oriented, fact-based cases.<sup>186</sup>

3. *Gap-Filling on Tolling Issues*—The body of case law addressing claims that statutes of limitation for IDEA claims are tolled for minors is a small one and largely contains little to no analysis of the issue. Similar to the scenario laid out at the beginning of this Article, these cases have typically involved compensatory education claims by adult students, often nearing the end of their IDEA eligibility, attempting to redress alleged and often long-ago IDEA violations when they were minors. Courts have reached opposite and largely cursory conclusions about whether the IDEA incorporates minority tolling provisions from state statutes of limitation.

a. *Cases Rejecting Tolling for Minors for IDEA Claims*—The Ninth Circuit appears to have been the first federal appeals court to address the issue, and its analysis remains among the most thorough and cogent. In *Alexopoulos v. San Francisco Unified School District*, a 1987 decision involving a compensatory education claim by a twenty-two-year-old autistic student for alleged Section 504 and IDEA violations dating back ten years,<sup>187</sup> the Ninth Circuit used the Supreme Court's state law borrowing analysis to adopt a California three-year statute of limitation for the IDEA claims at hand. However, the *Alexopoulos* court did not adopt the part of the state statute that provided for tolling while a prospective plaintiff is a minor. The court found the tolling provision to be inconsistent with IDEA policy.<sup>188</sup>

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184. *Id.* at 1 n.2. Although there are no research studies available due to the lack of adequate archival data at state education agencies, the second author's experience as an IDEA second-tier review officer and consultant in various states in such matters is that these proceedings typically take significantly longer than the periods prescribed in the regulations for each tier in 34 C.F.R. § 300.511 (2004)—forty-five days for the first tier and thirty days for the second tier, not including transmission and extension periods.

185. See, e.g., Andriy Krahnal, Perry Zirkel & Emily Kirk, "Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor, 9 TEX. F. ON C.L. & C.R. 201 (2004).

186. See, e.g., Zirkel, *supra* note 35, at 44.

187. *Alexopoulos v. S.F. Unified Sch. Dist.*, 817 F.2d 551, 553 (9th Cir. 1987).

188. *Id.* at 555–56. For another case where a federal appeals court rejected a different sort of tolling provision as inconsistent with the IDEA policy of prompt dispute resolution, see *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1300 (11th Cir. 2002) (rejecting state tolling provision involved with the filing of a parallel lawsuit in state court).

The Ninth Circuit concluded that: "The [IDEA] is designed to assure that representatives of handicapped children would promptly assert the children's educational rights. To permit tolling in favor of the children would undercut this federal policy."<sup>189</sup> The court offered two primary reasons in support of its rejection of tolling, both of which focus on what is educationally best for disabled students. First, assigning dispute resolution and other procedural rights to parents furthers parental involvement in their children's education. Second, doing so is consistent with efficiently resolving any IDEA violations. The Ninth Circuit reviewed some of the panoply of rights given to parents under the IDEA, from access to records, notice of program changes, membership on their child's team, notice of procedural rights, and the right to file for a due process hearing.<sup>190</sup> The court also recognized that if an IDEA student did not have a parent or guardian, the statute assigned these rights to the surrogate parent whom the statute requires be appointed in this event. The court characterized the basis for the assignment of these rights to parents, in particular the right to bring a claim for their child,<sup>191</sup> as one of ensuring parental involvement, which in turn is "essential to assure an appropriate substantive educational program for a child."<sup>192</sup>

Second, the court noted that the IDEA "recognized that it is critical to assure appropriate education for handicapped children at the earliest time possible. Failure to act promptly could irretrievably impair a child's educational progress."<sup>193</sup> The court

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189. *Alexopoulos*, 817 F.2d at 555. While not addressing tolling issues specifically, other courts faced with IDEA statute of limitations issues have emphasized the federal policy preferring prompt resolution of special education disputes, which educationally benefits IDEA students. See, e.g., *Ga. State Dep't of Educ. v. Derrick C.*, 314 F.3d 545, 549 (11th Cir. 2002) (adopting a brief Stage II timeline to ensure that IDEA students receive appropriate educations); *Cory D.*, 285 F.3d at 1298-99 ("The most effective means of ensuring disabled children receive an education tailored to meet their specific needs is to provide prompt resolution of disputes over [the] IEP. A brief limitations period guarantees students will receive their statutorily prescribed education when they can most benefit from it. The IDEA recognizes children develop quickly and once correct placement decisions can soon become outdated."); *Pardini v. Allegheny Intermediate Unit*, 280 F. Supp. 2d 447 (W.D. Pa. 2003). In the view of the agency that enforces the IDEA, "the limited Federal resources under the Act should be used to provide special education and related services and not be used to promote litigation of disputes." Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12615 (Mar. 12, 1999).

190. *Alexopoulos*, 817 F.2d at 556 (citations omitted).

191. The court distinguished the parent's own claim for reimbursement of tuition expenses incurred on behalf of the child. *Id.* at 556 n.6 (citation omitted).

192. *Id.* at 555 (citations omitted).

193. *Id.* at 556.

reasoned that Congress had acted on its "desire to obtain timely and appropriate education for handicapped children by conferring substantial substantive and procedural rights on parents . . . [which] clearly indicates that it did not intend to authorize filing of claims on behalf of or by the children many years after the alleged wrongdoing occurred."<sup>194</sup> The court also noted that IDEA students who are legal adults may be able to bring claims that are not time-barred for recent IDEA violations.<sup>195</sup>

More recently, and in another compensatory education case, the Eighth Circuit also rejected IDEA tolling for minor students, and for largely the same reasons found in *Alexopoulos*.<sup>196</sup> In *Strawn v. Missouri State Board of Education*, a case involving a request for compensatory education for a severely disabled student for alleged IDEA violations dating back ten years,<sup>197</sup> the Eighth Circuit performed the Supreme Court's borrowing analysis set forth above<sup>198</sup> and identified strong federal policies in favor of quick resolution of IDEA claims<sup>199</sup> as well as parental involvement in their children's education. The Eighth Circuit thus adopted a state two-year statute of limitations for civil rights claims rather than the more general state five-year statute of limitations or laches.<sup>200</sup> This same federal policy favoring prompt dispute resolution was identified as the reason for rejecting tolling based on minor status.<sup>201</sup>

Although not cited in *Strawn*, a federal district court within the Eighth Circuit had previously rejected the tolling provision for minors in the state statute of limitations it adopted for IDEA claims. In *Smith ex rel. Townsend v. Special School District No. 1*, the federal district court of Minnesota cited Supreme Court precedent indicating that tolling provisions of borrowed state statutes of limitations

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194. *Id.*

195. *Id.* at 556 n.7 (citation omitted). The court reserved the issue of tolling when an EHA student is not represented. *Id.*

196. *Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954, 958 (8th Cir. 2000).

197. *Id.* at 956.

198. *Id.* at 957.

199. The court also emphasized the impact on the educational programs provided to IDEA students, noting that "children protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm." *Id.*

200. *Id.* at 956-57. The Eighth Circuit already had applied the five-year statute of limitations to § 1983 claims. *Id.* at 957 (citing *Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998)). The dissent would have applied the five-year time limit, reasoning that the two-year time limit frustrates federal policy. *Id.* at 959 (Heaney, J., dissenting in part). The dissent does not address the issue of tolling during the period when the student was a minor.

201. *Id.* at 958 (majority opinion). The court reserved the issue of tolling when the parents were not involved in the IEP process or the parents "intentionally acted contrary to the interests of the child." *Id.* at 958 n.7.

should not be adopted if they would be inconsistent with federal policy.<sup>202</sup> As to federal IDEA policy, the court found that “[p]rompt resolution of IDEA disputes is imperative because of the harm caused to the disabled child by delay in establishing an appropriate program,”<sup>203</sup> and, specifically with regard to tolling, that borrowing the state tolling provision for minors “would be completely incompatible with the federal policy of prompt resolution of IDEA disputes.”<sup>204</sup> Finally, the district court noted the large-scale impact of adopting tolling for minors, “since an IDEA claim will almost always accrue to someone younger than 18, the tolling provision is inconsistent with the cause of action.”<sup>205</sup>

Finally, a federal district court in Michigan implied it would not adopt tolling for minors. In finding that the Supreme Court borrowing analysis supported borrowing the state “tolling for disability” provision in the specific case of a severely disabled adult IDEA student, the court noted that federal IDEA policy favoring prompt dispute resolution would not be thwarted by adopting tolling for the small subset of IDEA students “who are *severely* mentally impaired.”<sup>206</sup> This lies in contrast with tolling for “[t]he vast majority of [IDEA] students,”<sup>207</sup> which “would *not* result in opening the floodgates of stale cases.”<sup>208</sup> Of course, tolling based upon minority status, or disability generally, would open those very floodgates.<sup>209</sup>

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202. 24 IDELR (LRP Publications) 1003, 1012 n.11 (D. Minn. 1996) (citing Bd. of Regents v. Tomanio, 446 U.S. 478, 485 (1980)), *aff'd on other grounds*, 184 F.3d 764 (8th Cir. 1999).

