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Balancing Acts: Dispute Resolution in U.S. and English Special Education Law

I. INTRODUCTION

Eleven-year-old Karis Lane of Worcestershire County, England, could not find the right school for the 2001–2002 school year. The Worcestershire County Council determined that she belonged in a “mainstream school” that served the general student population.¹ Karis, however, had multiple disabilities, including cerebral palsy, Autistic Spectrum Disorder,² and Turner’s Syndrome.³ Her mother, Karen Lane, believed Karis belonged in a boarding school for which the county’s local educational authority (LEA) is obligated to pay. She appealed the Council’s decision to the Special Education Needs Tribunal (SENT).

Earlier, Karen Lane had successfully appealed other County decisions.⁴ In 1999, she suggested her child be placed in a specific school that provided residential education for children with special needs. The SENT subsequently ordered the LEA to send Karis to that school instead of the nonresidential program she currently attended.⁵ The LEA appealed the SENT’s decision and the Court of Appeal reversed. The Court of Appeal held that due to

1. Sue Smith, *Mum’s Plea on Special Needs Daughter, Tribunal to Rule on Girl in School Row*, BIRMINGHAM EVENING MAIL (England), Aug. 14, 2001, at 16.

2. The “spectrum” refers to the varying degrees of autism. AUTISM SPECTRUM DISORDERS at <http://www.geocities.com/Heartland/Fields/6979/autigen2.html> (last visited Feb. 19, 2003).

3. The syndrome results from a chromosomal abnormality in girls and is characterized by their short stature and sexual underdevelopment at puberty. Steven Ploof, *Definition: Turner’s Syndrome*, TURNER’S SYNDROME INFORMATION, TEXAS, at <http://www.onr.com/ts-texas/turner.html> (last modified June 4, 1999).

4. Richardson v. Solihull Metro. Borough Council (Special Educ. Needs Tribunal, interested party); White v. London Borough of Ealing; Hereford and Worcester County Council v. Lane, [1999] 1 FCR 356 (consolidating three appeals from the SENT on the issue of whether the SENT is obligated to order a local education authority to name a specific school as part of a special education program for a child so labeled under statutory law)[hereinafter Hereford and Worcester County Council v. Lane].

5. Hereford and Worcester County Council v. Lane, [1999] 1 FCR 356.

apparent budget constraints, the LEA properly exercised its statutory power to determine that Karis did not need a residential program.⁶

Karis Lane's story illustrates the complex intersection of England's special education law, system of tribunals and courts, and educational values. Her story emphasizes the importance of parental choice and the quality of schooling for children with disabilities. Although the U.S. dispute resolution process is markedly different from the English system, the considerations highlighted by Karis Lane's experience are also critically significant in U.S. special education law.

This Comment compares the legal framework of the British tribunal system with the U.S. dispute resolution system under the Individuals with Disabilities Education Act (IDEA). Some critics have argued that involving the courts in special education breeds discontent and litigiousness in the United States.⁷ This Comment, however, posits that enforcing legal protections through litigation is hardly the problem.⁸ Rather, the real problem lies in the overall effect protracted litigation has on achieving the goals of the IDEA. The IDEA should allow states to adopt specific features of the British SENT to strengthen each state's ability to fulfill the statute's goals. Such tribunal features include specific guidelines for (1) organizing an independent and impartial panel, (2) issuing binding decisions, and (3) making local educational authorities accountable.

Part II presents the background of the British SENT system and the changes made since the passage of the Human Rights Act in 1998. Part III introduces IDEA and how the 1997 amendments

6. The local authority's costs to provide tuition for Karis at the residential school would have been £40,000 per year. *Karis Jets Off to Visit Santa*, THIS IS WORCESTERSHIRE, Dec. 14 2001, available at http://www.thisisworcestershire.co.uk/worcestershire/archive/2001/12/14/brom_news_latest83ZM.html.

