# REPRESENTING CHILDREN WITH DISABILITIES: LEGAL AND ETHICAL CONSIDERATIONS

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## I. INTRODUCTION

Client-directed advocacy has long been recognized as the primary means model of advocacy for youth who have been accused of committing crimes.[1] It is mandated further by standards of professional conduct that require that lawyers allow the client to establish the goals of the representation and maintain a normal relationship with them as far as reasonably possible.[2] Providing representation to children in disability cases can and should undoubtedly embody the same principles of client-directed goals, yet little guidance is provided in the Model Rules to assist attorneys to avoid and appropriately handle conflicts with parents, enhance the decision making process through effective communication with the child, and better understand the role of the attorney as the child's advocate.

Originally passed in 1975 as the Education for All Handicapped Children Act and amended over the years, the Individuals with Disabilities Education Act ("IDEA")[3] established numerous rights regarding free appropriate public education for students and parents. The IDEA's procedural protections are designed to encourage parental involvement in the education process with the ultimate goal of their child receiving a free appropriate public education. The purpose statement of IDEA explicitly recognizes the statute's mission "to ensure the rights of children with disabilities and parents of such children are protected."[4] Despite this purpose, the courts and legislature have provided little clarity as to whether the substantive rights under the IDEA belong to the child alone or are also held by the parents who seek to protect their child's educational future.

Providing legal representation in IDEA cases presents unique and sometimes complicated ethical dilemmas for an attorney, including clarification as to whom the attorney actually represents. This paper takes the position that attorneys can effectively provide legal representation to the child as the client,

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[1] Standards for the Administration of Juvenile Justice, Report of the National Advisory Committee for the Juvenile Justice and Delinquency Prevention (1979), Lee Teitelbaum, Standards Relating to Counsel for Private Parties in Juvenile Justice Standards Annotated 69, P. 3.1(a), at 75 and 9.3(a) and 90 (Robert Shepherd, Jr. ed. 1996)

[2] MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.14 (2002).

[3] 20 U.S. C. §§ 1400-1487 (2000 & Supp. 2005).

[4] 20 U.S.C. § 1400(d)(1)(B).

rather than the parent, in IDEA cases, and discusses the various challenges regarding potential conflicts of interest with the parent, client based decision-making, and communication with the client. Part II examines the legal basis for enforcing a child's substantive rights under the IDEA and provides an analysis of three differing views of rights enforcement. Part III suggests appropriate strategies for engaging the parent or guardian in the child's representation to avoid potential conflicts of interest. Finally, Part IV examines the role of the attorney as the child's advocate and suggest strategies to address potential difficulties with client centered decision making in these cases.

## II. THE CHILD AS CLIENT IN IDEA CASES: THREE LEGAL THEORIES

Three diverse views have emerged addressing whether the rights granted under the IDEA belong to the child or to the child's parents. The first view focuses on the rights belonging solely to the child. Under this reasoning, the IDEA grants parents rights, but they are merely procedural and exist only to help the child through the IDEA process so they can receive free appropriate public education. The second line of thinking grants parents both procedural and substantive rights under the IDEA. This school of thought allows parents to direct the representation in an IDEA due process hearing or federal court action and considers them the client in the representation. Finally, a third view suggests that parents' rights and children's rights under the IDEA are so interwoven that it is impossible to distinguish whether the rights belong to one or the other. Each is examined separately below.

### *A. The Child as the Client in an IDEA Claim*

Although the IDEA establishes numerous parental rights, the provision of these rights to parents does not mean that the parent represents himself when pursuing IDEA services for his child. The IDEA focuses on the educational needs of the disabled child, not of the parents.[5] The Sixth Circuit echoed this belief in 2005 by holding that the IDEA grants parents a narrow set of procedural rights, which exist only to ensure that the child's substantive rights are protected, not to vicariously confer those rights on the child's parents.[6] The Third Circuit has held the same and granted a cause of action for the deprivation of educational rights belongs to the child alone.[7] "Separate from the rights that their children hold, parents do not have a substantive right to a free appropriate public education."[8] "[T]he intended beneficiary of the IDEA is not the parent of the individual with a disability, but the disabled individual."[9]

The statutory language itself, as well as common law reasoning and legislative intent, support the allocation of procedural rights, not substantive rights,

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[5] Doe v. Bd. of Educ. of Baltimore County, 165 F.3d 260, 262-263 (4th Cir. 1998).