203. *Id.* at 1007 (citing IDEA legislative history).

204. *Id.* at 1012 n.11 (citing Alexopoulos v. S.F. Unified Sch. Dist., 817 F.2d 551, 555 (9th Cir. 1987)). The court also recognized that “an IDEA claim will almost always accrue to someone younger than 18, [hence] the tolling provision is inconsistent with the cause of action.” *Id.*

205. *Id.* The age of legal majority in almost every state is eighteen. See Legal Information Institute, *Laws of the Fifty States, District of Columbia and Puerto Rico Governing Emancipation of Minors*, [http://www.law.cornell.edu/topics/Table\\_Emanicipation.htm](http://www.law.cornell.edu/topics/Table_Emanicipation.htm) (last visited Aug. 15, 2005). *But see* MISS. CODE ANN. §§ 1-3-21, -27 (2005). The vast majority of IDEA students are under the age of eighteen. See *infra* note 248. IDEA eligibility ends with the earlier of high school graduation or the student’s twenty-first birthday. 20 U.S.C. § 1412(1)(a) (2000); 34 C.F.R. § 300.122(a)(3) (2004).

206. Wayne County Reg’l Educ. Serv. Agency v. Pappas, 56 F. Supp. 2d 807, 817 (E.D. Mich. 1999).

207. *Id.*

208. *Id.*

209. See New Lothrop Area Pub. Sch. Dist., 41 IDELR (LRP Publications) 174 (SEA Mich. 2004) (rejecting tolling for minors and any implication by *Wayne County*, 56 F. Supp. 2d 807, that such tolling would be appropriate) (“The structure of the IDEA . . . clearly evidences intent on the part of Congress that the active role of the parent . . . means that the parent has the authority to act and make decisions on behalf of the child . . . . Accordingly, the child is bound by those decisions.”).

*b. Cases Adopting Tolling for Minors for IDEA Claims*—The Fourth Circuit adopted tolling for minor IDEA students in *Shook v. Gaston County Board of Education*. That case involved a student's third-party beneficiary claim for reimbursement of health insurance benefits from her parents' policy that had been used to partially pay for her special education program in a private residential school.<sup>210</sup> While citing some of the relevant Supreme Court precedent on borrowing analysis, the Fourth Circuit nowhere referred to (or performed) the part of the analysis that focused on consistency of the borrowed state statute of limitations with federal (i.e. IDEA) policy. The Fourth Circuit did recognize the Ninth Circuit's decision to reject tolling,<sup>211</sup> and noted its disagreement, reasoning instead that IDEA suits are "properly maintained both by the child and its parents," consequently tolling on behalf of the minor child "should not deter the parents from bringing a suit at an earlier time."<sup>212</sup>

Several federal district courts in Pennsylvania have also adopted IDEA tolling for legal minors or have engaged in analysis that produces a similar result. These district courts are part of the Third Circuit, which has not yet addressed tolling issues under the IDEA, but has taken a unique approach on other IDEA statutes of limitation issues.<sup>213</sup> First, that court has found that equitable principles should govern, and accordingly a laches-like reasonableness analysis defines the Stage I time limit, at least for tuition reimbursement claims.<sup>214</sup> Second, the Third Circuit has used the Supreme Court borrowing analysis to identify a state two-year personal injury statute of limitation as the appropriate one for Stage II administrative

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210. 882 F.2d 119 (4th Cir. 1989).

211. *Id.* at 121 n.2.

212. *Id.* The Fourth Circuit appeared to assume that rejecting tolling for minors also meant rejecting tolling for disability in legal adults. The court reasoned that under the school's approach, a high-functioning disabled student who was a legal adult could bring timely claims, while an incapacitated student could not. *Id.* at 121–22.

213. For a more detailed discussion of the Third Circuit's approach, see Perry Zirkel, *The Statute of Limitations Under the Individuals with Disabilities Act: Is Montour Myopic?*, 12 WIDENER L.J. 1 (2003).

214. *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 157–58 (3d Cir. 1994) (failing to mention or apply Supreme Court borrowing analysis in determining that a New Jersey parent's claim for tuition reimbursement filed more than one year after unilateral placement is unreasonable and thus untimely); see also *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 280 n.16 (3d Cir. 1996) (citing *Bernardsville's* reasonableness approach as the standard for Pennsylvania cases); cf. *Montour Sch. Dist. v. S.T.*, 805 A.2d 29 (Pa. Commw. Ct. 2002) (setting the Stage I limit for Pennsylvania compensatory education claims at one year with an extension to two years if there are mitigating circumstances).

appeals to court, but not for Stage I filing for due process.<sup>215</sup> Third, and perhaps most unusually, that court has held that compensatory education claims accrue “when the school knows or should know that the student is receiving an inappropriate education,”<sup>216</sup> resulting in an indefinite statute of limitations for those claims.<sup>217</sup>

The earliest of these cases, *Jeffery Y. v. St. Marys Area School District*, was a suit for damages for alleged violations of the IDEA and other laws.<sup>218</sup> The *Jeffery Y.* court simply noted that the relevant two-year state statute of limitations included a provision for tolling for minors.<sup>219</sup> In its brief opinion, the court did not cite to nor apply the Supreme Court borrowing analysis, nor did it offer any other reasoning or citation to authority in support of its conclusion. Similarly, in *McKellar v. Pennsylvania Department of Education*, another federal district court referred to the Supreme Court state law borrowing analysis to identify the state two-year statute of limitations as the appropriate one for IDEA claims.<sup>220</sup> Like the *Jeffery Y.* court, the *McKellar* court then simply referenced the tolling provision under the state law without applying the borrowing analysis to the tolling provision, nor offering any analysis in support of the tolling provision’s applicability.<sup>221</sup> *Susavage v. Bucks County Schools*

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215. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250–51 (3d Cir. 1999) (citing Supreme Court borrowing analysis to find a New Jersey claim for compensatory education most analogous to a New Jersey two-year statutes of limitation for personal injury claims and claims under the state Tort Claims Act, and holding that it runs from the date of the final administrative decision); see also *Jeremy H.*, 95 F.3d at 280–81.

216. *Ridgewood Bd. of Educ.*, 172 F.3d at 250. The *Ridgewood* court decided a New Jersey claim. However, since accrual is an issue of federal law rather than one borrowed from the states, this analysis presumably would apply elsewhere within the Third Circuit.

217. Courts disagree about the extent to which the *Ridgewood* decision governs Stage I limitations for IDEA compensatory education claims. Compare *Amanda A. v. Coatesville Area Sch. Dist.*, No. Civ. A. 04-4184, 2005 WL 426090, at \*6 (E.D. Pa. Feb. 23, 2005) (finding that *Ridgewood* rejects a Stage I statute of limitations for compensatory education claims), *Jonathan T. v. Lackawanna Trail Sch. Dist.*, No. 3:03CV522, 2004 WL 384906 (M.D. Pa. Feb. 26, 2004), and *Jonathan H. v. Elizabeth Forward Sch. Dist.*, 40 IDELR (LRP Publications) 261 (E.D. Pa. 2004), with *Montour Sch. Dist. v. S.T.*, 805 A.2d 29, 37–38 (Commw. Ct. Pa. 2002) (finding that *Ridgewood* addressed only the Stage II limit for Pennsylvania compensatory education claims and adopting a Stage I one-year limit for such claims with an extension to two years if there are mitigating circumstances).

218. 967 F. Supp. 852 (W.D. Pa. 1997).

219. *Id.* at 855.

220. *McKellar v. Pa. Dep’t of Educ.*, No. 98-CV-4161, 1999 WL 124381, at \*4 (E.D. Pa. Feb. 23, 1999). The court also conflated its analysis of IDEA timelines with those for § 504, the ADA, and § 1983. *Id.*

221. *Id.* The court did note that the tolling provision would apply to the student’s claim, but not the parent’s related claims. *Id.* At least one other federal district court has adopted tolling based on minority status without any analysis or discussion. See *Mason v. Schenectady Sch. Dist.*, 879 F. Supp. 215, 220 n.4 (N.D.N.Y. 1993) (centering analysis on identification of



*Intermediate Unit No. 22*<sup>222</sup> involved claims for money damages under the IDEA and numerous statutes related to a disabled student's death on a school bus. The district court performed a single borrowing analysis for the statutes of limitations for four federal statutes—the IDEA, § 504, the ADA, and § 1983.<sup>223</sup> The *Susavage* court then incorrectly stated that it must also incorporate any relevant state tolling rules,<sup>224</sup> and cited § 1983 precedent to borrow Pennsylvania tolling provisions for minors.<sup>225</sup> As to the tolling provision, the court performed no actual analysis of consistency with federal IDEA (or § 504, ADA, or § 1983) policy nor other borrowing analysis.

