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Whos the Boss?: The Need for Thoughtful Identification of the Client(s) in Special Education Cases'

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WHO’S THE BOSS?: THE NEED FOR THOUGHTFUL IDENTIFICATION OF THE CLIENT(S) IN SPECIAL EDUCATION CASES

Yael ZAKAI CANNON*

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INTRODUCTION

Tony, an eleven-year-old boy, and his father, Mr. Johnson, meet with an attorney to discuss possible legal representation in connection with Tony’s special education needs. If the attorney accepts the case, who will she represent? Is her client Tony, Mr. Johnson, or both? Is the attorney limited to zealous representation of the expressed interests of her client or clients, or are her own views as to what may be in Tony’s best interests relevant? What happens if Tony and Mr. Johnson disagree about the best course of action? If the attorney represents Tony exclusively and litigation is required, would an administrative hearing officer recognize Tony’s legal capacity, as a minor, to bring an administrative due process complaint, without the involvement of Mr. Johnson or another adult? If a civil action is required in a state or federal court to enforce Tony’s special education rights, would he have the capacity to sue, in the court’s view, without the involvement of Mr. Johnson or another adult acting on his behalf? What happens if Tony actually lives with his grandmother, not Mr. Johnson, and his grandmother is his primary caregiver? In that case, would his grandmother serve as a client? Figuring out who the client is may be obvious in many other areas of law, but there can be significant ambiguity in determining which individual is serving as the client when a child’s

interests are at stake,¹ an ambiguity that is amplified in special education cases, in which a parent's interests are also central.²

This Article explores the various models of representation used by attorneys in special education cases and advocates for thoughtful identification of the client or clients through a contextualized, individualized decision made collaboratively by the lawyer and client(s), with considerations of a panoply of factors. Part I attempts to unpack these models. While clear advantages exist with each of the models, the Article presents case examples and questions that illustrate some of the challenges that may be presented by each model.³ Part II includes a discussion of the factors that an attorney should consider in each case in determining the appropriate model of representation.⁴ These factors reveal the legal, ethical, and practical challenges in selecting a model of representation. The rights of parents, including their rights to make decisions on behalf of their children more generally and in relation to their children's special education needs in particular, affect the decision to select a particular model of representation. Challenges related to identification of the "parent" or educational decision-maker under the Individuals with Disabilities Education Act (IDEA) also play a role.⁵ Questions as to whether administrative hearing officers and courts view a minor child as having the capacity to bring an administrative due process complaint or civil action in a special education case should also factor into an attorney's assessment, as should expectations regarding the attorney-client relationship by the child, parents, and other individuals, such as school officials. Other factors such as the characteristics, capacity and age of the child, potential conflicts of interest between the parent and child, and the implications for attorney-client confidentiality should be considered in selecting a model of representation for each case. Similarly, involvement by the family in child welfare proceedings or by the youth in delinquency proceedings influences the model of representation that is used. This section includes an analysis of these factors and the roles they should play in an attorney's evaluation of the appropriate model of representation in a particular case.

In Part III, the Article provides several recommendations to facilitate the effective identification of the client or clients in a special education case.⁶

1. See Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 *FORDHAM L. REV.* 1819, 1826-28 (1996).

2. See Jillian Petrera, *The Ethical Dilemma of a Special Education Lawyer: Who is the Client?*, 31 *PACE L. REV.* 531, 531-34 (2011).

3. See *infra* Part I.

4. See *infra* Part II.

5. 20 U.S.C. § 1400 *et seq.* (2006).

6. See *infra* Part III.

The Article recommends that attorneys, in partnership with their potential clients, thoughtfully identify the client or clients in a special education matter, clearly communicate the chosen model to all family members, and remain aware of any potential or existing conflicts among clients where joint representation is used. Finally, the Article emphasizes the importance of clear communication about the role of each person and ultimate loyalty to the identified client, but also advocates for the involvement and empowerment of both parent and child in the representation, wherever possible.

The IDEA is a federal special education statute that guarantees that all children with disabilities have available to them a free appropriate public education (FAPE) that is designed to meet their unique needs.⁷ In addition to conferring significant substantive rights to children with disabilities, the statute also provides parents with a number of important rights. Under the IDEA, school districts have an affirmative obligation to identify, locate, and evaluate any students who are suspected of having a disability to determine if they qualify as eligible for special education services under the IDEA.⁸ A parent or a teacher can refer a child for special education evaluations.⁹ Parental consent is then required before an educational agency can evaluate a child.¹⁰ After the evaluation is completed, a team of individuals, including the parent, convenes to determine whether the student has a disability that is covered by the IDEA and whether the student requires special education services.¹¹

Once a child is found eligible for special education services, the team meets to develop an Individualized Education Program (IEP).¹² An IEP is a written plan that documents information about the child's unique needs, the special education and related services that the child will receive, and the educational placement selected by the team.¹³ IEPs must be reviewed

7. 20 U.S.C. § 1400(d)(1)(A) (2006). For useful background on the special education statutory and regulatory scheme, see Ruth Colker, *A Brief Overview*, in *SPECIAL EDUCATION ADVOCACY 1-4* (Ruth Colker & Julie K. Waterstone eds., Lexis 2011).

8. § 1400.

9. § 1414(a)(1)(B).

10. § 1414(a)(1)(D)(i)(I).

11. § 1414(b)(4)-(5). A child is qualified as disabled under the IDEA if he or she has an intellectual disability, hearing impairment, speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, and/or specific learning disabilities that are affecting his or her education. *Id.* § 1401(3)(A)(i).

12. § 1414(d)(1)(A)-(B); see Stephen A. Rosenbaum, *When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. DAVIS J. JUV. L. & POL'Y 159, 162 (2001) (defining an "IEP" as a written statement describing a child's needs and the special education services that will be provided for that child).

13. 34 C.F.R. § 300.320(a) (2011).

annually to assess the level of success of their implementation and to make any necessary modifications in order to meet the child's current needs.¹⁴ If the parent disagrees with any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE, the parent can bring a complaint for an impartial administrative due process hearing.¹⁵ Parents who are not satisfied with the result of a due process hearing can bring a civil action in federal court.¹⁶

As the IDEA confers rights on both the parent and the child, the ambiguity may be intensified as to who is serving in the client role when a family seeks legal representation from a special education attorney.¹⁷ Although the IDEA provides that the *child* has a right to a free and appropriate public education, one of the statute's stated purposes is "to ensure that the rights of children with disabilities *and parents of such children* are protected."¹⁸ In interpreting this statement, the Supreme Court explained that "the word 'rights' in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense."¹⁹ Because the statute references the rights of both the parents and the child, it may be unclear to attorneys who their client is or should be in a special education matter. As a result, there has been some debate in the field of special education advocacy as to whether the client is the child, the parent, or both.²⁰

I. MODELS OF REPRESENTATION IN SPECIAL EDUCATION CASES

Attorneys in special education cases use a variety of different models of representation. Many attorneys represent the parent or a qualified caregiver exclusively, while other attorneys represent the parent and child together. Some attorneys instead represent solely the child with an "expressed interests" model, while other attorneys use a model in which they advocate

14. 20 U.S.C. § 1414(d)(4)(A)(ii).

15. § 1415(b)(6)(A).

16. § 1415(i)(2); *see also* § 1415(g)(1)-(2) (if the state has a two-tiered administrative procedure then the parent must appeal to the state educational agency first before the parent will be able to appeal the decision in federal court).

17. *See generally* Rosenbaum, *supra* note 12.

18. § 1400(d)(1)(A)-(B) (emphasis added).

19. Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 528 (2007).

20. *See* Cynthia Godsoe, *All in the Family: Towards a New Representational Model for Parents and Children*, 24 GEO. J. LEGAL ETHICS 303 (2011) [hereinafter Godsoe, *All in the Family*]; Petreera, *supra* note 2, at 531; Suzanne Rabe & Stephen A. Rosenbaum, *A "Sending Down" Sabbatical: The Benefits of Lawyering in the Legal Services Trenches*, 60 J. LEGAL EDUC. 296, 303 n.30 (2010); Kim Brooks Tandy & Teresa Heffernan, *Representing Children with Disabilities: Legal and Ethical Considerations*, 6 NEV. L.J. 1396 (2006).

for the “best interests” of the child.²¹ For children who are involved in either the neglect or delinquency systems, the court may appoint an attorney to handle the related special education matter. For these attorneys, there may be limitations imposed by a statute other than the IDEA, non-special education regulations, court rules, or judicial instruction as to the model of representation these attorneys should use in their cases.

A. Parent as Client

Many attorneys choose to represent parents exclusively in special education matters, without formally including the child as a client.²² As discussed below, special education rights under the IDEA are designed to benefit the student with a disability, but the statute also gives parents independent rights and empowers them to enforce their rights.²³ Many lawyers will conduct intake interviews exclusively with the parent and, as a practical matter, will direct most, if not all, communications to the parent or guardian of a minor rather than the minor child herself.²⁴

There are a variety of reasons why an attorney might choose a model of representation in which the parent—or an individual serving in the role of parent under the IDEA—is the sole client. Representing a child in any matter can be challenging, particularly where the child might have difficulty understanding complicated legal concepts or the needs that flow from her disability, expressing her preferences, or maintaining consistency in her decisions. An attorney might also elect to represent the parent exclusively to avoid joint representation of the parent and child because

21. See Emily Buss, “You’re My What?” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *FORDHAM L. REV.* 1699, 1700 (1996) (defining the “expressed interests” model as advocating for what the child wants versus the “best interest” model, where the attorney’s strategy is an independent determination of what is in the best interest of the child).

22. Joseph B. Tulman, *Using Special Education Advocacy to Avoid or Resolve Status Offense Charges*, in *REPRESENTING JUVENILE STATUS OFFENDERS* 99 (Sally Small Inada & Claire S. Chiamulera eds., 2010) [hereinafter Tulman, *Special Education Advocacy and Status Offense Charges*] (“Ordinarily, the parent is the client in a special education matter.”); Godsoe, *All in the Family*, *supra* note 20, at 15 (“Because most cases are initiated by a parent who privately retains counsel, most attorneys in these cases represent parents.”); see also *Ashland Sch. Dist. v. Parents of Students R.J.*, 585 F. Supp. 2d 1208, 1211 n.1 (D. Or. 2008) (“[The] attorney in an IDEA case usually represents the parents.”).

23. Tulman, *Special Education Advocacy and Status Offense Charges*, *supra* note 22, at 99.

24. See, e.g., Rabe & Rosenbaum, *supra* note 20, at 303 (noting that communication is almost always between an attorney and the child’s parent or guardian at the legal services organization Disability Rights California); see also Godsoe, *All in the Family*, *supra* note 20, at 14-15 (“Many attorneys representing parents, and paid by parents, interpret parents’ rights to direct a child’s education as meaning that they should not consult with even older children about educational placement . . . they do not interview or regularly meet with children.”).

such a model clashes with the individualistic structure of attorney practice standards and ethical rules, which presume the attorney's undivided loyalty to a singular, easily identifiable client.²⁵ Parents are accorded decision-making rights both constitutionally and statutorily as prescribed by the IDEA, and parents clearly have the capacity to sue in administrative due process hearings and civil actions under the IDEA, unlike minor children, as described extensively below. While there may be clear advantages to a parent-as-client model of representation, the decision to represent a parent exclusively in a special education matter involves a variety of legal and ethical considerations and consequences.

Imagine a situation in which Ms. Jones approached an attorney seeking representation in connection with her daughter Brandy's special education needs.²⁶ Brandy was fifteen years old and was exposed to alcohol and drugs in utero. She suffered delays in her development as a result, and came into foster care at a young age. Ms. Jones adopted Brandy after serving as her foster mother and was concerned that Brandy was failing in school. A recent psychological evaluation confirmed that Brandy required intensive special education services due to her severe learning disabilities and emotional disturbance. She was not receiving the special education services she required to make academic progress. Ms. Jones came to the attorney for legal help, and the attorney signed a retainer with Ms. Jones, but not with Brandy, as the attorney's legal services organization had a clear policy of representing parents or other adult caregivers in special education matters. Even outside that legal services organization, most special education attorneys in the attorney's jurisdiction used a similar model of representation, in which the parent or caregiver alone plays the role of client, as special education hearing officers in that jurisdiction had not recognized a minor child as having the capacity to sue in a due process hearing.

At the direction of the client Ms. Jones, the attorney helped Brandy get placed into an intensive special education school to address her severe learning disabilities and secured mental health services to help stabilize Brandy at home. Brandy wanted these services and thought they would help her, but they seemed to amount to too little, too late. Brandy failed the tenth grade, destroyed furniture at school one day in a fit of rage, was

25. See Godsoe, *All in the Family*, *supra* note 20, at 4 (explaining that the ABA Model Rules of Professional Conduct and other practice standards presume the attorney's undivided loyalty to her client, disfavor joint representation and make no exception for family relationships).

26. These client stories are representative of the challenges that the author confronted while working with clients in her legal practice. Some of these situations are loosely based on real client stories, with names and facts altered to protect the identity of the individuals.

arrested for assaulting another family member, and threatened to kill herself. Ms. Jones was extremely worried about Brandy's safety and the safety of others, including the safety of other family members.

Ms. Jones took Brandy to psychiatrists and psychologists, in a desperate search for answers that would help stabilize Brandy. As Brandy's situation worsened, the psychiatrists and psychologists all made the same recommendations. They told Ms. Jones that Brandy was in a state of crisis, and that she urgently required residential treatment in order to receive intensive mental health care before she hurt herself or someone else. The teachers and counselors at Brandy's school agreed; for now, they did not think that she could make academic progress in a less restrictive setting than a residential treatment facility. They told Ms. Jones that an appropriate residential treatment facility for Brandy would not only provide Brandy with therapeutic services, but also with the special education services she needed to address her learning disabilities. Upon hearing the recommendations of the health and school professionals she trusted, Ms. Jones made up her mind. She did not feel that Brandy could be safe in her home or in the community, and she asked the attorney to help her find a residential placement for Brandy and obtain funding from the school district for Brandy to attend the program as her special education placement. The attorney was worried about Ms. Jones's decision. Although Brandy was struggling greatly at home and at school, despite receiving very intensive services in both places, residential treatment is extremely restrictive and greatly limits the independence of its participants. There are horror stories about aversive therapies used with children in such programs, and abuse, neglect, and overmedication of children at such facilities are all too common.²⁷ The attorney counseled Ms. Jones about

27. See, e.g., UNIV. LEGAL SERS., OUT OF STATE, OUT OF MIND: THE HIDDEN LIVES OF D.C. YOUTH IN RESIDENTIAL TREATMENT CENTERS 5-9 (2009), available at <http://www.uls-dc.org/out%20of%20state%20out%20of%20mind%20revision%20final.pdf>. Some scholars argue that any parent advocating for a residential placement for her child is arguably acting against her child's legal interests in a free appropriate legal education in the least restrictive environment, and that attorneys advocating for residential treatment for a child are failing to recognize the conflict between parent and child, and violating the requirement that they advocate for the least restrictive environment for clients with diminished capacity. Godsoe, *All in the Family*, *supra* note 20, at 24. The evidence shows that residential treatment for youth is often not effective. See ROBERT BRAME ET AL., RESEARCH ON PATHWAYS TO DESISTANCE (2009), available at <http://www.macfound.org/atf/cf/%7Bb0386ce3-8b29-4162-8098-e466fb856794%7D/PATHWAYSREPORT.pdf>. While attorneys should counsel their clients about the risks and restrictiveness of such treatment and any legal entitlements to community-based alternatives, it is unclear what ethical duties an attorney has to a non-client child where the model of representation used by the attorney is one in which the parent is exclusively the client. Moreover, some youth express an interest in participating in residential treatment, especially where such treatment might provide an alternative to a more punitive placement such as a juvenile detention center or prison.

other less restrictive options which would allow Brandy to remain at home, but Ms. Jones was terrified that Brandy would attempt suicide, hurt someone else, or end up incarcerated if she did not find Brandy a residential placement immediately. She hoped that Brandy's stay at the program would be short, but she felt that she had no choice but to listen to the recommendations of the doctors and school officials.

Because her client was clear about the decision and would not change her mind despite strong counseling, the attorney located a residential treatment center with a good reputation that was not too far from the Jones' home. The staff of the center assured the attorney and Ms. Jones that the center could provide Brandy with both the mental health treatment that she required and special education services to address her learning disabilities. Ms. Jones and the attorney talked with Brandy about Ms. Jones's plan and the residential treatment center that the attorney had identified. Brandy was adamant—she did not want to go to a residential treatment center, even for a few months. She wanted to stay at home with Ms. Jones, the only parent she had ever known.

The attorney felt even more hesitant about the idea of Brandy going into residential treatment. If Brandy did not want to go to such a program, the attorney wondered how she could advocate for funding from the school district for this type of special education placement. With Brandy and Ms. Jones, there was no question as to who was the client. Ms. Jones was the client, and the lawyer's job was to carry out her wishes, within the bounds of the law and the retainer agreement. But how could the attorney ignore Brandy's disagreement with Ms. Jones's decision, especially given that Brandy was the one who would have to live with the consequences? How could the attorney be expected to shake her concerns about residential treatment more generally and the nagging feeling that Ms. Jones's decision might not be the best one? Might a liberty interest of Brandy's be at stake here? Through their advocacy for a residential placement, would the attorney and Ms. Jones be violating Brandy's liberty interest in remaining out of an institutional, congregate care facility and in her home and community? Or did Ms. Jones's parental right to make decisions about Brandy's care and education, or her role as the client, and only client, in this matter mean that the attorney had no choice but to advocate zealously for Ms. Jones's position? Pursuant to a model in which the parent is the sole client, even though it is clear who should be directing the representation, an attorney exclusively representing a parent may struggle with different aspects of the special education representation.

B. Parent and Child as Joint Clients

An attorney could instead choose to represent both the parent and child,

with both individuals directing the attorney throughout the course of the case. Joint representation can have the advantage of providing both the parent and child with a voice in the special education process, as both have recognized rights and a strong stake in the special education process.²⁸ An attorney who represents both the parent and student can protect the rights of both individuals, without disenfranchising one or the other.²⁹ A joint model of representation can help involve both the parent and student in shaping the student's education, which can also empower each of them to become better informed, effective self-advocates in the long-term even after the representation has concluded.³⁰ Additionally, both the parent and student have important information, opinions, and views that can assist the attorney in providing adequate and effective representation if both serve as clients.³¹

However, an attorney using this model might confront a number of challenges, such as a conflict of interest between the two clients.³² Imagine that an attorney represented a fourteen-year-old girl named Emily and her mother, Ms. Stewart. In the first meeting with the attorney, Ms. Stewart and Emily sat together on a couch, while Ms. Stewart talked about Emily's academic failures as if her daughter were not in the room. Emily stared off into the distance. The attorney requested to spend some time alone with Emily during that first meeting, and Ms. Stewart agreed, wanting to make sure Emily could get to know and trust the attorney. In speaking to Emily alone, the attorney quickly learned that Emily hated school, but was not sure why or what she needed to improve her educational experience. The attorney signed a retainer agreement with both Emily and Ms. Stewart, promising to assist them in securing appropriate educational services for Emily.

After some investigation into Emily's school records and psychological evaluations, the attorney learned that Emily was recently diagnosed with a mild intellectual disability.³³ Her school was not providing her with the

28. See Godsoe, *All in the Family*, *supra* note 20, at 40 (advocating for a new type of family representation in special education cases).

29. *Id.*

30. *Id.*

31. *Id.* at 41.

32. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2011) (describing the prohibition on representing two clients whose interests conflict).

33. The IDEA still refers to the disability classification of "mental retardation"; however, this term has commonly fallen out of favor and the term "intellectual disability" is now preferable. In fact, the American Association on Mental Retardation changed its name in 2007 to the American Association on Intellectual and Developmental Disabilities. See AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES FAQ ON INTELLECTUAL DISABILITY, http://www.aaid.org/content_104.cfm (last visited Apr. 29, 2011).

required services and accommodations to address her disability, resulting in academic failures. The evidence was there: Emily could qualify for special education services under the IDEA as a child with "Mental Retardation."³⁴ With the support of the conclusions and recommendations from a recent psychological evaluation, Emily would qualify for an IEP that would include specialized instruction and certain accommodations, such as preferential seating and extra time on tests. There was no doubt in the attorney's mind that Emily could benefit from these services and accommodations, and Ms. Stewart agreed. Both Ms. Stewart and the attorney were hopeful that these special education services and accommodations would give Emily the help that she needed to improve her grades and begin to enjoy school.

The attorney sat down with Emily to discuss these options. She balked at the entire plan, especially the special education disability classification of "Mental Retardation." Even when counseled by the attorney as to the benefits she could derive from an IEP, Emily insisted that she did not belong in special education and asserted that she just simply hated school, like lots of other teenagers, and just wanted to be left alone. However, Ms. Stewart was insistent that she wanted to pursue an IEP for Emily, with the specialized instruction and accommodations recommended in the recent psychological evaluation. The attorney tried to get them to come to an agreement, but neither mother nor daughter would change her mind.

During this process, the attorney struggled with the idea of playing mediator between two clients. The attorney was concerned about what would happen if Ms. Stewart and Emily could not resolve their conflict, worrying that she might need to terminate the representation, leaving the family without a lawyer.³⁵ As a legal representative of both Emily *and* Ms. Stewart, what should the attorney have done? Emily wanted one thing and Ms. Stewart another, but they were both the attorney's clients and the attorney had a duty to advocate zealously on behalf of both of them. Could the attorney have sided with one or the other? Did it matter what the attorney thought was best for Emily? How could the attorney practice "client-centered representation"³⁶ if the clients could not provide the

34. 20 U.S.C. § 1401(3) (2006); 34 C.F.R. § 300.8(c)(6) (2011).

35. See Tandy & Heffernan, *supra* note 20, at 1403-05 (noting that an attorney's early detection of divergent goals between parents and children can result in more successful client counseling and representation).

36. Client-centered representation emphasizes "the client as the prime decision-maker in the lawyer-client relationship and the person who decides the objectives of the representation. The lawyer's role, then, is a helping one, in which the client ultimately decides the objectives of the representation." STEPHEN ELLMANN ET AL., *Critical Issues in Interviewing and Counseling*, in *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 6 (2009); see also Stanley S. Herr, *Capacity for and Consent to Legal Representation*, in *A GUIDE TO CONSENT*, 77, 79-80 (Robert D. Dinerstein et al. eds., 1999) [hereinafter Herr, *Legal Representation*] (discussing client-

attorney with direction with one voice? Would the attorney have needed to terminate the representation, leaving both Emily and her mother without a lawyer, if the conflict could not be resolved? Despite the advantages of joint representation in a special education matter, significant challenges related to the representation may still present themselves.