[6] Cavanaugh *ex rel.* Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753, 757 (6th Cir. 2005).

[7] Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 236 (3d Cir. 1998).

[8] Green v. Cape Henlopen Sch. Dist., No. Civ.A. 04-920 KAJ, 2005 WL 3413320, at *4 (D. Del. Dec. 13, 2005) (citing *Collinsgru*, 161 F.3d at 235).

[9] *Cavanaugh*, 409 F.3d at 757 (quoting Barnett v. Memphis City Schs., 113 F.App'x 124, 128-129 (6th Cir. 2004) (unpublished opinion)).

to the parents of a disabled child. First, a parent pursuing IDEA services for his child is acting for the child and not for himself because "[a]lthough parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding."[10] "The references to parents [in the statute] are best understood as accommodations to the fact of the child's incapacity."[11] Children have long been considered incapable of entering into contracts and other legally binding actions on their own, but that "incapacity does not collapse the identity of the child into that of his parents."[12]

Second, language in the statute indicates that the rights belong to the child alone. The statute's rights-shifting provision makes the child the focus by transferring procedural rights "accorded to the parents" to "a child with a disability" when the child "reaches the age of majority under State law".[13] The frequent mention of parents and specifically the "parent . . . who is the prevailing party" only in the procedural safeguards section of the statute could be read as bestowing the rights on the parents, but more logically, could merely be a reference to the parent's procedural rights under the statute.[14]

Finally, the Second, Third, Sixth, Seventh, and Eleventh Circuits have held that non-lawyer parents may not represent their child in an action brought under the IDEA.[15] These courts have cited the common law theory that "parents cannot appear pro se on behalf of their minor children because a minor's personal cause of action is her own and does not belong to her parent or representative."[16] As such, it appears that legislative intent, case law, and the IDEA on its face suggest that Congress did not intend to create joint rights under the IDEA, thus pro se representation by parents is not permissible.[17] Only the First Circuit has specifically refused to accept this reasoning and allowed pro se representation by parents in IDEA claims.[18] This refusal to allow pro se representation by parents in an IDEA case is similar to the assertion that the attorney in IDEA proceedings represents only the child. Under this school of thought, by asserting the IDEA's educational rights, the child gains all the benefits of an attorney-client relationship, including the right to direct his own case.

### *B. The Child's Parents as the Client in an IDEA Claim*

Although the IDEA establishes numerous procedural rights for parents, there is little case law enumerating whether the substantive rights granted to

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[10] *Doe*, 165 F.3d at 263.

[11] *Id.*

[12] *Id.*

[13] 20 U.S.C. § 1415(m)(1)(B) (2000 & Supp. 2005).

[14] *Collinsgru*, 161 F.3d at 234 (quoting 20 U.S.C. § 1415(i)(3)(E) (1997)).

[15] *See Cavanaugh*, 409 F.3d at 756 (citing Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147, 1149 (7th Cir. 2001); *Collinsgru*, 161 F.3d at 227; Wenger v. Canastota Central Sch. Dist., 146 F.3d 123, 124-25 (2d Cir. 1998) (per curiam); Devine v. Indian River County Sch. Bd., 121 F.3d 576, 582 (11th Cir. 1997)).

[16] *Id.* at 755 (quoting Shepherd v. Wellman, 313 F.3d 963, 970-71 (6th Cir. 2002)).

[17] *Collinsgru*, 161 F.3d at 233-37.

[18] *See* Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247, 249 (1st Cir. 2003) (holding that parents of students with disabilities were "parties aggrieved" under the IDEA and thus could sue the school district *pro se* regardless of whether their rights were procedural or substantive).

children also belong to parents. However, multiple courts have given parents other rights under the IDEA.[19] In accord with common law, the judiciary presumes the incapacity of juveniles because they are incapable of exercising reasoned judgment about what is best for them.[20] Ordinarily, this means that unless a parent is declared unfit by the court, they have the responsibility to make decisions on their child's behalf.[21] Parents, in turn, have the choice of whether to consult with their child on the decisions they make on their behalf.[22] As such, it would only be logical that parents direct the litigation during an IDEA case.