More recently, a federal district court in Pennsylvania indirectly addressed the tolling issue in *Jonathan T. v. Lackawanna Trail School District*.<sup>226</sup> *Jonathan T.* involved a claim for compensatory education for alleged IDEA and other violations dating back thirteen years by a then twenty-year-old former IDEA student who had dropped out of school three years earlier.<sup>227</sup> The due process hearing officer and state review officer panel dismissed the claim as time-barred,<sup>228</sup> but the federal district court reversed.

The *Jonathan T.* court's reasoning began with a reference to the Supreme Court borrowing analysis,<sup>229</sup> and then analyzed Stage II timeline issues under the unique Third Circuit precedent discussed above.<sup>230</sup> As to Stage I, however, rather than performing a borrowing analysis, the court reviewed intra-circuit precedent on other points,<sup>231</sup> and then rejected a two-year statute of limitations as

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an appropriate statute of limitations for IDEA court claims where administrative exhaustion is not required).

222. No. CIV.A. 00-6217, 2002 WL 109615 (E.D. Pa. Jan. 22, 2002).

223. *Id.* at \*22.

224. *Id.*

225. *Id.*

226. *Jonathan T. v. Lackawanna Trail Sch. Dist.*, No. 3:03CV522, 2004 WL 384906 (M.D. Pa. Feb. 26, 2004).

227. *Id.* at \*1.

228. *Id.*

229. *Id.*

230. The court noted that the Third Circuit has not conclusively identified an IDEA statute of limitations for Pennsylvania claims. *Id.* The court then correctly referenced Third Circuit precedent that the Stage II statute of limitations begins to run from the "completion of the state administrative process" rather than the violation of the IDEA. *Id.*

231. While the borrowing analysis set out by the Supreme Court typically involves identifying an appropriate *state* statute of limitations, the Third Circuit instead identified an equity-based "reasonableness" approach for some cases. See *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 281 n.16 (3d Cir. 1996).

As to compensatory education claims specifically, the Third Circuit apparently has an indefinite statute of limitations because of its accrual standard. See *Jonathan T.*, 2004 WL 384906, at \*2 (citing intra-circuit district court precedent to distinguish the equitable one-

appropriate for Stage I. The court then inexplicably relied on rules for eligibility for special education services, rather than examining statutes of limitation and tolling provisions, to find that compensatory education claims are available and timely until the student's IDEA eligibility ends at age twenty-one. The (former) student plaintiff in *Jonathan T.* filed his due process claim more than two years after attaining majority status,<sup>232</sup> and thus would be time-barred even if a two-year statute of limitations was tolled until he became a legal adult. However, the *Jonathan T.* court found his claim was not time-barred,<sup>233</sup> noting that as a twenty-year-old at the time he filed for due process, Jonathan T. was eligible under state statute and the IDEA to receive educational services since he had not yet turned twenty-one.<sup>234</sup> The court then apparently concluded from this eligibility to receive education services that "the statute of limitations in special education matters should not begin to run against the child until he or she reaches the age of twenty-one."<sup>235</sup>

The *Jonathan T.* opinion never actually refers to nor discusses tolling based upon minority status. However, as a fallback position, the court suggested that application of equitable tolling principles also compelled the court's conclusion that Jonathan T.'s compensatory education claims were not time-barred. The court's reasoning appears confused in its understanding of these equitable tolling principles. The court suggested that equitable tolling was appropriate so that "the school district not benefit from its pervasive violations [of IDEA procedural safeguards]."<sup>236</sup> It did not refer

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year statute of limitations for parent IDEA claims of tuition reimbursement); see also *Jonathan H. v. Elizabeth Forward Sch. Dist.*, 40 IDELR (LRP Publications) 261 (E.D. Pa. 2004) (following *Jonathan T.* on this point); *Kristi H. v. Tri-Valley Sch. Dist.*, 107 F. Supp. 2d 628, 634 (M.D. Pa. 2000). Therefore, it may be appropriate to perform separate statute of limitations analyses for parent tuition reimbursement and student compensatory education IDEA claims.

232. *Jonathan T.*, 2004 WL 384906, at \*1 (noting that the plaintiff was born July 16, 1981, and filed a request for an administrative special education due process hearing on May 2, 2002).

233. It would thus appear that even with tolling based on minority status, the claim would be time-barred by the two-year Pennsylvania statute of limitations identified by the *Jeffery Y.* and *McKellar* courts for Pennsylvania-based IDEA claims.

234. *Jonathan T.*, 2004 WL 384906, at \*3 (citations omitted).

235. *Id.* at \*3. The court rejected the school's argument that the statute should begin running when Jonathan left school at age eighteen. *Id.* at \*3 n.4.

Another federal district court in Pennsylvania has cited and uncritically adopted the *Jonathan T.* court's approach, ruling without further reasoning or analysis that "[w]ith regard to a compensatory education, . . . the statute of limitations in special education mailers [sic] should not begin to run against the child until he or she reaches the age of twenty-one." *William S. v. Upper St. Clair Sch. Dist.*, 42 IDELR (LRP Publications) 35 (W.D. Pa. 2004).

236. *Jonathan T.*, 2004 WL 384906, at \*3.

to any of the exceptional circumstances that trigger equitable tolling set forth in the Third Circuit opinion it cited.<sup>237</sup>

4. *Analysis*—Courts will continue to address tolling issues under the pre-2004 amendments IDEA. The 2004 amendments, including the new statutes of limitations described below, are not effective until July 1, 2005.<sup>238</sup> Hence, not-yet-decided claims filed prior to the 2004 amendments, as well as new claims filed after the amendments were enacted in December 2004 but before they take effect in July 2005, will be governed by the pre-2004 amendments IDEA. As discussed earlier, the IDEA dispute resolution process is a lengthy one, and it will likely be years before there are final decisions on this set of claims.

a. *The Required Borrowing Analysis*—The Supreme Court has provided substantial guidance and instruction to courts faced with these issues. A borrowing analysis is to be performed. The Court has clearly instructed that tolling provisions of borrowed statutes of limitation are not automatically borrowed; a separate borrowing analysis must be performed for the tolling provision at issue.<sup>239</sup> Equally clear is the proposition that the statute of limitations borrowed for one statute is not necessarily the appropriate time limit to borrow for other statutes in the same case, although they may cover similar topics or claims.<sup>240</sup>

The case law to date on tolling under the IDEA is limited both as to quantity and as to depth of reasoning. In light of the Supreme Court's clear guidance, it is puzzling that some courts, notably some of the federal district courts in Pennsylvania, have not followed the prescribed analytic approach. Rather than performing the policy analysis required by the Court to determine if a tolling provision should be borrowed, the *Jeffery Y., McKellar*, and *Susavage* courts automatically adopted the tolling provision for minors in the Pennsylvania statute of limitations.<sup>241</sup>

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237. *Id.* (citing *Lake v. Arnold*, 232 F.3d 360, 370 n.9 (3d Cir. 2000)); see also *M.D. v. Southington Bd. of Educ.*, 334 F.3d 217, 223–24 (2d Cir. 2003) (stating that equitable tolling is applicable where a school failed to give parents notice of their IDEA procedural rights, and declining to extend a state equitable tolling provision to the parents' IDEA claim because to do so would frustrate federal IDEA policy of "expeditious resolution of . . . disputes" by "permitting claims to be brought long after their accrual date"); *R.S. v. District of Columbia*, 292 F. Supp. 2d 23 (D.D.C. 2003).

238. Individuals with Disabilities Education Act of 2004, Pub. L. No. 108-446, § 302, 118 Stat. 2647, 2803.

239. See *supra* note 169.

240. See *supra* Parts IV.A–B.

241. See *supra* Part IV.C.3.b.

Moreover, the *Susavage* and *McKellar* courts did a single borrowing analysis for claims made under four very different statutes—the IDEA, § 504, the ADA, and § 1983. This single analysis ignores the obvious: congressional intent concerning time limits likely differed for these four statutes, which were enacted as much as a century apart,<sup>242</sup> and serve very different ends. Performing a single analysis is also inappropriate since § 1983 borrowing is governed by § 1988, while borrowing under the other three statutes is not.<sup>243</sup> Moreover, the four statutes are structured differently: the IDEA is set up as a grant program, in contrast to the unfunded civil rights mandates of the ADA and § 1983.<sup>244</sup> The four statutes' dispute resolution processes also differ greatly,<sup>245</sup> and they have very different remedial schemes.<sup>246</sup>

Section 504, the ADA, and § 1983 cover large groups of persons regardless of age.<sup>247</sup> Given the broad coverage of these statutes, tolling for legal minors would affect only a small subset of claims under them, while the borrowed statute of limitations would continue to set a time limit for most claims. In contrast, the IDEA covers only a subset of disabled students aged three to twenty-one,

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242. Section 1983 was part of the Civil Rights Act of 1871. 42 U.S.C. § 1983 (2000). Section 504 was part of the Rehabilitation Act of 1973. 29 U.S.C. § 794 (2000). The IDEA was enacted in 1975. 20 U.S.C. § 1400 (2000). The ADA was enacted in 1990. 42 U.S.C. § 12101 (2000).