7. See ROBERT J. STERNBERG & ELENA L. GRIGORENKO, OUR LABELED CHILDREN 223-24 (1999).

8. See generally Leila B. Helms, *Recent Developments in Public Education Law: Postsecondary Education 2000-2001*, 33 URB. LAW. 1025 (2001) (noting that in the 1990s, K-12 education litigation seemed to "stabilize"). *But see Due Process Hearings: 1999 Update*, NASDSE FORUM, at 1-2 (Dec. 1999) (National Ass'n of State Directors of Special Education, Alexandria, VA), available at <http://www.directionservice.org/cadre/nasdse2.cfm> [hereinafter NASDSE Update]. The total number of due process hearings at the school or district level in the United States increased from 1,574 in 1991 to 3,315 in 1998, though "the year-by-year totals reflect an increase from the prior year for only four of the years and a decrease for three years." *Id.*

incorporated mediation into its special education dispute resolution process. Part IV compares and contrasts the main structural and policy features of the U.S. and British systems. Part V suggests that the SENT structure may be used as a model for improving the IDEA's due process hearings. Specific SENT features can be practically adapted to the IDEA to address certain criticisms of the IDEA. Part VI concludes that the SENT system is a highly useful, if incomplete, model of special education dispute resolution.

II. OVERVIEW OF THE SPECIAL EDUCATION NEEDS TRIBUNAL IN ENGLAND

A. *The History and Function of the Special Education Needs Tribunal*

Tribunals, the British alternative to court, are somewhat analogous to U.S. administrative courts.⁹ Tribunals proliferated throughout England as a result of increases in regulatory legislation during the twentieth century.¹⁰ Since 1963, tribunals have been created by statute to resolve disputes involving regulated activities at various levels of jurisdiction, such as social services and housing.¹¹ One such statute, the Tribunals and Inquiries Act of 1992,¹² created the Special Education Needs Tribunal system.¹³ The SENT system consists of a network of localized tribunals that convene as needed when parents appeal decisions by local education authorities "during the process of assessing and making special educational provision for children with special educational needs."¹⁴

9. SIR ANDREW LEGGATT, REPORT OF THE REVIEW OF TRIBUNALS: TRIBUNALS FOR USERS ONE SYSTEM, ONE SERVICE § 2.18, Mar. 2001, available at [http://www.tribunals-review.org.uk/\\$leggatthtm/leg-02.htm](http://www.tribunals-review.org.uk/$leggatthtm/leg-02.htm) [hereinafter ONE SYSTEM, ONE SERVICE].

10. J.A. FARMER, TRIBUNALS AND GOVERNMENT 3 (1974).

11. *Id.* at 2-3.

12. Tribunals and Inquiries Act 1992, c.53, sched. 1 (Eng.).

13. Education Act, 1996, c.56, § 333 (Eng.) [hereinafter Education Act].

14. *Special Education Needs Tribunal*, § K1, available at <http://www.tribunals-review.org.uk/tribreview.educational.htm> [hereinafter *Special Education Needs Tribunal*]. In this Comment, the term *SENT* may refer to one of these localized tribunals in a particular case, or to the network as a whole (i.e. the "SENT system"), depending on context.

The idea for the SENT system derived from historical legal trends in England and Wales. The country's public education laws evolved to emphasize parental rights. Unlike U.S. federal law, which places educational control primarily with the states and, to a lesser extent, with municipalities, British law places greater educational control and responsibility with local authorities.¹⁵ This emphasis on local control in the United Kingdom has continued, notwithstanding England's mandate for a "National Curriculum"¹⁶ in all public schools.

Furthermore, the modern British education system is a joint effort of the Department of Education and strong LEAs.¹⁷ In the wake of the Education Act of 1944, and a "wartime spirit of unity and social reconstruction,"¹⁸ Parliament provided for two types of schools: county schools and voluntary (i.e. religious) schools. The LEAs financially supported both types of schools.¹⁹ The statutory scheme granted the LEAs wide discretion in budget planning and spending, including the budget for special education.²⁰

Some critics speculate that the lack of a constitutional right to education is the primary reason for the LEAs' strong discretionary control.²¹ Consequently, most parental challenges of special education placements stem from the LEAs' alleged failures to fulfill their statutory duties to children.²² Parents, whose children have been denied an appropriate special education, may petition for judicial review of a LEA decision "[o]nly in the rarest of cases—where the LEA or Secretary of State's decision-making or planning 'flies in the face of the statute.'"²³

Notwithstanding the limitations on judicial review under British law, children with disabilities were assured a new avenue to

15. Tom Allen, *The Law of Special Education in the United States and England: Civil Rights and Public Duties*, 25 J.L. & EDUC. 389, 391 (1996).