The courts have interpreted the IDEA as granting parents the right to sue for procedural violations.[23] Additionally, the Fourth Circuit has held parents may bring their own substantive claims in district court.[24] Under the IDEA, "all aggrieved parties, school committees and parents alike, are entitled to judicial review."[25] Parents are parties aggrieved regardless of whether the rights being asserted are procedural or substantive.[26] The statute makes no distinction between procedural and substantive claims.[27] Therefore, if parents are parties aggrieved by due process when seeking appeal, they are also logically parties aggrieved when seeking judicial review.[28] It follows then that parents are parties to the suit, which though brought on their child's behalf, treats them as aggrieved parties who have a right to protect their interests as well as their child's. Hiring an attorney to represent the parents and their child together against the school does this most logically.

Through the numerous procedural rights granted to parents by the statute, the IDEA reflects the practical recognition that parents are vested with the authority and the obligation to oversee their child's education and to enforce their child's rights under the act.[29]

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[19] *Id.* at 249 (citing Weber v. Cranston Sch. Comm., 212 F.3d 41, 51 (1st Cir. 2000) (finding parent's claims to be within the zones of interests protected under IDEA and citing the statute's purpose of ensuring the rights of children with disabilities and parents of such children are protected)); Kathleen H. v. Mass. Dept. of Educ., 154 F.3d 8, 13 (1st Cir. 1998) (assuming that parents can be named plaintiffs in their individual capacity in IDEA suits)); *see also* Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380, 383 (4th Cir. 2000) (holding that parents can file IDEA claims as original civil actions on behalf of themselves and their child in Federal Court, however not addressing the issue of *pro se* representation).

[20] Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 438-39 (1993).

[21] *Id.*

[22] *Id.*

[23] *Collinsgru*, 161 F.3d at 233.

[24] *Kirkpatrick*, 216 F.3d at 383.

[25] Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247, 249 (1st Cir. 2003) (quoting Providence Sch. Dept. v. Ana C., 108 F.3d 1 (1st Cir. 1997)).

[26] *Id.* at 250.

[27] *Id.* at 253.

[28] *Id.* at 252 (asserting that there is no reason to construe 20 U.S.C § 1415(g) and 20 U.S.C. § 1415(i) differently).

[29] *Collinsgru*, 161 F.3d at 238-239 (Roth, J., concurring in part and dissenting in part); *see, e.g.*, 20 U.S.C. § 1415(a) (2000 & Supp. 2005) (assures parents and children procedural safeguards with respect to a free appropriate public education); 20 U.S.C. § 1415(b)(1) (providing parents the opportunity to examine all of their child's records); 20 U.S.C.

> Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.[30]

Clear procedural safeguards are statutory protections demonstrating that "Congress envisioned that parents would play an active and informed role in the evaluation and education of their children."[31]

None of the IDEA provisions allowing parents to seek relief in either administrative or judicial hearings draws a distinction between substantive or procedural rights; however due process hearing provisions address both.[32] Because there is no clear divide between the parent's procedural rights and the child's substantive rights, the child's substantive rights may suffer if the parents make a procedural mistake, such as failing to give notice of the reasons for wanting a due process hearing. As such, parents must successfully use their procedural rights granted by the IDEA to vindicate their child's substantive rights.[33]

Some authors have argued that it is problematic to take the right to control litigation away from parents and give it to the child. Children can lack the verbal ability to instruct counsel.[34] Even if children are able to speak their wishes, they may often be indecisive about what they really want, which, without parental guidance, would force the attorney to be more involved in the decision than ethically comfortable.[35] Proponents of this theory argue that fundamentally, young children lack the capacity to make reasoned and intelligent choices.[36] This concept is emphasized by the transfer provision in the IDEA.[37] By transferring all parental rights to the child once they reach majority, the statute recognizes that children are unable to direct and determine appropriate educational options and rights before reaching this age. Advocates of this view argue that only by allowing parents to directly litigate claims regarding IDEA can their personal rights, as well as their child's right to a free appropriate public education, be enforced.

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§ 1415(b)(3) ( requiring written notice to parents); 20 U.S.C. § 1415(e)(2)(A)(ii) (ensuring the mediation process does not "deny or delay a parent's right to a due process hearing"); 20 U.S.C. § 1415(f)(1)(A) (giving parents the opportunity for an impartial due process hearing); 20 U.S.C. § 1415(k)(5)(B)(i) (basing a determination of school's knowledge of a child's disability on what action a parent has taken to notify the school of concern); 20 U.S.C. § 1415(m)(1)(B) (transferring all rights accorded to parents to the child once they reach the age of majority).

[30] Amanda J. *ex rel.* Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001).

