

In Defense of *Maroni*: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases

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Should the ability to pay for the services of an attorney determine which students have a better chance of receiving appropriate services and placement because they can afford an attorney to represent them at the various stages of administrative appeal and litigation? I think we would all agree that the answer to that question is a resounding “no.”¹

INTRODUCTION

In March of 1991, fifteen-year-old Steven Wenger suffered severe head trauma as a result of an auto accident.² Following his release from the hospital a year later, Steven needed special education services from his local school district.³ The Individuals with Disabilities Education Act (IDEA)⁴ required the school district to provide Steven with these services. Under the IDEA, states receiving federal special education funding must provide a “free appropriate public education” to all children—no matter the extent of the child’s disabilities—and must observe certain procedures laid down in the statute in order to receive federal funds.⁵ Because Steven lived in a state that was subject to the IDEA, his family’s attempts to obtain appropriate special education services for their child provide a concrete example of how the IDEA works.⁶

As it had every year since Steven first started receiving special education services, a committee at the Canastota School District met in July 1994 to prepare Steven’s Individualized Education Program (“IEP”), which is the document that specifies the special education services a child will receive.⁷ Steven’s father was dissatisfied with his child’s IEP,⁸ so he requested that a local education agency review its appropriateness at an impartial due process hearing.⁹ The school, wishing to avoid a

1. 132 Cong. Rec. 17610 (1986) (remarks of Rep. Jeffords).

2. *Wenger v. Canastota Cent. Sch. Dist.*, 961 F. Supp. 416, 418 (N.D.N.Y. 1997).

3. *Id.*

4. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

5. The IDEA so strongly asserts that education be made available to all children that it even requires that services be provided for children expelled from school. *Id.* § 615; STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 3 (Steve McEllistrem et al. eds., 2002).

6. While litigation is not particularly frequent, the IDEA process often ends in the parents of children with disabilities and the school district developing an adversarial relationship. Stephen A. Rosenbaum, *Aligning or Maligning: Getting Inside a New IDEA, Getting Behind No Child Left Behind, And Getting Outside It All*, 15 HASTINGS WOMEN’S L.J. 1, 15 (2004). Since parents want schools to provide as many educational services as possible to their child and schools want to “shortchange students” due to budgetary constraints, the reason parent/school relations so often descend into hostility is apparent. *Id.* at 2 n.9.

7. Individuals with Disabilities Education Improvement Act of 2004 § 614(d).

8. *Wenger*, 961 F. Supp. at 418.

9. The IDEA grants parents the right to administrative review of school decisions. Individuals with Disabilities Education Improvement Act § 614(d)(4).

due process hearing, scheduled another IEP meeting in September of 1994 to reevaluate Steven's IEP.¹⁰ The second IEP still did not satisfy Steven's father, who again requested a due process hearing. Unable to afford an attorney,¹¹ Steven's father represented his son without the aid of an attorney, as the IDEA expressly permits parents to do.¹² At the due process hearing, the local education agency decided that Steven's IEP was appropriate.

The IDEA allows a state to decide whether to provide one or two levels of administrative review of IEPs. Steven lived in a state that maintained two levels of administrative review.¹³ Steven's father appealed to the state education agency, where he lost as well.¹⁴ Having exhausted his administrative remedies, Steven's father filed suit in federal court.¹⁵ From 1995, when the case was filed, until 1997, when the court issued an opinion, Steven's father represented his child pro se in a federal district court.¹⁶ Steven's father lost his claim at the district court level; however, the Second Circuit vacated the district court's ruling against Steven by holding that Steven's father should not have been allowed to represent his son pro se.¹⁷ The court of appeals reasoned that it was protecting children with disabilities by preventing parents from compromising their children's rights under the IDEA by providing impassioned but incompetent counsel.¹⁸

In 2003, the First Circuit decided *Maroni v. Pemi-Baker Regional School District* and reached the opposite conclusion; parents do have a right to proceed pro se in IDEA cases.¹⁹ The court noted that given the scarcity of lawyers who handle special education cases and the expense of hiring them, the Second Circuit, and other circuits that have ruled in a similar manner,²⁰ might be preventing children from utilizing their only available advocate—their parents.²¹ According to *Maroni*, denying parents the right to proceed pro se in IDEA cases contravenes the language of the IDEA, which allows “[a]ny party aggrieved” by a final administrative review ruling to appeal to either state or federal court, and the structure of the IDEA, which is designed to encourage parental advocacy.²² Because federal law and that of most states prevents nonlawyers from representing another person's rights in courts, the question of whether parents should be allowed to proceed pro se in IDEA cases hinges on whether

10. *Wenger*, 961 F. Supp. at 418.

11. *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124 (2d Cir. 1998).

12. *Id.*

13. In states that have two levels of due process, the first hearing is administered by what the IDEA refers to as a local education agency and the appellate hearing is administered by the state education agency. Individuals with Disabilities Education Improvement Act § 615(f)(1)(A).

14. *Wenger*, 961 F. Supp. at 418–19.

15. *Id.* at 419.

16. *Id.*

17. *Wenger*, 146 F.3d at 125.

18. *Id.*

19. *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 258 (1st Cir. 2003).

20. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997).

21. *Maroni*, 346 F.3d at 258.

22. *Id.* at 250–53.

the Act grants parents their own cause of action, because the U.S. Code expressly permits individuals to proceed pro se when litigating their own claims.²³

This Note will argue that parents have a cause of action under the IDEA and, thus, should be allowed to proceed pro se. I will undertake this task by analyzing *Collinsgru v. Palmyra Board of Education*, the seminal case that argues that parents should not be allowed to proceed pro se,²⁴ and the *Maroni* decision which held that the IDEA allows pro se representation.²⁵ The circuit courts' reasoning will serve as a touchstone to examine the IDEA's language, legislative history, and policy. Part I of this Note will provide an overview of the IDEA and of some of the problems that families of children with disabilities have in utilizing its protections. Part II of this Note will argue that the First Circuit's decision in *Maroni*, which allows parents to proceed pro se, represents the correct interpretation of the IDEA under the plain language of the act. Part III of this Note will argue that, because the legislative history of the IDEA shows that Congress created the statute in part to protect parents against having to pay for their children's special education costs, parents have a right under the IDEA that can be aggrieved by insufficient IEPs for their children. Part IV of this Note will argue that, since lawyers who handle IDEA cases are scarce and expensive, disallowing pro se representation goes against the IDEA's purpose, which is to ensure that all children, regardless of their parents' fiscal resources, receive an appropriate education. This Note concludes that, for the above-given reasons, parents should be able to proceed pro se in IDEA cases.

I. AN OVERVIEW OF THE IDEA'S GOALS AND EFFECTIVENESS

Section A of this Part details the history of the IDEA. It will show that the IDEA came into existence because America's schools warehoused disabled children and that Congress amended the Act several times to increase parental involvement. Section B describes how the IDEA works to ensure that children with disabilities receive appropriate education services and how disputes between parents and school districts are resolved. Section C uncovers shortcomings of the act in ensuring fair educational treatment of all children, especially children of parents with limited means.

A. *The IDEA's History*

Over the course of its history, our country has done little to educate children with special needs. In 1975, an observer of a school for children with special needs saw "rows and rows of children and adults strapped to their chairs in a dimly lit room, a cacophony of moans and screams. Four or five attendants stood watch over what

23. 28 U.S.C. § 1654 (2000).

24. *Collinsgru*, 161 F.3d 225, 231. The other circuits that ruled that parents may not proceed pro se did not even bother to engage in extended statutory analysis. See *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th Cir. 2001); *Wenger*, 146 F.3d 123; *Devine*, 121 F.3d 576. The Second Circuit also found that the IDEA grants parents only procedural rights. *Wenger*, 125 F.3d at 124. And the Seventh and Eleventh Circuits bar any parental cause of action. *Navin*, 270 F.3d at 1149; *Devine*, 121 F.3d at 576. So before the First Circuit decided *Maroni* in 2003, no court had found that the IDEA's text granted a parental cause of action.