C. *Child as Client*

In a special education matter, the child is the subject of the case. But should the child serve as the client in a special education case? As detailed below, in most cases where children have reached the age of majority, they will take over those rights that previously belonged to their parents under the IDEA and the parents will not retain any rights under the statute.³⁷ Therefore, in most situations in which a student has reached the age of majority and the rights previously belonging to the parent are transferred to that student, exclusive representation of the student, without involvement by the parent in the representation, is a clearer choice. However, an attorney representing a student who has reached the age of majority may still face challenges in the representation. For example, what if a court has appointed the mother of a nineteen-year-old student to serve as his guardian based on the court's determination that he is incompetent to make decisions on his own behalf? Even where there is no such determination from a court, how will the attorney take direction from a twenty-year-old client with severe autism who is nonverbal?

Some attorneys might also choose to represent minor students, even before they reach the age of majority and obtain full decision-making rights under the IDEA. Where a minor child is the sole client, the attorney may elicit information or opinions from the parent, but would typically aim to protect the goals as established by the child-client.³⁸ If an attorney represents a minor child exclusively, this model of representation has the strong benefit of providing the child with a real voice in the special education process and a sense of agency and empowerment in making decisions regarding educational programming. The voices of children, especially those with disabilities, often go unheard in matters affecting their own lives, even when they have legal representation.³⁹ An attorney who

centered representation on behalf of individuals with disability).

37. 20 U.S.C. § 1415(m); 34 C.F.R. § 300.520.

38. See Tandy & Heffernan, *supra* note 20, at 1407 (noting that parental participation, when elicited, should be done so in a manner that preserves the goals of the child-client).

39. "Too often, lawyers, when faced with clients who are 'different' intellectually or from the standpoint of age, believe that they must act so as to do what is best for the client rather than what the client says he or she wants. Such a protective and paternalistic approach to one's clients is problematic from a number of perspectives, not the least of which is the denial of the client's capacity to make his or her own

can effectively represent a minor child exclusively can help the child overcome this disempowerment and disenfranchisement, and make sure that the child's interests and core rights to a free and appropriate public education are truly protected. Moreover, a lawyer representing the student in a special education case might be in a better position to mediate the conflict between the parents and the school district⁴⁰ by standing distinct from either entity and perhaps gaining some legitimacy in the eyes of the school district, a hearing officer, or a court, by serving the interests of the child, rather than the parent, whose interests might not be viewed as sympathetically.

Before the student reaches the age of majority, there are a number of factors that might influence an attorney's decision as to whether to represent that child exclusively. These factors include age; competency; maturity of the child; whether the child has the capacity to sue should litigation be necessary in the special education matter; the implications for a delinquency or abuse/neglect case, if applicable; and the role and rights of the parent in a special education case.⁴¹ These factors, as well as others discussed below, might create challenges in effectuating a model of representation in which the child is the sole client. For example, can a five-year-old child direct his legal representation in a special education matter? What about a sixteen-year-old child with a severe intellectual disability who is nonverbal? Can the attorney in that situation determine the educational program that is in the child's best interests or substitute her own judgment as to what the child would want if she could express herself?⁴² Does the model of representation change if the parent is the one who retained the attorney and is paying for the representation? What if a fifteen-year-old client is choosing to attend a particular school that will not meet his special education needs simply because his girlfriend attends that school? Should the attorney advocate for that client's position? Alternatively, if the attorney represents an eleven-year-old child, that child might be able to direct the representation, but would a hearing officer view her as having the capacity to sue as the named complainant in an administrative due process hearing or a civil action in court without involvement of a parent or guardian?

Imagine that a sixteen-year-old named Jimmy was charged with possession of marijuana. In reviewing his court-ordered psychological

decisions" ELLMANN ET AL., *supra* note 36, at 110.

40. See Petrera, *supra* note 2, at 545 ("[W]hen the child is the client, a lawyer is in a better position to mediate the conflict between the parents and the school district.").

41. See Tandy & Hefferman, *supra* note 20, at 1406-07 (citing *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1312 (1996)).

42. See *id.* at 1405-07.

evaluation, his public defender noted that he had been diagnosed with autism. The public defender, who represented Jimmy exclusively without any involvement from a parent in the delinquency matter in juvenile court, ran into some challenges during the attorney-client relationship because Jimmy did not speak very much and, when he did speak, he used short, simple sentences that made it difficult for her to discern Jimmy's goals and preferences. She was able to learn from him that he wanted the court case to be done with as soon as possible, even if it meant he had to participate in an inpatient addiction program. She identified a six-month inpatient program where Jimmy could receive addiction counseling. The alternative was a year-long outpatient program, during which he could live at home and remain in the community. If he completed the inpatient program successfully, he could get out of court supervision and have the delinquency case behind him in only six months, whereas the outpatient program would require him to remain under court supervision for a year. When presented with these two options, Jimmy indicated a preference for the six-month inpatient program because he wanted to participate in the shortest possible program.

In further investigating the case, the public defender learned that Jimmy was receiving no special education services and was failing school. She referred Jimmy to a special education attorney who also worked for the public defender organization. The special education attorney investigated the inpatient program and learned that it did not offer any special education services to address Jimmy's autism. Without special education services at the inpatient program, he would fall even further behind in school, and a high school diploma would be even further out of reach. After six months away from school, without any special education services, he would probably need to repeat the tenth grade all over again. The special education attorney scheduled a meeting with Jimmy and his father, Mr. Campbell to discuss next steps. She explained what she learned, and advised Jimmy and Mr. Campbell that although it might require an administrative due process hearing, if Jimmy chose the year-long outpatient program that allowed him to stay in the community, she could advocate to secure special education services at Jimmy's high school so that he could start making progress in school and continue working towards his diploma without interruption. Although he would be under court supervision longer, the special education attorney explained to Jimmy that he could begin to catch up in school and avoid repeating the tenth grade, making the possibility of graduating with a high school diploma far more likely, if he attended the outpatient program. Jimmy shrugged and mumbled that he wanted to get his addiction counseling over with in the inpatient program. The special education attorney, however, was concerned that Jimmy did not truly understand the implications of that decision.

Mr. Campbell preferred to have Jimmy stay at home, attend the outpatient program, and receive special education services at his high school. Mr. Campbell was concerned that Jimmy would have a hard time readjusting to life at home and at school if he was away for six months. Jimmy's public defender planned to advocate at his next delinquency hearing in juvenile court for the six-month inpatient program, at Jimmy's direction. Pursuant to the public defender organization's policy, the special education attorney represented Jimmy's expressed interests exclusively. What position should the special education attorney take? Is she able to consider Mr. Campbell's opinion in any way, even though it conflicts with Jimmy's position in the delinquency matter? Does she have any opportunity to deviate from Jimmy's expressed interests as a result of his autism? Should her concern that Jimmy did not fully understand the decision he was making affect her actions? Similarly, should she act on her concern that his position is not in his best interests? If an administrative due process complaint is warranted in order to secure appropriate special education services for Jimmy, could he, as a minor, bring the complaint on his own? Or would Mr. Campbell need to bring the complaint on Jimmy's behalf in order for Jimmy to have capacity to sue in the view of the hearing officer? Such challenges may present themselves when an attorney exclusively represents a minor child in a special education matter.

Whether an attorney represents a parent exclusively, jointly represents a parent or parents and child, or represents a child exclusively, each model of representation has both advantages and challenges. A variety of factors, if carefully considered, can help attorneys identify the appropriate model of representation for a particular situation and avoid any obstacles. Thoughtful identification of the client or clients in a special education matter, with clear communication of that model to all parties, can help to minimize some of the challenges illustrated in the cases above. Where challenges do still present themselves during the course of the representation, thorough consideration of the factors below can also assist attorneys and their clients in effectively tackling such obstacles.

II. FACTORS TO CONSIDER IN SELECTING A MODEL OF REPRESENTATION

A. The Rights of Parents

1. The Rights of Parents to Make Decisions on Behalf of Their Children

Courts have recognized that parents are not only uniquely qualified, but also have a constitutional right, to make decisions on behalf of their minor

children.⁴³ From the Supreme Court's explicit recognition of parental rights⁴⁴ and a belief that parents typically act in the best interests of their children,⁴⁵ parents have the authority to make decisions concerning the medical, moral, educational, and financial welfare of their children.⁴⁶ The Court has underscored the long-held principle of the "liberty of parents and guardians to direct the upbringing and education of children under their control."⁴⁷ In particular, the Court has emphasized, "it is cardinal with us that the custody, care and nurture of the child reside first in the parent, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁴⁸ As such, "... the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children."⁴⁹ Because the role of "parents in the upbringing of their children is now established beyond debate as an enduring American tradition,"⁵⁰ the rights of parents to make decisions related to their children's special education needs—and therefore to serve as the client in directing an attorney in a special education case—should be considered by special education attorneys contemplating an appropriate model of representation in a particular matter.

Unless their rights are restricted or terminated by a court, there is a presumption that parents are the appropriate decision-makers for their children.⁵¹ Accordingly, a parent typically maintains the authority to make decisions about his or child's well-being under the assumption that the parent can and will act in the child's best interest.⁵² Parents, or caregivers in a parental role, are also often the best-situated adults to determine their

43. *See, e.g.*, *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 628 n.13 (1986) (plurality opinion) (citing 45 C.F.R. § 1340 (1985)) (invalidating federal regulations requiring medical treatment for infants with disabilities without parental consent).

44. The Court has acknowledged the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 747-48, 753 (1982) (requiring "clear and convincing evidence" to terminate parental rights).

45. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (describing the historical recognition by the courts that parents' natural bonds of affection lead them to act in the best interests of their children).

46. Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 683 (1987) [hereinafter Lyon, *Speaking for a Child*].

47. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

48. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

49. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

50. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (exempting Amish children from compulsory formal education beyond the eighth grade).

51. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 n.13 (1986) (plurality opinion) (quoting the 1983 report of the President's Commission for the Study of Ethical Problems in Medical and Biomedical and Behavioral Research, which found a presumption that parents are the appropriate decision-makers for their infants).

52. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979).

children's best interests.⁵³ Protection of parental rights in decision-making furthers societal interests because parents are often simply the best decision-makers for their children.⁵⁴ Parents usually "know their children's needs, desires, strengths, weaknesses, personality, and history in nuanced ways that others cannot come close to approaching."⁵⁵ They are in a unique position both to advocate on behalf of their child and to serve as experts on their child's needs, especially where the child has a disability and the parent understands the child's needs most intimately. "Children are extremely dependent on their parents for both care and support. This is even more true for disabled students. In fact, parents of disabled children literally are their lifelines . . . [t]hese parents undoubtedly are experts in the everyday lives of children"⁵⁶

In most cases, the parent or guardian will act in the best interests of the child as expected by society and the courts.⁵⁷ In seeking legal assistance in a special education case, the caregiver is usually hoping to secure an appropriate education for the child. Short of any limitations on the parent's legal right to make educational decisions or any indication that the parent is unwilling or unable to serve as the client, a parent's fundamental decision-making rights argue for a model of representation in which the parent is a client.⁵⁸

53. Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1264 (2006).

54. Jonathan 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, 427, 446 (1993).

55. Gottlieb, *supra* note 53, at 1264.

56. Justin M. Bathon, *Defining "Parties Aggrieved" Under the Individuals with Disabilities Education Act: Should Parents be Allowed to Represent their Disabled Child Without an Attorney?*, 29 S. ILL. U. L.J. 507, 507 (2005).

57. Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 STAN. L. REV. 625, 628 (1979).

58. Lower courts have not always equated this strong protection of fundamental parental rights with a strong protection of parental decision-making authority around special education. For example, in appointing a guardian ad litem attorney to represent a child in an IDEA case, despite the desire of the child's mother to remain involved in the litigation, one district court reasoned that such an action was not an infringement on a parent's fundamental constitutional right to make decisions regarding the education of her child because the case did not implicate those rights, but rather statutory rights under the IDEA. *Muse B. v. Upper Darby Sch. Dist.*, No. 06-CV-00343, 2007 WL 2973709, at *4 (E.D. Pa. Feb. 14, 2007). By distinguishing between a parent's fundamental constitutional right to make educational decisions regarding her child and the parent's rights under the IDEA, the court emphasized that the appointment of the guardian ad litem did not impede the former because the appointment was a narrowly tailored remedy, as the guardian ad litem was limited to decision-making involving educational matters related to a consent decree that had been previously negotiated between the parent and the school district. *Id.* at *4-5. The court explained that the parent still retained her rights to make decisions on such basic questions as how the child should be raised and whether he should receive private, religious, or public

If an attorney represents the parent exclusively and does not believe that the parent is acting in the best interests of the child, the attorney might be able to raise the issue with a hearing officer or judge and request a guardian ad litem or separate counsel for the child.⁵⁹ However, the Supreme Court's jurisprudence establishing a parent's right to make educational decisions might lead a hearing officer or court to hesitate to appoint separate counsel or a guardian ad litem for a child in a special education matter where the parent retains educational decision-making rights. When there is a designated guardian or guardian ad litem for a child, separate from the attorney and from whom the attorney is taking direction, "the lawyer is not required to meekly succumb to any course of action suggested by [that] client representative."⁶⁰ However, in most cases, there will be no designated guardian or guardian ad litem, and the parent will have educational decision-making rights over the child. In such typical cases, especially where the attorney represents the parent, that parent would be accorded more deference by the attorney than would a guardian ad litem. Unlike a designated guardian ad litem, parents have their own rights, procedurally and substantively, to make decisions regarding their children's education more generally and special education in particular. If an attorney lets her own views of the child's needs and best interests govern the decision-making or substitutes her own judgment for a parent's, that attorney is disenfranchising the parent and taking away rights squarely recognized by the Supreme Court and Congress. Because parents have a right to make decisions about their child's education, barring any conflicts of interest, special considerations related to delinquency or child welfare system involvement, or unwillingness or inability on a parent's part to participate in the attorney-client relationship, a model of representation in

schooling, but did limit her right to special education decision-making by appointing the guardian ad litem. *Id.* at *4. This opinion suggests that some courts might not find a parent's fundamental constitutional right to make decisions regarding her child's education as coextensive with a parent's right to make decisions regarding her child's special education needs under the IDEA. However, this decision may have been unique in that the court was concerned that the child was being left without representation where the parent had fired several attorneys and was denied by the court the ability to proceed pro se on behalf of her child because a non-attorney parent may not proceed pro se on behalf of her minor child. *Id.* at *1, *3. Also, interestingly, the court collapsed the attorney and the educational decision-maker into one individual: the court-appointed guardian ad litem attorney. *Id.* at *3, *5. Other courts may instead hesitate to tread on the parent's constitutional right to make educational decisions, finding that it does protect the parent's right to make special education decisions as well, or may be loathe to have an attorney play the role of both educational decision-maker and counsel, as the guardian ad litem attorney did here.

59. *Id.* at *3.

60. Mickenberg, *supra* note 57, at 634; see also MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 4 (2011) ("If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.").

which the parent is not the sole client or at least one of the clients, and particularly any model that gives the attorney power to decide what is in the best interests of a child, deprives the parent of these significant rights.

2. *The Parent's Decision-Making Rights Under the IDEA*

The IDEA's grant of significant procedural and substantive rights to parents is another important factor that attorneys should consider in selecting a model of representation in a special education case. Parents were the impetus behind the enactment of the statute and remain the driving force for ensuring that children with disabilities receive the educational services they require.⁶¹ The House and Senate committee reports discuss the significant role of parents in decision-making, the deference accorded to their views, and the overall importance of their strong role.⁶² In many ways, parental involvement is essential for the enforcement of the IDEA statutory scheme.⁶³ The American Bar Association advises attorneys and advocates to "make sure there *is* an IDEA parent" in a special education case⁶⁴ because "for the IDEA's substantive and procedural protection to work effectively, every child with or who is thought to have a disability must have a 'parent' who can act on her behalf."⁶⁵ "Under the IDEA, the parent has the legal authority to make special education decisions for a child."⁶⁶

The IDEA specifically envisions the parent as the enforcer of special education rights and confers upon the parent a wide variety of rights to make certain that the child is being provided with a FAPE.⁶⁷ The Supreme Court noted that "parents and guardians will not lack ardor in seeking to

61. Jennifer Rosen Valverde, *A New IDEA for Improving the Education of Children with Disabilities in Foster Care: Applying Social Work Principles to the Problem Definition Process*, 26 CHILD. LEGAL RTS. J. 17, 29 (2006) [hereinafter Valverde, *A New IDEA*].

62. H.R. Rep. No. 104-614, at 4, 15 (1996); S. Rep. No. 105-17, at 2 (1997).

63. Margaret Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263, 286 (2008) (citing Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007)).

64. LEGAL CTR. FOR FOSTER CARE & EDUC., *Special Education Decision Making: Role of the Child's Attorney*, 27 A.B.A. CHILD LAW PRAC. 138 (2008), available at http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/special_ed_series_DM_child_s_attorney.authcheckdam.pdf.

65. Janet Stotland et al., *Special Education Decisions for Children in Foster Care: Everyone Has a Role*, 26 A.B.A. CHILD LAW PRAC. 21 (2007).

66. LEGAL CTR. FOR FOSTER CARE & EDUC., IDENTIFYING SPECIAL EDUCATION DECISION MAKERS FOR CHILDREN IN FOSTER CARE: STATE LAW QUESTIONS 2 (2009), available [at http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/state_law_questions_eddm.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/state_law_questions_eddm.authcheckdam.pdf)

67. 20 U.S.C. § 1414(a)(1)(D) (2006).

ensure that handicapped children receive all of the benefits to which they are entitled by the Act.”⁶⁸ The IEP is the plan that lays out the special education services and accommodations that the child needs.⁶⁹ Schools are required to include the parent in meetings at which the IEP is developed.⁷⁰ In devising the first federal special education statute, the Senate noted that IEP meetings were a means for parents to frequently monitor the child’s progress.⁷¹ Parents are viewed as “the logical agents of change” where there is no forceful oversight by state or federal agencies.⁷² Parents are assigned a substantial role in decision-making, provided through “significant bargaining power” in the IEP process.⁷³ The level of participation by the child in an IEP meeting, on the other hand, is a decision that belongs to the parent.⁷⁴

Parental oversight is built into the IDEA as a “recognition of individual parental insight and collective political influence.”⁷⁵ Parents are experts in knowing and raising their own children and contribute to the special education process “as information gatherers and accumulators of knowledge about their children through daily interactions with their child at home, with the family, in the community.”⁷⁶ Parents are not only accorded the right to contribute to the IEP process by deciding what they believe to be in the best interests of their child, they also provide information about the child critical to developing a comprehensive IEP and about which only they may be in a position to know.⁷⁷ “A parent’s involvement in the entire

68. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 178 (1982).

69. § 1414(d)(1)(A)(i)(IV).

70. § 1414(d)(1)(B).

71. *See* S. Rep. No. 94-168 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435 (explaining that frequent monitoring is essential in structuring an adequate educational program for the child and those involved in his care).

72. *See* Rosenbaum, *supra* note 12, at 162 (citing Guy Benveniste, *Implementation and Intervention Strategies: The Case of PL 94-142*, in *SCHOOL DAYS, RULE DAYS* 153 (David L. Kirp & Donald N. Jensen eds., 1986)) (emphasizing the central role and control of the parent in a child’s education).

73. *See id.* at 165 (citing Bruce Meredith & Julie Underwood, *Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education*, 24 *J.L. & EDUC.* 195, 200 (1995)).

74. *See* Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540, 46671 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300 & 301) (“Generally, a child with a disability should attend the IEP meeting if the parent decides that it is appropriate for the child to do so.”); *see also* 20 U.S.C. § 1414(d)(1)(B)(vii) (2006); 34 C.F.R. § 300.321(b) (2010); Tulman, *Special Education Advocacy and Status Offense Charges*, *supra* note 22, at 99.

75. *See* Rosenbaum, *supra* note 12, at 181 (noting that in spite of a parent’s central role under the IDEA, a parent may not always know what is best for the child or who to trust in the special education process).

76. *Id.* at 186 n.83.

77. Tandy & Heffernan, *supra* note 20, at 1400.

process can significantly influence the type and level of educational services that the student receives,⁷⁷⁸ and Congress expressly acknowledged that the educational services received by children with disabilities depend, at least in part, on a parent's ability to advocate on their behalf, up to and including filing legal action to challenge the denial of educational services.⁷⁹ 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.⁸⁰

The "IDEA expressly contemplates that parents will act as advocates for their children at every stage of the administrative process, from initial IEP meetings to administrative due process hearings."⁸¹ The statute provides parents with many rights to guarantee they are included in every stage of the IEP process and in seeking resolution of any disputes, including the opportunities to request an initial evaluation; provide consent for evaluations, special education, and related services; participate in decision-making about the child's educational planning and placement; and examine the child's records.⁸² The IDEA also requires that parents be provided with notice from school officials of the statute's procedural safeguards; "prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an opportunity for 'an impartial due process hearing' with respect to any such complaints."⁸³

The IDEA explicitly vests in *parents* the right to bring an administrative

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

79. See Julie F. Mead & Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents' Rights to Advocate for Children with Disabilities under the IDEA*, 34 J. LEGIS. 123, 125 (2008) (emphasizing the Senate's finding that when state and local districts were left on their own, they provide inadequate or no educational services to children with disabilities).

80. Tandy & Heffernan, *supra* note 20, at 1399 (citing *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 238-239 (3d Cir. 1998) (Roth, J., concurring in part and dissenting in part)); see also 20 U.S.C. § 1415(a) (2006) (ensuring that parents and children have procedural safeguards with respect to a free appropriate public education); § 1415(b)(1) (providing parents the opportunity to examine all of their child's records); § 1415(b)(3) (requiring written notice to parents); § 1415(e)(2)(A)(ii) (ensuring the mediation process does not deny or delay a parent's right to a due process hearing); § 1415(f)(1)(A) (giving parents the opportunity for an impartial due process hearing); § 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); § 1415(m)(1)(B) (transferring all rights accorded to parents to the child once he or she reaches the age of majority).

81. See *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 256 (1st Cir. 2003).

82. 20 U.S.C. §§ 1414(a)(1)(D)(i), 1415(b)(1)-(6).