243. See *supra* Part IV.B.

244. See *supra* Part III.A.

245. For example, the IDEA requires administrative exhaustion and sets up a formal administrative hearing with limited judicial review. See 20 U.S.C. § 1415(f), (g), (l) (2000). In contrast, § 504 and the ADA make informal complaint processes available but do not require using them before filing a court claim. See 34 C.F.R. § 100.7 (2004) (stating that alleged § 504 violations may be the subject of OCR complaints); 29 U.S.C. § 794a(a)(2) (2000) (discussing private judicial claims under § 504); 42 U.S.C. § 12133 (2000) (adopting § 504 enforcement mechanisms for ADA title II); *id.* at § 12188 (discussing DOJ complaints and private lawsuits available under ADA Title III). Section 1983 recourse is exclusively in the courts. See 42 U.S.C. § 1988 (2000).

246. Equitable remedies are available under § 504, the ADA, and § 1983, but money damages are the typical remedy. *Cf.* 42 U.S.C. § 12188 (stating that under ADA Title III punitive damages are not available and that compensatory damages are limited to suits brought by the government); *Barnes v. Gorman*, 536 U.S. 181, 187–88 (2002) (finding that compensatory but not punitive damages are available under § 504 and ADA Title II). Under the IDEA, the remedies are primarily, if not exclusively, equitable. *Smith v. Robinson*, 468 U.S. 992, 1020 n.24 (1984). *But see* *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995).

247. Section 1983 covers all “persons” whose constitutional or certain other federal rights are violated under color of state law. 42 U.S.C. § 1983 (2000). The ADA covers disabled persons, among others, in their capacities as employees and as patrons of places of public accommodation. *Id.* at § 12182. Section 504 covers disabled employees of schools and disabled students. 29 U.S.C. § 794 (2000); 34 C.F.R. § 100.3 (2004).

more than ninety-five percent of whom are legal minors.<sup>248</sup> Tolling for minors would thus have the practical effect of wholesale obliteration of the limitations period for IDEA claims.<sup>249</sup> Adult IDEA students could file claims dating back to their preschool years unless their parents had done so already.

Finally, § 504, the ADA, and § 1983 claims are assigned to the allegedly injured party, whether adult or minor. In contrast, the IDEA explicitly assigns the right to initiate the IDEA dispute resolution process to parents. Moreover, none of the other three statutes establish the special parent proxy and partner role contained in the IDEA.<sup>250</sup> To whatever extent tolling applies under them, § 504 and the ADA do not provide a comparable and comprehensive special parental role. Rather, § 504 and the ADA are civil rights acts specific to the members of the protected class, which may include parents separately in such circumstances as alleged retaliation but which do not provide a detailed role for parents from the eligibility stage to the dispute resolution stage of the child's education.<sup>251</sup>

The *Jonathan T.* opinion and its progeny are of special concern. The *Jonathan T.* court identified the likely applicable two-year Pennsylvania statute of limitations from precedent that had used the borrowing analysis.<sup>252</sup> The claims in the case were for compensatory education claims, dating back more than ten years, made by a twenty-year-old student who had been a legal adult for more than two years at the time he filed his claims. The *Jonathan T.* court

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248. See U.S. DEP'T OF EDUC., TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT tbl. AA1 (2002), available at <http://www.ed.gov/about/reports/annual/osep/2002/appendix-a-pt1.pdf>. During 2001-02, for example, 95.62% of IDEA students were minors. *Id.* (6,096,007 out of 6,375,400).

249. One court appears to have recognized this difference, adopting tolling in a specific case involving a severely disabled student, but distinguishing and rejecting wholesale tolling for all disabilities as an improper opening of the floodgates. *Wayne County Reg'l. Educ. Scriv. Agency v. Pappas*, 56 F. Supp. 2d 807, 817 (E.D. Mich. 1999). Since all IDEA students are disabled, wholesale tolling for disability would open the floodgates 100%. *Id.* Wholesale tolling for minors would open those very same floodgates at a more than ninety-five percent level. See *supra* note 248.

250. See *supra* Parts III.A, III.B.1-2.

251. The ADA regulations do not specifically address the child's schooling, much less the parents' role in the process. See 28 C.F.R. §§ 35.102-.178 (Title II); *id.* at §§ 36.104-.505 (Title III). The § 504 regulations only refer to the parent's role briefly based on the overlap with FERPA and the IDEA. See 34 C.F.R. § 104.36 (2004) (mentioning parents only with respect to the right to review the child's records and the "opportunity for participation" in the due process hearing).

252. *Jonathan T. v. Lackawanna Trail Sch. Dist.*, No. 3:03CV522, 2004 WL 384906, at \*3 (M.D. Pa. Feb. 26, 2004); see also *supra* text accompanying notes 230-231.

blithely announced that the claims were timely since the student had not yet turned twenty-one and thus had not yet exhausted his eligibility for special education. The court inexplicably relied on special education eligibility age rules to determine timeliness of IDEA claims and never mentioned the Pennsylvania tolling provision, much less performed any borrowing analysis, nor any analysis of consistency with IDEA policy as to that tolling provision.<sup>253</sup> Under this reasoning, apparently any Pennsylvania IDEA student who is not yet twenty-one can file timely claims concerning her special education program, beginning with the preschool IEPs. In fact, *Jonathan T.* apparently contemplates that turning twenty-one only starts the running of the statute of limitations clock,<sup>254</sup> and thus even older adult former students will be able to file timely claims.

The decision of the Fourth Circuit in *Shook* to adopt tolling for minors is a somewhat more reasoned approach. *Shook* did cite relevant Supreme Court precedent on borrowing analysis, but nowhere referred to (nor performed) the part of the analysis which focused on consistency of the borrowed state statute of limitations with federal IDEA policy. The Fourth Circuit's reasoning relied instead on the premise that IDEA claims are "properly maintained both by the child and its parents" and a statement that tolling on behalf of minors would not deter parents from promptly filing claims.<sup>255</sup> For the reasons described above, *Shook's* premise that both students and parents are given the right to file IDEA claims is simply not accurate.<sup>256</sup> The substantive (FAPE and other) rights under the IDEA are the student's. However, the IDEA explicitly assigns the right to file for a hearing to parents, which by definition only include students to the extent parent rights may transfer to them when they become legal adults.

*b. IDEA Policy and the Appropriateness of Borrowing Tolling Provisions*—Notably, those courts that have a) done the federal IDEA policy review as part of the borrowing analysis, b) performed this analysis for IDEA claims separately from those under other statutes, and c) analyzed the tolling provision separately (namely the Eighth and Ninth circuits in *Strawn* and *Alexopoulos* respectively as well as the federal district court in *Smith*), have all rejected tolling for minors. In other words, those courts that have performed the

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253. *Id.* at \*1-4.

254. *Id.*; see also *supra* text accompanying note 235.

255. *Shook v. Gaston County Bd. of Educ.*, 882 F.2d 119, 121 n.2 (4th Cir. 1989); see also *supra* note 212 and accompanying text.

256. If tolling applied, Congress would have had little need to include provisions in the statute for parents to initiate due process.

correct analysis have consistently rejected tolling for minors under the IDEA. In so doing, the courts have, to varying degrees, identified three IDEA policy concerns which are inconsistent with borrowing a tolling provision for minors: 1) the unique role and responsibilities the IDEA assigns parents, 2) the IDEA policy of resolving disputes promptly, which in turn enhances efficient allocation of limited educational resources, and 3) that the impact of tolling for minors would essentially negate any timelines in the IDEA.

*i. The IDEA Parent Role*—The most thoroughly reasoned of these opinions, *Alexopoulos*, correctly recognized (but did not comprehensively address) the central role of parents under the IDEA.<sup>257</sup> *Alexopoulos* reviewed some of the panoply of rights assigned to parents under the statute as well as the statutory provisions designed to ensure that all IDEA students had a (surrogate or other) parent to assert these rights.<sup>258</sup> Most importantly, the court recognized the utilitarian basis for the assignment of these rights to parents, in particular the right to bring a claim for their child,<sup>259</sup> as one of ensuring parental involvement. This involvement is, in turn, “essential to assure an appropriate substantive educational program for a child.”<sup>260</sup>

As the Ninth Circuit noted, the special comprehensive role of the parents under IDEA, including the right to file for due process hearings and judicial review, shows that the IDEA is distinct from other legal contexts where tolling is based on the generic definition of disability.<sup>261</sup> Thus, Congress arguably considered not only the applicable reason of infancy, or the child’s age being below eighteen,<sup>262</sup> but also the special, narrower definition of disability<sup>263</sup> in according parents a special, central role that includes the right and responsibility to initiate the administrative hearing/judicial review mechanism<sup>264</sup> that gives rise to the issue of statute of limitations.<sup>265</sup> Case law in various other IDEA contexts also recognizes this critical right and responsibility of the parents and provides support for disallowing tolling of the limitations periods under the

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257. *Alexopoulos v. S.F. Unified Sch. Dist.*, 817 F.2d 551, 556 (9th Cir. 1987).