25. *Maroni*, 346 F.3d at 358.

seemed to be about a hundred ‘students.’”²⁶ After court cases made clear that public schools either excluded or warehoused children with disabilities, Congress passed the Education for All Handicapped Children Act (“EACHA”) in 1975,²⁷ which later become the Individuals with Disabilities Education Act (“IDEA”).²⁸

The IDEA has been amended numerous times. In 1986, Congress added an attorney’s fee provision out of concern about the lack of lawyers taking IDEA cases.²⁹ In 1990, Congress added a transition clause that was aimed at youth with disabilities about to enter the work force.³⁰ In 1997, Congress then added provisions that were meant to increase parental involvement and advocacy.³¹ And in 2004, Congress reauthorized the IDEA and amended it so that the act would be more outcome-based and create less paperwork for teachers, but these latest amendments do not change the statutory language that covers civil actions.³²

B. The IDEA’s Structure

Under the IDEA, the federal government provides special education funding to those states that have both a “zero reject” policy³³ when it comes to education and follow certain procedures when deciding on a student’s eligibility for special education services.³⁴ To ensure that a state is complying with the IDEA, the statute requires that every year a participating state provide the federal government with its plan to provide special education services for students with disabilities.³⁵ Also, in addition to mere accessibility to special education services, the IDEA imposes a substantive pedagogical standard on participating states that demands that each child receive a “free appropriate public education.”³⁶

26. Therese Craparo, Note, *Remembering the “Individuals” of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 467, 472 (2003) (quoting John Merrow, *What’s So Special About Special Education?*, EDUC. WEEK, May 8, 1996, at 48).

27. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

28. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

29. Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986).

30. Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1103 (1990).

31. See NATIONAL COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 34 (2000).

32. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

33. A “zero reject policy” consists of making education accessible to all children regardless of the severity of their disabilities. H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION 37–40 (1990).

34. Individuals with Disabilities Education Improvement Act, § 615(a).

35. *Id.* § 612(a).

36. *Id.* § 612(a)(1)(A).

In enacting the IDEA, Congress created a procedure demanding schools to involve parents in making educational choices for their children.³⁷ To ensure active parent participation, the IDEA mandates that a school notify parents of their procedural rights under the statute.³⁸ The Department of Education states that there are ten steps in the IDEA process, assuming that there is no dispute between the school and the child's parents:

- (1) a child is identified as possibly needing special education and related services;
- (2) the child is evaluated; (3) eligibility is decided; (4) the child is found eligible for services; (5) an Individualized Education Program (IEP) meeting is scheduled;
- (6) an IEP meeting is held, and the IEP is written; (7) services are provided; (8) progress is measured and reported to parents; (9) the IEP is reviewed by the IEP team a minimum of once a year; and (10) the child is reevaluated at least every three years.³⁹

A school or parent can request an evaluation⁴⁰ and a parent must give consent to the evaluation unless a hearing officer rules otherwise.⁴¹ If a parent disagrees with the evaluation, she has the right to obtain an independent evaluation.⁴² In deciding upon eligibility, there are ten enumerated disability categories that invoke the IDEA and a second catch-all class of protected students, those with a specific learning disability.⁴³ Once a child is deemed to need special education, the school assembles a team that includes teachers and parents to create the IEP—the description of what special educational services will be provided to the child for the academic year.⁴⁴ With parental consent, a student can have an IEP lasting for three years under the 2004 amendments to the IDEA, which created a pilot program that allows fifteen states to create multiyear IEPs.⁴⁵ A parent who disagrees with the final outcome of an evaluation, an IEP, or the implementation of an IEP has the right to ask for a due process hearing to resolve the dispute,⁴⁶ or to ask for non-binding mediation first.⁴⁷

To succeed at the due process hearing, a parent must show either that a school failed to meet the IDEA's substantive standards for an IEP or that the school failed to follow all of the IDEA's procedural safeguards. Substantially, an IEP must provide a "free appropriate public education,"⁴⁸ and the Act presumes that an appropriate

37. See MILTON BUDOFF & ALAN ORENSTEIN, *DUE PROCESS IN SPECIAL EDUCATION* 54 (1988).

38. Individuals with Disabilities Education Improvement Act, § 615(c).

39. Tana Lin, *Recovering Attorney's Fees Under the Individuals with Disabilities Education Act*, 180 ED. LAW. REP. 1, 3 (2003) (citing U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVICES, *A GUIDE TO THE INDIVIDUALIZED EDUC. PROGRAM* (2000)).

40. Individuals with Disabilities Education Improvement Act, § 614(a)(1)(B).

41. *Id.* § 614(a)(1)(D)(i)(I).

42. Independent Educational Evaluation, 34 C.F.R. § 300.502(a)(1) (2002).

43. Individuals with Disabilities Education Improvement Act, § 602(3)(A)(i).

44. *Id.* § 614(d)(1)(A)(i).

45. *Id.* § 614(d)(5).

46. *Id.* § 615(e).

47. *Id.* § 615(f).

48. *Id.* § 602(9).

education for children with disabilities is in the same classroom as everyone else.⁴⁹ The statute directs schools to provide an education that will give each child with a disability meaningful opportunities for employment after school.⁵⁰ The Supreme Court, however, undermined this relatively high standard by holding that under the IDEA a school must only provide some minimal educational benefit.⁵¹

At a due process hearing the IDEA grants parents the right to choose between representing their child, obtaining an attorney, or using a nonlawyer representative.⁵² The official selected to conduct the due process hearing must be impartial.⁵³ The parents—as parties—have a right to present evidence, compel witnesses, and confront witnesses through cross-examination.⁵⁴ Parents also have a right to a written record of the hearing and a written opinion justifying the ruling.⁵⁵ If the ruling is adverse, parents, as parties, can appeal to the state appeal board if the state has an appellate review agency.⁵⁶ The statute also provides that once all administrative hearings have been exhausted, “any party aggrieved” by the ruling or the findings of the decision can appeal to either a state or federal court.⁵⁷

Courts subject due process hearings to a limited standard and scope of review. The IDEA states that a court “shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.”⁵⁸ The First Circuit places emphasis on the word “additional” in the text and interprets the provision to mean that a court must use the administrative record unless the new evidence supplements the record.⁵⁹ The Sixth Circuit, however, allows any type of new evidence to be presented to the court.⁶⁰ Nevertheless, all circuits agree that “a court should [give] ‘due weight’ to the results of the administrative proceedings and not to ‘substitute [its] own notions of sound educational policy for those of the school authorities, whose decision it is reviewing.’”⁶¹ Depending on the circuit, a court may or may not be able to look at the record anew, but it must be deferential to the

49. *Id.* § 612(a)(5)(A).

50. *Id.* § 600(d)(1)(A).

51. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561 (2003). While the Supreme Court was arguably simply worried about courts not getting involved in pedagogical disputes, in the years following *Rowley* lower courts have specifically held that a school need not provide the best possible education or one created to maximize the student’s potential. ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 99 (1996).

52. Individuals with Disabilities Education Act, § 615(h)(1).

53. *Id.* § 615(f). State and federal law require that hearing officers be independent from public education agencies. STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW, *supra* note 4, at 141.

54. Individuals with Disabilities Education Improvement Act, § 615(h)(2).

55. *Id.* § 615(3)–(4).

56. *Id.* § 615(g).

57. *Id.* § 615(h)(2)(A).

58. *Id.* § 615(h)(2)(C).

59. *Town of Burlington v. Dept. of Educ. for Commonwealth of Mass.*, 736 F.2d 773, 790 (1st Cir. 1984).

60. *Metro. Gov’t of Nashville v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990).