16. Education Reform Act, 1988, c. 40 §§ 1-25 (Eng.).

17. See CHARLES L. GLENN, CHOICE OF SCHOOLS IN SIX NATIONS: FRANCE, NETHERLANDS, BELGIUM, BRITAIN, CANADA, WEST GERMANY 110-15 (1989) (describing the transition of English and Welsh schools from privately-funded religious institutions into a system of publicly-funded secular and religious schools both).

18. *Id.* at 114.

19. *Id.* at 114-15.

20. Allen, *supra* note 15, at 402 n.52.

21. See *id.* at 401-02. But see *infra* Part II.B (noting that the Human Rights Act of 1998 now guarantees a right to education).

22. See Allen, *supra* note 15, at 402-03.

23. *Id.* at 402-03.

obtain special education in the 1990s.²⁴ As indicated above, in 1992 Parliament created the SENT in addition to a number of new tribunals to handle administrative matters.²⁵ Each LEA is allowed to set up a tribunal (or education appeal committee) that is legally independent of the LEA and accountable to the national independent council on tribunals.²⁶

Given the history of education in the United Kingdom, the SENT has some unique features that reflect sensitivity to historic parental interests. Lay people, rather than judges, hold the majority of seats on these tribunals.²⁷ The convened SENT has the power to hear parents' appeals from a decision of the Secretary of State or a LEA that affects those parents' children. The purpose of this appeal process is to assure an appropriate education for each child in accordance with the Education Act of 1996.²⁸ One of the LEAs' duties under this Act²⁹ is to properly assess the needs of children within their jurisdictions by consulting suitable specialists.³⁰ Parents who receive a "special needs assessment" for their child at the LEA's expense,³¹ may bring their case before the SENT if the assessment has not been properly implemented.³²

After the advent of this special education tribunal system, however, SENT decisions rarely receive judicial review.³³ This

24. Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 155 (1998) (Article 2 of the first protocol added to the original convention signed on Nov. 4, 1950) [hereinafter European Convention].

25. See Tribunals and Inquiries Act 1992, sched. 1 (Eng.).

26. Tony Wright, *Your Child Has Been Excluded from School Without Sufficient Reason. Tony Wright MP Tells You What To Do*, THE GUARDIAN, July 19, 2001, available at <http://politics.guardian.co.uk/Print/0,3858,4165001,00.html>.

27. See *id.*

28. Education Act, *supra* note 13, § 336 (codifying the financial responsibilities of LEAs and procedural safeguards for parents of special needs children to require proper assessment and placement of the children); see, e.g., *White v. Aldridge* (President of the Special Needs Tribunal), [1999] ELR 150 (determining that the LEA was under no obligation to allocate resources to comply with parents' requested placement for their multi-disabled child outside the local authority area).

29. Education Act, *supra* note 13, § 313; *G v. Special Education Needs Tribunal and another*, [2001] E.W.H.C. Admin. 258 (stating that the regulations of 1994, which place requirements on the local education authority, "take effect under the Education Act of 1996").