83. § 1415(f); *Honig v. Doe*, 484 U.S. 305, 311-12 (1988).

due process complaint to enforce their child's special education rights.⁸⁴ It is not clear that hearing officers will allow a minor child to bring an administrative due process complaint without involvement of a parent or other adult in a parental role, as discussed below. Therefore, an attorney might *need* to formally involve a parent in the legal representation as a client at the time an administrative due process complaint must be filed. Indeed, some lawyers who have used a model of representation in which the child is exclusively the client acknowledge that the attorney might need to bring the parent into the legal representation when a complaint must be brought.⁸⁵ Because it is likely that a parent or other adult must be the one to bring and sign a due process complaint, especially in jurisdictions where litigation is frequent and there is a higher likelihood that a due process complaint would be filed in the course of the representation, many attorneys include the parent in the representation as a client from the outset, usually as the sole client.⁸⁶

At the impartial due process hearing, parents are explicitly entitled to be represented by counsel, present evidence, cross-examine witnesses, and pursue various remedies.⁸⁷ The Supreme Court has explicitly emphasized the central role of parents not only in the IEP process, but also in the pursuit of relief for violations under the IDEA through a due process hearing:

Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.⁸⁸

84. § 1415(b)(6).

85. Interview with Dean Rivkin, Distinguished Professor of Law, University of Tennessee School of Law (Dec. 14, 2010) (discussing representation by Professor Rivkin and his clinic students of children in truancy cases on special education matters and their need to bring a parent into the representation should an administrative due process complaint need to be filed).

86. The District of Columbia, where the author has practiced special education law, is one of those jurisdictions in which litigation is frequently required. Many special education attorneys in the District of Columbia include parents in the representation or represent parents exclusively without formally including minor children as clients, and bring due process complaints with the parent-clients as the named complainants. The prominence of the model of representation in which the parent is the client is evidenced by the name of a major national organization that works "to protect special education rights and secure excellence in education for children with disabilities," the Council of Parent Attorneys and Advocates, Inc. The Council of Parent Attorneys and Advocates, Inc., (COPAA) (emphasis added), <http://www.copaa.org/> (last visited Aug. 24, 2011); see also Godsoe, *All in the Family*, *supra* note 20, at 14 n.66.

87. § 1413(a)(1)(B), (a)(1h)(D); § 1414(e); § 1415(b)(1), (3); § 1415(d)(1)(A).

88. *Honig*, 484 U.S. at 311-12.

The IDEA also provides for the transfer of rights from parent to child when the child reaches the age of majority, which may serve as evidence that Congress intended certain rights to belong to the parent alone until that time⁸⁹ and can be used by attorneys to justify a model of representation in which the parent is a client. Before the child reaches the age of majority, the IDEA and applicable regulations appear to provide decision-making rights—and in fact, all of the procedural rights provided for in the statute—to the parent or person qualifying as a “parent” under the IDEA. Moreover, that procedural rights under the IDEA belong to the parent is evidenced by the IDEA’s provision for the appointment of a surrogate parent where no other “parent” is identifiable,⁹⁰ underscoring the need for an adult serving in a parental decision-making role. While the IDEA plainly provides parents with many concrete rights, the statute does not provide specific rights to minor children, such as any procedural rights related to decision-making or the pursuit of administrative relief.⁹¹ The right that is clearly accorded to children is the broader substantive right to a FAPE.⁹² Although this right sits at the core of the IDEA and the child is literally the subject of the entire statute, the parent is provided with the authority to protect and enforce the child’s right to a FAPE.⁹³ Barring any special circumstances, such as court-ordered restrictions on the parent’s rights, or the inability or unwillingness of the parent to participate in the attorney-client relationship, the IDEA’s strong emphasis on the decision-making rights of parents argues in favor of an attorney including the parent as a client in special education matters.⁹⁴

3. *The Supreme Court’s Conclusion That Parents Have Substantive Rights Under the IDEA*

While the IDEA undoubtedly provides parents with procedural rights, as described above, the Supreme Court has also affirmed the substantive rights of parents in the special education context, emphasizing that “it is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child.”⁹⁵ In *Winkelman ex rel.*

89. § 1415(m).

90. § 1415(b)(2).

91. *Id.*

92. § 1400(d)(1)(A).

93. See Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 277 (2005) (“Congress intended each parent to contribute to the educational planning as an expert on her child and to advocate for the child’s needs . . . In the end, although IDEA includes the above-described institutional enforcement mechanisms, the primary role of enforcement falls as a practical matter on parents.”).

94. § 1414(a)(1)(D).

95. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529

Winkelman v. Parma City School District,⁹⁶ the Supreme Court held that the IDEA provides parents with not only procedural rights and the right to sue, but independent, enforceable, substantive rights, which they are empowered by the IDEA to enforce as “real parties in interest.”⁹⁷ Attorneys should consider the implications of the Supreme Court’s decision in *Winkelman*, and its reasoning therein, in deciding which model of representation to use in a special education case.

Prior to the Court’s decision, the Federal Circuit Courts of Appeals diverged regarding the ability of non-attorney parents to appear pro se on behalf of their child in a civil action under the IDEA.⁹⁸ In 2003, Mr. and

(2007).

96. *Id.* at 516.

97. *Id.* at 531.

98. Looking to FED. R. CIV. P. 17(c) (discussing who can represent a minor in federal court), 28 U.S.C. § 1654, and the common law rule that a non-lawyer may not represent another person in court, some Circuit Courts of Appeals held prior to *Winkelman* that parents could not proceed pro se in IDEA cases in federal court because it is not in the interest of the child to be represented by non-attorney parents where the claims required adjudication, given that the child is entitled to trained legal assistance so that her rights may be fully protected. *See Myers v. Loudoun Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005) (“We therefore join the vast majority of our sister circuits in holding that non-attorney parents generally may not litigate the claims of their minor children in federal court”); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (“[P]arents 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.”); *Devine v. Indian River Cnty. Sch. Bd.*, 121 F.3d 576, 582 (11th Cir. 1997) (“[P]arents who are not attorneys may not bring a *pro se* action on their child’s behalf—because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.”); *Johns v. Cnty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) (“[W]e hold that a parent or guardian cannot bring an action on behalf of a minor child without retaining a lawyer.”); *Hickey v. Wellesley Sch. Cmty.*, 14 F.3d 44, n.1 (1st Cir. 1993) (unpublished table decision); *Osei-Afriyie v. Med. Coll. of Penn.*, 937 F.2d 876, 883 (3d Cir. 1991); *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990) (“[A] non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child.”); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam). Prior to *Winkelman*, the United States Court of Appeals for the First Circuit held that parents could proceed pro se in IDEA cases because they were “parties aggrieved” within the meaning of the IDEA, as the statute provides them with the right to request a due process hearing at the administrative level that must be exhausted prior to a civil action. *Maroni v. Pemi-Baker Reg’l Sch. Dist.*, 346 F.3d 247, 250-52 (1st Cir. 2003). The United States Courts of Appeals for the Second, Third, Seventh, and Eleventh Circuits held before *Winkelman* that parents were permitted to appear pro se on their own behalf, but not permitted to assert the claims of their children. *Mosely v. Bd. of Educ.*, 434 F.3d 527 (7th Cir. 2006) (holding that parents cannot proceed pro se on behalf of their child in an IDEA case but are entitled to bring their own action on their own behalf for their procedural rights violations); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998) (holding that a parent who is not an attorney could not appear pro se on behalf of a child but that the parent can represent herself on claims related to the parental role under IDEA); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998) (concluding that non-attorney parents were not entitled to represent their child under the IDEA in federal proceedings because Congress did not intend to override the common law principle that a non-lawyer may not represent another person in court, and the IDEA does not create joint rights in parent and child. Because parents do not have rights without a disabled child, the rights are divisible and not concurrent);

Mrs. Winkelman became involved in lengthy legal proceedings in which they wanted to proceed *pro se*, alleging that the Parma City School District had failed to provide their son, Jacob, who has an autism spectrum disorder, with a FAPE.⁹⁹ In deciding whether parents, either on their own behalf or as representatives of their children, could proceed in court unrepresented by counsel under the IDEA, Justice Kennedy, writing for the majority, determined that parents enjoy independent and enforceable substantive rights under the IDEA as “parties aggrieved” and are entitled to prosecute IDEA claims on their own behalf.¹⁰⁰ Furthermore, the Court rejected the school district’s argument that parental involvement is only required so that parents can represent their children and that the IDEA accords parents nothing more than procedural tools relating to their children’s substantive rights.¹⁰¹ Because the purpose of the IDEA is to protect the rights of children with disabilities and their parents, it would be

Devine, 121 F.3d at 582 (holding that a non-lawyer parent does not have right to act as counsel in an action brought pursuant to the IDEA on the child’s behalf in federal court, even though he or she can do so in due process hearings). The United States Court of Appeals for the Sixth Circuit also determined that parents could not appear *pro se* on behalf of their children, reasoning that even though parents are entitled to represent their child in administrative proceedings, the IDEA does not similarly carve out an exception to permit parents to represent their children in federal proceedings. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (6th Cir. 2005). The Sixth Circuit went one step further than the Second, Third, Seventh and Eleventh Circuits by explicitly stating that parents have procedural rights but not substantive rights because the child’s right to receive a free appropriate public education belonged to the child alone. *Cavanaugh*, 409 F.3d at 757.

99. *Winkelman*, 550 U.S. at 520. The Winkelmans appealed the hearing officer’s rejection of their claims to the state-level review officer and, after losing that appeal, filed both on their own behalf and on behalf of Jacob in the United States District Court for the Northern District of Ohio. The District Court found that the school district had provided Jacob with a FAPE. *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722 (N.D. Ohio 2005). The Winkelman’s appealed to the Court of Appeals for the Sixth Circuit, which ordered dismissal of their appeal before reaching the merits, concluding that non-attorney parents could not represent their disabled child in IDEA suit. *Winkelman v. Parma City Sch. Dist.*, 150 F. App’x. 406, 407 (6th Cir. 2005). The Winkelmans by this time were again representing themselves *pro se* and raised on appeal whether parents may pursue an appeal to the Federal District Court of an administrative decision under the IDEA *pro se*, on behalf of themselves and on behalf of their minor children. *See Pro Se Appellant’s Brief, Winkelman v. Parma City Sch. Dist.*, 150 F. App’x. 406, 407 (6th Cir. 2005) (No. 04-4159), 2004 WL 5489342. The Winkelman’s then sought review from the Supreme Court, which granted certiorari in light of the disagreement between the circuits over the ability of non-attorney parents to appear *pro se* under the IDEA. *Winkelman*, 550 U.S. at 522.

100. *See Winkelman*, 550 U.S. at 522-24, 535 (examining the procedures within the IDEA that are followed when a child’s IEP is established). The majority discussed the criteria governing the sufficiency of an education provided to a child, the requirement that the child’s IEP meet the unique needs of the child, the mechanisms for review that must be made available to a party when there are objections to the IEP, and the requirement that in certain circumstances, the state must reimburse the parents for various expenses, such as private school tuition and attorneys’ fees under the IDEA. *See id.*

101. *Id.* at 527-28.

illogical to conclude that the word “rights” refers just to the child and not to both the child and the parent.¹⁰² The Court determined that the IDEA created in parents an independent stake not only in the procedures, but also in substantive decisions concerning the provision of a free appropriate public education to their children. The Court considered that parents are entitled to participate in not only the implementation of the statute’s procedures, but also in the substantive formation of their child’s IEP and emphasized that parents are empowered to bring challenges under the IDEA on a wide range of issues.¹⁰³ Because parents enjoy enforceable rights at the administrative stage, the Court reasoned that it would be inconsistent with the statutory scheme to bar them from continuing to assert those rights in federal court.¹⁰⁴ The majority held that parents’ rights are not limited to certain procedural and reimbursement related matters, but are also encompassed in the entitlement to a FAPE for their child.¹⁰⁵ Therefore, the Court concluded that the Sixth Circuit erred when it dismissed the Winkelmans’ appeal for lack of counsel because parents are entitled to prosecute IDEA claims *on their own behalf* as “parties aggrieved.”¹⁰⁶ With this holding, the Supreme Court explicitly declined to decide the related question of whether the IDEA entitles parents to litigate their *child’s* claims pro se.¹⁰⁷

As a result of the holding in *Winkelman*, non-attorney parents not only began bringing their own claims pro se, as allowed by the Court, but also the claims of their children, even though the Court specifically declined to decide if non-attorney parents are able to litigate their child’s claims pro se under the IDEA.¹⁰⁸ Therefore, the lower courts continue to be faced with the question of whether non-attorney parents can represent *their child* in federal court pro se.¹⁰⁹ Some non-attorney parents have argued that *Winkelman* provided them with the ability to represent the claims of their child in court.¹¹⁰ The lower courts that have examined this issue since *Winkelman* have concluded that the IDEA only allows parents to bring their

102. *Id.* at 528.

103. *Id.* at 530-31.

104. *Id.* at 526.

105. *Id.* at 533.

106. *Id.* at 535.

107. *Id.*

108. *Id.*

109. See Patricia C. Hagdorn, Comment, *Winkelman v. Parma City School District: A Major Victory for Parents or More Ambiguity?*, 39 SETON HALL L. REV. 981, 998 (2009) (discussing the ambiguity resulting from the decision).

110. See, e.g., *Woodruff v. Hamilton Twp. Pub. Schs.*, No. 06-3815, 2007 WL 4556968, at *3 (D.N.J. Dec. 20, 2007); *Chase v. Mesa Cnty. Valley Sch. Dist.*, No. 07-cv-00205, 2007 WL 2889446, at *1 (D. Colo. Sept. 27, 2007).

own claims and not the claims of their children pro se.¹¹¹ As a result, non-attorney parents can currently proceed pro se on their own behalf in federal court, but not on behalf of their children under the IDEA because even if the parents are “parties aggrieved” and have both substantive and procedural rights, they still cannot represent as a non-attorney the claims of another.¹¹²

However, the Supreme Court’s recognition that parents on their own are “parties aggrieved” with substantive rights under the IDEA supports an

111. *See* *Hunter v. Ind. Sch. Dist.*, No. 09-1664, 2010 WL 1333232, at *5 (W.D. Pa. Mar. 31, 2010); *L.F. v. Houston Indep. Sch. Dist.*, No. H-08-2415, 2009 WL 3073926, at *19 (S.D. Tex. Sept. 21, 2009); *M.W. v. Clarke Cnty. Sch. Dist.*, No. 3:06-CV-49, 2008 WL 4449591, at *8-9 (M.D. Ga. Sept. 29, 2008); *N.N.J. v. Broward Cnty. Sch. Bd.*, No. 06-61282, 2007 WL 3120299, at *3 (S.D. Fla. Oct. 23, 2007); *Woodruff*, 2007 WL 4556968 (acknowledging that these courts have all concluded that *Winkelman* did not abrogate the previous holdings among the circuits that Fed. R. Civ. P. 17(c) and 28 U.S.C. § 1654 prohibited non-attorney parents from representing their child pro se); *see also* *Lenker v. Gray*, No. 2:07-CV-274, 2008 WL 4613534, at *1 (N.D. Ind. Oct. 10, 2008); *J.R. v. Sylvan Union Sch. Dist.*, No. 06-2136, 2008 WL 682595 (E.D. Cal. Mar. 10, 2008); *N.N.J.*, 2007 WL 3120299; *L.J. v. Broward Cnty. Sch. Bd.*, No. 06-61282, 2007 WL 1695333 (S.D. Fla. June 8, 2007); *Bell v. Anderson Cnty. Sch.*, No. 1:07-cv-00936, 2007 WL 2265067 (S.D. Ind. Aug. 6, 2007) (addressing that some courts have simply dismissed the claims brought on behalf of the child without prejudice); *cf.* *Chambers v. Tibbs*, 980 So. 2d 1010 (Ala. Civ. App. 2007) (holding that parents could not represent the claims of their child so that part of their appeal was dismissed); *B.D. ex rel. Dragomir v. Griggs*, No. 1:09cv439, 2010 WL 2775841 (W.D.N.C. July 13, 2010); *Chase*, 2007 WL 2889446, at *1 (addressing that other courts have dismissed the complaint because the parents lacked standing to represent their child’s claims). *See generally* *L.F.*, 2009 WL 3073926, at *11; *French v. N.Y. State Dep’t of Educ.*, No. 5:04-CV-434, 2008 WL 4426625 (N.D.N.Y. Sept. 24, 2008); *Woodruff*, 2007 WL 4556968, at *5 (some courts have allowed the parents to leave and amend their complaint so that the complaint reflects the parents’ claims and not the child’s claims). Another district court judge simply substituted the parents’ names for the child’s name in the complaint since they both had identical claims. *See* *Alexandra R. v. Brookline Sch. Dist.*, No. 06-cv-215, 2007 WL 2669717 (D.N.H. Sept. 6, 2007). Three district courts stated that parents were actually asserting their own claims even though the complaint referred to the child’s claims. *See* *B.J.S. v. State Educ. Dep’t*, No. 08-CV-513A, 2010 WL 502796 (W.D.N.Y. Feb. 9, 2010); *D.E. v. Cent. Dauphin Sch. Dist.*, No. 1:06-CV-2423, 2009 WL 904960 (M.D. Pa. Mar. 31, 2009); *M.W.*, 2008 WL 4449591. Some judges, including a panel of circuit court judges, informed parents that they needed to obtain counsel in order to represent their child’s claim. *See* *KLA v. Windham Se. Supervisory Union*, 348 Fed. App’x. 604 (2d Cir. 2009) (holding that appeal would proceed if parents obtained counsel but if they did not then the appeal would be dismissed); *B.D.S. v. Southold Union Free Sch. Dist.*, Nos. CV-08-1319, CV-08-1864, 2009 WL 1875942 (E.D.N.Y. June 24, 2009); *French*, 2008 WL 4426625; *Woodruff*, 2007 WL 4556968. One magistrate judge stated that the parent could not present the claims of the child and therefore appointed a guardian ad litem to represent the child. *St. Joseph-Ogden Cmty. High Sch. Dist. No. 305 v. Janet W.*, No. 07-CV-2079, 2008 WL 170693 (C.D. Ill. Jan. 17, 2008). Another panel of circuit court judges found that though the parents filed the complaint on their own behalf as well as on behalf of their child, the complaint asserts independent claims so they can proceed pro se. *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App’x. 202 (2d Cir. 2010).

112. *A.P.*, 370 Fed. App’x. at 202. Non-attorney parents proceeding pro se need to ensure that their complaint words their claims as their own claims and not the claims of the child to avoid any delay or prejudice in having their complaint dismissed, being required to leave and amend the complaint, or being required to obtain counsel for their child’s claims.

attorney's decision to include a parent as a client in an IDEA case. Conversely, the decisions of lower courts following *Winkelman* that non-attorney parents may not represent the rights of their children in federal court lends support to the notion that children have their own distinct rights under the IDEA, which could be litigated separately from a parent's claims by an attorney.¹¹³ Moreover, the Supreme Court may have created further confusion by asserting that "Congress specifically indicated that parents have rights under the Act that are separate from and independent of their children's rights," but acknowledging that "it is difficult to disentangle the provisions in order to conclude that some rights adhere to both parent and child while others do not."¹¹⁴ Although parents have distinct substantive rights under the IDEA pursuant to *Winkelman*, the rights of parents and their children are intertwined, as "parents have no rights under the IDEA if they do not have a disabled child seeking an education."¹¹⁵ While the decision in *Winkelman* affirms the substantive rights of parents under the IDEA and favors including the parent as a client in a special education matter, the decision also suggests that minor children have separate and distinct rights under the IDEA worthy of a voice—and therefore worthy of inclusion in the attorney-client relationship.¹¹⁶

B. Who is the "Parent?"

In deciding the model of representation to use in an IDEA case, an attorney should consider which individual or individuals could serve as a "parent" under the IDEA. A variety of individuals, including but not limited to a biological parent, might play the role of "parent" under special education law.¹¹⁷ Whenever a "parent" is referenced in this Article, that person could be any individual who meets the IDEA definition of a "parent" and can therefore serve as the educational decision-maker in

113. Godsoe, *All in the Family*, *supra* note 20, at 11-12, 19-20 ("A more general recognition of the potential for conflict between parents and children is the common law rule that a parent may not represent her child *pro se* . . . [this rule] appears to contradict the general presumption that parents are the best voice for their children and that they can consequently direct litigation on behalf of the child."). Because parents and their children may have distinct rights under the IDEA, it is possible that they could have separate attorneys in a special education matter. However, due to the scarcity of attorneys who handle special education matters, the likely reluctance of many attorneys to provide representation when another attorney is already involved in the matter, and the concern that a hearing officer or court may not allow parents and their child to bring separate claims with separate representation, it may be impossible for both parents and child to obtain separate representation.

114. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 532, 541 (2007).

115. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d Cir. 1998).

116. *Winkelman*, 550 U.S. at 529.

117. 34 C.F.R. § 300.30 (2011).

regards to special education.¹¹⁸ The IDEA defines a parent as a natural, adoptive, or foster parent (unless a foster parent is prohibited by state law from serving in that role); a guardian (although not the state if a child is a ward of the state); an individual acting in the place of a natural or adoptive parent, including a grandparent, stepparent, or other relative, with whom the child lives; an individual who is legally responsible for the child's welfare; or an individual assigned to be a surrogate parent under the IDEA.¹¹⁹ The biological or adoptive parent is presumed to be the "parent" for purposes of the IDEA. However, that person may be replaced in this role if he or she does not have legal authority to make educational decisions for the child or a judicial decree or order identifies another person, who otherwise qualifies under the IDEA as a "parent," to act in that role.¹²⁰ Because the IDEA defines "parent" broadly to include a variety of different adults, many individuals might qualify as a "parent" and serve as the client in a special education matter.

The IDEA also provides for the appointment of a surrogate parent whenever the parents of a child are not known, the local or state agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the state.¹²¹ The surrogate may not have any personal or professional interest conflicting with the interest of the child, must have the knowledge and skills to ensure adequate representation of the child, and cannot be an employee of any agency involved in the education or care of the child, although the surrogate can be paid by the state to serve in that role.¹²² If the child is a ward of the State, the surrogate can be appointed by the judge overseeing the child's care, as long as that surrogate meets the requirements of the IDEA.¹²³ The local educational agency must appoint a surrogate for an unaccompanied homeless youth. Where necessary, staff of emergency shelters, independent living programs, and street outreach programs can be appointed as temporary surrogate parents, even though they may be employed by an agency involved in the care of the child, until a surrogate parent can be appointed who meets all of the statutory requirements.¹²⁴ "The State is responsible for ensuring that a surrogate is appointed within thirty days after a determination by a state or local

118. *Id.*

119. 20 U.S.C. § 1401(23) (2006); 34 C.F.R. § 300.30(a).

120. 34 C.F.R. § 300.30(b).