61. *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052–53 (7th Cir. 1997) (alteration in original).

educational judgment of the hearing officers who are experts in the field.⁶² Additionally, this deference to the hearing officer recognizes the traditional role of the state to control education.⁶³

C. The IDEA's Effectiveness

The IDEA's importance as a statute can be seen by the fact that in the 2001–2002 school year about six and half million children, or 13% of students nationwide, received special education services and, thus, were eligible for the IDEA's protections.⁶⁴ But while the IDEA's purpose of ensuring that all six and one half million children protected by the statute receive an appropriate education is noble, its ability to effect those results has been mediocre. While schools and parents are supposed to work together cooperatively to forge an IEP for a child with a disability, that goal often goes unrealized. A study done by the National Council on Disability reported that schools have a poor track record in fulfilling their duty to create IEPs that meet the needs of children with disabilities.⁶⁵ Also, because parental requests for due process hearings are concentrated in certain geographic areas, there is a concern that certain schools are not attempting to work cooperatively with parents to create appropriate IEPs, which means that parents might be getting their first real input about their child's IEP at the due process hearing.⁶⁶ This failure of individual schools to create sufficient IEPs is unsurprising because many state education agencies fail to sufficiently monitor schools to ensure compliance with the IDEA.⁶⁷

State and school noncompliance forces many parents to invoke the IDEA's formal grievance process and ask for either a due process hearing or mediation.⁶⁸ But even in the due process hearing, a child's right to an appropriate IEP is not always adequately protected. Authorities in the educational field depict these hearings as being especially unfair to children whose parents are of poor or moderate means.⁶⁹ Children of modest means are disadvantaged when their parents cannot afford to remove their child from the school being litigated against pending the outcome of the hearing, when their parents cannot afford lawyers, and when arguing their claim because their parents tend to be less familiar with administrative hearings.⁷⁰

The importance of having a vigorous system of judicial review is apparent since states are lax in enforcing school compliance with the IDEA,⁷¹ some schools

62. *Id.* at 1053.

63. *Id.*

64. U.S. GENERAL ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBER OF FORMAL DISPUTES ARE LOW AND STATES ARE USING OTHER STRATEGIES TO RESOLVE DISPUTES 5 (2003), available at www.gao.gov/new.items/d03897.pdf.

65. NATIONAL COUNCIL ON DISABILITY, *supra* note 31, at 18.

66. *Id.* at 22.

67. *Id.*

68. *Id.* But to those worried about frivolous litigation by parents it should be noted that the number of due process hearings actually had decreased in the five years prior to 2001–2002 school year as parents used mediation more often. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 63, at 3, 12.

69. BUDOFF & ORENSTEIN, *supra* note 36, at 91–94.

70. *Id.*

71. See *supra* note 67.

traditionally override parents' concerns about their child's IEP,⁷² and because due process hearings are skewed against poor children.⁷³ Congress itself saw the need for the full panoply of due process rights that comes with getting one's day in court, which is why it granted a civil right of action under the IDEA.⁷⁴ However, unless parents are "parties aggrieved" with their own IDEA cause of action, only the few parents who can afford representation have full access to the protections of the Act.⁷⁵

II. PARENTS ARE "PARTIES AGGRIEVED" UNDER THE IDEA

When courts interpret a statute, they should endeavor to hew closely to the plain meaning of the language.⁷⁶ This seemingly simple mandate is quite often difficult for courts to enact. This mandate is especially hard for a court deciding whether the IDEA grants a parental cause of action because the court must look to scattered passages throughout the IDEA instead of interpreting a particular line or section of the statute.⁷⁷

This Part of the Note will examine and compare the *Collinsgru* and *Maroni* courts' understandings of the text of the IDEA. The Note will examine the First Circuit's *Maroni* opinion because it is the only court that has ruled that the IDEA authorizes parents to proceed pro se, while the *Collinsgru* decision is chosen as an exemplary case of those circuits that do not allow parental pro se representation because the Third Circuit's opinion is careful, well crafted, and thorough. This Note will argue that the IDEA's extensive language proclaiming parents as their child's primary advocates and acknowledging parents' stake in the outcome of the IEP review process clearly mandates that parents are "parties aggrieved" entitled judicial review by the statute.

A. *The Collinsgru Court on the IDEA's Text*

In *Collinsgru*, the Third Circuit held that the IDEA grants parents procedural rights, like the right to be involved in the IEP team, but it does not grant parents substantive rights.⁷⁸ The parents in the case, Martha and Robert Collinsgru, proceeded pro se on behalf of their son. After a hearing in which the district court ruled that the Collinsgrus could not represent their son, the parents sued in federal court. All parties stipulated that the Collinsgrus could not find an attorney to represent them and did not qualify for a court-appointed attorney in forma pauperis.⁷⁹ The Collinsgrus asserted two alternative legal arguments as to why they should be allowed to proceed pro se. First, they argued that the IDEA creates an exception to the common-law doctrine that parents cannot represent their child's claim in federal court.⁸⁰ Second, they argued that

72. NATIONAL COUNCIL ON DISABILITY, *supra* note 31, at 22.

73. BUDOFF & ORENSTEIN, *supra* note 36, at 91–94.

74. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(i) 118 Stat. 2647, 2723 (2004).

75. *See Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 257–58 (1st Cir. 2003).

76. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

77. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 233 (3rd Cir. 1998).

78. *Id.*

79. *Id.* at 228.

80. *Id.* at 231–32.

the IDEA gives parents an independent cause of action, in which case they could claim the right to proceed pro se in federal court. The Third Circuit rejected both claims.⁸¹

1. The *Collinsgru* Court Holds that the IDEA Does Not Authorize Parents to Represent Their Child's Claim

The Third Circuit first addressed the issue of whether the IDEA authorizes parents to represent their child's claim in court. Looking to precedent to guide its decision, the *Collinsgru* court examined *Osei-Afriyie v. Medical College of Pennsylvania*—a previous case dealing with parental advocacy. In *Osei-Afriyie*, the Third Circuit vacated a verdict where a father had pursued his child's tort claim pro se by reasoning that the child could pursue the claim when he reached majority.⁸² The *Osei-Afriyie* court gave two policy reasons for its decision: (1) pro se representation places a burden on the court system,⁸³ and (2) the child is more likely to receive adequate representation from an attorney because of the professional's skill and because the profession is regulated.⁸⁴ These policy reasons justified adherence to the common-law rule that a nonlawyer may not prosecute another person's claims.⁸⁵ In *Collinsgru*, because of these policy reasons, and because Congress legislates "against a background of common-law principles," the Third Circuit held that unless there was strong evidence to the contrary, Congress did not intend parents to proceed pro se under the IDEA.⁸⁶

The Third Circuit rejected the argument that the IDEA, as a remedial statute, should be construed liberally to allow parents to represent their child's claims because this common-law canon of statutory interpretation only applies to the remedies a statute gives.⁸⁷ The Third Circuit instead employed another tool of statutory interpretation to show that the IDEA does not overturn the common law rule prohibiting nonlawyer representation. The court invoked "[t]he canon of *expressio unius est exclusio alterius* [which] means that explicit mention of one thing in a statute implies congressional intent to exclude similar things that were not specifically mentioned."⁸⁸ In the IDEA, Congress explicitly states that parents can advocate for their child's claim in due

81. *Id.* at 232.

82. *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 883 (3rd Cir. 1991).

83. *Id.*

84. *Id.*

85. *Collinsgru*, 161 F.3d at 230. Here, it should be highlighted that the logical weakness of giving a school a weapon with which to dismiss IDEA claims in the name of protecting the interests of a child with disabilities has been made apparent in the case law. In a recent case, a school district tried to get an appellate court to vacate a verdict in favor of a child because the parents were allowed to proceed pro se. The Second Circuit, which rejected pro se representation in *Wenger*, and still does, declined to overturn the verdict favoring the child without reversing *Wenger*. *Murphy v. Arlington Sch. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002). So, in the Second Circuit, precedent seems hold that a parent cannot proceed pro se, but if the district court mistakenly does not dismiss the parent's case for proceeding pro se and the parent wins, then that is fine. This holding creates the incentive on the part of parents to sneak one past judges; it also creates an incentive on the part of judges to not remember to dismiss a pro se IDEA action if a plaintiff seems sympathetic or to remember if the plaintiff is less endearing.

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

87. *Id.*

88. *Id.* at 232.

process hearings, but failed to do the same in the section regarding judicial review;⁸⁹ so Congress must have only authorized parents to represent their child's claims in due process hearings.