30. See *G v. Special Education Needs Tribunal*, [2001] E.W.H.C. Admin. 258.

31. Education Act, *supra* note 13, § 323.

32. *Id.*

33. See *Allen*, *supra* note 15, at 404.

may be because the High Court (or Court of Appeal) generally gives great deference to SENT decisions.³⁴

B. *The Advent of Human Rights Law in British Courts*

Recent developments may have influenced the functions of these tribunals. The United Kingdom, as a signatory to the European Convention on Human Rights of 1998 (1998 Convention), recognizes a right to education.³⁵ Article 2 of the first Protocol of the 1998 Convention unequivocally states that "no person shall be denied the right to education."³⁶ It further states that "[i]n the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."³⁷

This Protocol appears to advance the notion of "school-choice" by respecting parents' right to have their child educated according to their "religious and philosophical convictions."³⁸ Practically speaking, however, this may not be as much of a right to education as it is a guarantee of "freedom of education."³⁹ Because all the signatory countries apparently had sufficient primary educational systems in place, one interpretation of this Protocol is that it was meant to restrict countries' obligations to provide "(expensive) higher educational facilities."⁴⁰ Consequently, British tribunals might likely avoid associating special education with human rights issues.

Although European conventions are not directly binding on British courts or LEAs,⁴¹ Parliament incorporated the 1998 Convention into British civil law through the Human Rights Act of

34. *Id.*

35. Jonathan L. Black-Branch, *Equality, Non-Discrimination and the Right to Special Education; From International Law to the Human Rights Act*, [2000] E.H.R.L.R. Issue 3, 297, 297-98.

36. European Convention, *supra* note 24; see also *Universal Declaration of Human Rights*, G.A. Res. 217 (III), art. 26, U.N. Doc. A/810 (1948), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 384 (2001) (stating "[e]veryone has the right to education").

37. European Convention, *supra* note 24.

38. *Id.*

39. IAIN CAMERON & MAJA KIRILOVA ERIKSSON, *AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 92 (1993).

40. *Id.*

41. Allen, *supra* note 15, at 401 n.50.

1998.⁴² British citizens were free to “argue alleged breaches of this obligation [to protect human rights under the 1998 Convention] directly in home courts.”⁴³ The Human Rights Act of 1998 established that “[a] court or tribunal determining a question which has arisen in connection with a Convention right must take into account any . . . judgment, decision, declaration or advisory opinion of the European Court of Human Rights.”⁴⁴ In *H v. Kent County Council and the Special Education Needs Tribunal*,⁴⁵ parents of a girl with epilepsy appealed a SENT decision in which the SENT denied the need for a statutory assessment of the girl. Her parents wanted her placed in a regular school and offered specialists’ opinions to support an order granting a new assessment. Relying on the 1998 Convention,⁴⁶ as interpreted in *Belgian Linguistics Case (No. 2)*,⁴⁷ the court found that the SENT did not violate a “right to education.”

There are two resultant ways to view the influence on school choice of the 1998 Convention in the context of special education. Under the law, nothing has fundamentally changed since 1998 because the SENT primarily ensures that parental rights are not damaged.⁴⁸ Interpreting the Convention broadly, however, it is within the spirit of the 1998 Convention for the tribunal to protect children’s human rights as well as parents’ religious or philosophical goals for their children.⁴⁹

Indeed, if the 1998 Convention were so binding on British courts, then LEAs would have to consider human rights in every alleged violation, conceivably opening the proverbial floodgates of

42. See Human Rights Act, 1998, c.42, § 1 (Eng.).

43. Black-Branch, *supra* note 35, at 298.

44. Human Rights Act, 1998, c.42, § 2(1) (Eng.).

45. 2000 WL 699369 (Q.B. May 9, 2000) (Eng.).

46. European Convention, *supra* note 24.

47. *Belgian Linguistic Case (No. 2)*, 6 Eur. Ct. H.R. (ser. A) (1968).

48. ONE SYSTEM, ONE SERVICE, Part II, Individual Tribunals, *The Special Education Needs Tribunal*, *supra* note 9, ¶ 11 (stating “[t]he Education Act 1996 gives rights to parents, not children”); see *Hereford and Worcester County Council v. Lane*, [1999] 1 FCR 356 (stating “[t]he first person with rights in relation to the education of a child is its parent”). *But see* Black-Branch, *supra* note 35, at 298 (stating that under the Human Rights Act, “local courts will be both empowered, and indeed compelled, to hear alleged violations of these rights”).

49. See Black-Branch, *supra* note 35, at 301 (summarizing views of Article 2 of the first Protocol that allow parents to argue a specific approach to educating their child based on their philosophical convictions pertaining to education).

parents' complaints. The floodgates, however, have seemingly remained closed.