121. 20 U.S.C. § 1415(b)(2)(A). The state or local educational agency must have an established method for determining whether a child needs a surrogate parent and for assigning the surrogate. 34 C.F.R. § 300.519(b).

122. 20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. § 300.519(d)-(e).

123. 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.519(c).

124. 20 U.S.C. § 1415(b)(2)(A)(ii); 34 C.F.R. § 300.519(f).

educational agency that the child needs a surrogate.¹²⁵ Surrogate parents can represent the child in all matters relating to the identification, evaluation, and educational placement of the child and in all matters relating to the provision of a free appropriate public education to the student.”¹²⁶

Congress’ explicit provision for the appointment of a surrogate parent when necessary further supports the significance Congress placed on the parental role in educational decision-making and provides further justification for a model of representation in which an adult serves as the decision-maker and client in a special education case.¹²⁷ On the other hand, especially where the “parent” is a surrogate who does not intimately know the child—or possibly does not know the child at all—the attorney should involve the child in the representation in some way, whether formally as a client or in more informal ways, so that the child’s needs and interests are brought to light.

Involvement by more than one parent can present another complication in determining who will serve in the role of educational decision-maker and direct the legal representation. Sometimes two parents will want to be involved in making special education decisions. In other situations, a child may move between the homes of two parents or from the care of a parent to the care of another relative and back to the parent. In such a situation, two or more different individuals may be interested in serving as the educational decision-maker. To minimize the complications and potential conflicts of joint representation of two adults in the client role, some attorneys request that parents or caregivers select only one person to serve in the client role, whose decisions would control the course of the legal case. If the attorney chooses to represent multiple parents or caregivers in a special education matter, the attorney should consider potential or existing conflicts of interest among the joint clients, as discussed below, and clarify and plan with the joint clients what will happen if a conflict

125. 20 U.S.C. § 1415(b)(2)(B).

126. Yael Zakai Cannon & Laura Rinaldi, *Initiating a Special Education Case*, in SPECIAL EDUC. ADVOCACY 10 (Ruth Colker & Julie K. Waterstone eds., 2011) (citing 20 U.S.C. § 1415(b)(2)(B)); 34 C.F.R. § 300.519(h); 34 C.F.R. § 300.519(g)). Also, the authors note that:

“[S]ome states have separate provisions allowing for the appointment of a foster parent as the educational decision-maker. For example, New Hampshire provides that where the parental rights of the biological parents have been terminated by a court of law or by death, a foster parent in a long-term parental relationship with a child can be appointed, and such appointment would supersede that of a surrogate parent. N.H. REV. STAT. ANN. § 186-c:14-a (2010).”

See id.

127. 34 C.F.R. § 300.519.

arises between them.

*C. Legal Capacity of a Minor to Independently Bring a Due Process Hearing Complaint or Civil Action in Federal Court*¹²⁸

Where filing an administrative due process complaint is necessary, it is unclear whether a minor student may independently bring the complaint under the IDEA without any involvement from a parent or other guardian or next friend. The IDEA and applicable regulations explicitly entitle parents to file a due process complaint when they are aggrieved.¹²⁹ The regulations also reference the parent as the individual who should be provided with information about free and low cost legal services upon filing a complaint, perhaps alluding to the role that belongs to the parent, and not the student, as complainant in a due process hearing, and the parent's entitlement to be accompanied by legal representation.¹³⁰ However, hearing officers in some jurisdictions have recognized the legal capacity of minors to independently bring special education due process complaints, and have allowed children to sign and bring a complaint without involvement of a parent or caregiver.¹³¹ Attorneys should investigate the policies and practices of hearing officers in their jurisdiction prior to filing a due process complaint on behalf of a minor without involvement of a parent or other guardian or next friend. These policies and practices might influence the model of representation used by the attorney. Absent a policy or practice recognizing the capacity of minor children to bring due process complaints, an attorney who wishes to assist a

128. The legal "capacity" to sue or bring a complaint, as discussed here and throughout, references a hearing officer's or court's acceptance of the naming of a minor child, without the naming of an adult on the child's behalf or as next friend, as the complainant in a suit. The decision by a hearing officer or court as to whether a minor child may or may not independently bring a due process complaint or civil action on her own is sometimes referred to among attorneys as the child's "independent standing" or "standing." However, the concept of "standing" usually refers to constitutional and prudential questions regarding whether an individual has suffered a cognizable injury-in-fact such that the individual will have the requisite interest in the case to litigate it fully. For children, the issue as discussed here is not whether they have suffered this kind of Article III harm, as a child denied FAPE could certainly show that harm, but rather whether they are deemed by a court or hearing officer to have sufficient capacity and judgment to participate in the lawsuit as a party, guide their attorneys, and serve as named complainants in a suit without adult involvement as a next friend or otherwise on their behalf. Therefore, this Article discusses the legal "capacity" to sue or bring a complaint, rather than referencing this issue as one of "standing."

129. 20 U.S.C. § 1415(b)(8); 34 C.F.R. § 300.507(a)(1).

130. 34 C.F.R. § 300.507(a)(1)-(b).

131. Interview with Marlies Spanjaard, Ed Law Project, Children's Law Center, Massachusetts (Mar. 10, 2011) [hereinafter Interview with Spanjaard]. Marlies Spanjaard is the Project Coordinator for The Edlaw Project, an initiative of the Children's Law Center of Massachusetts and the Youth Advocacy Department, which advocates for the education rights of indigent children in Massachusetts. *Id.*

minor in filing a complaint should prepare arguments to justify the child's capacity to sue in the event that it is challenged by opposing counsel or a hearing officer.

Not specific to the special education context, many jurisdictions have procedural codes, court rules, or administrative rules delineating that a minor does not have the capacity to sue on her own behalf and that a minor may only sue or be sued through a "representative, such as a general guardian" or "by a next friend or by a guardian ad litem" in local or state court or in administrative hearings.¹³² Depending on the specifics of state law, a parent or adult "representative" may be needed to sue on the child's behalf in state court or administrative hearings in that state.¹³³

If the case necessitates a civil action in federal court, an adult representative is necessary for the child to bring suit, a principle also enshrined in common law. Courts have recognized that minors are limited in their capacity to exercise reasoned judgment in making significant decisions; the judicial system assumes that parents or other adults are better situated to make such decisions.¹³⁴ For example, the Supreme Court has emphasized that:

States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.¹³⁵

Unless a court declares a parent unfit, she will usually have the responsibility to make decisions on the child's behalf in the course of litigation and can choose whether to consult with the child about these decisions.¹³⁶

The Federal Rules of Civil Procedure have codified this principle, and do

132. See Moore, *supra* note 1, at 1828-29 (noting that the legal inability to sue minors is based upon common law).

133. *Id.* at 1828-29.

134. Tandy & Heffernen, *supra* note 20, at 1398 (citing Hafen, *supra* note 42, at 438-39).

135. See *Bellotti v. Baird*, 443 U.S. 622, 634-639 (1979) (plurality opinion).

136. Tandy & Heffernen, *supra* note 20, at 1399.

not allow a minor child to bring a civil action without a representative.¹³⁷ The Rules provide that a minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem.¹³⁸ A minor may not sue on her own; if she is unrepresented in an action, the court must appoint a guardian ad litem or issue another appropriate order to appoint an adult “representative.”¹³⁹ Consequently, when a child’s substantive rights need to be enforced in a civil action in federal court, parents are often involved to serve as an adult “representative.” The need for an adult “representative” to bring a claim on behalf of a minor in federal court calls into question whether an attorney could exclusively represent a child in a federal civil action alleging violations of the IDEA, without involvement of a parent or other adult in the representation. If an attorney represents a child as the exclusive client and federal litigation becomes necessary, the attorney must elicit the participation of a parent or other adult “representative” in the litigation or seek to have a guardian or guardian ad litem appointed. As a result, in federal civil actions under the IDEA, it is quite possible that an attorney bringing an IDEA case, at least at that stage, *must* formally include a parent or identify another adult to include in the legal representation as a client.

It may also be possible for an attorney to serve in the guardian ad litem role, thereby eliminating the necessity of involvement by another adult in the litigation.¹⁴⁰ However, such an arrangement provides a great deal of power to the attorney, in that the court would be sanctioning a model in which that individual plays both attorney and client and can determine what courses of action are in the best interests of the child and then litigate the case based on those beliefs. An attorney serving as next friend or guardian ad litem should aim to maintain fidelity to an expressed interests model of representation on behalf of the child or at least to incorporate the child’s views into the litigation to the greatest extent possible so as not to maximize the attorney’s voice at the expense of the child’s.

Without clear delineation and discussion of the roles of each individual, federal litigation can create confusion for attorneys, parents, and children in special education matters. In other civil contexts, where parents bring cases on behalf of their children in this way, it is not necessarily clear who has the authority to make decisions during the course of the litigation. Sometimes general guardians are considered real parties in interest,

137. FED. R. CIV. P. 17(c)(1) (noting that a general guardian, a committee, a conservator, or a fiduciary may sue or defend on behalf of a minor).

138. *Id.*

139. *Id.*

140. *See, e.g.,* Muse B. v. Upper Darby Sch. Dist., No. 06-CV-00343, 2007 WL 2973709 (E.D. Pa. Feb. 14, 2007) (appointing a guardian ad litem to represent the child).

whereas next friends and guardians ad litem are sometimes treated as nominal parties, with the minor being the real party in interest.¹⁴¹ If the latter situation applies, it may be possible for an attorney to represent the child exclusively if the child is the only real party in interest in a case. However, because parents are considered real parties in interest in a special education matter, pursuant to *Winkelman*, the parent may conversely be treated as a real party and not as a nominal party when filing as next friend of a child.¹⁴² The attorney may choose to have the parent and child both serve as fully named plaintiffs, or real parties in interest, with both family members directing the litigation. Alternatively, the attorney could file the complaint with the parent named as the next friend, acting on behalf of the child, and with the parent setting the representation goals and guiding counsel, even though the child is the real party in interest.¹⁴³ Either of these models contemplates the parent taking an active role in directing the attorney through the course of the federal litigation.

However, the parent or caregiver could agree to serve as a next friend on paper only, taking a more back seat role and acting primarily in the role of next friend as a formality to allow the minor to sue, while the child sets the goals and directs the attorney. If the adult simply plays the role of “representative” in name only in this way, such an arrangement might lead to confusion in the attorney-client relationship because the adult “representative” would still have *some* authority in the court’s eyes to make decisions by virtue of her role in the litigation and might not be easily relegated to a non-client role in which she only represents the child’s interests on paper.

A federal court adjudicating a special education complaint with no named adult representative might require the attorney to withdraw the complaint to add the parent or another adult representative as next friend or might appoint an adult representative to serve in a guardian ad litem role. When a next friend is not named, the court must appoint a guardian ad litem—or issue another appropriate order—to protect the minor who is unrepresented in an action.¹⁴⁴ If the attorney specifically wanted to exclude the parent from representation (for example, where a conflict existed between the parent and child), the attorney could identify another adult whose interests do not diverge with the child’s to serve as the guardian ad litem, at least on paper for purposes of the suit, whether or not that person

141. Moore, *supra* note 1, at 1829.

142. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 530-31 (2007).

143. Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 624 (1990).

144. FED. R. CIV. P. 17(c) (2011).

participates more directly in the attorney-client relationship. Upon learning of such an arrangement, a federal court might question the failure to include the parent in the litigation, but the attorney might be able to explain the divergence of interests and successfully bring the case with another adult serving as guardian ad litem or next friend.

As described above, it is unclear whether a minor child could bring a due process complaint under the IDEA. The Federal Rules of Civil Procedure clearly prohibit minors from bringing their own civil actions in federal court, without adult “representatives.”¹⁴⁵ Therefore, to allow the attorney to pursue a due process complaint or civil action if necessary, the involvement of an adult in the representation in some way—whether as a client or in a more limited role as “next friend” for purposes of the complaint—will often be necessary.

*D. Expectations of the Attorney-Client Relationship By the Student,
Parents and Other Individuals*

When a parent retains a lawyer regarding a matter in which a child's interests are involved, the parent will often select the lawyer, pay for the lawyer's services, and fully expect to direct the representation.¹⁴⁶ A model of representation in which the parent retains the attorney, but the attorney represents the child exclusively, might create confusion for all parties if the parent expects to be the decision-maker in the attorney-client relationship.¹⁴⁷ Unless the lawyer clearly states that she is not representing the parent, but rather only the child, “the parent's reasonable expectations and reliance may form the basis of an attorney-client relationship, despite the intent of the lawyer.”¹⁴⁸ A child may also assume that a lawyer stands united with her parent or even her school when the lawyer in fact represents her wishes. Alternatively, a child may assume that the lawyer is there to act on her expressed position when that is not the case and information she shares with the lawyer will be kept secret when it will not, or that the lawyer is obligated to act upon his request when she is not.¹⁴⁹

Through the language in a retainer or through conversation with the family, attorneys might similarly create expectations that differ from the actual model the attorney intends to use. For example, “a lawyer may end

145. *Id.* (detailing who may sue or defend on behalf of a minor).

146. Moore, *supra* note 1, at 1824; *see also* Petrerá, *supra* note 2, at 554.

147. Interesting ethical questions arise when a parent hires an attorney to represent a child. For a discussion of the related ethical questions in the delinquency context, see Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 300 (2005).

148. Tandy & Heffernan, *supra* note 20, at 1402.

149. Buss, *supra* note 21, at 1700.

up representing both a parent and child without she or the parties explicitly engaging in joint representation . . . many attorneys who represent parents believe that they are also implicitly attorneys for the child.”¹⁵⁰ Other special education attorneys may create expectations that they represent the child in special education matters because they describe themselves as child advocates when they are in fact retained by parents, while other attorneys purporting to represent the child may in fact see themselves as advocates for the parents or the entire family.¹⁵¹ Due to the confusion created by some attorneys in their self-characterization or through ambiguous or conflicting language in a retainer or in discussions with the client, either the parent, the child, or both individuals may be mistaken as to whom the attorney in fact represents.

Other individuals involved in addressing the child’s special education needs, such as school staff, an administrative due process hearing officer, or a judge may be expecting the attorney to take direction from the parent, not the child, for many of the same reasons. Moreover, school staff may be accustomed to parents serving in the client role when an attorney is involved and administrative hearing officers and judges may be expecting the attorney to represent the parent due to the limitations on a minor’s legal capacity to bring suit, as discussed above. If many parties expect the lawyer to represent the parent, a model of representation that excludes the parent may result in confusion and complications for the attorney.

Conversely, some parents may not expect to be intimately involved with the legal representation or with the special education process more generally, or may not feel empowered or able to participate actively. The level and quality of parental involvement can vary depending on the wealth and formal education of the parent and the child’s degree of disability.¹⁵² Parents who are marginalized by poverty or race, or “have other family stress or have limited English proficiency, continue to be disenfranchised in the special education process.”¹⁵³ However, low expectations on the part of parents as to their role in the attorney-client relationship can often be overcome with effective engagement and counseling of a parent client. Although mistaken beliefs and confusion about who is serving in the client role can and should be minimized by the attorney, the expectations of the parent, the student, school officials, hearing officers, and judges should be considered by an attorney in deciding which model of representation to use

150. Godsoe, *All in the Family*, *supra* note 20, at 17.

151. *See id.*

152. Rosenbaum, *supra* note 12, at 185 n.82.

153. NAT’L COUNCIL ON DISABILITY, IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: MAKING SCHOOLS WORK FOR ALL OF AMERICA’S CHILDREN 122 (1995).

in a particular special education case and how and to whom to provide clarification about who will be serving in the client role.

E. The Child's Characteristics and Capacity to Participate in the Attorney-Client Relationship

In deciding whether it is possible to establish an attorney-client relationship with a student in a special education matter, the attorney should consider the student's age, maturity level, and capacity to consent to representation and make decisions throughout the course of the case. A child with a disability is not necessarily unable to participate in the attorney-client relationship simply by virtue of her disability or age, even if she has been declared incompetent or would be considered incompetent under certain legal standards.¹⁵⁴ Even clients who might be considered or declared legally incompetent on the basis of disability can be capable of articulating their own concerns, understanding a legal problem, and assisting counsel in contributing to its solution.¹⁵⁵

While the American Bar Association Model Rules of Professional Conduct ("Model Rules") conflate minority of age and disability in one rule concerning representation of individuals with diminished capacity, the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases include some more nuanced, useful principles for special education attorneys to consider in regards to capacity and age, even outside of the abuse and neglect context.¹⁵⁶ These Standards of Practice do not assume that minority in and of itself is a disability, and instead reflect the heterogeneity of children.¹⁵⁷

154. Because the concept of incompetency is elusive and blurry, and the "disabled" population is heterogeneous, lawyers should not assume that all individuals with disabilities or with any particular disability have the same needs or that any individual is unable to carry out a typical lawyer-client relationship by virtue of her disability. Herr, *supra* note 143, at 618. Moreover, the term "incompetent," although used in the IDEA, no longer reflects the current understanding that capacity is contextual and is not an all or nothing proposition, as assumed by the notions of "competency" and "incompetency." Robert D. Dinerstein, *Guardianship and Its Alternatives*, in *ADULTS WITH DOWN SYNDROME* 253, 237 (Siegfried M. Pueschel ed., 2006). Moreover, current understanding of capacity recognizes that capacity can be enhanced for many people with appropriate supports to assist them in decision-making. ELLMANN ET AL., *supra* note 36, at 110.

155. Mickenberg, *supra* note 57, at 626.

156. AM. BAR ASS'N, *STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES* (1996), *available at* <http://www.abanet.org/child/repstandwhole/pdf>.

157. *Id.* at cmt. B-3. The commentary to the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases advocates for an individualized assessment of each child's competence to determine her position with respect to different issues: "These Standards do not accept the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined. Rather, disability is contextual, incremental,

Although children may have certain cognitive and psychosocial limitations that can frustrate their full participation in the attorney-client relationship, “there is no magical age at which young people become capable of making good decisions.”¹⁵⁸ Zealous advocacy on behalf of a child client requires the attorney’s willingness to defer to that client, but also may depend on the child’s ability to make and communicate the necessary decisions.¹⁵⁹ Some attorneys view maturity on a sliding scale; the more mature the client, the more weight is given to the child’s preferences.¹⁶⁰ Attorneys may be particularly challenged in deferring to children, who may have “a limited fund of information, sometimes lack the capacity to engage in effective cognitive reasoning, often exercise poor and/or short-sighted value judgments, and frequently err in predicting future outcomes.”¹⁶¹ Generally, lawyers struggle with representation when a client vacillates frequently or if the client is overly dependent on the lawyer and seeks to cede all decisions to the lawyer. These challenges can arise even more frequently when the client is a child or a person with a disability.¹⁶² Children may also be prone to particular kinds of mistakes, including a preference for short-term over long-term thinking.¹⁶³

However, with appropriate engagement and counseling by their attorneys, many children will be able to effectively make certain decisions and direct their attorneys during the course of a case. The attorney should take care to ensure that the child understands what this relationship means. If the child is aware that she has an attorney acting on her behalf and at her direction, she can better take advantage of the lawyer’s services by bringing issues to the lawyer’s attention, discussing options, and sharing sensitive information.¹⁶⁴ The attorney should also play an integral role in enhancing the child’s ability to participate effectively as a client.¹⁶⁵ For example, the child’s decision-making capacity is promoted when an attorney effectively earns the child client’s trust, helps the child client

and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.”

158. Henning, *supra* note 147, at 317.

159. *Id.* at 270-71.

160. Angela D. Lurie, *Representing the Child Client: Kids Are People Too*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 233-34 (1993).

161. Henning, *supra* note 147, at 271.

162. Herr, *supra* note 143, at 614.

163. Peter Margulies, *The Lawyer as Caregiver: Child Client’s Competence in Context*, 64 FORDHAM L. REV. 1473, 1475 (1996).

164. Buss, *supra* note 21, at 1745.

165. Henning, *supra* note 147, at 272-73.

understand her directive role, and empowers the child client to make her own decisions and not simply defer to the lawyer.¹⁶⁶ If the child understands that she has an advocate who will press her position against all odds, she will discover and use her own voice and her own power.¹⁶⁷

Where a client has limitations related to age, maturity, or disability, the attorney may struggle with whether to act on the client's expressed interests or best interests. For example, where the attorney does choose to represent the child exclusively, what position will the attorney take if that child wishes to pursue a course of action that the attorney believes to be detrimental? Will the attorney pursue the child's expressed interests or the action that the attorney believes to be in the child's best interests? In any lawyer-client relationship, but especially where a client's capacity to communicate or make decisions is limited by age or disability, a lawyer can struggle in deciding what action to take if the client's goals or the means to achieve them seem to be at war with the client's interests.¹⁶⁸ In other areas of law in which an attorney represents a child, there may be confusion as to whether the attorney represents the child's expressed wishes or best interests.¹⁶⁹ Traditionally, a guardian ad litem is charged with advocating for the best interests of the child, while counsel for a child, such as counsel appointed in a delinquency matter, will usually be charged with advocating for the child's expressed wishes; however, attorneys may not be clear on which model to use in different situations.¹⁷⁰

Proponents of a best interests model of representation of children argue that deference and conclusive weight should not be given to a child's decision, and that good lawyers employ their wisdom to advise child-clients to seek what is best for them, rather than obtaining a result the client wants, but should not have.¹⁷¹ However, if the attorney represents the student exclusively as her attorney in a special education matter, without different guidance from a judge who may have appointed the attorney or from relevant court rules or practice standards, ethical rules require that the attorney maintain as normal an attorney-client relationship as possible, even if the child is a minor or has diminished capacity.¹⁷² This obligation

166. *Id.* at 272-73, 319.

167. Buss, *supra* note 21, at 1745.

168. Herr, *supra* note 143, at 614-15.

169. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 36-40 (3d ed. 2007); Buss, *supra* note 21, at 1700-05 (discussing the debate that generally divides people into two camps: those favoring a "traditional attorney's" role—representing what the child client wants, or the child's "expressed interests"—and those favoring a guardian ad litem's role—representing what the lawyer determines to be in the child's "best interest").