2. The *Collinsgru* Court Holds Parents Do Not Have a Cause of Action Under the IDEA

Having concluded that parents could not represent their child's claims, the Third Circuit examined whether the IDEA granted parents their own cause of action. The IDEA states that "any parties aggrieved" by the administrative ruling can "bring a civil action in federal court."⁹⁰ The Third Circuit conceded that the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court."⁹¹ In the Third Circuit, parents are "parties aggrieved" for IDEA procedural claims, when, for example, a school district does not give a parent notice of her rights under the IDEA.⁹² Therefore, the main issue in the *Collinsgru* court's opinion is whether parents count as "aggrieved parties" on substantive IDEA claims or if only the child denied services counts. The Third Circuit analogized that whether parents have a cause of action under the IDEA is similar to a plaintiff claiming that a statute creates a private cause of action when there is no explicit language in the statute to that effect.⁹³ When creating a new cause of action not explicitly mentioned in the text of the statute, courts require strong and clear evidence.⁹⁴

The Third Circuit rejected the statutory sections that the *Collinsgrus* relied upon to support their claim that the IDEA creates joint rights in parents and children. First, the court reported that the *Collinsgrus* relied on an old version of § 1415 of the IDEA, which provided attorneys' fees to "parents or guardian of a handicapped child or youth who is the prevailing party."⁹⁵ The court rejected this passage as evidence that the IDEA currently creates parental rights by noting that in 1997 the statute was changed "to the parents of a child with a disability who is a prevailing party."⁹⁶ This new language indicates for the Third Circuit that the child is the prevailing party and, therefore, the aggrieved party who can bring suit. Next, the court rejected the attorneys' fee section of the IDEA as evidence that parents are parties who can be aggrieved by a due process hearing outcome. The text of the attorneys' fee section of the IDEA "allows for the award of attorney's fees 'to the parent or guardian who is the prevailing party if he was substantially justified in rejecting [any] settlement offer.'"⁹⁷ While the grammatical structure of this passage indicates that the parents are the prevailing party, for the Third Circuit this passage could simply be referring to the

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 234 (quoting 20 U.S.C. § 1415(e)(4)(B) (1988)).

96. *Id.* (quoting 20 U.S.C. § 1415(i)(3)(B) (1997)).

97. *Id.* (quoting 20 U.S.C. § 1415(i)(3)(E) (1997)).

procedural cases where the court acknowledges that parents have standing to pursue judicial review.⁹⁸

For the Third Circuit, the IDEA's language is ambiguous about whether parents are "parties aggrieved."⁹⁹ Even the passages in *Collinsgru* brought to the fore can be read as granting or addressing only parents' procedural rights. So the clear evidence the Third Circuit required to find a parental cause of action under the IDEA is not present.

B. The First Circuit Found That the Plain Language of the IDEA Creates a Parental Cause of Action

As in *Collinsgru*, the parents in the *Maroni* case argued that the IDEA authorizes them to represent their child's claim and that parents have their own cause of action under the Act. Because the First Circuit held that parents had their own cause of action, it did not have to address the representation argument.¹⁰⁰ Nevertheless, in dicta the First Circuit suggested that the IDEA does overrule the common-law rule that parents cannot represent their children's claims.¹⁰¹

1. The First Circuit Held that Parents Are "Parties Aggrieved"

The First Circuit began its analysis of whether the IDEA grants a parental cause of action by noting that the IDEA grants any "party aggrieved by the findings and decision" made in a due process hearing(s) a "right to bring a civil action."¹⁰² The court reasoned that parents are parties to the due process hearings because the IDEA allows them to transfer the ability to ask for a due process hearing to their child once the child reaches majority.¹⁰³ Having decided that parents are parties to due process hearings, the court reasoned that the plain language of the IDEA permits parents to sue if they are aggrieved by the outcome of the hearing.¹⁰⁴ The First Circuit further justified its holding by noting that the courts have determined that parents are "parties aggrieved" under an identically worded section that permits parents to appeal an adverse decision of the local education agency to the state education agency.¹⁰⁵ Because the same term should be given the same meaning within one statute, the court felt that it was further justified in holding that parents should be "parties aggrieved" for the purposes of judicial review.¹⁰⁶ To do otherwise would unnecessarily muddy the meaning of terms in the Act.

The argument against parental pro se representation that the First Circuit found most persuasive is that Congress' inclusion of a fee-shifting provision suggests that Congress wants to bar pro se representation of IDEA claims.¹⁰⁷ But the *Maroni* court thought that this use of Congress' inclusion of a fee-shifting provision in the IDEA

98. *Id.*

99. *Id.* at 235.

100. *See* *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 249 (1st Cir. 2003).

101. *Id.*

102. *Id.* at 251 (quoting 20 U.S.C. § 1415(i)(2)(A) (2000)).

103. *Id.*

104. *Id.*

105. *Id.* at 251–52.

106. *Id.* at 252.

107. *Id.*

“would lead to perverse results.”¹⁰⁸ While Congress wanted to encourage attorney representation in IDEA cases, this was done to remove an obstacle to special education advocacy. The First Circuit stated that it would be paradoxical for Congress, after removing one bar to IDEA suits, to raise another.¹⁰⁹ The court also noted that in other civil rights statutes a fee-shifting provision has not been read to ban pro se representation.¹¹⁰

The First Circuit directly rejected the Third Circuit’s view that courts should permit parents to proceed pro se to enforce procedural violations of the IDEA but deny parents the right to proceed pro se to enforce substantive claims. The *Maroni* court argued that such a division would cause needless litigation to resolve whether a claim was substantive or procedural because it is not always clear to which category a claim belongs.¹¹¹ Therefore, as a means to reduce complexity and costs in IDEA litigation, courts should not unnecessarily attempt to distinguish between procedural and substantive claims.

To conclude its disagreement with the *Collinsgru* decision, the First Circuit faulted that decision for erroneously applying statutory rules of construction. Statutory rules of construction, such as *expressio unius est exclusio alterius*, should be invoked only when they make sense in light of the context of the whole statute.¹¹² According to the First Circuit, the doctrine of *expressio unius est exclusio alterius* was not applicable to the civil cause of action section of the IDEA because Congress “needed to include several categories of plaintiffs and so used a collective term.”¹¹³ The First Circuit also concluded that the *Collinsgru* opinion relied on another false principle of statutory interpretation when deciding that parents lack a cause of action. The *Collinsgru* court wrongly treated a parental cause of action like a request for an implied right of action.¹¹⁴ Such reasoning misunderstood the claim that a parental cause of action existed because the question posed was whether parents were “parties aggrieved” included amongst those granted an explicit cause of action. The question of whether parents are “parties aggrieved” under the IDEA requires that courts engage only in normal statutory interpretation with no extra burdens placed on the plaintiffs.¹¹⁵

2. The Structure of the IDEA Calls for a Parental Cause of Action

To supplement its language-centered statutory analysis, the First Circuit also concluded that the procedural structure created by the IDEA supports a parental right to sue. The IDEA requires parental involvement in the “centerpiece of the statute: the

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* But here it should be noted that this litigation worry might be exaggerated as most district courts that have used *Collinsgru* or *Wenger* as precedent do so to exclude all pro se claims. Such courts do so by simply citing to *Collinsgru* and *Wenger* as rejecting parent representation without noting the cases’ caveat about procedural claims. *See e.g.*, *Hammer v. U.S. Dep’t of Educ.*, 85 F. Supp. 2d 191 (E.D.N.Y. 2000).

112. *Maroni*, 346 F.3d at 252.

113. *Id.* (stating the collective term being “any parties aggrieved”).

114. *Id.* at 255.