258. *Id.*

259. *Id.* at 555–56.

260. *Id.* at 555 (citations omitted).

261. *See supra* notes 14, 31.

262. In the limited case where the individual with a disability is eighteen or over, Congress has provided the special, qualified transfer provisions. *See supra* Part III.B.2.j.

263. 20 U.S.C. § 1401(3)(A)–(B) (2000); 34 C.F.R. § 300.7 (2004).

264. *See supra* Part III.B.2.i.

265. *See supra* Parts III.A., III.B.1., III.B.2.

Act. These contexts include the directly applicable case law on filing for hearings, court decisions in various partially applicable categories such as non-custodial parents' rights, and parents representing their child pro se.<sup>266</sup> These cases emphasize the special role that parents have in triggering and implementing the dispute resolution mechanism to enforce the IDEA with respect to their child. They also emphasize the parental role by illustrating that only those parents with legal custody can trigger some of the most essential parent rights. Thus, even though the child is the true party in interest in IDEA suits, the parent has the responsibility to exercise procedural rights to ensure that their child is receiving FAPE. Tolling of the statute of limitations would negate this special parental role.

In the case of tuition reimbursement claims, tolling would also produce a seemingly nonsensical result in the case of tuition reimbursement, which represents a significant segment of special education litigation at both the hearing/review officer and court stages.<sup>267</sup> These claims are clearly made by the parents for reimbursement of expenses incurred in trying to ensure their child received FAPE when the public schools were not providing it. If tolling for minors applied, the parents' tuition reimbursement claim would be tolled, even though it is the parents who made the unilateral placement and who would receive reimbursement.

The partner dimension of the special IDEA parent role also is inconsistent with tolling IDEA claims for minors. As "equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child," parents are joint decision-makers with schools in developing their child's education program.<sup>268</sup> If tolling were allowed for minors, claims would be available to students for all violations except those about which their parents had already filed claims at some point in the past. Thus, the tolled claims would involve alleged violations in which the student's parents were joint decision-makers, and with which the student's parents presumably agreed. Hence the student would be filing tolled claims that not infrequently would be challenging decisions in which their parents participated and with which their parents agreed. This scenario is in marked contrast, for example, to a medical malpractice claim tolled while the injured patient was a

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266. See cases cited *supra* notes 148, 155.

267. See, e.g., Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

268. 34 C.F.R. pt. 300, app. A, No. 5 (2004).



minor. In that case, the plaintiff is suing a stranger. In the case of tolled IDEA claims, the parents would not be a defending party, but the claim would attack decisions the parents helped to make. This scenario has the potential for harm to intra-family relations on the one hand and for collusion between the student claimant and her parents on the other.

If Congress believed parent participation to be important in the special education process, it would seem counteractive to allow parents to do nothing for their child when problems arise. Tolling essentially allows problems to persist for years without anything being done. If Congress intended for parents to be involved, that involvement must include ensuring their child receives FAPE as quickly as possible, and not allowing the child to languish in an unsuccessful educational program. Despite the suggestion to the contrary by the *Shook* court,<sup>269</sup> tolling might actually give some parents an incentive not to initiate due process in order to preserve their child's right to later file an IDEA claim. It must be remembered that the primary purpose of the IDEA is to ensure that all children eligible for special education receive FAPE.<sup>270</sup> If a parent thinks that her twelve-year-old child's educational program is inappropriate, she should not be allowed to continue with the program for six years and then bring a suit. If the program truly does not provide FAPE, it is not only important to the school to be able to effectively allocate resources<sup>271</sup> by promptly being put on notice and having a chance to make changes, but more importantly the student needs to receive appropriate education sooner rather than later.<sup>272</sup>

*ii. Prompt Dispute Resolution and Efficient Resource Allocation*—The Ninth Circuit also found that borrowing the state tolling provision for minors was inconsistent with the IDEA's policy of prompt dispute resolution.<sup>273</sup> That court correctly viewed prompt resolution of

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269. See *supra* note 212.

270. 20 U.S.C. § 1401(8) (2000); 34 C.F.R. § 300.13 (2004).

271. In the view of the Department of Education, the agency that enforces the IDEA, "the limited Federal resources under the Act should be used to provide special education and related services and not be used to promote litigation of disputes." Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12615 (Mar. 12, 1999).

272. A recent decision echoes the *Strawn* court's analysis, holding that Congress intended for parents to be actively involved in their child's education and expeditious in any IDEA concerns. Apache Junction Unified Sch. Dist., 39 IDELR (LRP Publications) 49 (SEA Ariz. 2003) (citing *Strawn v. Mo. State Bd. of Ed.*, 210 F.3d 954 (8th Cir. 2000)).

273. See *Alexopoulos v. S.F. Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987) (holding that the Education of the Handicapped Act—which Congress re-titled the IDEA in 1990—was designed to assure that parents would promptly assert their children's rights).

disputes as a means to an educational end: assigning dispute resolution and other procedural rights to parents furthers parental involvement in their children's education, and doing so is consistent with efficiently resolving any IDEA violations. The court noted that the IDEA "recognized that it is critical to assure appropriate education for handicapped children at the earliest time possible. Failure to act promptly could irreparably impair a child's educational progress."<sup>274</sup> The court reasoned that Congress had acted on its "desire to obtain timely and appropriate education for handicapped children by conferring substantial substantive and procedural rights on parents . . . [which] clearly indicates that it did not intend to authorize filing of claims on behalf of or by the children many years after the alleged wrongdoing occurred."<sup>275</sup> Tolling would defeat this purpose, to the detriment of the student not receiving FAPE when she will most benefit from it, and to the detriment of other children with and without disabilities, whose resources for educational purposes will become even more limited,<sup>276</sup> as recognized by the Department of Education, the agency that enforces the IDEA.<sup>277</sup>

*iii. Impact of Adopting Tolling for Minors*—Finally, within this group of correctly decided cases, the *Smith* court also recognized the magnitude of the impact of tolling for minors on IDEA litigation. As that court noted, tolling of IDEA claims for minors would mean that IDEA cases need not be brought until some period after the student reaches age eighteen, thus effectively negating any statute of limitations. For most if not all of the child's education under the IDEA, the parent could choose not to file for a hearing and for judicial review, thus undercutting the intent and framework of the Act and putting both the child and the school district at risk of untimely proceedings and wasted resource allocation. In fact, much of the case law concerning the statute of limitations under the IDEA would be redundant if tolling were appropriate.<sup>278</sup>

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274. *Id.* at 556.

275. *Id.*

276. More recently, the Eighth Circuit in *Strawn* reiterated the strong federal policies in favor of quick resolution of IDEA claims. *Strawn*, 210 F.3d at 959. This court also emphasized the impact on the educational programs provided to IDEA students, noting that "children protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm." *Id.* at 957 (citation omitted).

277. *See supra* note 271.

278. *See, e.g., In re The Educ. Assignment of M.S., Special Educ. No. 1321*, at \*6 n.37 (SEA Pa. Jan. 10, 2003), available at <http://www.pattan.k12.pa.us/ODR/RedAppDec/PDFs/App1321.pdf>.

## V. THE 2004 IDEA AMENDMENTS

A. *The 2004 IDEA Amendments Add Stage I and Stage II Statutes of Limitation*

As discussed above, the IDEA, as originally enacted, did not include explicit deadlines for filing a request for a due process hearing or for an appeal to a court from a due process hearing.<sup>279</sup> The 2004 amendments to the IDEA added deadlines for filing for a due process hearing or otherwise making a complaint, as well as appealing a hearing officer decision to court.

Due process hearings must be requested within two years:

**TIMELINE FOR REQUESTING HEARING.**—A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.<sup>280</sup>

Congress has established two exceptions for this two-year deadline for parents who initiate due process:

**EXCEPTIONS TO THE TIMELINE.**—The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.<sup>281</sup>

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279. See *supra* text accompanying notes 176–177.

280. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(f)(3)(C), 118 Stat. 2647, 2722.