[31] *Collinsgru*, 161 F.3d at 237 (Roth, J., concurring in part and dissenting in part).

[32] *Maroni*, 346 F.3d at 254-55; *see also* 20 U.S.C. § 1415(h); 20 U.S.C. § 1415(b)(6).

[33] *Maroni*, 346 F.3d at 254-55; *see also* 20 U.S.C. § 1415(h); 20 U.S.C. § 1415(b)(6).

[34] Hafen, *supra* note 20, at 451.

[35] *Id.*

[36] *Id.*

[37] *See* 20 U.S.C. § 1415(m).

### C. *The Interwoven Rights of Children and Parents in an IDEA Claim*

A third view emphasizes that there is no way to extricate the children's rights from the parents' rights. Under the IDEA, the procedural and substantive rights are inextricably intertwined.

> IDEA's procedural guarantees . . . serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA. Congress addressed the problem of how to guarantee substantive rights to a diverse group by relying on a process-based solution.[38]

Joint rights arise from the special nature of the child-parent relationship and from the role of parents in directing their children's educational rights and opportunities.[39] The rights of both the parents and child are overlapping and inseparable. In enforcing their own rights under the IDEA, parents are also acting on behalf of their child.[40]

The language of the IDEA is unclear on its face. Some language can be read to suggest that Congress intended parents and children to share the substantive rights, but it is equally logical to read the statute in the alternative.[41] Under either reading, enough ambiguity exists to look to other authorities for guidance.

However, the Congressional intent behind the statute conflicts as well. The Senate Report on the Education to the Handicapped Act (the precursor to the IDEA) stated that "parents of [learning disabled] children have the right to expect that individually designed instruction to meet their children's specific needs is available."[42] Legislative history also refers to the responsibility of the states to "develop procedures for appointing the parent or another individual to represent the interests of the child."[43] This confusion in the legislative record, in combination with ambiguous statutory language, emphasizes that the rights of the parent and child are highly interwoven, interdependent, and difficult to meaningfully separate.

## III. Representing the Child While Engaging the Parent to Avoid Conflicts of Interest

Although the majority of courts that have addressed this issue have implied that the substantive rights of the IDEA belong to the child alone, questions remain as to how parents are involved in the representation. Attorney involvement in IDEA cases is generally initiated by a parent, rather than through appointment in a court of law, or a request by a child. As such, an

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[38] *Maroni*, 346 F.3d at 255 (quoting Heldman v. Sobol, 962 F.2d 148, 155 (2d Cir. 1992) (alteration in original)).

[39] Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 237 (3d Cir.1998) (Roth, J., concurring in part and dissenting in part).

[40] *Id.*

[41] *Id.* at 235; *See* 20 U.S.C. § 1415(i)(3)(F)(iv) (uses "attorney representing the parent" language in reference to attorney's fees); 20 U.S.C. § 1415(f)(3)(E)(ii)(I) (uses "child's right" language regarding a free appropriate public education); *and* 20 U.S.C. § 1415(b)(6) (giving "any party" generally an opportunity to present a complaint).

[42] *Collinsgru*, 161 F.3d at 235 (quoting S. Rep. No. 94-168, at 10 (1975)) (alteration in original).

[43] *Id.* (quoting S. Rep. No. 105-17 (1997)).

attorney is generally privately retained by the parent to provide such representation. Further, IDEA requires that many of the education decisions on behalf of the child be made by the "parent"[44] This is generally the natural parent, but may be another individual acting as guardian, or who is otherwise legally responsible for the child's welfare, or designated as a surrogate parent.[45] The language in IDEA provides that the "parent" have certain opportunities,[46] and provide informed consent before a district can evaluate a child for the first time, conduct a re-evaluation, or provide a child with special education and related services for the first time.[47] IDEA permits states to require parental consent for other IDEA services and activities, for example, changes in IEPs or placement.[48] Because the parent or other legal guardian therefore usually provides the impetus for the representation, and further is the required party to consent to many of the education decisions for the child under the IDEA, the involvement of the parent or other legal guardian is important.

The role of the attorney must necessarily be clarified from the initial interview with the parent and child. Unless the lawyer clearly states that she is not also representing the parent, the parent's reasonable expectations and reliance may form the basis of an attorney-client relationship, despite the intent of the lawyer.[49] This is even more likely in IDEA cases where the children at issue are disabled and have varying degrees of ability to communicate with others. Any written retainer agreement with the parent should reflect this understanding, and the premise that the client directs the representation. Potential conflicts of interest should be discussed at this early stage so that the parent is apprised of the attorney's role as the child's attorney, and the implications of this should the child and parent disagree on the goals of the representation.