115. *Id.*

individualized education program.”¹¹⁶ To force parental involvement, the IDEA names parents as part of the IEP team, demands revision of IEPs to address parental concerns, and requires that parents be involved in any decision regarding the educational placement of their child.¹¹⁷ The IDEA also requires schools to obtain parental consent for education evaluations and to ensure that parents have access to any information that will be used to make educational decisions about the child.¹¹⁸

The IDEA’s procedural processes were created so that the parent becomes its child’s advocate. Until a parent asks for a due process review of the IEP, attorney participation is actually discouraged.¹¹⁹ The statute allows parents to proceed pro se in due process hearings and authorizes the funding of training centers that will improve parents’ advocacy skills.¹²⁰ According to the First Circuit, it would be odd for Congress to encourage parents to be their children’s advocates “at every other stage” of the IDEA process but not in federal courts.¹²¹

C. Expanding Upon the First Circuit’s Statutory Analysis

1. The IDEA Can Be Read to Authorize Parents to Represent Their Child’s Claims

While the First Circuit concluded that *Collinsgru* incorrectly invoked the *expressio* doctrine, it fails to explain the full irony of the Third Circuit’s use of that doctrine. The Supreme Court has made it clear that canons of statutory interpretation “ha[ve] no application in the absence of statutory ambiguity.”¹²² The Supreme Court states that “[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.”¹²³ The First Circuit demonstrated the plain language of the IDEA allows any “party aggrieved” to appeal a due process hearing to a federal court and that the IDEA’s language makes it clear that parents are parties in a due process hearing. So, the only ambiguity present in the IDEA’s text as to whether parents are “parties aggrieved” exists because the *Collinsgru* court invoked the *expressio* doctrine. That means the Third Circuit ignored the Supreme Court’s mandate to not usurp Congress’ legislative powers by only using statutory rules of construction when there is ambiguity.

Also, in IDEA cases, unlike in common law tort cases like *Osei-Afriyie*, Congress created a cause of action in the context of a statute that indicates throughout that parents should be trusted as their child’s advocate. Therefore, unlike a common-law claim where Congress has not spoken, in IDEA cases there is evidence for legislative intent for parental representation.¹²⁴ Additionally, one can distinguish parental

116. *Id.* at 256.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 257.

122. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134–35 (2002) (citing *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001)).

123. *Id.* at 135.

124. Brief for Appellants at 19, *Collinsgru v. Palmyra Sch. Dist.*, 161 F.3d 225 (3rd Cir. 1998) (No. 96-5807).

representation in IDEA cases from tort cases like *Osei-Afriyie*. Unlike in a tort case, where monetary compensation is being sought, in an IDEA case a child's remedy—a good education—will be lost if she has to wait until majority to pursue it.¹²⁵ It would seem strange if Congress gave a cause of action to children, but only allowed children of poor and moderate means to pursue it after their remedy had been lost. Finally, *Osei-Afriyie* is inapplicable if parents are, alternatively, and as the *Maroni* court accepted, pursuing their own case.¹²⁶

2. Parents Have Their Own Cause of Action Under the IDEA

In 1997, Congress clarified the importance of parental advocacy by adding statutory provisions assuring parental involvement.¹²⁷ It was in the 1997 amendments that Congress made it clear that parents—not children—had a right to a due process hearing by adding a provision that transfers a parent's right to a due process hearing to their child upon majority.¹²⁸ Congress also added a provision that expressly allowed for parental reimbursement of private school tuition, which shows that Congress was interested in the fiscal harm done to parents by IDEA non-compliance.¹²⁹

As the First Circuit noted in *Maroni*, the text of the IDEA grants parents the right to be participants in the due process hearing. When the IDEA outlines what participants in the due process hearing, like parents, can do, the statute refers to them as parties.¹³⁰ Parents are parties when cross-examining witnesses, bringing experts, and pleading their child's case.¹³¹ Because the text of the IDEA describes parents as parties in all their numerous activities in the due process hearing, it seems contrary to the plain meaning of the statute for a court to not describe them as parties for the sake of determining who can appeal the outcome of the hearing to a federal court.¹³²

Arguing that parents have substantive rights under the IDEA is not equivalent to arguing that parents have a right to be taught in schools. Instead, it is an argument that the procedural rights given to parents are inextricably intertwined with their child's substantive right to a "free appropriate public education."¹³³ As the *Maroni* opinion observed¹³⁴ and the 2004 amendments to the IDEA dictate,¹³⁵ courts can only find a due process hearing faulty for procedural reasons if the procedural faults negatively impact a child's access to appropriate educational services. Thus, parents would have to advocate that their child's substantive right to appropriate educational services was

125. *Id.*

126. As previously noted, a person has a statutory right to pursue their own cause of action pro se in federal court. 28 U.S.C. § 1654 (2000).

127. NATIONAL COUNCIL ON DISABILITY, *supra* note 30, at 34–35.

128. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(m) 118 Stat. 2647, 2716 (2004).

129. *Id.* § 612(a)(10)(B)(i).

130. *Id.* § 615(h).

131. *Id.* § 615(h).

132. Brief of Amicus Curiae Disabilities Rights Center, Inc. and The National Association of Protection and Advocacy Systems at 3–4, *Maroni v. Pemi-Baker Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003)(Nos. 03-1407, 03-1700).

133. *Maroni*, 346 F.3d at 247.

134. *Id.* at 255.

135. Individuals with Disabilities Education Improvement Act, § 615(g)(3)(E)(ii).

denied even if the parent were only entitled to bring procedural cases pro se. Such a result, where parents have to successfully argue that their child is not receiving an appropriate IEP but could not themselves seek remedy for that harm, would seem counter-intuitive.

Despite what the Third Circuit claims, there is no clear divide between a parent's procedural rights and a child's substantive right to a "free appropriate public education;" for when a parent makes a procedural mistake in a due process hearing, like not giving the school notice of the parent's reasons for wanting the hearing, the child's substantive rights suffer.¹³⁶ In other words, parents must successfully use the procedural rights that the IDEA grants them to have their child's substantive rights vindicated. Congress must have accepted that parents' poor exercise of their procedural rights, rights which are the heart of the IDEA, might negatively impact their child's substantive rights. Still, Congress trusted parents to be their children's best advocates and risked such impairment. The Third Circuit cites to *Board of Education v. Rowley* to assert a distinction in the IDEA between procedural and substantive rights,¹³⁷ but *Rowley* actually helps further the argument that IDEA's procedural rights define what the statute considers a "free appropriate public education." In *Rowley*, the Supreme Court stated that a "free appropriate public education" is a hazy substantive right; yet the IDEA's procedural rights are quite clear. Therefore, the Supreme Court concluded that Congress must have trusted the IDEA's procedures to determine what an appropriate education is for a given child.¹³⁸

III. EACHA AND THE IDEA WERE ENACTED AS A RESPONSE TO PARENTS' COMPULSORY EDUCATION OBLIGATIONS AND COSTS

Section A of this Part explains the *Collinsgru* court's reading of the legislative record, which it turned to because the court found the statutory language of the IDEA to be ambiguous. Section B gives the truncated legislative history analysis of the *Maroni* court, which is brief because the court found no reason to examine the legislative history as in its view the language of the Act clearly gave parents their own cause of action. Section C provides a reading of the legislative history that gives force to the argument that Congress intended the IDEA to protect the rights of parents as well as children with disabilities. This indicates that parents can be "parties aggrieved" under the Act.

A. *The Collinsgru Court Argues that the Legislative Record is Ambiguous*

Because the language of the IDEA is unclear in the *Collinsgru* court's estimate, it felt free to turn to the legislative history; however, the court found that the legislative history was also ambiguous.¹³⁹ The Third Circuit concedes that a Senate Report filed when Congress amended the IDEA in 1985 states, "[a]lthough the law has worked very well in most cases, Congress knew that there would be instances where *parents*

136. *Maroni*, 346 F.3d at 256.

137. *Collinsgru v. Palmyra Sch. Dist.*, 161 F.3d 225, 234-235 (3rd Cir. 1998) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982)).

138. *Rowley*, 458 U.S. 190.