281. Individuals with Disabilities Education Improvement Act § 615(f)(3)(D).

The 2004 IDEA amendments also add a ninety-day deadline to file a court appeal of a hearing officer (or, in two-tier states, a hearing appeals panel) decision:

(2) RIGHT TO BRING CIVIL ACTION.—

(A) IN GENERAL.—Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) LIMITATION.—The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.<sup>282</sup>

The 2004 IDEA amendments also add a two-year deadline for making a complaint.<sup>283</sup> The amendments do not explicitly address timelines for IDEA court claims that are filed without first filing for due process, such as attorney fee requests and claims where administrative exhaustion is not required.<sup>284</sup> Congress thought its new IDEA statutes of limitation important enough to add a requirement that schools inform parents of them in the notice of procedural safeguards.<sup>285</sup>

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282. Individuals with Disabilities Education Improvement Act § 615(i)(2).

283. Individuals with Disabilities Education Improvement Act § 615(b)(6)(B) (using language identical in all pertinent respects to that for initiating a due process hearing) (“[The IDEA provides] [a]n opportunity for any party to present a complaint . . . which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint . . .”).

284. Where the fee request follows IDEA litigation, the Federal Rules of Civil Procedure set out a fourteen-day time period for filing the request. FED. R. CIV. P. 54(d)(2)(B). In some instances, IDEA parents are allowed to go straight to court without first exhausting due process, for example when they seek an injunction or a remedy that is outside of a hearing officer’s jurisdiction. Congress did not set out an explicit deadline for filing a lawsuit in court without first going through due process. Congress’s intent presumably would be to impose the two-year deadline, as is explicit when IDEA action is initiated administratively.

285. See Individuals with Disabilities Education Improvement Act § 615(d).

### B. *Implying Tolling into a Federal Statute of Limitations*

When Congress writes an explicit statute of limitations but does not address tolling, courts may be asked to imply tolling rules.<sup>286</sup> The Supreme Court has explained that whether to imply a tolling rule is a question “of legislative intent whether the right shall be enforceable . . . after the prescribed time,”<sup>287</sup> and “whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.”<sup>288</sup> The indices of congressional intent are “the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.”<sup>289</sup> This is, of course, a different congressional intent analysis than determining whether Congress intended to borrow an analogous provision, as the Court instructed is to be performed in situations such as that of the pre-2004 IDEA.

Each of these relevant indices of Congressional intent indicates tolling for minors in the post-2004 IDEA should be rejected.

#### 1. *The Purposes and Policies Underlying the IDEA’s New Statute of Limitations Provisions*

a. *Congress’s Choice of Two-Year and Ninety-Day Deadlines*—Congress’s choice of a two-year deadline for filing for due process is significant. First and foremost, it makes clear Congress’s preference for finality and a bright line rule, as well as Congress’s rejection of alternative approaches to IDEA dispute resolution timeliness issues. These include situations in which there is no deadline, or only an equity-based reasonableness deadline such as that adopted by the Third Circuit in some cases.<sup>290</sup> Specifically, Congress’s choice to add timelines is inconsistent with tolling for minors because, as discussed earlier in this Article, the vast majority of IDEA claims are brought on behalf on minors.<sup>291</sup> The practical

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286. *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424 (1965) (addressing whether filing a claim in state court tolled the FELA statute of limitations).

287. *Id.* at 426 (quoting *Midstate Horticultural Co. v. Pa. R.R.*, 320 U.S. 356, 360 (1943)).

288. *Id.* at 427.

289. *Id.*

290. If Congress intended for tolling to apply, there would be little need to include a statute of limitations. Tolling would effectively nullify any limitations period because no IDEA cases would need to be brought until the child reaches majority.

291. See *supra* notes 248–249.

impact of tolling for minors would be to make any timelines a nullity.<sup>292</sup>

Second, Congress's adoption of explicit statutes of limitation rather than continuing the borrowing of analogous state statutes described above<sup>293</sup> suggests a desire for more uniformity.<sup>294</sup> Third, it is notable that Congress chose a single deadline for Stage I and Stage II claims of all kinds,<sup>295</sup> rather than separate deadlines for different kinds of claims—such as tuition reimbursement and compensatory education—as some courts had done under the prior borrowing analysis. Fourth, the two-year period is shorter, by half, than the general default federal statute of limitations,<sup>296</sup> suggesting Congress intended that IDEA disputes be initiated more promptly than litigation under other federal statutes. Fifth, the two-year deadline is shorter than the state statutes of limitation some courts have borrowed for IDEA claims—a number of the borrowed statutes were three years and some were longer.<sup>297</sup> Again, this suggests Congress intended for IDEA disputes to be initiated, and thereby resolved, promptly. The ninety-day deadline for appealing to court also demonstrates Congressional intent that IDEA disputes be resolved promptly, and that there will be some finality to disputes or potential disputes between parents and schools. Moreover, as with the two-year deadline for initiating due process, the ninety-day court appeal deadline<sup>298</sup> is shorter than the years-long state statutes of limitation borrowed by some courts for IDEA appeals.<sup>299</sup>

This choice of fairly short time periods suggests that Congress thought that prompt resolution of IDEA disputes best served the IDEA's primary goal of providing eligible students with appropriate educational programs, thus impliedly rejecting suggestions by some lower federal courts that short limitations periods force parents to

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292. The situation under the IDEA if tolling were adopted would be far different than, for example, that of torts, where prospective plaintiffs are of all ages and presumably only a small subset are minors.

293. See *supra* text accompanying notes 280–283.

294. Note, however, that under the amendments, explicit state statutes of limitation will continue to be recognized. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(f)(3)(C), 118 Stat. 2647, 2722.

295. See Individuals with Disabilities Education Improvement Act § 615(f)(3)(C).

296. 28 U.S.C. § 1658 (2000).

297. See *supra* text accompanying note 182.

298. See Individuals with Disabilities Education Improvement Act § 615(i)(2).

299. See *supra* text accompanying note 183.

quickly become adversarial, rendering the parent role, and hence education itself, less effective.<sup>300</sup>

*b. Congress's Inclusion of Some Tolling Language*—Congress's fairly comprehensive treatment of time deadlines in its 2004 IDEA amendments is also significant. In other statutes, Congress set out a fairly bare statute of limitations, leaving much gap-filling for later litigation. For example, the four-year default federal statute of limitations is vague about when the four-year clock starts, merely stating that claims “may not be commenced later than 4 years after the cause of action accrues.”<sup>301</sup> This “accrual” could be the date of the harm, the date the harm is discovered, or the date the putative plaintiff discovers she has a cause of action. In contrast, Congress specified that the two-year clock in the 2004 IDEA amendments begins on the “date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.”<sup>302</sup>

Similarly, the “default” federal statute of limitations includes no tolling language. In contrast, in its 2004 IDEA amendments, Congress set out two exceptions limited to parents that turn off the two-year clock. First, if a school falsely states that a problem has been resolved—perhaps that a physical therapist has been located and is working with the student in accordance with the IEP—and that misrepresentation causes the parent not to request due process, the two-year rule does not apply.<sup>303</sup> Second, when the school has withheld information which it is required to provide to a parent, presumably such as the notice of parent rights under the IDEA, and that withholding of information causes the parent not to request due process, the two-year rule does not apply.<sup>304</sup> These exceptions seem to be equitable tolling rules of the sort discussed earlier in this Article.<sup>305</sup> It thus appears Congress considered reasons to suspend or turn off its two-year clock.

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300. See *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1298–99, 1299 n.4 (11th Cir. 2002) (surveying the authority taking this position and then rejecting it).

301. 28 U.S.C. § 1658 (2000).

302. Individuals with Disabilities Education Improvement Act § 615(f)(3)(C). The proposed implementing regulations do not add to this language or explicitly address the tolling issue. Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities; and Service Obligations Under Special Education—Personnel Development to Improve Services and Results for Children With Disabilities, 70 Fed. Reg. 35782-01 (proposed June 21, 2005).

303. See *id.* § 615(f)(3)(D).

304. *Id.*

305. See *supra* Part II.C.

In following the canon of *expressio unius est exclusio alteris*, by specifically mentioning certain conditions that would trigger tolling, Congress must have intended to exclude tolling on other bases, such as minority. Congress's choice not to include tolling language based upon minority status thus appears to reflect its intent that its two-year IDEA clock not be tolled for minors. Moreover, as the foregoing discussion of case law addressing this tolling issue indicates, borrowed state statutes of limitation typically include explicit tolling language for minors. Congress's failure to do so is thus all the more conspicuous.

The new tolling language appears to represent Congress's judgment about how to balance the sometimes harsh results of statutes of limitation such as those in the scenario with which this Article began. Moreover, the exceptions work to ameliorate these harsh results in some instances. For example, a student whose IEP was not implemented, and thus did not receive FAPE, may still have a timely claim many years later if the school misrepresented the situation to the parents. Parent attorneys will likely argue that the two tolling exceptions should be read broadly; in particular that the withholding of information tolling includes items such as the notice of procedural safeguards, the required copy of the IEP, access to their child's records, advance notice of proposed changes in their child's program, and reports of their child's progress.