It is important also to discuss the parent's goals in obtaining representation for the child, since widely conflicting goals between the child and parent may signal a practical problem for the attorney being able to advocate a contrary position for the child. Establishing such perimeters at the front end of the rep-

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[44] As noted in 20 U.S.C. § 1401(23) (2000):

> The term "parent" means—
> (A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
> (B) a guardian (but not the State if the child is a ward of the State);
> (C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
> (D) except as used in sections 1415(b)(2) of this title and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

[45] *Id.*

[46] The IDEA includes the

> opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

20 U.S.C. §1415(b)(1) (2000). That same section also includes "[a]n opportunity for mediation. . . . [and a]n opportunity for any party to present a complaint." *Id.* at § 1415(b)(5)-(6).

[47] 20 U.S.C. §§ 1414(a)(1)(C), 1414 (c)(3).

[48] 34 C.F.R. § 300.505(c)-(d), *incorporating by reference* § 300.345(d).

[49] Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1831 (1996).

resentation makes clear the boundaries the attorney has if such conflict does surface.

Parents and children generally have similar goals in the process—helping the child to improve academically in school, obtaining necessary services in an individualized education plan, or avoiding unnecessary or inappropriate disciplinary measures. Youth may not agree with their parent or guardian, however, as to how best to accomplish these goals. For example, not all youth want to be labeled as having a disability and subject to an individualized education plan. For youth already identified and receiving services, some may not wish to avail themselves of additional assistance such as after school programs, or smaller pullout rooms, which may make the child feel he is being treated differently. Further, consideration of placement options may yield conflicts between parents and children, especially where a child may not want to be taken out of a setting where he is familiar with his peers and instructors. For older youth, a decision not to remain in school may conflict with the wishes of parents attempting to obtain more services to help the child.

Parents have the responsibility and the authority to make educational decisions for the child, such as permission to drop out, or a request to evaluate the child to determine the need for special education services. The ability of the attorney to advocate for a different outcome on the part of the child in accordance with the child's wishes may well be hampered in some instances if the parent chooses to exercise this authority with the school. Identifying these divergent views as soon as possible will help to ensure that the parent and child are not pitted against one another, as well as against the educational institution. Three examples suggest possible ways of dealing with such conflicts when they arise.

EXAMPLE 1: Mr. and Mrs. Howard retain an attorney for their eleven-year-old child Jacob who was brain damaged at birth as a result of medical malpractice. The injuries created significant developmental delays and cognitive limitations. At times, he exhibited somewhat aggressive behaviors in school and at home. The couple had a younger child at home, and became increasingly concerned about the safety of the other child, especially since they did not have in-home assistance.

Jacob's parents insisted that the school pay for an intensive residential placement several states away, citing problems with controlling him at home, and believing that he could benefit more academically. A review of Jacob's file, interviews with school personnel who worked directly with him, and observations of Jacob indicated that the specially designed instruction provided to him by the school was intensive and well suited to his educational needs. Jacob made steady academic progress, and although peer interactions were limited, they were increasingly positive and rewarding. Jacob appeared to like school and responded well to the professionals working with him.

Although Jacob could not articulate his own academic goals, the attorney used the substituted judgment model in taking the position that Jacob should remain in the least restrictive setting where he was making good academic and social skills progress. At the urging of the attorney, the school was willing to increase extended school program Jacob was in, and to utilize other community based supports at home with Jacob to stabilize him. Rather than removing Jacob from a familiar setting both at home and school for what appeared to be reasons other than academic, the attorney's position was consistent with the substantive right to least restrictive placement under the IDEA, and with what he believed Jacob would prefer if he could articulate

a position verbally. Ultimately, because the attorney and parents could not reach an agreement, the parents terminated the attorney's representation of the child.

EXAMPLE 2: Mrs. and Mrs. Forester retained an attorney for their fifteen year-old son William, an eighth grader who was failing for the second year in a row, and who was now facing juvenile court charges and expulsion for kicking a teacher. William was a child identified with an emotional behavioral disorder under the IDEA, with a diagnosis of ADHD and bipolar disorder. The school system not only failed to implement his individual education plan from his prior school, they refused to acknowledge that he needed any specially designed instruction. After filing a request for a due process hearing based on failure to identify, failure to develop and implement an appropriate IEP, and various other violations of IDEA pertaining to disciplinary measures taken against William, the school board attorney urged settlement, and offered several options for William. At that point, William wanted only to have the criminal charges dismissed and to go to another school. He did not want any remedial assistance that could catch him up grade level in the after school program the school offered. The parents became hostile to any offer by the school, wishing only to litigate the matters and unrealistically believing they were entitled to damages.