139. *Collinsgru*, 161 F.3d at 235.

would be denied the free appropriate public education to which their child was legally entitled.”¹⁴⁰ The court also acknowledges that a “Senate Report stated that ‘parents of [learning disabled] children have the right to expect that individually designed instruction to meet their children’s specific needs is available.’”¹⁴¹ But as a counter to these passages that suggest the IDEA is meant to protect parental rights, the Third Circuit produced a piece of legislative history noting that it is a state’s duty to “develop procedures for appointing the parent or another individual to represent the interests of the child.”¹⁴² The *Collinsgru* court also produced a Senate Report stating that EACHA created “an enforceable right to free appropriate public children for all handicapped children.”¹⁴³ For the court, these passages suggested that parents in the IDEA process merely represent the interests of their children. The *Collinsgru* court reasoned that the conflict in these passages demonstrates that determining whether the IDEA grants parents a cause of action from the legislative history is impossible because all these passages are simply “snippets plucked from broad discussions” randomly chosen to prove a point.¹⁴⁴

B. Because the Plain Language of the IDEA Supports a Parental Cause of Action, the First Circuit in Maroni Does Not Engage with the Legislative History

The First Circuit only looked briefly at the legislative history because it felt that the plain language of the statute created a parental cause of action. The First Circuit looked at the legislative history only to confirm that its reading of the IDEA did not contradict some clearly displayed congressional intent that only lawyers should be permitted to bring substantive IDEA claims in federal court.¹⁴⁵ Instead, the First Circuit found Congress demonstrating support for parental involvement throughout the entire IDEA enforcement process. The court uncovered a Senate Report that stated EACHA was intended “to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.”¹⁴⁶ Having found only support for its holding allowing pro se representation, the *Maroni* court concluded its cursory legislative history analysis.

C. The Legislative History Shows that the IDEA is Meant to Protect Parents’ Rights and that Congress Wants Parents to Be Strong Advocates for Their Children

Because *Maroni* concluded that the plain text of IDEA allowed parents to proceed pro se, the court only briefly touched on the Act’s legislative history. Had the First Circuit fully explored the legislative history of the IDEA, it would have found a great

140. *Id.* (quoting 131 CONG. REC. S1979 (daily ed. Feb. 6, 1985) (statement of Sen. Weicker)) (emphasis in original).

141. *Id.* (quoting S. REP. NO. 94-168, at 10 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1434) (alteration in original).

142. *Id.* (quoting S. REP. NO. 105-17, at 22 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 100).

143. *Id.* (quoting 131 CONG. REC. S1979 (1985)).

144. *Id.*

145. *Maroni*, 346 F.3d at 257.

146. *Id.* (quoting *Collinsgru*, 161 F.3d at 237–38 (Roth, J., dissenting) (citing S. REP. NO. 94-168, at 11–12 (1975), reprinted in 1995 U.S.C.C.A.N. 1425, 1435–36)).

deal of evidence that supports the claim that parents are “parties aggrieved” and can bring a civil action. In fact, Congress justified the EACHA by stating that because parents had a legal duty to educate children, it would be unfair to make them pay for their child’s special education.¹⁴⁷ Historically, EACHA was a direct response to two court rulings in the early seventies that held that parents of children with disabilities have a right for their child to receive educational services for free.¹⁴⁸ Courts made these rulings because many public schools excluded children from attendance. While EACHA no longer exists, when Congress changed the name of the statute to the IDEA in 1990, it expressly stated that all the rights and court interpretations of EACHA survive in the new statute.¹⁴⁹ Thus, the EACHA’s focus on providing the parents of children with disabilities access to special education for their child at no cost carries on in the IDEA.

In addition to the nature of the court decisions that prompted Congress to pass EACHA, there is also direct evidence in the legislative record showing that special education bills from the beginning were concerned with the harm done to families as well as with the harm done to children when schools discriminate against student with disabilities. Even the Third Circuit in *Collinsgru* admitted that in enacting EACHA, Congress stated that “parents of [handicapped] children have the right to expect that individually designed instruction to meet their children’s specific needs is available” and that such education should be provided at “no cost to the parents of a handicapped child.”¹⁵⁰ In addition, the legislative history notes that while public schools can place children with disabilities in private educational institutions, “[i]t should be emphasized, however, that in no case should such charges result in cost to the parents or guardian, or the denial or diminution of services to the child.”¹⁵¹ This passage clearly demonstrates that Congress wanted to protect both the fiscal concerns of parents and the educational concerns of children in passing the IDEA.

When the *Collinsgru* court argued that such history is “snippets from board discussions,” the court ignored that the congressional sentiment regarding protecting parents was incorporated into the IDEA’s text. The 1997 parental reimbursement provision, which gave parents the right to a refund if their child needed to go to a private school, is a clear example of this sentiment.¹⁵² And Congress strengthened this commitment to parental choice and reimbursement in the 2004 amendments.¹⁵³ Also,

147. See S. REP. NO. 94-168 at 6, 8, 10-11, 41 (1975), reprinted in 1975 U.S.C.C.A.N. at 1430, 1432, 1434-35, 1464.

148. See *Mills v. Bd. Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972). The due process and procedural frame work of the IDEA originated in *Mills* and *PARC*. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 402 (4th ed. 1998); Jean M. Bond, *Making Up for Lost Time: The Third Circuit’s Use of Remedies for Violations of the Individuals with Disabilities Education Act*, 46 VILL. L. REV. 777, 780 (2001).

149. Stefan R. Hanson, Buckhannon, *Special Education Disputes, and Attorney’s Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 528-29 (2003).

150. *Collinsgru*, 161 F.3d at 235 (quoting S. REP. NO. 94-168 at 10, 32 (1975), reprinted in 1975 U.S.C.C.A.N. at 1434, 1456).

151. S. REP. 94-168 at 32 (1975), reprinted in 1975 U.S.C.C.A.N. at 1456 (alteration from original).

152. *Individuals with Disabilities Education Improvement Act of 2004*, Pub. L. No. 108-446, § 612(a)(10)(B)(i), 118 Stat. 2647, 2680 (2004).

153. *Id.* § 612(a)(10)(B)(i).

the IDEA's text promulgates that EACHA is being continued as the IDEA because EACHA was successful "in ensuring children with disabilities and the families of such children access to a free appropriate public education"¹⁵⁴ Here, the IDEA's text mirrors the legislative history and clearly indicates that the statute exists both to protect the families of children with disabilities and to ensure that children with disabilities receive an appropriate education. Finally, the statutory definition of the IDEA's substantive goal, "free appropriate public education," is defined as special education that has been "provided at public expense, under public supervision and direction and without charge"¹⁵⁵ Given the court cases that drove the creation of EACHA, the part of IDEA's substantive goal which consists of providing free education is clearly a legislative response that compulsory primary and secondary education should never cost parents of children with disabilities more than other parents. When a school denies a child a "free appropriate public education" under the IDEA, the school injures not only the child but the parents' right to have their child educated for free.

Supporting the claim that parents should be able to proceed pro se, members of Congress working on the EACHA endorsed the principle that "parents or legal guardians have available to them the full range of remedies to protect and defend their rights to a free, appropriate education."¹⁵⁶ Even if the IDEA were meant primarily to protect children with disabilities, Congress could have utilized the broad "parties aggrieved" language when granting standing to bring suit in court so that parents would have the full range of means, including pro se representation, available to protect their children's rights.¹⁵⁷ Because Congress meant the IDEA to address parental fiscal concerns, and because Congress meant to give parents the greatest possible access to remedies to gain special education for their children, it is contrary to the legislative intent to not allow parental representation.

IV. THE IDEA'S POLICY GOAL OF ENSURING THAT ALL CHILDREN RECEIVE SPECIAL EDUCATION DEMANDS THAT COURTS ALLOW PARENTAL REPRESENTATION

Section A of this Part explains the *Collinsgru* court's analysis of the policy goals of the IDEA. The *Collinsgru* court believed that the IDEA exists solely to protect children with disabilities and that to protect these children requires preventing their parents from giving passionate but poor legal representation. Section B explains the *Maroni* court's policy analysis of the IDEA. The *Maroni* court asserted that given the prohibitively expensive costs involved in hiring a lawyer to handle special education cases and the scarcity of these lawyers, the only way to protect the education rights of

154. *Id.* § 601(c)(3).