170. PETERS, *supra* note 169, at 36-40.

171. Lurie, *supra* note 160, at 208.

172. D.C. R. OF PROF'L CONDUCT 1.14(a) (2011).

means that the attorney should pursue the student's expressed interests wherever possible, even if the student's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority or disability or both.¹⁷³ The principle of "normalization" requires that attorneys work directly with their clients with disabilities in a "normalized," or "typical" attorney-client relationship by involving them in the representation and consulting them.¹⁷⁴ Because individuals with disabilities should be afforded culturally normative ends through culturally normative means, they are entitled to representation by attorneys who are diligent, competent, and communicative, just like individuals without disabilities.¹⁷⁵

Lawyers have sometimes acted swiftly to waive the rights of clients with mental disabilities or acted on their own volition on decisions that should belong to the client.¹⁷⁶ Lawyers for individuals with disabilities often exert considerable control over the lives of their clients, and there is a high risk that they may dominate their clients and usurp decisions they would reserve for clients without disabilities, exhibiting paternalism that draws on images and stereotypes.¹⁷⁷ Lawyers may also be tempted to set goals for the representation and make important decisions for their clients rather than deferring to their clients or engaging them in this process. Client-centered counseling can be time consuming and challenging, but the challenges for attorneys may be magnified where the client has cognitive limitations or emotional instability,¹⁷⁸ leading some attorneys to decline to make the necessary effort to engage the client. These risks may be heightened when the client is a child with a disability—or a parent with a disability—to whom an attorney might be hesitant to defer when the stakes are as high as a child's education or safety at school.

173. *Id.*

174. Mickenberg, *supra* note 57, at 626. Current terminology in the disability rights field seeks to avoid the normal-abnormal dichotomy, and instead refers to the typicality. Similarly, the adaptation of Rule 1.14 of the Model Rules by the District of Columbia Rules of Professional Conduct refers to the "typical" attorney-client relationship, rather than the "normal" attorney-client relationship. D.C. R. OF PROF'L CONDUCT 1.14(a).

175. Herr, *supra* note 143, at 619.

176. Legal representation on behalf of individuals with disabilities has been plagued historically with inadequate effort, unjustified compromise of clients' rights, and distorted perception of legal ethics. A number of concerns are raised when attorneys are in a position in which they are making decisions that are properly those of the client. One of the principal checks on inadequate assistance of counsel is eliminated. Mickenberg, *supra* note 57, at 627.

177. Herr, *supra* note 143, at 611.

178. *Id.*; see also ELLMANN ET AL., *supra* note 36, at 110 (emphasizing the importance of client-centered representation and engagement, especially with clients who may articulate their concerns, or recount their stories, in a less-straightforward way than would so-called typical clients).

The Model Rules emphasize the importance of client decision-making and remind lawyers that a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.¹⁷⁹ The comments to Rule 1.14 specifically note that children as young as five or six, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.¹⁸⁰ This guidance can be useful in the special education context as well, and weigh in favor of a model of representation based on the expressed interests of the client or clients, rather than the best interests as determined by the lawyer, even if the client is a child—or parent—with a disability.

Although the Model Rules call for normalization in the attorney-client relationship with a minor or person with a disability, they do allow for some deviation from an expressed interests model in certain situations. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in her own interest, the lawyer can take reasonably necessary protective action.¹⁸¹ Such action may include consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.¹⁸²

This approach may involve attorneys using “substituted judgment,” or making decisions on behalf of an incapacitated client based on what the client would decide if the client were competent.¹⁸³ The substituted judgment model differs from best interests advocacy in its aim of honoring client loyalty and dignity by replicating the client's wishes, as opposed to emphasizing the attorney's wishes, to the greatest extent possible.¹⁸⁴ This

179. D.C. R. OF PROF'L CONDUCT 1.14(a) cmt. 1.

180. *Id.*

181. D.C. R. OF PROF'L CONDUCT 1.14(b) cmt. 5.

182. *Id.* In taking any protective action, the lawyer should be guided by the wishes and values of the client to the extent known and the client's best interests and ensure that any intrusion into the client's decision-making autonomy is as minimal as possible, maximizing client capacities and respecting the client's family and social connections.

183. Henning, *supra* note 147, at 303. The attorney would attempt to formulate a position based on what the child-client would want if he were able to adequately comprehend the situation and verbalize his opinions, considering any information obtainable from the child, as well as the opinions of individuals who know the child, similarly situated individuals, and any professionals who could shed light on the child's interests. Lurie, *supra* note 160, at 234-35. The attorney would determine “what choices a competent person with the characteristics, tastes, preferences, history and prospects the incompetent would make to maximize his interests or wants—both those he presently has and those he is likely to have in the future.” *Id.* at 235 (quoting John A. Robertson, *Organ Donations By Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 65 (1976)).

184. Henning, *supra* note 147, at 303.

model purports to be less vulnerable to the influence of the attorney's own personal, subjective judgment as to what is best for the client.¹⁸⁵ Contrary to a best interests judgment, substituted judgment "commends itself simply because of its straightforward respect for the integrity and autonomy of the individual," focusing not on what the child *should* want, but what the child *would* want.¹⁸⁶ While the line may be blurry, when the attorney resorts to protective measures in the limited circumstances provided for by the Model Rules, the attorney should take care not to decide what *she* would do in that situation or what she thinks is best for the client, but instead should use a substituted judgment model to do *what the client would want* if he were able to decide for himself and express that decision.¹⁸⁷ When an attorney substitutes her own judgment for that of a client's, she should do so as thoughtfully as possible, given that such decision-making involves a high degree of speculation, as well as arbitrariness.¹⁸⁸

If a guardian or other representative has already been appointed for the client, the lawyer should ordinarily look to that representative for decisions on behalf of the client where protective action is required.¹⁸⁹ In matters involving a minor, whether the lawyer should look to the parents or natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.¹⁹⁰ In a special education matter, depending on the attorney's interpretation of the IDEA, the parent may already be the recognized representative of the student under the statute, meaning that the lawyer would look to the parent if protective action is required. Generally, the unique significance of the parent under special education law further complicates the lawyer's assessment of whether he may represent the student independently without involvement of the parent and without regard to the wishes of the parent, or whether the parent could or should play a role where the child is the client and protective action is required.¹⁹¹

185. *Id.*

186. Lyon, *Speaking for a Child*, *supra* note 46, at 702 (quoting Superintendent of Beldertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1990)).

187. Lurie, *supra* note 160, at 235. For a comprehensive discussion of the application of the substituted judgment doctrine to representation of children, see generally Lyon, *Speaking for a Child*, *supra* note 46.

188. Henning, *supra* note 147, at 305.

189. D.C. R. OF PROF'L CONDUCT 1.14(b) cmt. 4 (2011).

190. *Id.*

191. Some scholars argue that school boards should seek the appointment of a guardian ad litem for a special education student whose desires conflict with those of their parents, essentially attempting to sever the interests of the children from those of their parents. Charles J. Russo, *The Rights of Non-Attorney Parents Under the IDEA: Winkleman v. Parma City Sch. Dist.*, 221 EDUC. L. REP. 1, 15 (2007). Such a system could potentially provide representation of the substantive interests of students at IEP meetings, although a guardian ad litem is not necessarily charged with advocating for

Attorneys deciding on a model of representation in a special education case should take into account the child's age, maturity and capacity for decision-making, but should realize that attorneys can take steps to enhance the child's capacity. Once the child is included as a client, attorneys should follow the guidance of the Model Rules in maintaining as normal an attorney-client relationship as possible. If protective measures are necessary, substituted judgment is preferable to advocacy based on the attorney's determination of best interests. If attorneys suspect that they might have to resort to protective measures, they should consider including a parent in the representation, barring any conflicts of interest or inability or unwillingness on the parent's part to participate, so as to avoid a situation in which the attorney is in fact the individual driving the decision-making.

F. Children Who Have Reached the Age of Majority

Under the IDEA, when students reach the age of majority, depending on state law, they may become the educational decision-makers and retain all of the rights that their parents previously possessed under Part B of the IDEA.¹⁹² States have discretion as to whether to allow the transfer of rights to occur at the age of majority, and that age is based on the laws in each individual state.¹⁹³ In many jurisdictions, such as the District of Columbia and North Carolina, the age of majority is eighteen.¹⁹⁴ The rights accorded to parents also transfer to children who are incarcerated in an adult or juvenile state or local correctional institution.¹⁹⁵ Specifically, all of the rights accorded to the parent under Part B of the IDEA transfer to the child.¹⁹⁶ This transfer includes, but is not limited to, the right to participate in IEP meetings, the right to participate in placement decisions, the right to provide informed consent for evaluations, and the right to present a

the expressed desires of a child. Instead, guardians ad litem usually pursue the best interests of the child, which are grounded in the guardian ad litem's own views of the child's best interests. This type of system would conflict with principles of client-centeredness and maintenance of a normalized attorney-client relationship, as required by the Model Rules.

192. 20 U.S.C. § 1415(m) (2006); 34 C.F.R. § 300.520 (2011).

193. 20 U.S.C. § 1415(m); 34 C.F.R. § 300.520.

194. N.C. DEP'T OF PUB. INSTRUCTION, POLICIES GOVERNING SERVICES FOR CHILDREN WITH DISABILITIES, N.C. § 1503-4.1(c) (2010); D.C. MUN. REGS., tit. 5, § E-3023.1 (2010).

195. 20 U.S.C. § 1415(m)(1)(D); 34 C.F.R. § 300.520(a)(2).

196. Not later than one year before the student reaches the age of majority, the school district must inform the student of those rights under the IDEA, if any, that will transfer when the student reaches the age of majority. The IEP must also include a statement that the student was informed about this transfer. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc); 34 C.F.R. § 300.320(c).

complaint for a due process hearing.¹⁹⁷ When the transfer of rights occurs, the school district is required to provide notice of the transfer to both the student and the parent. Once the transfer of rights occurs, the school district must continue to provide legally required notices to the parent and also provide them to the adult student. This obligation includes notices such as prior written notices and notices about IEP meetings.¹⁹⁸ If the rights previously belonging to the parent under the IDEA have in fact transferred to a student, the attorney should consider representing the student exclusively, especially given that the parent does not retain any rights under the IDEA in that situation.

However, the IDEA explicitly provides that the rights accorded to parents do not transfer to children who have been determined incompetent under state law when they reach the age of majority.¹⁹⁹ Instead, the parents retain their own rights under the IDEA.²⁰⁰ Even where a child has not been deemed incompetent under state law, if that child does not have the ability to provide informed consent with respect to her educational program, there must be state-established procedures for appointing the parent of the child or, where unavailable, another appropriate individual, to represent the child's educational interests when the child reaches the age of majority through the duration of her special education eligibility.²⁰¹ Neither the IDEA nor its accompanying regulations provide a standard for making this determination.²⁰² Where a parent or other guardian retains rights under the IDEA even after the child reaches the age of majority, the attorney should include the parent in the representation in some way, and also consider including the adult student in the representation, barring any conflicts of interest.

Local statutes and regulations can assist attorneys in determining if their jurisdiction has adopted the transfer of rights provision of the IDEA.²⁰³ If the transfer of rights is applicable in an attorney's jurisdiction, then the attorney needs to know the specific age of majority and how an individual is deemed incompetent in that state. In some states, like North Carolina, the standard for the determination of competency is included in the state's special education statutes or regulations.²⁰⁴ If this information is not

197. 20 U.S.C. § 1415(m)(1)(B); 34 C.F.R. § 300.520(a)(1)(ii).

198. 20 U.S.C. § 1415(m)(1)(A).

199. 20 U.S.C. § 1415(m)(1); 34 C.F.R. § 300.520(a).

200. 20 U.S.C. § 1415(m)(2).

201. 20 U.S.C. § 1415(m)(2); 34 C.F.R. § 300.520(b).

202. For a comprehensive analysis of the transfer of rights at age of majority, including the exceptions for students found incompetent or unable to provide informed consent with respect to their educational programs, see Rebore & Zirkel, *supra* note 78.

203. *See, e.g.*, D.C. MUN. REGS., tit. 5, § E-3023.1 (2011).

204. POLICIES GOVERNING SERVICES FOR CHILDREN WITH DISABILITIES, N.C. §

included in these sources, then the attorney will have to research related statutes and regulations, such as those that provide for the appointment of a guardian for an individual deemed to lack capacity.

Because a student to whom rights are transferred at the age of majority becomes the holder of educational rights instead of the parent, an attorney providing special education representation in this situation should in most circumstances represent the student exclusively because the parent retains no rights under the IDEA.²⁰⁵ If the attorney is representing the parent exclusively, or the parent and child jointly before the child has reached the age of majority, and there is a possibility that the representation may be ongoing when the student reaches that age, the attorney should consider planning with the parent and student at the outset of the representation how the representation will change, if at all, when the student reaches the age of majority. For example, the attorney and parent may decide that the attorney will terminate representation of the parent at that time and begin representing the student exclusively or the parties may agree that the student should seek separate representation from another attorney at that time.

In determining with the parties if and how the representation might change once the student reaches the age of majority, the attorney should consider any relevant conflicts issues. If the attorney represents the parent while the child is a minor, the attorney retains some loyalty to the parent as a former client even after the representation of the parent is terminated.²⁰⁶ The attorney should also consider any practical challenges that might be raised by a change in representation from the parent serving as the client or parent and student jointly serving as clients to a model in which the student is the sole client after the age of majority. A student might be accustomed to her parent working with the lawyer and making educational decisions. She might not easily assume the client role when she formally becomes the exclusive client and similarly, the parent might not easily cede the decision-making authority. If a student who reaches the age of majority still wants the parent to remain involved in the legal matter, she can choose to include the parent informally or may explore the option of a power of attorney ceding special education or general educational decision-making rights to the parent, even though these rights belong to the student at that time. However, such an arrangement might not be accepted by all jurisdictions.

1504-1.21(b) (June 2010), *available at* <http://www.ncpublicschools.org/docs/ec/policy/policies/policies-62010.pdf>.

205. 20 U.S.C. § 1415(m)(1)(B).

206. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2011).

G. Conflicts of Interest

In many cases, both the parents and child will be working together to secure the special education services and accommodations that the child needs to make academic progress. The interests of both parents and child will most often be aligned in a special education case, especially given that parents will typically act in the best interests of their children.²⁰⁷ Where parents or caregivers adequately represent the interests of the child, independent representation might not be necessary.²⁰⁸ However, in some cases, the interests of a parent or guardian might conflict with those of the child or may even trample on those rights, leading to concerns about conflicts of interest within joint representation.²⁰⁹

Whenever legal representation in a single matter involves multiple parties, conflicts of interest may arise.²¹⁰ In special education cases, conflicts of interest could arise among multiple parents or caregivers being represented by an attorney in a special education matter. Conflicts might also arise between a parent and child, particularly where a teenager is able to communicate her wishes and interests. Examples of such conflicts include situations in which a parent is acting against a child's legal interests, the parent and child disagree over educational goals and services, or a parent is unable or unwilling to advocate for the child's educational

207. “[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (leaving the decision to commit a child to a state mental institution largely with the parents); see also Lois A. Weithorn, *Children's Capacities for Participation in Treatment Decision-Making*, in *EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW* 22, 22 (Elissa P. Benedek & Diane H. Schetky eds., 1985) (explaining parents typically make decisions in the ‘best interests’ of their children).

208. Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinator Council*, 27 *FAM. L. Q.* 417, 418 (1993).

209. One domestic relations court opined, “[W]e have long noted in the reported cases dealing with children's rights a tendency to identify them with parental rights, i.e. to regard them as identical. This is quite understandable, but not always correct. One doesn't have to work in a family court very long to learn that in countless circumstances a juvenile's rights and interests . . . are at sharp variance with those of his parents.” *In re Clark*, 185 N.E.2d 128, 130 (Ohio Com. Pl. 1962) (ordering a blood transfusion for the child despite the parent's religious beliefs).

210. If a special education attorney represents the parent alone and the attorney and parent are clear that the parent alone will direct the representation, then there is no need for an analysis of conflicts of interest, regardless of any disagreements or other conflicts of interests between parent and child, because the parent's wishes will control. Moore, *supra* note 1, at 1824. Conflicts of interest with the child may present challenges more broadly, but would generally not affect the representation of the parent or alter the attorney-client relationship where the parent is the client and directs the representation. The same would be true in regards to the attorney's loyalty to the child and her expressed interests, regardless of a disagreement by the parent, if the child were the sole client. If the attorney represents either the parent or the child exclusively, she has an ethical responsibility to advocate zealously to pursue the singular client's expressed wishes alone. MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 2 (2011) (“As advocate, a lawyer zealously asserts the client's position . . .”).

rights.²¹¹ While conflicts between parents and children are far more likely in a family court setting that might involve abuse, neglect, confinement or institutionalization as a result of delinquency or mental illness, custody, or disputes about medical treatment, conflicts may similarly arise in the special education context between the goals, interests and values of the child and a parent or parents.²¹² For example, a parent could seek to commit a child to a residential treatment facility through the special education process in order to end the psychological and financial strain of keeping the child at home or simply because the parent is unaware of alternatives to institutionalization.²¹³ In these cases, the parent's goal might conflict with the child's liberty interests or with the child's expressed desire to remain at home and in the community.²¹⁴

Where the child has special education needs, but abuse, neglect, truancy, and/or delinquency are also at issue, conflicts may be more likely to arise. For example, the facts underlying a juvenile status offense charge, such as truancy from school, running away from home, or misbehavior at school and at home, can lead to a conflict of interest for an attorney seeking to represent both parent and youth.²¹⁵ A teenager facing truancy charges might have missed school at the parent's direction to care for younger siblings, or the refusal to obey the parent might stem from domestic

211. Godsoe, *All in the Family*, *supra* note 20, at 21-26. Godsoe advocates for a family representation model in special education cases in which the attorney represents the family as a whole, but takes care to clarify that parents *and* child are the client. She argues that this model allows the attorney to take a more communal view of the case, incorporating the parties' interests, their concern for other family members and the parent-child dyad as a whole. She distinguishes her model from those in which parents' attorneys ignore the child's view and those in which children's attorneys fail to make use of parents' knowledge about their children. Moreover, she advocates that the attorney has a special duty to the child and should not follow the parent's direction without an independent assessment of the child's legal interests and any potential conflicts. Pursuant to the proposed model, if the lawyer believes the parent is acting so as to infringe upon the child's rights, the lawyer should cease communal representation and take protective action such as using a best interests model or substituted judgment, as contemplated by Model Rule 1.14, or communicate the lawyer's concerns to a court or hearing officer, even if they are adverse to the parent's interests, to safeguard the threatened interests of the child. *Id.* at 37-48. Her proposed model is innovative and draws on other areas of law in which collaborative family representation is used, such as family business, estate planning, and elder law. However, if an attorney is in a position to withdraw from representation of the parent to take protective action on behalf of child, there is a risk that the attorney will be inserting her own subjective view of the child's legal interests, at the expense of the parent's right to make special education decisions and at the expense of the parent's opportunity to maintain the representation to which the attorney originally committed.

212. Herr, *supra* note 143, at 628.

213. Mickenberg, *supra* note 57, at 628.

214. *Id.*

215. Tulman, *Special Education Advocacy and Status Offense Charges*, *supra* note 22, at 100.

violence between the parents or from direct abuse of the youth.²¹⁶ Although separate representation could avoid issues raised by such conflicts, joint representation in the special education matter might allow the attorney to assist the youth and the parent in addressing the underlying issues that led to a status offense.²¹⁷

Under a standard conflicts analysis, the ethical propriety of joint representation of a parent, multiple parents or caregivers, and/or a child should be determined prior to the initiation of the representation by identification of any potentially impermissible conflicts, a determination of whether any such conflicts are waivable, and the procurement of voluntary consent after disclosure for those conflicts that are waivable.²¹⁸ The requirement that a client have the “legal capacity to give consent” in such situations may be problematic for a young child or a child with severe disabilities who is unable to express her wishes.²¹⁹ Where the potential for conflict seems remote, a parent is not prevented from consenting to joint representation on behalf of both herself and her child,²²⁰ but the attorney could not ethically allow a parent to waive a conflict on behalf of a child and pursue joint representation where the conflict exists with that same parent.

Beyond the initial conflicts of interest analysis at the point the representation begins, the attorney must remain alert as to any concurrent conflicts of interest that might arise during the course of joint representation. The Model Rules provide that a lawyer should not represent a client if the representation involves a concurrent conflict of interest, which happens if the representation of one client is directly adverse to another client or there is a significant risk that the representation of a client will be materially limited by the lawyer’s responsibilities to another client.²²¹ The lawyer can proceed with the representation of a client, despite a concurrent conflict of interest, if the lawyer reasonably believes that she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another represented by the lawyer in the same proceeding before a tribunal, and each affected client gives written informed

216. *Id.*

217. *Id.*

218. Moore, *supra* note 1, at 1831.

219. *Id.* at 1835; *see also* Herr, *Legal Representation*, *supra* note 36, at 77-94 (discussing generally the capacity of individuals with intellectual disabilities to enter into and sustain an attorney-client relationship).

220. Moore, *supra* note 1, at 1839.

221. MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2010).

consent.²²² As described above, there may be similar concerns about a child's ability to consent to continued representation when a concurrent conflict of interest arises.²²³

Pursuant to the Supreme Court's decision in *Winkelman*, a parent representing her own interests is likely also representing her child's interest in a free appropriate public education.²²⁴ Although the Court in *Winkelman* cited to the First Circuit's decision in *Maroni v. Pemi-Baker Regional School District*,²²⁵ the Court did not resolve the First Circuit's concern that the recognition of parents as aggrieved parties is problematic because "[c]hildren whose interests are advanced by parents who sue pro se may not have the best advocates. Parents may be emotionally involved and not exercise rational and independent judgment."²²⁶ Sometimes, parents might "experience anger toward the school officials, each other and even the child."²²⁷ It remains unclear what would happen if a child in need of special education services alleged that her parent failed to represent her interests adequately or ignored her wishes in developing her IEP.²²⁸ The rights of a parent and child under the IDEA are intertwined, but also distinct.²²⁹ In maintaining this paradox, the *Winkelman* decision did not clarify what would happen if a special education student who is a minor disagrees with her parents, and it is uncertain whether the parent and child would be able to litigate their claims separately.²³⁰ The status of a minor

222. *Id.* at R. 1.7(b).

223. If the lawyer believes there is a concurrent conflict of interest, as defined in Model Rule 1.7(a) and discussed above, but chooses to proceed in representation and seek informed consent from both the parent and student to continue the multiple representation, the attorney needs to make both parties aware of the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 cmt. 18.

224. Logan Steiner, *Playing Lawyers: The Implications of Endowing Parents with Substantive Rights Under IDEA in Winkelman v. Parma City School District*, 127 *S. Ct.* 1994 (2007), 31 *HARV. L. & POL'Y REV.* 1169, 1180 (2008).

225. 346 F.3d 247, 258 (1st Cir. 2003).

226. *Id.* at 258.

227. Petretera, *supra* note 2, at 544 (citing PETER W. D. WRIGHT, REPRESENTING THE SPECIAL EDUCATION CHILD: A MANUAL FOR THE ATTORNEY AND LAY ADVOCATE (Jan. 21, 2009), http://www.wrightslaw.com/advoc/articles/attorney_manual.html).