Settlement was ultimately hampered by the significant difference in motivation. Counseling both the parent and William again as to realistic outcomes for the litigation allowed them to come to some basic common terms about what they wanted. Ultimately, a settlement was reached whereby William was able to go to a new school with an appropriate IEP and discipline plan, the district provided transportation, and remedial programs were built into his regular school day in an attempt to catch him up to grade level. The attorney also counseled the parents regarding the need to reduce conflicts with the school in order to make the program work for William.

EXAMPLE 3: Ms. Smith was a retired nurse and single foster parent who took several special needs children into her home, some medically fragile. The local school district did not work well with Smith, as her expectations for the school's programming were at times unreasonable. While no better advocate for these youth in spirit, Smith at times hurt her own attempts to help children in her care by unnecessarily creating conflict with the school.

She retained an attorney to advocate for Jamie, an eight-year-old child with a fatal renal disease and severe emotional problems due to prior childhood trauma. Jamie had an IEP that addressed primarily behavioral issues, although he also had a learning disability that affected his written skills. Jamie had difficulties with peers but was also very manipulative in using this to get attention, reporting frequently that other children made fun of him or threatened him.

While Jamie could articulate few goals, he did want to get along better with other youth and wanted to stay out of trouble. (Ironically, as he liked the attention being in the principal's office.) He also liked using the computer and wanted to do more of this. Smith believed that he was not making sufficient progress in school as a result of being harassed by other youth constantly. Smith wanted the attorney to file a civil rights suit, claiming that the school did nothing to deal with the harassment Jamie experienced from other youth as a result of his disabilities.

Ultimately, the attorney was able to get Jamie what he wanted—more computer time, more rewards for good behavior, and being put in a regular classroom with his peers for nearly 100% of his school day. The attorney's disagreement with the parent to file a civil claim ultimately resulted in the parent terminating the retainer agreement.

> The attorney's role, however, was not diminished in this case by failing to take action that was of questionable legal merit, but more importantly, contrary to Jamie's wishes of improving his peer relationships.

In each case, the position of the child, whether representing the child's actual express wish or the substituted judgment of the attorney, is in conflict with the parent. The first example represents perhaps the most difficult scenario, when withdrawal or termination of representation is necessary because the attorney can neither represent the interest of the child, nor achieve his goals. In the case of the Foresters, while conflicts arose during the course of the representation, the attorney was able to essentially mediate those differences between the child and parent and achieve good outcomes for the child as a result. Finally, in the last example, the attorney could achieve the youth's goals, but decline taking other affirmative steps not consistent with the child's goals, even though in the end it terminated the representation.

While parental participation is essential and in fact helpful in most disability rights cases involving students who have yet reached the age of majority, parental participation and control works best when the parents' goals for the child are realistic and achievable, and where there is good communication and trust between the child and parent about educational programming. Parents whose motivation is to perpetuate conflict with a school are particularly challenging since their desired outcomes do not generally include resolution of the child's difficulties, but instead focus on punishing the school system for wrongdoing. Unfortunately, the child is always the one to lose in these instances.

## IV. THE ROLE OF THE ATTORNEY FOR THE CHILD

There appears little doubt that an attorney retained for a child in an IDEA case functions as an attorney advocate for the child, rather than as a guardian ad litem using the "best interest" role. The guardian ad item role is a creature of statute in many states, and typically are appointed by trial courts for children involved in dependency, neglect or abuse cases, terminations of parental rights, adoptions, or guardianships.[50] Because there is no such statutory provision in IDEA cases, the traditional advocate role for the attorney should be presumed. Using the Model Code of Professional Responsibility as a guide, the attorney is bound to recognize that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer."[51]

The Model Rules of Professional Conduct do little to guide lawyers in this situation. Model Rule 1.14(a) states that "when a client's ability to make adequate considered decisions in connection with the representation is impaired, whether because of minority . . . the lawyer shall as far as reasonably possible maintain a normal client-lawyer relationship." The Comments to the rule indicate that a lawyer should look to the guardian of the child for guidance when necessary, but say little about the role of parents in this process generally, or

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[50] See, for instance, KY. REV. STAT. ANN. § 620 (West 1970 & Supp. 2005).