155. *Id.* § 602(9).

156. 131 CONG. REC. S10396-01, (daily ed. July 30, 1985) (statement of Sen. Kennedy, T.) (discussing the Handicapped Children's Protection Act). Another member of Congress stated that "[t]he bill clarifies the intent of Congress that handicapped children and their parents have available to them the full range of remedies necessary to protect and defend both their right to be free from discrimination and their right to a free appropriate public education." 132 CONG. REC. H4841-01 (daily ed. July 24, 1986) (statement of Rep. Williams)

157. See Brief of Amici Curiae The National Association of Protection and Advocacy Systems & The Disabilities Rights Center, Inc. at 17, *Maroni v. Pemi-Baker Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003).

children with disabilities is to allow parents to proceed pro se. Section C argues that courts have a self-interest in limiting pro se representation due to the perceived burdens it places on the judicial system and that all members of the legal profession, including judges, have an economic self-interest in limiting any form of lay advocacy.

A. The Collinsgru Court on Parental Representation and the Policy Goals of the IDEA

Even the *Collinsgru* opinion admitted the “hard practical reality that parents are often the only available advocate for a child’s right to an appropriate education.”¹⁵⁸ But the opinion rejected any argument that the IDEA’s policy of parental advocacy makes parents parties to IDEA proceedings that could bring their own claim pro se in federal court.¹⁵⁹ For the *Collinsgru* court, the policy goal of the IDEA is for parents to be their child’s advocate, and that goal is separable from parents having their own cause of action. To support its conclusion that parents are mere facilitators of their children’s rights, the Third Circuit pointed to the provision of the IDEA stating that if a child has no parent, an appointed surrogate can fill the parental advocacy role.¹⁶⁰ Implicit in this is that the legally appointed surrogate would certainly not have the right to be free from the extra educational costs associated with raising a child with disabilities because the surrogate never had a duty to pay such costs. In other words, a parent’s role in the IDEA is purely procedural and, thus, a parent does not have any substantive rights protected by the statute. In the Third Circuit’s view, preventing a parent from proceeding pro se on substantive IDEA claims would not undercut the Act’s policy because the statute never envisioned that parents themselves would be anything more than advocates who advance the enforcement process.

B. The Maroni Court Concludes that the IDEA’s Policy Goals Require Pro Se Representation

In the *Maroni* opinion, the First Circuit concluded that proscribing pro se representation undercuts the IDEA’s substantive goal of providing special education to all children that qualify for services. To support its claim, the First Circuit gave three reasons why a parent of moderate means might not be able to find an attorney in an IDEA case: 1) such cases are so fact intensive that finding an attorney with the time to take the case pro bono is difficult; 2) there is no constitutional right to an attorney in civil cases; 3) as the attorney fee shifting provision only takes effect if the parent wins, it is only a partial incentive.¹⁶¹ The First Circuit also noted that New Hampshire’s Protection and Advocacy (“PA”) unit, which is the primary legal group handling IDEA cases at no charge in the state, could handle only 35 out of 390 requests for legal aid in IDEA cases.¹⁶² And many PA attorneys refuse to take an IDEA case unless they also represented the parents at the due process hearing.¹⁶³ There is also a shortage of private attorneys who handle IDEA cases, for example: Michigan has eight, Wisconsin

158. *Collinsgru*, 126 F.3d at 236.

159. *Id.*

160. *Id.*

161. *Maroni*, 346 F.3d at 257–58.

162. *Id.* at 257 n.9.

163. *Id.*

has fewer than ten, and Arizona has one.¹⁶⁴ So, even having money and the existence of the IDEA's fee shifting provision are not enough to secure representation.

Additionally, the First Circuit found that interpreting the IDEA so as to deny parents from proceeding pro se would create a problem that Congress most likely would not have intended. The IDEA allows parents to proceed pro se in state or federal court. And some states allow parents to represent their child.¹⁶⁵ So parents could file in state court, a school district could then ask for the case to be removed to federal court, and then when the parents could not find an attorney the case would be remanded back to state court.¹⁶⁶ This logjam would be a waste of judicial time and effort.

To conclude its reasoning for parental representation the *Maroni* court contended that pro se representation allows for a child's claim to at least be heard¹⁶⁷ even though parents can lack the traits the legal system values: objectivity and rationality.¹⁶⁸ Also, while pro se representation places a burden on the courts because poor advocacy makes courts' adjudication harder, such difficulty can be handled in the same manner as other pro se claims.¹⁶⁹ For the First Circuit, these problems are hurdles the legal system can overcome so that more people can get a hearing for their IDEA claims.

C. The IDEA, Access to the Courts, and the Judicial System's Dislike for Pro Se Representation

1. Parental Representation and Access to Justice for Children of Poor and Moderate Means

While the *Collinsgru* opinion does not explicitly state as much, other courts have read its policy concerns against parents representing their child's IDEA claims as being the same concerns that also girded the court's decision to hold that the IDEA does not create a parental cause of action.¹⁷⁰ These concerns, that the child will not receive competent counsel and that the court system will be overly burdened by poor advocacy, are either false, self-interested, or both. Courts have a strong dislike for pro se advocates.¹⁷¹ In recent years, due to a flood of pro se representation, courts

164. *Id.*

165. For example, New Hampshire allows a person of good character to appear before its courts representing another person. *See* N.H. REV. STAT. ANN. § 311:1 (Supp. 2004). Since the state also has a statute banning the unauthorized practice of law, courts have interpreted this to mean a person could handle the occasional case, for instance for a family member. *State v. Settle*, 523 A.2d 124 (N.H. 1987). Another example would be Arizona, which lacks a statute banning the unauthorized practice of law. George C. Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, REGULATION: THE CATO REV. OF BUS. & GOV'T, Winter 1997, available at <http://www.cato.org/pubs/regulation/reg20n1c.html>.

166. *Maroni*, 346 F.3d at 258.

167. *Id.*

168. *Id.*

169. *Id.*

170. *See, e.g., Michael M. ex rel. M.D. & M.A. v. Plymouth Sch. Dist.*, No. Civ. 01-469-M, 2003 WL 1191396, at *1 (D.N.H. Mar. 10, 2003).

171. *See* Deborah L. Neveils, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers*, 25 NOVA L. REV. 343, 347 (2000) (noting that judges get frustrated at the incompetence of pro se litigants).

increasingly make it more difficult for self advocates to have their day in court.¹⁷² This Note argues that courts' worry about parents providing incompetent advocacy for their children with disabilities makes little sense if no alternative representation to parental advocacy exists. The fear of an overly burdened court system due to self-representation is not a completely valid fear because cases involving pro se litigants are often shorter; and even to the extent it is valid, if courts let its fear be a driving policy in statutory interpretation, this would make access to justice class-based.

On a practical level, preventing parents from proceeding pro se in federal court would do little to protect children's rights because the IDEA grants parents an explicit right to proceed pro se in due process hearings. Courts do not review the due process hearings *de novo*. In some circuits, the court must use the evidentiary record produced by the hearing, and parties can only add supplementary facts.¹⁷³ And every court gives deference to the hearing officer's education opinion.¹⁷⁴ So if a parent either does not introduce enough evidence or introduce the right evidence in the due process hearing, the outcome of the trial is almost predetermined. Thus, because parents can proceed pro se at the due process hearing, having a lawyer at the court level can do little to cure parental mistakes.¹⁷⁵ This fact explains why New Hampshire's PA lawyers will not take a case unless they already represented the parent in the due process hearing. Such stacked odds also would make the fee shifting provision less useful in attracting private attorneys, as a lawyer is unlikely to take an IDEA case that she has a small chance of winning.