*c. Congress's Accrual Language*—Congress chose explicit accrual language pursuant to which the two-year clock starts on the date “the *parent* or agency knew *or should have known* about the alleged action that forms the basis of the complaint,”<sup>306</sup> thus indicating that it is the parent, not the minor student, who may file the claim.<sup>307</sup> If, as the *Shook* court suggested, both IDEA minor students and their parents had the right to file for due process,<sup>308</sup> the accrual language

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306. Individuals with Disabilities Education Improvement Act § 615(f)(3)(C) (emphasis added).

307. Prior to the 2004 amendments, some courts and hearing officers determined that the IDEA statute of limitation accrued when the *parents* knew of the alleged violation, recognizing that the parent, not the child, files the claim. *See, e.g., R.R. v. Fairfax County Sch. Bd.*, 338 F.3d 325, 332 (4th Cir. 2003); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186 (1st Cir. 1994); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991); *cf. Menasha Sch. Dist.*, 31 IDELR (LRP Publications) 43 (SEA Wis. 1999) (statutory prerequisite of notice to parents). Similarly, in figuring out the length of the time period for filing IDEA claims, courts have recognized the IDEA's policy of providing *parents* an opportunity to protect the child's rights. *See, e.g., Manning ex rel. Manning v. Fairfax County Sch. Bd.*, 176 F.3d 235, 239 (4th Cir. 1999).

308. *Shook v. Gaston County Bd. of Educ.*, 882 F.2d 119, 121 n.2 (4th Cir. 1989) (citation omitted).



would be expected to reference the date the *student* knew or should have known of the IDEA violation.

Moreover, Congress chose accrual language which started the clock running for parents under either of two circumstances: actual knowledge of the action about which the parent complains and situations where a reasonable parent would have known about the action.<sup>309</sup> This is the language of negligence, and specifically a duty of reasonable care. It reflects Congress's understanding that parents of IDEA students not only have extensive rights vis-à-vis their child's special education program, but also corresponding responsibilities and duties including prompt initiation of the dispute resolution process.

*d. Legislative History for the 2004 IDEA Statutes of Limitation*—Both the House and Senate bills that were the basis of the 2004 IDEA amendments contained statutes of limitation. The IDEA bill originally passed by the House in April 2003 contained one-year Stage I and complaint statutes of limitation.<sup>310</sup> The one-year clock began with the IDEA violation.<sup>311</sup> The House bill did not include any exceptions for its one-year deadline, nor a Stage II deadline. The Senate bill was quite similar to the ultimately enacted language. It contained a two-year Stage I statute of limitations, accrual language substantively identical to that enacted, and a ninety-day Stage II statute of limitations identical to that enacted.<sup>312</sup> The Senate bill also included three exceptions to its two-year Stage I clock that are substantially similar to the two exceptions enacted.<sup>313</sup>

The legislative history for the 2004 IDEA amendments reflects Congress's intent to have IDEA disputes resolved quickly, as well as the educational and other benefits it foresaw from prompt dispute resolution. The House Report notes that the statute of limitations and other modifications to the IDEA dispute resolution process will restore trust and reduce litigation, help ensure that eligible students obtain the needed services and education in a timely manner, and improve the current state of litigation under the Act, which has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to

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309. See Individuals with Disabilities Education Improvement Act § 615(f)(3)(C).

310. H.R. 1350, 108th Cong. §§ 205(b)(6)(B), (f)(1)(A) (2003).

311. *Id.*

312. S. 1248, 108th Cong. §§ 615(f)(3)(D)(E), (h)(2)(B) (2004).

313. *Id.* § 615(f)(3)(E).

protect the substantive rights of children with disabilities.<sup>314</sup> Consequently, “trust between schools and parents” will be restored.<sup>315</sup>

In its fullest statement concerning the proposed one-year statute of limitations, the House Report notes:

The Act currently has no statute of limitations and leaves local educational agencies open to litigation for the entire length of time a child is in school, whether or not the child has been identified as a child with a disability. Local educational agencies are often surprised by claims from parents involving issues that occurred in an elementary school program when the child may currently be a high school student. Such an unreasonably long threat of litigation hanging over a local educational agency forces them to document every step they take with every child, even if the parents agree with the action, because they could later change their mind and sue. The fear of far-removed litigation raises the tension level between the school and the parent. Prolonged litigation breeds an attitude of distrust between the parents and school personnel and has the effect of requiring school personnel to document conversations, rather than working cooperatively to find the best education placement and services for the child.

The bill includes a statute of limitations of one year from the date of the violation. This change will align the Act with other Federal statutes that have explicit statutes of limitations (e.g., civil rights claims, Federal tort claims, Social Security) and allow for timely resolution of issues. Parents, or their advocates, often wait to bring actions until many years after discovering a concern. The child’s education is usually jeopardized by this strategy. A statute [sic] of limitations alleviates . . . unnecessary

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314. H.R. REP. NO. 108-77, at 85–86 (2003).

315. *Id.* at 130. The minority views contained in the House Report include:

[There is a] need that schools have for some type of closure regarding their possible liability, [however] one year is much too short. It is not unusual for parents to take a full year to realize the nature of their child’s disability and to come to a full understanding of that child’s needs. Parents should have at least three years in which to begin the complaint process . . . .

*Id.* at 379.

paperwork designed to protect them from protracted, long-term litigation.<sup>316</sup>

Tolling the new IDEA statute of limitations for minors would of course lead to exactly the same consequences that the House Report indicates Congress wished to avoid: “local educational agencies open to litigation for the entire length of time a child is in school,” with this “unreasonably long threat of litigation hanging over” the school “breed[ing] an attitude of distrust . . . [with] the effect of requiring school personnel to document conversations, rather than working cooperatively to find the best education placement and services for the child.”<sup>317</sup>

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316. *Id.* at 115–16.

317. *Id.* The Senate Report also includes a detailed statement concerning its statute of limitations:

Section 615(f)(3)(D) creates a new two year timeline for requesting a hearing on claims for reimbursed or ongoing compensatory education services. If the State has developed an explicit timeline for requesting a due process hearing either through statute or regulation, that State provision will apply. The bill also provides for exceptions to the timeline in limited instances. The committee does not intend that common law determinations of statutes of limitation override this specific directive or the specific State or regulatory timeline.

This new provision is not intended to alter the principle under IDEA that children may receive compensatory education services, as affirmed in *School Comm. of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) and otherwise limited under section 612(a)(10)(C). First, the statute of limitations will bar consideration of claims where: (1) the allegation relates to conduct or services that are more than two years prior to the commencement of due process on the basis of that conduct or those services, or upon the unilateral placement of the child in a private school or with a private service provider, and (2) during that two year period, either (a) the services are not alleged to have been at cost or inappropriate, or (b) the conduct is not alleged to have been appropriate. In essence, where the issue giving rise to the claim is more than two years old and not ongoing, the claim is barred; where the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old at the time of due process or the private placement. Second, the statute of limitations will bar consideration of claims for reimbursement of private school tuition or services where the child has not attended school with the public entity for more than two years. Simply put, if a child leaves a public school and the parent chooses to place the child in a private school, the parent must claim through due process that they are entitled to reimbursement for those services prior to the two year anniversary of that student's departure.

S. REP. NO. 108-185, at 40 (2003).

This statement clarifies that the new timeline applies to tuition reimbursement claims and that the prior judicial borrowings of analogous statutes of limitation are *not* the type of state timelines that override the new IDEA statutes of limitations. *See supra* Part IV.

2. *The Nature of the IDEA*—The IDEA's structure, its unique parent role, its policy of prompt dispute resolution, and the educational effectiveness reasons for that structure, parent role, and dispute resolution policy all strongly favor rejecting implied tolling for minors under the 2004 IDEA statutes of limitation, just as they strongly favored rejecting the borrowing of tolling provisions under the pre-2004 IDEA.

The 2004 amendments made these identified structure and goals even clearer. As described above,<sup>318</sup> the 2004 amendments worked to strengthen the role of parents in the IDEA process, even to the point where schools must defer to certain, possibly ill-advised, parent choices about their child's special education. Enacting guidance from the Department of Education, and overriding at least one court decision,<sup>319</sup> the 2004 amendments provide that if a parent refuses to give the necessary consent for initial placement in special education, the school *may not* initiate due process to attempt to override the lack of parental consent and get a hearing officer to order placement in special education.<sup>320</sup> While there may be disagreement about the wisdom of this approach,<sup>321</sup> Congress has made it clear that a parent's wish to keep her child in general education overrides a school's reasonable belief that the student needs special education, and thereby the child's receipt of an appropriate education. If tolling for minors were allowed under the IDEA, a suit by an adult IDEA student that sought many years of compensatory education as a remedy because she was kept out of special education due to her parents refusing consent would not be time-barred. Surely Congress did not intend such a result.<sup>322</sup> This new provision and others<sup>323</sup> also make it clear

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318. See *supra* Part III.B.2.i.