228. Russo, *supra* note 191, at 15.

229. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531-32 (2007).

230. It is possible that a guardian ad litem or other next friend who is not the parent could be appointed where a parent is not adequately representing the child's interests or where there may be a conflict of interest. *See, e.g.*, *Muse B. v. Upper Darby Sch. Dist.*, No. 06-CV-00343, 2007 WL 2973709 (E.D. Pa. Feb. 14, 2007) (appointing a guardian ad litem to represent the child's special education interests when the parent had repeatedly fired counsel); *see also* Herr, *Legal Representation*, *supra* note 36, at 85 (citing *Developmental Disability Advocacy Center, Inc. v. Melton*, 689 F. 2d 281, 285 (1st Cir. 1982)) ("[A]lthough the parent of a child with a disability will generally

student's rights related to the contents of her IEP, apart from the wishes of her parents, is uncertain. If students under the age of majority do not have their own rights under the IDEA, there might be a concern that special education students who are minors are "harnessed" to the decisions of their parents without opportunities to express their own desires.²³¹

Where the attorney jointly represents the parent and child, the retainer agreement should contain an explanation regarding any potential conflict of interest, including the possibility that they might disagree on the objectives of the representation.²³² The retainer agreement should also describe the consequence, such as withdrawal of representation of both parties, should an unresolvable and unwaivable conflict occur. Attorneys should also check the rules of professional responsibility in their own state to see if those rules provide additional guidance for common representation of both parent and student.

An attorney who jointly represents a parent and child can cite to the intertwined nature of their special education rights in support of this model. Conversely, concerns that a child's voice will not be heard or could even be silenced in joint representation, as well as concerns about other types of conflicts of interest between parents and child, can be used to justify individual and sole representation of a child by a special education attorney. Where an attorney who has instead decided to jointly represent a parent and child is confronted with this type of conflict, in many situations, the attorney should counsel the parent and child about the child's rights and the alternatives and help the parent and child to find a mutually agreeable solution. For example, where a more restrictive alternative such as a residential treatment facility might be of interest to a parent, the parent may change her mind once she learns that the child has a right to be educated in the least restrictive appropriate environment and that the attorney can use that legal mandate to advocate for additional services on the IEP or a new day school placement that would allow the child to stabilize and remain in the community. Special education attorneys who do represent the parent and child jointly are often able to mediate such conflicts between parents

receive preference over an outsider's proposed representation, an unrelated next friend, guardian ad litem, or more distant relative may be appointed when the parent has an interest that may conflict with the interests of the minor that parent is supposed to represent.").

231. Russo, *supra* note 191, at 15 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 245-46 (1972) (Douglas, J., dissenting in part)).

232. Tulman, *Special Education Advocacy and Status Offense Charges*, *supra* note 22, at 100 n.64. The retainer agreement probably should contain an explanation regarding the potential conflict of interest between the parent and the child, including the possibility that they might disagree on the objectives of the special education representation. An irresolvable and unwaivable conflict likely would lead to the withdrawal by the attorney from the representation. *Id.*

and their children when they do arise.²³³ However there will be times when a conflict between multiple clients in a special education case will be irresolvable.²³⁴ The lawyer may be forced to withdraw if the common representation is not effective.²³⁵ Due to the difficulty of securing legal representation in special education matters, withdrawal often leaves the family with no representation whatsoever. In determining whether to jointly represent both parties, the lawyer should keep in mind that the family members may not be able to secure alternate representation if the common representation fails.²³⁶

H. Attorney-Client Confidentiality

The attorney-client privilege prohibits an attorney from revealing information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.²³⁷ Between commonly represented clients, the prevailing rule is that the attorney-client privilege does not attach.²³⁸ Therefore, when an attorney is jointly representing the parent and child, communications between the attorney and the parent are not confidential as to the child, and communications between the attorney and the child can similarly be shared with the parent. The parent and child will need to clearly understand this alteration to the traditional attorney-client privilege prior to agreeing to representation. Because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation and the right to use that information to the client's benefit, common representation will be problematic if one client asks the lawyer not to disclose to the other client information relevant to the representation.²³⁹ As a result, if the student or parent

233. Interview with William Koski, Eric and Nancy Wright Professor of Clinical Education and Director of Youth and Education Law Clinic, Stanford Law School (October 22, 2011); Interview with Dean Rivkin, *supra* note 85.

234. It may also be difficult for the lawyer to remain impartial when there are conflicts. When the lawyer agrees with one client more than the other and when it is unlikely that impartiality can be maintained, representation of multiple clients is improper. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2010). Unless otherwise established at the outset of the representation, an irresolvable and unwaivable conflict likely would lead to withdrawal from representation by an attorney jointly representing parent and child in a special education matter. Tulman, *Special Education Advocacy and Status Offense Charges*, *supra* note 22, at 100 n.64.

235. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29.

236. *Id.* Moreover, a lawyer cannot undertake common representation when contentious negotiations between the clients are imminent or contemplated. *Id.*

237. *Id.* at R. 1.6(a). The Model Rule also provides for additional narrow limited circumstances in which the attorney may reveal confidential information related to the representation.

238. *Id.* at R. 1.7 cmt. 30.

239. *Id.* at cmt. 31.

discloses information relevant to the representation, and requests that the lawyer not share this information with the other party, the lawyer will need to end the common representation, unless the lawyer appropriately counsels the disclosing client, who then decides that sharing the information with the other party is acceptable.

Attorney-client confidentiality may weigh in favor of the attorney choosing to represent the child exclusively, where that protection might incentivize the child to be more open to sharing information with the attorney. If the attorney suspects that the child will be hesitant to confide in the attorney out of concern that the information might be shared with a parent or school official, the attorney can overcome that obstacle through the establishment of the attorney-client privilege with a child client and by ensuring that the child, where she is the sole client, understands the confidentiality principle.²⁴⁰ Where the attorney represents a child independently and exclusively, the child client may still choose to have parents, family members, or other individuals participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege and those communications will remain privileged.²⁴¹ Even where the client is exclusively the child, with the child's permission, the lawyer may improve the effectiveness of the representation in this way by communicating with parents or caregivers, who often are the most important individuals in the child's life, without jeopardizing the attorney-client privilege.²⁴² However, even where the lawyer communicates with other individuals, the lawyer must keep the client's interests foremost and look to the child and not family members to make decisions on the child client's behalf.²⁴³

I. The Child's Involvement in Child Welfare Proceedings

A family's involvement in the child welfare system may influence an attorney's decision as to the model of representation to use in a special education matter. Children involved in abuse/neglect proceedings often have unmet special education needs and may require legal assistance to secure appropriate special education services. Those children who have been removed from their parents and placed in foster care in particular often perform below grade level academically and receive special

240. For a discussion of the importance of attorney-client confidentiality with child clients in special education cases, see generally Petrerá, *supra* note 2, at 548-52.

241. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2010).

242. Gottlieb, *supra* note 53, at 1273.

243. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2010).

education services at higher rates than the general population.²⁴⁴ Many of these are not receiving the appropriate special education and other educational services needed to address their difficulties.²⁴⁵ Generally, the educational needs of children in foster care go unmet because of the instability they experience as a result of multiple placements and the lack, at times, of adults to take responsibility in helping these children be successful in school. Children in foster care are also more likely to have their special education needs in particular go undetected due to the absence of an effective advocate or “parent.”²⁴⁶

When children involved in the child welfare system require special education legal representation, the attorney faces the challenge of determining which individual or individuals hold the educational rights for the child, or who can serve as the “parent” under the IDEA. Students involved in the child welfare system may not have long-standing relationships with an adult figure as a result of movement among foster care placements and schools. Although the statute provides a number of options as to who can serve as a “parent,” such as an appointed surrogate²⁴⁷ or a foster parent where the latter is not prohibited by state law,²⁴⁸ where the “parent” is a new foster parent or an appointed surrogate, that individual may not know the child at all. Even where there is a caring and steady adult involved in the life of the child, more pressing concerns such as safety, shelter, and permanency might trump the importance of advocacy regarding the child’s educational needs.²⁴⁹ Similarly, an individual who retains educational decision-making rights, such as a parent for whom those rights technically have not been limited, may not have physical custody at the start of the special education representation or maintain physical

244. Kathleen Kelly, *The Education Crisis for Children in the California Juvenile Court System*, 27 HASTINGS CONST. L.Q. 757, 759 (2000). As many as 75% of youth in foster care perform below grade level, 50-80% have been retained at least one year in school, and more than 50% of children in foster care do not graduate from high school. *Id.* at 759.

245. Brandy Miller, *Falling Between the Cracks: Why Foster Children Are Not Receiving Appropriate Special Education Services*, 5 WHITTIER J. CHILD & FAM. ADVOC. 547, 548 (2006) (citing Kathleen Kelly, *The Educational Crisis for Children in the California Juvenile Court System*, 27 HASTINGS CONST. L.Q. 757, 757-58 (2002)).

246. Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL’Y REV. 81, 106 (2000); Miller, *supra* note 245, at 558-59.

247. 20 U.S.C. § 1415(b)(2)(A) (2006).

248. 20 U.S.C. § 1401(23)(A); *see* 34 C.F.R. § 300.20(b)(1)-(2) (2011) (limiting the circumstances when a foster parent may act as a parent, if the following criteria are met: (1) the educational rights of the natural parents have been extinguished under state law; (2) the foster parent has an ongoing, long-term relationship with the child; (3) the foster parent is willing to make educational decisions on behalf of the child; and (4) there is no conflict with the child’s interest).

249. Valverde, *A New IDEA*, *supra* note 61, at 16.

custody throughout the duration of the representation.

Many children involved in abuse/neglect proceedings will be appointed counsel or guardians ad litem in connection with those proceedings who can advocate for a child's educational needs.²⁵⁰ However, frequently faced with high case loads, intensive demands for advocacy around safety and permanency issues, and a lack of familiarity with special education law, attorneys and guardians ad litem representing children in child welfare proceedings often cannot focus on the educational needs of each child, especially if extensive advocacy is required to secure appropriate special education services. Children involved in the abuse/neglect system, who are more likely to have poor educational outcomes, may need a separate advocate focused solely upon their educational needs.²⁵¹

With this recognition, some states have created a system for the separate appointment of education or special education attorneys for children in the child welfare system.²⁵² For example, the Juvenile Division of the Los Angeles County Superior Court established protocols providing for the appointment of an education attorney in dependency cases "to represent the *best educational interests* of the minor,"²⁵³ rather than the expressed interests of the child or the parent (or other educational rights holder). The attorney's only duty of confidentiality is to the child.²⁵⁴ The parent or other educational rights holder is instructed to work in cooperation with the education attorney to advocate for and receive an appropriate placement and services for the child,²⁵⁵ but is not the attorney's "client." Where the

250. See AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 2, 7-10 (1996) (advising that attorneys and guardians ad litem actively involve themselves in the clients' education by attending any meetings regarding the child, identifying educational support programs, investigating school records, interviewing school personnel, and requesting special education services, if applicable); see also N.Y. STATE BAR ASS'N, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS 12 (2007), available at http://www.nysba.org/AM/Template.cfm?Section=Law_Guardian_Representation_Standards&Template=/CM/ContentDisplay.cfm&ContentID=11559 (explaining that attorneys should seek educational services to protect a child's interest and use court orders to obtain these services, if necessary).

251. See Rebekah Gleason Hope, *Foster Children and the Idea: The Fox No Longer Guarding the Henhouse?*, 69 LA. L. REV. 349, 353 (2009) (discussing how school systems and courts may appoint an educational surrogate parent to advocate for the educational needs of children in foster care who have disabilities).

252. Miller, *supra* note 245, at 574.

253. RIGHTS AND RESPONSIBILITIES OF EDUCATION ATTORNEY/ADVOCATE AND RIGHTS AND RESPONSIBILITIES OF EDUCATIONAL RIGHTS HOLDER PURSUANT TO WIC § 317(E) OR CRC § 5.663 APPOINTMENT FOR EDUCATION ADVOCACY AND ACKNOWLEDGEMENT OF RECEIPT (Juv. Div., Super. Ct. of Los Angeles Cnty.) [hereinafter LOS ANGELES CNTY. APPOINTMENT OF EDUCATION ATTORNEY] (emphasis added).

254. *Id.*

255. *Id.*

education attorney does not feel the parent or other education rights holder is acting in the child's best interests, the education attorney can seek a court order to remove that individual as the educational rights holder and have a new individual appointed.²⁵⁶ This model of representation, as provided for by the court, gives the appointed education attorney a strong voice in the special education matter, perhaps even a stronger voice than the parent,²⁵⁷ who is not formally involved in an attorney-client relationship with the court-appointed education attorney. By providing attorneys with the power to determine what is in the child's best interests and allowing the removal from that role of a parent whose educational decision-making rights are still intact, this model promotes the voice of the lawyer over the voice of the parent or child, potentially at the expense of the parent's constitutional or statutory rights under the IDEA.

The Superior Court of the District of Columbia Family Court has also created a panel of special education attorneys who can be appointed for children in abuse/neglect proceedings.²⁵⁸ The attorney practice standards for that panel provide that the parent is the client of a court-appointed special education attorney pursuant to federal law, so long as the parent retains the right to make the educational decisions on behalf of the child.²⁵⁹ The family court has the discretion to order the attorney to represent a particular adult or caregiver where the rights of the parent can be limited.²⁶⁰ Alternatively, the special education attorney may choose to represent both the parent or other designated adult and child pursuant to a retainer agreement where the parent's interests do not conflict with those of the child.²⁶¹ In comparison to the model used by the Los Angeles Superior Court, the District of Columbia Superior Family Court model emphasizes the parent's rights under the IDEA by designating the parent as the client of the court-appointed special education attorney, with full decision-making rights, in most cases.²⁶²

256. *Id.*

257. With this model, the attorney has the power to determine what she feels is in the child's best interests and to seek removal and replacement of the educational rights holder where the attorney disagrees with that person's decisions and actions, even if that person's parental rights have not been otherwise limited by a court.

258. *See generally* SUPERIOR COURT OF THE DIST. OF COLUMBIA FAMILY COURT, FAMILY COURT ATTORNEY PRACTICE STANDARDS FOR SPECIAL EDUCATION ATTORNEYS (2003) [hereinafter D.C. SPECIAL EDUCATION ATTORNEY STANDARDS], available at <http://www.dccourts.gov/dccourts/docs/09-03Attachment.pdf>.

259. *Id.* at 13.

260. *Id.* (providing that the appointment order will inform the special education attorney and other parties who the client (educational decision maker) is for purposes of the special education representation).

261. *Id.*

262. Interestingly, a consent decree arising from class action litigation in Tennessee created an entirely different type of program for the provision of special education

Legal services attorneys are sometimes also available to provide special education representation to children involved in abuse/neglect proceedings. Attorneys who provide special education legal representation to this specialized population use different models of representation. Whereas some view the “parent” as the client, others see the child as the client, and still others represent both the child and parent. For example, the Children’s Law Center (CLC) in Washington, D.C.²⁶³ has a Guardian Ad Litem Project (GAL Project) through which its attorneys are appointed by DC Superior Court Family Court judges to represent the best interests of children in abuse and neglect proceedings. CLC also has a Guardian Ad Litem Special Education Project (GAL Special Ed Project), which receives in-house referrals for special education matters or appointments by District of Columbia Superior Family Court judges to provide special education representation regarding only those children who are already represented by CLC GAL Project attorneys in their abuse/neglect proceedings.²⁶⁴

Although the GAL Project attorneys are appointed to represent the best interests of the child, the attorneys within the GAL Special Ed Project represent a “parent,” who could be either the natural parent or another individual serving in a care-giving role such as a foster parent.²⁶⁵ Therefore, the GAL Special Ed Project must set some limitations on its

counsel to children in abuse/neglect proceedings, deploying attorneys employed by the state’s child welfare agency to serve in this role. The class action complaint was brought against the state on behalf of more than 9,000 children in the custody of Tennessee’s Department of Children’s Services (DCS), seeking reforms to the state’s overburdened and mismanaged child welfare system. *Complaint, Brian A. v. Sundquist*, 149 F. Supp. 2d 941 (M.D. Tenn. May 10, 2000) (No. 3-00-0445). The federal complaint charged the state with violating the constitutional rights of those children and causing them irreparable harm. The settlement agreement created the appointment of DCS-employed special education attorneys for children in DCS custody to address their educational needs. *Settlement Agreement at 17, Brian A. v. Sundquist*, 149 F. Supp. 2d 941 (M.D. Tenn. July 27, 2001) (No. 3-00-0445) (DCS was charged with assigning twelve attorneys who will represent children within the custody of DCS to ensure the children have access to a reasonable and appropriate education, including special education services). Consequently, the settlement agreement created a unit of attorneys in a state agency charged with providing legal representation in special education matters, potentially in opposition to other state employees of local and state educational agencies. These attorneys were permitted to represent the children in IEP meetings, but not permitted to bring due process complaints, because as employees of the state, they could not sue the state in this context. These attorneys, and subsequently the children they represented and their parents, were unable, at least through this type of attorney-client relationship, to enforce their due process rights if IEP negotiations failed and a violation of FAPE needed to be remedied through an administrative due process complaint. Interview with Dean Rivkin, *supra* note 85.

263. The author previously worked at the Children’s Law Center in Washington, D.C. as an attorney with the Health Access Project.

264. Jennifer N. Rosen Valverde et al., *Integrating Educational Advocacy into Child Welfare Practice: Working Models*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 201, 211 (2011) [hereinafter Valverde, *Educational Advocacy*].

265. *Id.* at 212. Occasionally, CLC-SEP represents the GAL client directly where the youth is 18 years of age or older and no conflict exists with the GAL representation.

special education representation of a parent or adult caregiver. For example, the legal assistance agreement explains to the potential client that attorney-client confidentiality will be limited, as the attorney will share information with the CLC guardian ad litem. Moreover, the agreement states that CLC must terminate the representation if the special education client and the guardian ad litem come into conflict about what is best for the child.²⁶⁶

Similarly, the Special Education Clinic at Rutgers University School of Law—Newark provides representation to “parents” of children with special needs who are involved with the child welfare system, unless the child is over eighteen, in which case he or she is the client. The Office of the Public Defender Law Guardian Division in Essex County, N.J., a Court Appointed Special Advocate or other child welfare professional can make referrals to the Special Education Clinic. The Clinic obtains confirmation that the person acting as the “parent” for IDEA purposes has the right to serve in that role, a right usually clarified in a court order stating that the person is the educational rights holder, before accepting the case for legal representation.²⁶⁷ The Special Education Clinic takes this step, based on recognition of parental rights to make educational decisions and special education decisions in particular, so as not to usurp the authority of biological and adoptive parents without due process.²⁶⁸ Because the clinic does not provide representation in the abuse/neglect proceeding itself, the clinic does not have to place any limitations on its representation of the parent or other designated adult in a special education case.

Both the Children’s Law Center’s GAL Special Ed Project and the Rutgers Special Education Clinic have faced challenges where parents or foster parents have been unable to stay in regular communication, attend meetings, or share information relevant to the educational matter with the special education attorneys, sometimes leading to withdrawal of

266. *Id.* at 217-18. If the potential client has counsel in the abuse/neglect matter, the agreement encourages the potential client to review the legal assistance agreement with that attorney. The agreement also informs the potential client of her right to seek separate counsel in the education matter elsewhere to avoid these limitations on representation that are necessary if CLC represents that individual in the special education case. Because CLC attorneys play two different roles, with one attorney within the organization serving as the GAL representing the best interests of the child and another attorney within the same organization representing an adult in the special education matter, the potential for conflicts is higher, potentially resulting in withdrawal from representation. Fortunately, such conflicts have arisen for CLC attorneys in only a few, isolated cases, as most parents whom the organization has represented recognize the importance of education and work with the special education attorney to secure the needed services, even where they may have experienced challenges in caring for their children in other areas of their lives. *Id.* at 225.

267. *Id.* at 217.

268. *Id.*

representation.²⁶⁹ Where there is child welfare system involvement, a model of special education representation in which the parent or other adult is the client can present these types of obstacles where the client is unable to or refuses to maintain the necessary level of engagement with the special education advocacy.

In contrast with these models, the Legal Aid Society in New York City, which established the Kathryn A. McDonald Education Advocacy Project (EAP) to address the educational needs of children in the child welfare system, takes a different approach to representation. New York City's Family Court appoints Legal Aid attorneys to represent children in abuse and neglect proceedings, and those attorneys make in-house referrals to EAP for special education representation. The EAP special education attorney will then represent the child and not the "parent" with respect to the child's educational needs. EAP uses an expressed interest model, which often requires extensive counseling of the client as to what is possible and realistic, unless the child is too young or impaired to express an opinion about the course of her case, and then EAP will use substituted judgment or a best interests model.²⁷⁰ EAP does work with the biological parent or educational right holders to make sure that they are on board with the special education services that will be requested, in acknowledgement that parents are the individuals vested with procedural rights under the IDEA.²⁷¹ Representation of the child's expressed interests exclusively, with some involvement of the parent, allows EAP to avoid potential conflicts that could arise if it were to undertake dual representation of the parent and child.²⁷² However, this model has resulted in some obstacles when the child's legal capacity to independently request a due process hearing has been challenged because it is not clear that students under the age of majority have legal capacity to bring a due process complaint under the IDEA, as discussed above.²⁷³

269. *Id.* at 226.

270. *Id.* at 206.

271. *Id.* at 226. If the parent or other education decision-maker is represented by counsel in the abuse/neglect proceeding, EAP seeks permission from the attorney to interview and gather supporting information from that parent and then uses this information to develop a case plan that is consistent with the child's wishes. *Id.* at 218. Ultimately, the parent will also be asked to provide written consent to any evaluations or services negotiated by EAP, given that neither the child nor the child's attorney has the right under the IDEA to consent. *Id.* at 226. The IDEA states that a "parent" must provide consent prior to an initial evaluation to determine whether a child qualifies as a child with a disability under the IDEA and prior to the initial provision of special education and related services to the child. *See* 20 U.S.C. 1414(a)(1)(D) (2006); 34 C.F.R. § 300.300 (2011).

272. Valverde, *Educational Advocacy*, *supra* note 264, at 211.

273. The IDEA provides that a child's "parent" has the right to request a hearing pursuant to 20 U.S.C. § 1415(f)(1), but it also states that "any party" may present a complaint. 20 U.S.C. § 1415(b)(6).