[51] MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1980).

the extent to which lawyers can rely on the guidance of the parent versus that of the child.[52]

While many children, if not most, who are represented in disability proceedings regarding their education rights are capable of directing their attorneys, some are undeniably unable or unwilling to do so. The lawyer for a verbal or otherwise communicative child should first determine whether the child has the capacity to direct the representation and to express a reasoned position. It is also the lawyer's responsibility to recognize, facilitate and maximize the child's capacities.[53]

The Recommendations on the Conference on Ethical Issues in the Legal Representation of Children at Fordham[54] provide guidance to help the attorney in this decision making process. Specifically, the Recommendations suggest that the attorney seek guidance regarding the determination of the child's capacity from appropriate professionals including family members, school officials, clergy or other concerned parties. In doing so, weight given to the factors in the determination of capacity may vary depending on the issue or the nature of the proceedings.[55]

The Recommendations provide several factors that should occur regularly in the normal lawyering process, and especially when assessing the capacity of a child client to make decisions. These factors include: 1) the child's development stage, including cognitive abilities, socialization and emotional development; 2) the child's expression of a relevant position, especially the ability to communicate with the attorney and articulate reasons for a decision; 3) the child's individual decision-making process as observed by the attorney (i.e. the presence of influence or coercion, the desire to conform, and variability and consistency in position); and 4) the child's ability to understand immediate and collateral consequences for the decision.[56]

In school settings, this can be particularly important since the child may be able to articulate goals in some areas, but not in others. For example, common client goals may include improving academically, being able to participate in certain high-interest activities, socialization with peers, improved interactions with teachers or administrators, or simply reducing disciplinary incidents. The client may not be able to articulate other more complex goals or methods to reach those goals, such as improving manual dexterity for writing skills, increasing the daily number of positive contacts initiated with peers, or the stabilization of medication to control behaviors. What measures should be taken in an individual education plan that can help to accomplish those goals may well be more within the purview of the attorney and the parent to help work through, even though the child client's involvement should be maximized to the extent reasonable.

For those child clients who are unable or unwilling to communicate with the attorney regarding the goals of the presentation, or some of the goals, some

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[52] Hafen, *supra* note 20.

[53] *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1312 (1996).

[54] *Id.* at 1313.

[55] *Id.*

[56] *Id.*

commentators propose that the attorney provide "substituted judgment" for the child, that is, stepping into the shoes of the client and articulating a goal that the attorney believes the client would articulate if they could do so.[57] In order to do so, the attorney should at least have "la[id] eyes" upon the child, observed the child in a living and/or school environment, and made use of experts and others with knowledge about the child's condition and educational programming, especially from the parents.[58] It is equally important that the attorney review pertinent records and reports from the child's school file, independent evaluations and medical records that may provide information on the nature and extent of the child's disability or learning style. The attorney may rely upon the substantive rights of the child to appropriate individualized education plans, least restrictive placement, and due process of law in framing the goals using substituted judgment.

## V. CONCLUSION

Providing representation to children with disabilities in school related cases presents a number of unique ethical challenges to the attorney, yet there are few more rewarding opportunities for a lawyer than opening up the door to education for a child whose academic successes have been minimized. While some programs may advocate for representation of parents in education disability cases, strong legal authority exists to recognize that substantive rights under the IDEA indeed belong to the child. In providing representation to the child, practitioners must exercise caution to ensure that parental participation is elicited without compromising the goals as established by the child client. Ensuring to the extent possible that the child client and the parent who has decision-making authority over the child's education have compatible goals will help minimize conflicts that may occur throughout the representation.

Youth with educational disabilities in most instances have the capacity to assist an attorney in establishing goals for the representation, or some of the goals of the representation, while not always able to determine how best to achieve these goals. Maximizing the youth's capacity to determine the direction of the representation, and guiding him through the various steps to do so empowers the child by involving him in the very decisions that his drive his own academic and social success. The skill of the attorney in interviewing and counseling the child throughout this process is perhaps one of the most essential elements to enhancing the child's capacity to make good decisions that can have lifelong educational benefits.

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[57] Shannan L. Wilbur, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 361 (1993).
[58] *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 53, at 1304.