319. *Garcia v. Town of Ridgefield Bd. of Educ.*, EHLR (LRP Publications) 558:152 (D. Conn. 1986) (finding that if a school believes a student requires special education, and a parent refuses the necessary written consent, the school *must* initiate due process to attempt to override the parent's refusal).

320. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 614(A)(1)(D), 118 Stat. 2647, 2702-03.

321. See discussion *supra* note 103.

322. As another example, tuition reimbursement represents a significant segment of special education litigation at both the hearing/review officer and court stages. See, e.g., *Mayer & Zirkel, supra* note 267, at 355. These claims clearly are made by parents for reimbursement of expenses incurred in trying to ensure their child received FAPE when the public schools were not providing it. If tolling for minors applied, query whether the parents' claim would be tolled, when it is the parents who made the unilateral placement and who would receive reimbursement.

323. See, e.g., Individuals with Disabilities Education Improvement Act § 612(a)(25)(A) (stating that schools cannot condition school attendance, evaluation, or provision of services on a student getting, and presumably taking, certain prescription medications).

that Congress recognized that on occasion an eligible student would not receive FAPE, and thus make it more likely that Congress was comfortable with the harsh result of some instances of failing to toll: that some meritorious IDEA claims would be time-barred.

Moreover, the 2004 amendments changed the Congressional findings about educational effectiveness and parent involvement that underlie the IDEA in a noteworthy way. Prior to the 2004 amendments, these findings referred to the following:

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

... (B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . .<sup>324</sup>

The 2004 amendments modify this finding as follows:

(5) *Almost 30* years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

... (B) strengthening the role *and responsibility* of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . .<sup>325</sup>

Congress explicitly found that responsibilities come with the rights it accords parents for the utilitarian reasons described above. Those responsibilities include initiating the IDEA dispute resolution procedures when they believe their child is not receiving an appropriate education.

3. *The IDEA's Remedial Scheme*—Analysis of the impact on the unique IDEA scheme for resolving disputes if tolling for minors were adopted strongly suggests such tolling is inconsistent with Congressional intent.

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324. 20 U.S.C. § 1400(5) (2000).

325. Individuals with Disabilities Education Improvement Act § 60(b)(5)(B) (emphasis added).

*a. Compensatory Education Claims by Adult IDEA Students Based on Alleged Violations Dating Back Many Years*—The common scenario in the IDEA tolling cases discussed above<sup>326</sup> is an adult IDEA student or former student seeking compensatory education for alleged IDEA violations dating back many years. No doubt in some instances involving such a scenario, the school has violated its IDEA obligations, perhaps egregiously. In some other cases, these adult students, facing the end of special education eligibility, may feel unable to succeed without continued support and may be realizing that the level of support for disabled adults is not nearly at the level of services under the IDEA for students with disabilities. For example, a medically fragile student who receives extensive nursing and physical therapy related services, an emotionally disturbed student who is placed residentially or in a day treatment program, or a severely retarded student who receives job coaching and other vocational training, all pursuant to IEPs, may find difficulty receiving the same level of government assistance as an adult. A successful claim for compensatory education offers these students additional years of high-level government support. IDEA tolling for minors would mean claims by these students would not be time-barred.

*b. Impact of the “Stay Put” Provision*—The IDEA’s “stay put” provision requires in general that when IDEA due process is initiated, the school must keep the student in her last uncontested placement while the due process hearing and any appeals are pending.<sup>327</sup> Courts have recognized that the “stay put” provision is relevant to IDEA statutes of limitation analysis.<sup>328</sup> Graduation and withdrawals from school are changes in placement.<sup>329</sup> Hence, if an about-to-graduate adult IDEA student files for due process, seeking compensatory education for alleged IDEA violations dating back many years, the “stay put” provision arguably requires that the school keep the student in special education until the due process hearing and any appeals are over. On occasion, courts have also issued injunctions ordering schools to provide compensatory

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326. See *supra* Parts IV.C.3.a–b.

327. 20 U.S.C. § 1415(j) (2000).

328. See, e.g., *Ga. State Dep’t of Educ. v. Derrick C.*, 314 F.3d 545, 550–51 (11th Cir. 2002) (stating that the purpose of the IDEA stay put provision suggests a short timeline is consistent with a short limitations period).

329. Cf. Individuals with Disabilities Education Improvement Act § 614(c)(5)(B) (excluding graduation and aging-out as changes that require reevaluation).

education while a claim by an adult (former) student is pending.<sup>330</sup> IDEA litigation can span many years. If the school ultimately prevails, there is no realistic prospect for reimbursement of education services it has provided during the stay put or injunction period. If the IDEA includes tolling for minors, the school faced with such a claim cannot attempt to get the case quickly dismissed as time-barred and likely will have to defend the claim on the merits. This means the school will have to provide educational services—for which the student ultimately may be found ineligible—for a lengthy “stay put” or injunctive period.

*c. IDEA Records Requirements and the Defense of IDEA Claims*—A primary reason for statutes of limitation is to prevent the trying of stale claims, where lost or destroyed evidence as well as faded witness memories may make the litigation difficult for both plaintiffs (who may have difficulty meeting their burden of proof) and defendants (whose access to evidence to defend themselves may be limited). In IDEA hearings and litigation, the student’s educational records are a major source of evidence. The IDEA itself contains no requirement that special education records be retained for a specific period. However, general requirements for federally funded education programs (such as IDEA) require that records sufficient to document compliance with federal funding conditions be maintained for three years after the completion of the federally funded activity.<sup>331</sup> Thus, for example, IEPs and evaluations would need to be maintained for at least three years to document compliance with IDEA. State public records retention laws may also specify a retention period for education records.<sup>332</sup>

What the IDEA does require is that when a student’s special education records are “no longer needed to provide educational services to the child” (often because that student is graduating, withdrawing from school, or being decertified from special education), the school must notify the parents (or adult student) and inform them of their right to request destruction of their special education records.<sup>333</sup> Schools are encouraged to inform parents

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330. See, e.g., *K.P. v. Juzwic*, 891 F. Supp. 703 (D. Conn. 1995) (affirming a grant of preliminary injunction keeping a twenty-one year-old student in his educational placement pending resolution of his claim for compensatory education for alleged IDEA violations when he was aged eight to nineteen).

331. 20 U.S.C. § 1232f (2000); 34 C.F.R. §§ 76.730–731 (2004).

332. See, e.g., CONN. GEN. STAT. § 7-109 (1999); CONN. AGENCIES REGS. § 10-4-10 (2005).

333. 34 C.F.R. § 300.573(a); see also Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 646 (1997); Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469, 487 (2001).

that retaining special education records may be helpful for other purposes such as social security benefits. However, if the parents so request, the no-longer-necessary records must be destroyed,<sup>334</sup> except that the school may permanently maintain a record of the student's name, address, telephone number, grades, attendance record, classes attended, grade level completed, and year completed.<sup>335</sup> Hence in a scenario like that in *Jonathan T.*, the school would inform the adult student who is withdrawing from school of his right to request destruction of records. If IDEA claims were tolled for minors, schools like the one in *Jonathan T.* could be faced with a timely claim for compensatory education by an adult student such as Jonathan T. and not have the records in its possession to defend itself, because that adult student had exercised his right to have the records destroyed.

In sum, although Congress did not explicitly address the issue of tolling IDEA claims for minors in the 2004 amendments, Congress's intent on the issue is clear. Considering the adopted statute of limitations and tolling language, the IDEA's structure and its unique and even more enhanced parent role that now explicitly includes responsibilities as well as rights, and the harsh and even nonsensical consequences of such tolling under the IDEA's unique remedial scheme, it is clear that tolling IDEA claims for minors would be both inappropriate and contrary to congressional intent.

## VI. CONCLUSION

It is doubtful that Congress ever intended that the IDEA statutes of limitation be tolled for minors. To do so would effectively nullify any statute of limitations, since the vast majority of alleged IDEA violations occur when covered students are minors. Moreover, tolling for minors would be inconsistent with Congress's explicit assignment of the right to file claims to parents, the unique proxy and partner role it has created for IDEA parents, the educational effectiveness goal the unique parent role is designed to serve, and Congress's intent that IDEA disputes be resolved promptly.

The 2004 IDEA amendments confirm and clarify Congress's intent not to toll IDEA claims for minors. In the amendments, Congress added fairly short statutes of limitations and some limited

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334. 34 C.F.R. § 300.560 (2004).

335. 34 C.F.R. § 300.573 (2004).



tolling provisions. Congress conspicuously did not add a tolling provision for minors. The legislative history for the 2004 statutes of limitation reemphasizes Congress's intent that IDEA disputes be resolved quickly. The legislative history and provisions added by the recent amendments also indicate Congress's wish to avoid the exact consequences which would result from tolling for minors: the possibility of a school having to face the kinds of claims exemplified in the scenario set out at the beginning of this Article. Despite the decisions of several courts to the contrary, it should now be clear that IDEA claims should not be tolled on account of minority.