The East Bay Children's Law Clinic, in collaboration with area law students, uses a different model of representation. Rather than assigning a separate attorney for the special education matter, the Clinic facilitates the appointment of law students as surrogate parents for children represented by the Clinic attorneys in abuse and neglect matters. Law students who work in the East Bay Children's Law Clinic in Berkeley, CA, receive referrals from the Oakland Unified School District foster care liaison for children involved in the abuse/neglect system to serve as surrogate parents (or "educational representatives") to advocate on behalf of the children's educational needs.²⁷⁴ The law students are assigned to a child and are appointed by a Juvenile Court judge to serve in this role.²⁷⁵ In those cases, the Clinic continues to represent the child in the abuse/neglect matter and a law student affiliated with the Clinic serves in a surrogate parent role.²⁷⁶

Attorneys providing special education representation to children involved in child welfare proceedings may face a number of complications. There may be confusion as to which adult holds the right to make educational decisions for the child, or the person who does hold the rights may not be in a position to serve effectively in the client role. Where a surrogate or foster parent serves in the role of the "parent," that individual may not know the child very well or at all. Legal services organizations that provide dual representation in both an abuse/neglect proceeding and in a special education matter may face internal conflicts of interest where the special education attorney represents an adult. Although there may be challenges involved with representation of an adult in a special education matter when the child welfare system is involved, there may be other obstacles posed by representation of a child, such as the possible lack of legal capacity to independently bring a due process complaint or the difficulties raised by a child's limited functional capacity to participate in the attorney-client relationship, as discussed elsewhere in this Article. Attorneys use different models of representation in special education cases where there is child welfare involvement, and even family courts that appoint special education attorneys provide for different models of representation. Sometimes, even court-appointed attorneys are faced with significant ambiguity as to their role and the identification of a client in a special education matter. If an attorney is appointed through a family court proceeding, it is critical to understand any requirements or guidance that may apply in that jurisdiction or particular proceeding.

274. Interview of Stephen Rosenbaum, Lecturer, U.C. Berkeley Boalt Hall School of Law (Dec. 30, 2010).

275. *Id.*

276. *Id.*

J. Delinquency Cases

Statistics show a strong correlation between special education needs and delinquency.²⁷⁷ A recent study showed that a median of 33% of youth in juvenile correctional facilities have special education needs; the percentage ranges from about 9% in some states to 77% in others.²⁷⁸ Given these statistics, juvenile defense attorneys in delinquency cases will likely uncover unmet special education needs. These defense attorneys may themselves advocate for special education services for their clients, but many juvenile defense attorneys have high case loads and special education law is often outside of their expertise. Consequently, when possible, juvenile defense attorneys may try to refer a client to a separate special education attorney. For juvenile defense attorneys who work for public defender or legal aid organization or student attorneys who operate within a law school clinic, there may be special education attorneys in-house to whom referrals can be made. Attorneys in organizations or law school clinics that do not have in-house special education attorneys may need to refer clients to private special education attorneys or special education attorneys affiliated with other organizations. Some public defender organizations have created partnerships with external special education attorneys for this purpose.²⁷⁹ Private defense attorneys can also refer cases to private special education attorneys, legal services organizations, or law school clinics. To facilitate special education representation, some juvenile courts have created systems for court appointment of special education counsel.²⁸⁰

Some public defender organizations have in-house education counsel, and juvenile defense attorneys can refer clients with special education needs directly to special education attorneys within their own organization, allowing for prompt focus on the special education issues. Models of representation vary depending on the level of affiliation between the juvenile defense attorneys and the special education attorneys and the

277. See generally Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD 339 (2005).

278. *Id.* at 342 (noting that beyond those who have been evaluated and determined eligible for special education, many youth involved in delinquency proceedings have not been evaluated at all. Accordingly, the actual percentages may be even higher). See generally Joseph B. Tulman, *Best Defense is a Good Offense: Incorporating Special Education Law into Delinquency Representation in the Juvenile Law Clinic*, 42 WASH. U. J. URB. & CONTEMP. L. 223, 226 (1992) [hereinafter Tulman, *Best Defense*].

279. See, e.g., OFFICE OF PROT. & ADVOCACY FOR PERSONS WITH DISABILITIES, <http://www.state.ct.us/opapd> (last visited Aug. 28, 2011) (partnering with and receiving referrals from Connecticut's public defender office regarding advocacy for youth and their families).

280. See, e.g., D.C. SPECIAL EDUCATION ATTORNEY STANDARDS, *supra* note 258 (explaining the duties of an appointed attorney chosen to represent persons in special education matters).

resulting impact on the loyalty to the established client in the delinquency matter. For example, when a juvenile defense attorney at the Public Defender Service for the District of Columbia identifies a client with special education needs, she may make a referral for that client to an in-house special education attorney.²⁸¹ The special education attorney then executes a retainer with both the child client and the parent for the purposes of the education case, in part out of recognition that special education rights inure to the parent and unless the child is eighteen and educational rights have transferred, the child will not be deemed by hearing officers in Washington, D.C. to have the legal capacity to independently bring a due process complaint.²⁸² In the event of a disagreement between parent and child, the Public Defender Service for the District of Columbia will not represent the parent in the special education matter and the special education attorney will instead consult with the defense attorney as to the child's needs, as the organization's first duty is to the child due to its prior commitment to and ongoing representation of the child's expressed interests in the delinquency matter.²⁸³ However, it is rare that unresolvable conflicts arise.²⁸⁴

The University of the District of Columbia David A. Clarke School of Law Juvenile and Special Education Law Clinic represents youth in both delinquency and special education matters and uses varying models of representation, depending on the circumstances.²⁸⁵ If the child is first represented by the clinic in a delinquency matter, the student attorneys will advise her that the parent will also need to serve as a client in the special education matter.²⁸⁶ If the child client chooses to go forward and a conflict arises between parent and child, the clinic will work to resolve the conflict.²⁸⁷ However, the clinic will have to withdraw from the special education case if the conflict is unresolvable.²⁸⁸ When the child is not already represented by the clinic in her delinquency matter, the clinic sometimes uses a joint representation model, sometimes represents the

281. E-mail from Jamie Argento Rodriguez, Juvenile Services Program Coordinator, Public Defender Service for the District of Columbia, to Jamie Sparano, Student, American University Washington College of Law (Feb. 7, 2011 20:35 EST) (on file with author).

282. *Id.*

283. *Id.*

284. *Id.*

285. E-mail from Joseph B. Tulman, Director, Juvenile and Special Education Law Clinic, University of the District of Columbia David A. Clarke School of Law, to Yael Zakai Cannon, Practitioner-in-Residence, American University Washington College of Law (Mar. 20, 2011 15:47 EST) (on file with author).

286. *Id.*

287. *Id.*

288. *Id.*

parent alone, and other times, such as when the youth is over the age of majority, the clinic represents the adult youth.²⁸⁹

Different questions concerning the model of special education representation for a delinquency client arose for the law clinics at the American University Washington College of Law. Law students in the Disability Rights Law Clinic typically represent parents or other caregivers in special education matters.²⁹⁰ In contrast, law students in the Criminal Justice Clinic at the same law school represent youth in the role of defense attorney in delinquency matters. Recently, the two clinics partnered on a case in which the Criminal Justice Clinic first represented the child's expressed interests in the delinquency matter and the Disability Rights Law Clinic took on representation of the child's special education needs. Because the two clinics are considered part of one umbrella law firm, the Disability Rights Law Clinic decided to deviate from its typical model of representation, in which the parent is the client, to represent the child's expressed interests in the special education matter, thereby maintaining fidelity to the Criminal Justice Clinic's agreed model of representation with the child.²⁹¹ If a due process hearing is required, the clinics will need to determine whether it is possible to add the parent to the representation without any concurrent conflict, or whether it would be preferable to maintain sole representation of the child and argue that the child should be deemed by the hearing officer to have legal capacity to bring a due process complaint without his parent.

The process used by the Baltimore City Office of the Maryland Office of the Public Defender results in two different models of special education representation, as that organization has an in-house education attorney to whom juvenile defense attorneys can refer special education matters, but also uses an outside partner organization for some referrals.²⁹² There are four teams of juvenile defense attorneys at the Baltimore City Office, two of which utilize in-house education counsel.²⁹³ Where an in-house attorney handles the special education matter, the child is the client in the special

289. *Id.*

290. *See* DISABILITY RIGHTS LAW CLINIC, AM. UNIV. WASHINGTON COLL. OF LAW, <http://www.wcl.american.edu/clinical/disability.cfm> (last visited Aug. 28, 2011) (describing the types of matters that the clinic handles, including special education matters).

291. The author currently teaches in the Disability Rights Law Clinic at the Washington College of Law at American University, along with Robert Dinerstein, Director of the Disability Rights Law Clinic and Director of the Clinical Program, and the description of the joint case with the Criminal Justice Clinic is based on the author's own experience with that case.

292. E-mail from Abbie Flanagan, Attorney, Maryland Office of the Public Defender, to Jamie Sparano, Student, American University Washington College of Law (Feb. 9, 2011 14:13 EST) (on file with author).

293. *Id.*

education case (as she is in the delinquency case), and the attorney will act on the child's expressed interests.²⁹⁴ Because the child is the client, and the organization recognizes that the parent is the individual with the legal capacity to bring a due process hearing, the in-house special education attorney is unable to continue assisting on the special education matter if a due process hearing is necessary.²⁹⁵ However, the in-house special education attorney will assist in writing a complaint on behalf of a child to the Maryland State Board of Education. In those instances, the parent and child client must both agree with the decision to file the complaint; otherwise, the organization withdraws from the special education representation and continues to represent the child in the delinquency matter only.²⁹⁶ The other two teams at the Baltimore City Office refer special education cases to an external organization, the Maryland Disability Law Center.²⁹⁷ The Maryland Disability Law Center signs a separate retainer with the parent, who its attorneys represent exclusively, as the Center has no obligation to align its model of representation with that of the juvenile defense attorney, who represents the child's expressed interests, because the organizations are wholly separate.²⁹⁸

A different model of representation is used by the EdLaw Project in Massachusetts, which accepts referrals from juvenile defense attorneys with the Youth Advocacy Department, an initiative of the state's public defender office combining legal, clinical, and community outreach services for court-involved youth.²⁹⁹ The EdLaw Project represents the expressed interests of child clients³⁰⁰ and maintains fidelity to the child client's expressed interests for the most part, but the organization's retainer agreement does contemplate the possibility of withdrawal if the child's expressed interests conflict with the parent's decisions or the attorney's advice.³⁰¹ The retainer agreement reflects the complexity of sole

294. *Id.*

295. *Id.*

296. *Id.* Such agreement is stated in the complaint itself, and a release from the parent is attached.

297. *Id.*

298. *Id.*

299. Interview with Spanjaard, *supra* note 131.

300. E-mail from Marlies Spanjaard, Project Coordinator, The EdLaw Project, Massachusetts, to Yael Cannon, Practitioner-in-Residence, American University Washington College of Law (March 15, 2011, 11:28 EST) (on file with author). The retainer used by the EdLaw Project emphasizes that the child's expressed interests are central, noting that "I understand that I am retaining The EdLaw Project to represent my expressed wishes. If there is a conflict between my expressed wishes and those of my parents, I understand and agree that The EdLaw Project is obligated to represent my expressed wishes." *Id.*

301. *Id.* However, there are some limitations on the pursuit of the child's expressed interests, as detailed in the retainer used by the EdLaw Project. Perhaps in recognition

representation of a child in a special education matter.

Some juvenile courts provide for the appointment of special education counsel for children involved in delinquency proceedings using different models of representation. Attorneys who belong to the District of Columbia Superior Family Court's special education attorney panel, as described above, can be appointed not only in child welfare cases, but in delinquency cases as well. Although these attorneys typically represent parents or other adults in special education matters,³⁰² the relevant Attorney Practice Standards provide that an attorney could represent both parent and child if there is no conflict of interest, and suggest that this model of representation might be particularly appropriate in a delinquency case,³⁰³ where the child's liberty interests are at stake and her expressed interests are critical.

The Los Angeles County Superior Court also provides for the appointment of special education attorneys in delinquency cases, as in child welfare cases. The court provides for the same model of representation in either situation; the attorney is assigned to represent the best interests of the child, while the parent, or educational rights holder, is there to act as an agent.³⁰⁴ Where the attorney and educational rights holder disagree as to the best educational interests of the child, the attorney may request a hearing to resolve the conflict and may seek the appointment of a new educational rights holder.³⁰⁵ Despite the importance of a child's expressed interests in a delinquency matter, the protocols do not require that a special education attorney take direction from a child involved in delinquency

that a parent's involvement is needed in educational decision-making in a special education matter, the retainer also provides that "In the event a conflict arises under this section which cannot be resolved, I understand that The EdLaw Project may withdraw from representing me If I should decide not to follow my lawyer's advice concerning a major decision, in particular a decision that may be in conflict with my parent(s) or which may require my lawyer to take steps he/she thinks are not proper, The EdLaw Project may take necessary steps to withdraw from my case." Moreover, in addition to having the child sign the retainer, the EdLaw Project has a parent or parents sign the retainer, indicating that the parent or parents "hereby retain on behalf of my/our child [child's name here], The EdLaw Project to represent my/our son/daughter in connection with the matter(s) described in this Agreement." The complexity of the EdLaw Project retainer reflects the complexity of representation in special education matters.

302. D.C. SPECIAL EDUCATION ATTORNEY STANDARDS, *supra* note 258, at 5.

303. *Id.* at 13.

304. *See* LOS ANGELES CNTY. APPOINTMENT OF EDUCATION ATTORNEY, *supra* note 253. ("The Attorney is appointed by the Court to represent the best educational interests of the Minor, not those of the [Educational Rights Holder] . . . The educational rights holder is functioning as the AGENT of the minor child. The [Educational Rights Holder] is an agent of the minor child for purposes of special education advocacy in that their participation in the attorney/client relationship is necessary and required in the pursuit of such advocacy.")

305. *Id.*

proceedings. Both the courts in Los Angeles and the District of Columbia require communication by the special education attorney with the juvenile defense attorney, although the special education attorney in both jurisdictions uses a different model of representation from the model used by the juvenile defense attorney, who represents the child's expressed interests without any loyalty to the parent or relevance of a best-interests analysis.³⁰⁶

Apart from pursuing separate special education representation, juvenile defense attorneys may be able to use the delinquency proceeding to make sure that a client's special education needs are met, and in turn, use special education arguments in furtherance of the child client's goals in the delinquency matter.³⁰⁷ Where clients have not received special education services, delinquency attorneys can argue that an urgent educational remedy is needed. Under delinquency court standards, a finding of delinquency might entail a need for supervision,³⁰⁸ but a variety of special education placements are available in both public and private settings that could provide such supervision and serve as alternatives to detention or incarceration.³⁰⁹ Accordingly, delinquency attorneys could argue that these special education services satisfy any need for supervision that the court would require and that they can address the child's underlying needs, thereby potentially keeping her out of a detention facility.³¹⁰ Where a

306. D.C. SPECIAL EDUCATION ATTORNEY STANDARDS, *supra* note 258, at 16; DELINQUENCY EDUCATION PROTOCOL 29 (Super. Ct. of D.C., Juv. Div. 2006).

307. Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Lead to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 3, 45 (2003) [hereinafter Tulman, *Disability and Delinquency*]. Joseph B. Tulman has been a strong proponent of using special education law as an alternative strategy in court for delinquency cases.

308. *Id.* at 45.

309. *Id.*

310. *Id.* For example, under District of Columbia Superior Court Juvenile Rule 48(b), courts can dismiss cases and send juveniles to appropriate social agencies. A special education placement could be considered one of these appropriate agencies. Tulman, *Best Defense*, *supra* note 278, at 227-28. Further, delinquency attorneys can attempt to discredit past offenses by arguing that the child was not receiving required services in an appropriate educational placement. Tulman, *Disability and Delinquency*, *supra* note 307, at 48. While these arguments might be made by the delinquency attorney, a separate education attorney may also appear in court or submit a memorandum regarding the client's special education needs. At the Public Defender Service for the District of Columbia, for example, special education attorneys attend delinquency proceedings, schedules permitting, helping to ensure that the court receives the most accurate information about a client's special education needs. When an education attorney is unable to appear in person, she may write a memorandum providing the pertinent information in writing, which the juvenile defense attorney can then present on behalf of the client. E-mail from Jamie Argento Rodriguez, *supra* note 281. Special education attorneys appointed in the District of Columbia are similarly encouraged to collaborate with delinquency attorneys and appear in court to update judges on the child's special education needs. D.C. SPECIAL EDUCATION ATTORNEY

youth is involved in a delinquency proceeding, special education representation can provide great benefit and may result in the provision of appropriate special education services for the youth in a less punitive or restrictive setting.

K. Challenges in Obtaining Legal Representation in Special Education Cases

Unfortunately, legal representation remains critical in some special education matters, as school districts still frequently fail to meet their obligations under the IDEA.³¹¹ Parents are often unaware of their rights, do not see themselves as competent and equal team members, do not feel confident about bringing due process complaints, and do not have the ability to bring those complaints without legal assistance.³¹² Parents of children with disabilities are often aware of “their own precarious social and psychological status”³¹³ and describe the “isolation, disrespect or marginalization they experience at an IEP meeting.”³¹⁴ These problems are only compounded for families in high-poverty and minority communities.³¹⁵ When parents do seek redress through a due process hearing, they are unlikely to prevail without an attorney.³¹⁶ Parents have had some success with lay advocacy, but more trained lay advocates are needed to meet the demand³¹⁷ and lay advocates are not always adequately trained to navigate the complex legal structure of the IDEA, particularly

STANDARDS, *supra* note 280, at 13.

311. Wakelin, *supra* note 63, at 263; see Olga Pribyl, *Leveling the Playing Field: Helping Children with Special Education Needs*, 23 CBA REC. 42, 43 (2009) (noting that many students with disabilities are not identified as needing special education services, parents can wait for months before obtaining evaluations, many students do not have appropriate IEPs or the school does not fully implement the IEP, many students with special education needs are unnecessarily segregated from their non-disabled peers, and students fail to receive necessary transition plans and services).

312. Massey & Rosenbaum, *supra* note 93, at 278-79.

313. See Rosenbaum, *supra* note 12, at 180 (explaining why a parent’s judgment about what their children really need is affected by their own skepticism and mistrust).

314. *Id.* at 181.

315. Wakelin, *supra* note 63, at 263, 271.

316. A study of due process hearings in Illinois found that access to attorney representation by parents significantly increases the likelihood of success. Parents who were represented by attorneys prevailed in 50.4% of due process hearings, while non-represented parents prevailed only 16.8% of the time. MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS 1997-2002, at 7 (2002), available at <http://dueprocessillinois.org/Access.pdf>; see also Stefan R. Hanson, *Buckhannon, Special Education Disputes and Attorneys’ Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 548 (2003). School districts are represented by attorneys 90% of the time, while parents are often left to fend for themselves. Pribyl, *supra* note 311, at 42.

317. Lilliam Rangel-Diaz, *Ensuring Access to the Legal System for Children and Youth with Disabilities in Special Education Disputes*, 27 HUM. RTS. 17, 19 (2000).

where a due process hearing or a civil action in federal court might be necessary. One parent opined that “there is no compliance unless the family secures legal backup, and even then the district feels no urgency or responsibility to comply.”³¹⁸

However, for many parents, and especially for those from low-income families, legal representation is not available for special education matters. Very few lawyers have the knowledge or experience to represent families in special education matters³¹⁹ or are willing to take on these cases,³²⁰ especially given that they often involve “voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer.”³²¹ Those lawyers who are willing to handle special education matters are often too expensive for the average American.³²² Although parents can obtain attorneys’ fees under the IDEA, those fees are only available for prevailing parties, and some attorneys are not willing to take the risk that they might not get paid for their work.³²³ Some legal services organizations and law school clinical programs engage in special education representation, but these services are typically only available to those who qualify under the income guidelines.³²⁴ Even then, these organizations are limited in resources, staff availability, case priorities and service guidelines.³²⁵

318. See Rosenbaum, *supra* note 12, at 177 (citing E-mail to S.P., California school district special education manager (Mar. 1, 2001) (on file with author)).

319. AM. BAR ASS’N, NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (1995), available at <http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=338#One>.

320. See *Maroni v. Pemi-Baker Reg’l Sch. Dist.*, 346 F.3d 247, 257 n.9 (1st Cir. 2003) (emphasizing that in 2002, Michigan had only nine private attorneys who represented parents in due process hearings, while Rhode Island had only six, Wisconsin had ten, Texas had twenty-nine, and Arizona had only one.); see also Brief for Autism Society of America et al. as Amici Curiae Supporting Petitioners at 9, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983); *Wakelin, supra* note 63, at 282.

321. *Collingsru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d Cir. 1998).

322. M. Brendhan Flynn, Note, *In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases*, 80 IND. L.J. 881, 901 (2005).

323. *Wakelin, supra* note 63, at 277.

324. Brief for the Council of Parent Attorneys and Advocates Inc., et al. as Amici Curiae in Support of Petitioners at 8-9, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983).

325. *Wakelin, supra* note 63, at 277; see also *Maroni*, 346 F.3d at 257 n.9 (discussing the scarcity of representation available to families seeking assistance with special education matters, including the inability of federally funded Protection and Advocacy organizations to meet the high demand for special education representation). The First Circuit Court noted that DRC, which is New Hampshire’s Protection and Advocacy Agency (P&A), reported that it could provide full representation in only 35 of 390 special education inquiries in 2002. Other P&As report similar shortages nationwide. Since 2000, Alaska’s P&A provided representation in only 183 of 1,092 requests for help in special education matters, and Arizona’s P&A did so in only 300 of 4,800 cases. Since October 1999, Michigan’s P&A handled only 840 out of 6,015

In some cases, the best alternative to common representation, especially where a conflict between the parent and child exists or is likely to arise, is for each party to have separate representation. However, in many jurisdictions, it is extremely difficult to find attorneys who will take special education cases, especially at a low cost or at no cost, despite the availability of attorneys' fees for prevailing parties.³²⁶ It may be difficult enough to secure one special education attorney for a family; the possibility of identifying and securing separate legal representation for the parent and child will often simply not be possible. Due to the scarcity of special education lawyers and the high cost usually required to secure such representation, withdrawal can have serious consequences and should be avoided whenever possible. Withdrawal will often result in no representation at all for the family, and withdrawal can be especially difficult for children, as they have more difficulty than adults in understanding the attorney role and trusting the nature of the relationship.³²⁷ The costs of separate representation, the consequences of withdrawal should there be an irresolvable conflict during joint representation, and the possible inability to secure separate representation are factors that the attorney and affected clients should consider in determining whether common representation is in the clients' interests.³²⁸ The scarcity of legal resources weighs in favor of joint representation in order to ensure that both parent and child have counsel, but the possibility of withdrawal as a result of an irresolvable conflict argues for representation of one individual, especially where such a conflict is more likely.