On a more global level, people of low or moderate means often do not have access to the judicial system.¹⁷⁶ Attorney fees are so extravagant that most of the populace cannot afford an attorney's hourly rates. The ABA has described this as one of the major ethical quandaries facing the legal profession in this generation.¹⁷⁷ For economic reasons, lawyers have a vested interest in retaining a professional monopoly over the ability to advocate in court.¹⁷⁸ Some authorities argue that lawyers' selfish economic

172. See generally Candice K. Lee, Note, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261 (2003).

173. See *supra* text accompanying notes 58–59.

174. See *supra* text accompanying note 61.

175. Empirical data shows that parents are much less likely than a school to be represented by an attorney at a due process hearing. One study puts the number of parents represented by an attorney at the due process hearing at 44%. Kay H. Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. ON POVERTY L. & POL'Y 193, 215 n.187 (2002).

176. AMERICAN BAR ASSOCIATION, CIVIL JUSTICE: AN AGENDA FOR THE 1990S: REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S 11 (1991); David Fagelson, *Rights and Duties: The Ethical Obligation to Serve the Poor*, 17 LAW & INEQ. 171(1999).

177. HERBERT M. KRITZER, "FIRST THING WE DO LET'S REPLACE ALL THE LAWYERS": A COMPARISON OF LAWYERS AND NONLAWYERS AS ADVOCATES 1 (1995); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

178. AMERICAN BAR ASSOCIATION COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 16–17 (1995) [hereinafter ABA COMMISSION REPORT].

desires partially explain unauthorized practice of law statutes, which ban lay advocacy.¹⁷⁹

Over the years, bar associations have been good at enforcing lawyers' professional monopoly via the courts, which in most states get to decide who appears before them.¹⁸⁰ Interest group analysis of such lobbying makes clear that lawyers' lobbying is more effective on the judiciary than that of legal consumers because the judges themselves are part of the legal profession.¹⁸¹ Judges more naturally empathize with lawyers' complaints about the damage done by the unauthorized practice of law than with consumer complaints about being denied a chance to use the legal system.¹⁸² Also, lawyers have greater access to judges than legal consumers do because judges belong to many of the same professional organizations as lawyers.¹⁸³ Greater access to judges gives lawyers a greater chance to sway the judiciary; some authorities argue that judges and the bar should not even have the ability to decide who can practice law in their courts due to these concerns.¹⁸⁴

This jaundiced view of judicial reluctance to allow lay advocates might explain the faulty reasoning of the *Collinsgru* court, which partly justified its rejection of parental representation out of a stated concern that children should receive the best advocacy possible. Empirical studies show that there simply are not enough lawyers that specialize in education to represent every child with an IDEA claim.¹⁸⁵ The shortage of legal representation means that even parents who can afford to pay a private attorney are facing inflated prices and, perhaps, an utter inability to secure representation. Empirical studies also show that even the presence of a fee shifting provision in a civil rights statute is not enough incentive to garner adequate access to the legal system for people of poor or moderate means.¹⁸⁶ Fee shifting provisions are not enough incentive to get lawyers to take civil rights cases because civil rights claims have low success rates and are time and work intensive.¹⁸⁷ Attorneys, despite their image as ambulance chasers, are actually quite risk adverse when deciding to accept cases that only pay when their client wins.¹⁸⁸ All of these factors are proof that when courts bar pro se representation in IDEA cases they are not normally protecting a child against a cheap or foolish parent, but instead, as even the Third Circuit partially acknowledges, are taking away the child's only advocate.

179. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1814–15 (2001).

180. *Id.* at 1806.

181. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 *GA. L. REV.* 1167, 1188–201 (2003).

182. *See id.*

183. *Id.* at 1201–10.

184. *Id.* at 1246; Rhode, *supra* note 175, at 99.

185. ABA COMMISSION REPORT, *supra* note 176, at 81.

186. *Id.* at 78 n.252.

187. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of Attorney Fees Statute and the Government As Defendant*, 73 *CORNELL L. REV.* 719 (1988).

188. HERBERT M. KRITZER & J. MITCHELL PICKERILL, *CONTINGENT FEE LAWYERS AS GATEKEEPERS IN THE AMERICAN CIVIL JUSTICE SYSTEM* (1996).

2. Pro Se Representation and the Exaggerated Burden to the Court System

Courts like good legal representation, such as the kind that lawyers hopefully provide, because it makes their job easier.¹⁸⁹ But the argument that courts are overly burdened by pro se representation is exaggerated and self-interested. First, federal courts have a duty to allow pro se representation.¹⁹⁰ Whether or not parents are representing their own cause of action under the IDEA should be determined independent of its impact on the court's docket, regardless of that impact being for the better or worse. Second, studies have shown that while pro se litigants need more help navigating the legal system, they are less likely to extend litigation via procedural maneuvering, because they have no ability to do so.¹⁹¹ This means that the negative impact of pro se representation on court dockets is not as great as members of the judiciary claim. In fact, an ABA study claims that members of the judiciary have a dislike for pro se litigants that extends far beyond the actual negative impact that pro se claimants have on the efficiency of the court system.¹⁹²

Because legal representation is not a right in civil cases in this country, courts have a duty to be creative in ensuring that access to justice does not become purely a matter of wealth.¹⁹³ In IDEA cases, one way to address lack of access to the legal system¹⁹⁴ is using *in forma pauperis*¹⁹⁵ procedures to grant parents court-appointed attorneys. But reliance on *in forma pauperis* to cure the problem of unrepresented IDEA claimants is problematic. First, in civil matters the decision to appoint an attorney is at the discretion of the court.¹⁹⁶ Additionally, as the *Collinsgru* decision illustrates, many parents who do not qualify fiscally for *in forma pauperis* or for free legal services, such as those participating in the New Hampshire PA program, still cannot afford to retain an attorney.¹⁹⁷ Therefore, even if courts appointed attorneys more frequently, the working poor and middle class would still not have an opportunity for judicial review of their children's IDEA due process hearings. Given that the IDEA was enacted to ensure that all children with disabilities have access to special education, it seems doubtful that Congress intended to create a system whereby the working poor and middle class are excluded. When judges deny pro se representation in IDEA cases, judges are not just hindering access to the legal system; they are acting contrary to the IDEA's policy, which courts are supposed to be upholding.

189. See STEVEN R. COX & MARK DWYER, REPORT ON SELF-HELP LAW: ITS MANY PERSPECTIVES 54 (1987).

190. 28 U.S.C. § 1654 (2000).

191. Many pro se litigants turn in poorly done legal forms and need to ask for assistance often. See COX & DWYER, *supra* note 187, at 50–51.

192. See *id.* at 50.

193. Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 826–28 (2002).

194. See, e.g., *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998).

195. 28 U.S.C. § 1915(e) (2000).

196. *Caruth v. Pickney*, 683 F.2d 1044, 1048 (7th Cir. 1982).

197. ABA COMMISSION REPORT, *supra* note 176, at 79 n.255 (noting that each year the amount of people who cannot afford lawyers but are not eligible for free legal services increases, and estimating that the number is around 100 million).

CONCLUSION

Courts that interpret the IDEA so as to prohibit parents from proceeding pro se ignore the plain meaning of the statute's text. Because parents are parties when acting in a due process hearing, they do not suddenly cease to become parties when determining whether they can ask for judicial review as "aggrieved parties" under any plain reading of the IDEA. Rulings that deny a parental cause of action, like *Collinsgru*, also ignore the IDEA's legislative history, as Congress enacted EACHA in response to court cases that held that parents cannot be forced to pay for their child's special education.

Finally, because the IDEA is geared toward creating access to special education for all classes, and because parents of poor and moderate means have trouble retaining lawyers, it is contrary to the policy of the IDEA not to allow parents to proceed pro se. That courts' distaste for parental representation might not originate from a concern that children have competent advocacy but rather from self-interested desires—like those that partially explain unauthorized practice of law statutes—bolsters the case for pro se representation. Because the judiciary's distaste could easily stem from economic self-interest of the legal profession and from the judiciary's concern that pro se claimants make their job harder, courts' arguments that denying parental representation benefits the child should not be given much weight. Given the text of the IDEA, the history of the IDEA, and the IDEA's policy, the First Circuit, in *Maroni*, was right to break from all the wrongly decided cases that took place before its ruling and hold that parents can represent their child in federal court.