III. RECOMMENDATIONS

A. Consider Legal and Ethical Implications of Possible Models of Representation and Thoughtfully Identify the Client or Clients Using a Contextualized, Individualized Approach

With each potential client family, attorneys should consider the various models of representation they might use, with a contextualized analysis of the factors described above, to assess the legal and ethical implications of

education-related requests. Massachusetts's P&A provides representation in less than 10% of special education cases, and Wisconsin's P&A does so in about 25% of cases that it deems meritorious. In New York, one full-time and one part-time attorney handle over 2,000 requests for help in special education cases.

326. See Brief of Autism Society of America et. al. as Amici Curiae in Support of Petitioner at 11, *Winkelman ex rel. Winkelman v. Parma City School District*, 550 U.S. 516 (2007) (No. 05-983), 2006 WL 3735956.

327. Godsoe, *All in the Family*, *supra* note 20, at 36.

328. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 19 (2011).

each possible model. Attorneys should evaluate each case individually, rather than using a stock model of representation for every case, due to the complexities discussed throughout this Article that might lead to a preference for a particular model over another in certain circumstances. A one-size-fits-all approach might result in obstacles during the course of representation that could have been avoided if the model of representation were tailored to the situation.

If the attorney wishes to represent a minor student exclusively, without including the parent in the attorney-client relationship, the attorney will need to research and reach a conclusion as to the student-client's rights in the special education context. The attorney will need to advise the student about the scope of these rights and the possible limitations on the student's right to make her own educational decisions, such as consent to evaluations or services, or her legal capacity to independently bring suit on her own behalf while she is still a minor. Even if the attorney determines that the student does not possess educational decision-making authority or procedural rights in the special education context, the attorney could still represent the student with the understanding that the attorney will not be able to proceed with litigation on the student's behalf, but will articulate the student's wishes and try to persuade the IEP team members on behalf of the student. If the attorney represents the child exclusively, but the parent is involved in the IEP process and takes action through litigation contrary to the child's wishes, it remains unresolved whether students can initiate administrative proceedings against their parents or school boards if their parents failed to adequately represent their interests or ignored their wishes in developing their IEPs,³²⁹ but the child's attorney should prepare arguments in support of the child's legal capacity to sue and her independent rights under the IDEA.

An attorney should think through any risks or challenges inherent in joint representation before entering into such an arrangement. If a lawyer is considering representation of both the parent and student or of multiple caregivers, a standard conflicts of interests analysis is necessary to decide whether to enter into joint representation in the first place and if joint representation is pursued, what will happen if the clients disagree during the course of representation.³³⁰

When an attorney chooses a model of representation that includes a parent or other caregiver, the attorney must ensure that the individual falls under the IDEA definition of a parent. An attorney interested in providing special education representation in connection with a child for whom the

329. Russo, *supra* note 191, at 15.

330. Moore, *supra* note 1, at 1824.

parents are unknown or cannot be located, a child who is a ward of the state, or a child who is unaccompanied and homeless, should research state laws, regulations and court rules to understand who may be appointed to serve as a surrogate parent for the child. The attorney should work with the appropriate entity—whether it be the state or local educational agency, a child welfare agency, or a court—to ensure that a qualified individual is appointed as a surrogate if the child requires one and no individual has yet been identified.³³¹ Where a surrogate or foster parent who does not know the child very well or at all serves in the parental role, the attorney should involve the child in the representation, or at least communicate closely with the child through the course of the representation, to ensure that the attorney is seeing the whole picture. Similarly, due to the unique needs of a child involved in the delinquency system, whose liberty interests are at stake, and the potential implications for the delinquency case as a result of the special education advocacy, a special education attorney should consider representation of the child in that situation or at least extensive involvement of the child in the legal case.

As the attorney explores these various factors in determining the appropriate model of representation, the attorney should involve the family members in the assessment. Each family member may have a vision for the representation that could assist the attorney in working with the family to select a model of representation that will work for everyone.

B. Clear Communication of Model of Representation and Any Potential or Actual Conflicts

Once a model is chosen, the attorney should discuss the model of representation that will be used with all parties, and ensure that all parties understand who will be serving in the client role and directing the representation. Especially given that there is often confusion about the role of the attorney in legal matters involving children,³³² clarity should be provided from the outset as to the role of the parent, and the role of the child, if any, in the attorney-client relationship. The retainer agreement provides an important opportunity to clarify and memorialize the relationship in writing, as well as a jumping-off point for a conversation reviewing the relationship that has been determined.

While carefully explaining from the start who is the client and whose

331. 20 U.S.C. § 1401(23) (2006). If an individual who seeks the attorney's representation is serving in the role of a surrogate, but has not been officially appointed, the attorney should research and investigate to determine whether that individual requires any sort of formal appointment as a surrogate in order to proceed as a decision-maker. The person may not require formal appointment as a surrogate if she meets the definition of a parent under the IDEA, as noted above.

332. See generally Buss, *supra* note 21, at 1699.

interests will govern the course of litigation,³³³ the lawyer should discuss fully any limitations on the scope of the representation, especially when establishing or adjusting an existing relationship between clients.³³⁴ A special education attorney should be prepared to clarify who is the client should there be confusion, not only within the relationship, but also with other individuals, as to whom the attorney represents. Sometimes parents and other individuals, such as school officials, medical professionals, hearing officers, and judges, assume that a special education attorney represents the parent.

An attorney must think through the risks and potential disadvantages of joint representation and, when selecting such a model, stay alert to changing circumstances, bring any developing conflicts to the attention of clients, and be prepared to withdraw in the event that the positions of the clients become fundamentally antagonistic.³³⁵ Attorneys may miss conflicts or feel reluctant to discuss them out of a desire to maintain family harmony.³³⁶ In many situations, conflicts between multiple special education clients can be mediated and resolved. However, because conflicts that are unresolvable may sometimes arise, close consideration should be given to the attorney's ethical responsibilities before proceeding with a model of representation in which the attorney represents more than one parent or both the parent and student.

C. Maximize the Voice of the Client (and Minimize the Lawyer's Voice)

Regardless of whether an attorney represents the parent, child, or both, she should avoid any model of representation or action within the representation that promotes the voice of the lawyer over that of the client or clients. The lawyer should not act in what the lawyer determines to be the client's best interests,³³⁷ unless required by a court or other similar authority, because this model promotes the voice of the lawyer at the expense of the voice of the parent and child. Even where an attorney is not

333. See Mickenberg, *supra* note 57, at 632.

334. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 32 (2011).

335. Moore, *supra* note 1, at 1839-40.

336. Godsoe, *All in the Family*, *supra* note 20, at 18.

337. See Petrerá, *supra* note 2, at 546 ("Some commentators argue that a lawyer-client relationship with the child casts the parent as the enemy. Others argue that the role of the lawyer is not to decide the best interests of the child. Courts and commentators, however, 'have often and overwhelmingly rejected the idea that a lawyer should act in what the lawyer determines is the client's 'best interests.'" Indeed, the most obvious role of the parent throughout the course of representation is to decide what is in the best interests of the child-client . . . the parent should remain an integral part of the representation.") (citing Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 340 (1999)).

expressly using a best interests model, she may feel tempted to act on her views rather than her client's. For example, an attorney may view a client's decision that accords with her own professional judgment as properly considered; in contrast, she may view a divergent decision by the parent or child as evidence of irrationality, stress, or impaired decision-making,³³⁸ and feel inclined to take the course of action she views as best.

The lawyer should consider whether the problem is one of information, given that educating and counseling the client can remedy information deficiencies.³³⁹ Clients might make uninformed decisions or yield their decision-making power because no one has taken the time to improve their capacities and opportunities for decision-making in the special education system in the past and the lawyer has failed to take care to avoid the same mistake.³⁴⁰ Especially where clients may have been silenced by antagonistic school officials or other professionals and may be ill-equipped to speak up assertively and knowledgeably in such a complex legal system, attorneys need to actively ensure that they avoid becoming judge, jury, and ultimate decision-maker in a case.³⁴¹ With patience and effective communication, a lawyer can help a client overcome a temporary incapacity, a gap in knowledge, or a lack of training to become a participatory client.³⁴² Intensive counseling and frequent contact can help the client to develop enough trust in the lawyer and obtain needed information to achieve an effective and typical attorney-client relationship.³⁴³

Especially where the child is the client, attorneys should take special care to avoid imposing their own views in a best interests model and instead use an expressed interests model whenever possible. If an attorney anticipates that a child will have limited capacity to direct the representation, the attorney should consider including an individual who meets the definition of an IDEA parent as a client to avoid a result in which the lawyer is taking protective action, such as practically driving the decisions by making best-interests or substituted-judgment determinations.³⁴⁴ Should the attorney decide not to include the parent as a client where the child is unable to direct the representation, the attorney should use a substituted-judgment model rather than a best-interests model to make a decision based on what the individual in that situation would

338. Herr, *supra* note 143, at 621.

339. *Id.* at 622.

340. *Id.* at 633.

341. *Id.* at 641.

342. *Id.* at 650.

343. *Id.*

344. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2011).

want rather than what the attorney wants for the individual. The substituted-judgment model may provide some limitation on the lawyer's own personal influence over the course of the legal case, which is more unfettered when a best-interests standard is used.

Especially because parents are vested with educational decision-making rights both constitutionally and under the IDEA, a model that maximizes the lawyer's control over decisions results in substantial disenfranchisement of the parent.³⁴⁵ Although the child—or the attorney—may have divergent views from the parent, an attorney representing a parent exclusively should in most situations maintain loyalty to the parent-client's expressed interests so as not to disenfranchise the parent and her legal rights under the Constitution and the IDEA.

*D. Involve and Empower Both Parent and Child Wherever Possible
Without Compromising Loyalty to Client*

In deciding whether to formally include the child as a client, the attorney should consider that participation of a child in legal representation that directly affects her can inform strategic decision-making and client counseling by the attorney by bringing to light information that professionals miss.³⁴⁶ Attorneys should also note that the voice of the child is especially important where the attorney is representing an appointed surrogate or foster parent who knows little about a child involved in the child welfare system or what might be the best decision for her. The child's voice may also be of particular significance where her rights as a criminal defendant, and a corresponding risk of incarceration, might be implicated in a related delinquency matter. Involvement in child welfare or delinquency proceedings weighs in favor of including the child in some way in the client role.

However, the importance of parental rights under the Constitution, the centrality of parental rights under the IDEA, and limitations on a minor's independent legal capacity to sue in a special education due process hearing or civil action in federal court, argue in favor of including the parent in the representation. Perhaps for these reasons and due to the challenges involved in representation of a minor, the most common model of special education representation is one in which the parent, as defined by the IDEA, is the sole client, without any involvement from the student in directing the attorney-client relationship. If this model is chosen, the attorney should remember that the student is still the subject of the representation and literally at the heart of the matter.³⁴⁷ Although the

345. 20 U.S.C. § 1415(b)(1) (2006).

346. Margulies, *supra* note 163, at 1482.

347. It is possible that Comment 4 to Model Rule 1.14 could be read as creating

parent's wishes would control under this model of representation, the attorney should spend time with the child and get to know her. With the parent-client's agreement, the attorney should still communicate with the child and involve her in the representation in informal ways, while maintaining clarity with all parties about the parent's role as the ultimate decision-maker in regards to the representation.

There are a number of ways that the attorney can involve the child in the case, regardless of whether or not the child is a client. Foremost, it is always helpful for a special education attorney to interact with the child, and try to understand the child's frustrations, needs, wishes, strengths and interests.³⁴⁸ The attorney should seek out as much information as possible from the child to assist in understanding the legal violations and developing an appropriate educational program. If the child is very young or severely disabled and unable to communicate, some observation of the child and interaction with the child in any way possible will still yield important information and remind the lawyer who will be receiving and benefiting from the services for which the attorney is advocating.³⁴⁹ If the child is able to communicate, either through traditional speech or with assistance from an adult or assistive technology, the attorney should interview the child. Attorneys gain an understanding of the student's strengths and needs from such a conversation unequaled by a review of documents describing the student.³⁵⁰ An interview of the student, even where the parent is the client, provides the attorney with important information necessary not only in building the factual evidentiary record in a special education matter, but in helping the parent-client to determine the appropriate remedies to pursue and the course of action to achieve those remedies. When interviewing a

some potential or actual duty to prevent or correct action adverse to the interests of non-client minors where the attorney represents the minor's guardian. See Godsoe, *All in the Family*, *supra* note 20, at 15. This duty might not be applicable to a situation in which an attorney represents a parent or other caregiver in a special education matter because the parent has educational decision-making rights in the special education case and corrective action might be based on a subjective determination by the attorney who is imposing her own views that the parent's actions are adverse to the child's. The comment states, "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 4. It is not clear that the comment would refer to a parent and child rather than a court-appointed guardian, or similarly that it would follow that attorneys in special education cases have any duty to non-client children of their parent clients.

348. See Joseph B. Tulman, *Investigating and Initiating the Special Education Case*, in *SPECIAL EDUCATION ADVOCACY UNDER THE IDEA FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 7-4* (Joseph B. Tulman & Joyce A. McGee eds., 1998).

349. Petrera, *supra* note 2, at 550 ("Even if the child is not capable of actively participating in the representation, the lawyer gains a wealth of information simply by observing the child for a moment.")

350. Cannon & Rinaldi, *supra* note 126, at 34-35.

child, lawyers may need to vary their interviewing techniques as a result of any special circumstances, including any cognitive limitations, age limitations, or emotional or psychological limitations.³⁵¹

To conduct an effective interview of the child, the attorney may want to review some of the extensive research on interviewing children.³⁵² While much of this literature focuses on the child welfare and criminal justice contexts, many of the principles remain the same.³⁵³ For example, open-ended questions are preferable because closed-ended questions tend to lead children to respond with no more information than the answer requires.³⁵⁴ It is also important to give the child plenty of time to respond to questions, particularly at the beginning of the interview.³⁵⁵ Especially if a student's special education needs are not being met, school may be an unpleasant topic.³⁵⁶ "Wait-time," in which children are allowed plenty of time to think about a question before an assumption is made that they do not know the answer, can be effective in enabling the child to build up the courage to discuss even difficult subjects.³⁵⁷

In addition to interviewing the child, whether that child is a client or not, an attorney should also involve her in the legal case, where appropriate and applicable, by including her in IEP meetings, taking her to visit potential school placements, and involving her in any placement decisions.³⁵⁸ An

351. ELLMANN ET AL., *supra* note 36, at 113.

352. Cannon & Rinaldi, *supra* note 126, at 34.

353. *Id.*

354. Thomas D. Lyon, *Investigative Interviewing of the Child*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 2-3 (D.N. Duquette & A.M. Haralambie eds., 2010) [hereinafter Lyon, *Investigative Interviewing of the Child*].

355. *Id.*

356. Cannon & Rinaldi, *supra* note 126, at 34.

357. Lyon, *Investigative Interviewing of the Child*, *supra* note 354, at 13. Attorneys may want to consult the Handbook on Questioning Children (ABA Handbook) produced by the American Bar Association Center on Children on the Law, which provides guidance for interviewing children in different development stages. For example, the book cautions that even adolescents between the ages of eleven and eighteen may not have acquired adult narrative skills, may not understand time as a historical concept and are likely to lose track of long, complex questions. ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE 4-5 (2d ed. 1999). While some of these materials on interviewing children, such as the ABA Handbook, provide guidance to attorneys based on a child's age range, children with disabilities may not have reached the developmental milestones and, therefore, information for attorneys in these materials that are based on age or age range may not be applicable to every child. Therefore, attorneys should avoid making assumptions about the capabilities and capacity of a student before beginning an interview and try to garner from other sources prior to the interview and from the student at the start of the interview the student's actual communication abilities. Cannon & Rinaldi, *supra* note 126, at 34. Regardless, the use of active listening and openness of mind can assist the lawyer in understanding a child or adolescent client. ELLMANN, *supra* note 36, at 113.

358. Especially if the student is an adolescent and able to communicate, she may

attorney should also educate the child about her legal rights under special education law more generally, and more specifically about what is happening in the case and the various courses of action that could be taken. Counseling the child about possible courses of action, and soliciting feedback from her about her goals and preferences can prove critical in developing a strong legal case and in ensuring buy-in from the very individual who will have to live with the consequences of the attorney's advocacy. Children who are not consulted about their educational placements will be less likely to succeed in those placements; it is clear that both the parent and child need to be engaged for the child's educational placement to work.³⁵⁹ For example, the child may not attend or feel engaged at school if he is not involved in the advocacy process; in contrast, a child can reap procedural justice benefits from involvement in the representation, whether formally as a client or informally, leading to more educational success.³⁶⁰ The child can also be involved in a due process hearing; indeed, sometimes the testimony of a child before a hearing officer can prove quite compelling, especially if she is well-prepared by the attorney to take the stand. Even where the child is not included in the client role, the lawyer can provide her a voice in the special education case in these ways, without compromising loyalty to the parent. Providing the child with a voice "implies participation, and a sense that others value one's opinions and sentiments,"³⁶¹ which can empower the child to express and advocate for herself both in the course of the case and in the long term.³⁶²

When the attorney decides to represent the child exclusively, the attorney should maintain a typical lawyer-client relationship with the child client³⁶³ and not minimize the child's role. The lawyer can also take steps to enhance the child's capacity through input from various sources such as the child, her family and peers, and professionals who have worked with the

participate in IEP meetings or otherwise voice her opinions as to her educational needs. *See, e.g.*, 20 U.S.C. § 1414(d)(1)(B)(vii) (2006) (providing that a student is a member of the IEP team whenever appropriate).

359. Godsoe, *All in the Family*, *supra* note 20, at 15, 41 (explaining that the failure to interview the child in a special education case "results both in a failure to gain valuable information about the case, and, often, worse outcomes-children who are not consulted about their educational placement will be less likely to succeed in it").

360. *Id.*

361. Margulies, *supra* note 163, at 1482.

362. Empowerment of a child who has been struggling in school is especially important, given that such children are often already in a very disempowered state. Petreera, *supra* note 2, at 550.

363. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2010). Even a client with a diminished capacity, whether due to age or disability, "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." *Id.* at R. 1.14 cmt. 1.

child and through the lawyer's sensitivity to race, disability, and gender.³⁶⁴ Additionally, the attorney can effectively involve the child by communicating with her in a developmentally appropriate way that accounts for the child's age, level of education, cultural context, and degree of language acquisition.³⁶⁵ The lawyer should counsel the child effectively by explaining clearly, precisely and in terms she can understand the meaning and consequences of any action, thereby affording the child a chance to provide informed guidance to the lawyer and, consequently, a voice.³⁶⁶

Even where the child is the sole client, a lawyer should still engage the parent or caregiver, if that person is involved in the child's life and willing to participate, throughout the course of the representation. In order to effectively advocate for the child, because the parent's educational decision-making rights are so central under the IDEA, "the dynamics of special education representation must incorporate a parent's right to decide their child's education."³⁶⁷ Involvement of a parent can also assist the attorney in forming a more effective working relationship with the child-client. The parent can offer emotional support to the client and practical guidance to the lawyer.³⁶⁸ Because parents have usually developed a system for communication with a child who might have difficulty communicating with others, a parent can help to facilitate communication between the parent and child and, where needed, can serve as a "translator" of sorts in situations where the lawyer has difficulty understanding the child or the child has difficulty understanding the lawyer.³⁶⁹

If the child is the attorney's sole client in the matter and the attorney involves the parents and interacts with them during the course of the case in these ways, the lawyer should still work to maintain the centrality of the child's voice. For example, in some cases, an attorney might involve the

364. Margulies, *supra* note 163, at 1476.

365. Gail Chang Bohr, *Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings*, 32 WM. MITCHELL L. REV. 989, 997 (2006).

366. *Id.* at 997-98.

367. Petrerá, *supra* note 2, at 541.

368. Herr, *supra* note 143, at 614.

369. Note that the attorney should account for any impact on attorney-client confidentiality that might result from involving the parent in facilitating communication. Under Model Rule 1.14, where a third party is there simply to assist in facilitating communication between the parent and child, it is possible that attorney-client confidentiality may be maintained between the lawyer and the child because it might extend to the parent in that situation. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. *See id.*

parents so that they may serve as a next friend in a due process complaint or civil action, but the child is the exclusive client for purposes of the attorney-client relationship. In that case, the attorney should ensure that the parents are willing to defer to the child to take the lead role in directing the representation and empower the child to make critical decisions. Similarly, if a parent is exclusively serving in the client role, but the attorney involves the child and interacts with her in any of these ways, the attorney should remember that the parent is the client and ultimate decision-maker. Where the parent is the client, her decisions should determine the course of action that the attorney takes, even if the child disagrees. Where one individual or another is the sole client, loyalty to that client should remain paramount.

CONCLUSION

The model of representation used by an attorney in a special education matter should not be taken for granted. Instead, thoughtful consideration of the relevant factors discussed in this Article should inform the decision. Especially when attorneys are deliberate in shaping the model of representation in a special education case and involving both the parents and the student, regardless of the selected model, attorneys can be uniquely positioned to empower all family members with which they interact in ways that can have a lasting positive impact. The recommendations in this Article are designed with an eye towards the empowerment of the entire family in a special education case.

Lawyers should remember that their clients will continue to be a part of the special education system beyond the life of the legal case, as well as other bureaucratic and legal systems to which low-income families and/or families with children with disabilities are subject during the child's school years and into adulthood. In the chaos and rush of practice, many lawyers have little time to assist with their clients' personal growth.³⁷⁰ However, children with disabilities may be uniquely in need of knowledge, skills, and training to empower them to function not only as participatory, assertive clients during the course of the attorney-client relationship,³⁷¹ but as participatory, assertive actors in these bureaucratic systems throughout their lives. Similarly, parents of a child with a disability could benefit from such training as a means of empowerment. Clients who actively participate in their special education cases are not only more likely to get better results in those cases,³⁷² but can become more effectively armed to advocate on their own behalf even when the instant legal case has concluded.

370. Herr, *supra* note 143, at 639.

371. *Id.*

372. *Id.*

Selection of a model of representation may present particular challenges and should be evaluated thoughtfully in each special education case through a contextualized approach. Regardless of the model chosen, however, an attorney should involve both the child and parents in the legal case wherever possible by educating them, counseling them, and providing them with a voice, thereby empowering them to become better self-advocates throughout their lives.