C. Evaluations of the Tribunal

An analysis of the development of the tribunal system illustrates a correlation between the changes in the law and the adjudication of special education claims. According to an independent evaluation, between 1994 and 1996, there were 2,800 appeals registered with the SENT.⁵⁰ Only seventy of these decisions, however, resulted in appeals to the High Court.⁵¹ It is unclear if there has been an increase in appeals from SENT decisions in recent years.⁵² Furthermore, since 1998, there is no evidence of an increase in appeals to the SENT or of appeals from the SENT directly to the Court of Appeals.⁵³

The Lord Chancellor of England ordered an independent review of the British tribunal system in 2000.⁵⁴ Since the last tribunal review had taken place in 1957, the Lord Chancellor commissioned Sir Andrew Leggatt to review the entire tribunal system in six different areas, including the decision-making requirements of the European Court of Human Rights.⁵⁵ The findings revealed a system of more than 100 tribunals each with their own bureaucracies.⁵⁶ Moreover, the findings revealed that the SENT upholds seventy-five percent of parents' appeals.⁵⁷ This statistic contradicts the proposition that more SENT decisions are appealed to the High Court, because parents who receive favorable decisions logically do not seek review of them. This

50. Neville Harris, *Meeting a Special Need for Access to Justice: The First Two Years of the Special Education Needs Tribunal*, 16 CIV. JUST. Q. 228 (1997). The "appeals" referred to here mean instances when parents appealed to the SENT because of disagreement about the statement a LEA may have issued regarding their child.

51. *Id.* at 229.

52. *See Special Education Needs Tribunal*, *supra* note 14, at § K2.

53. *See supra* Part II.A.

54. Alison Clarke & Neil Rose, *Tribunals on Trial*, LAW SOCIETY'S GAZETTE, July 6, 2000, at 26.

55. *Lord Chancellor Commissions Wide-Ranging Review of Tribunals*, LCD PRESS NOTICE 158/00, May 18, 2000, available at <http://www.tribunals-review.org.uk/pn18-05-00.htm>. The other five areas of review included whether (a) there is an "effective legal framework"; (b) there are "adequate arrangements for improving people's knowledge and understanding of their rights"; (c) "funding and management are efficient, effective, and economical"; (d) "performance standards are coherent and consistent"; and (e) there is a "coherent structure for the delivery of administrative justice." *Id.*

56. *Id.*

57. *Special Education Needs Tribunal*, *supra* note 14, at § K4.

statistic also suggests that SENT actually has functioned to curb British special education litigation.

Additionally, litigation can be a significant burden on local authorities. The costs of litigation incurred by the LEAs may be much greater than the actual costs of accommodating a student.⁵⁸ The SENT hearing process may likely keep the state costs of special education relatively low. For example, accommodations are entirely funded by the LEAs. Some hearings are held in hotels located within an hour of the aggrieved parents' home and account for some of the expenses in the SENT's annual budget.⁵⁹ Preparation for argument before a tribunal also incurs significant costs. The 1996 independent evaluation revealed that LEAs in London can spend as much as £150,000 annually to prepare and defend cases before the Southeast England SENT authority, the only office with a "permanent suite of rooms" for hearings.⁶⁰ Otherwise, LEAs must arrange and pay for ad hoc accommodations on a case-by-case basis.

III. OVERVIEW OF SPECIAL EDUCATION LAW IN THE UNITED STATES

Over the past three decades, public awareness of the widespread presence of students with disabilities has grown somewhat dramatically in the United States.⁶¹ This awareness is partly due to a more inclusive U.S. society in which people with disabilities are more visible than ever before.⁶² In addition to the IDEA (formally the Education of All Handicapped Children Act

58. *Id.* at § K2. The entire SENT budget annually is £2,849,000, most of which is earmarked for administrative salaries and expenses. Of this total, tribunal member salaries and expenses comprise £1,087,000, and that of staff members comprises £955,000. *Id.*

59. Harris, *supra* note 50, at 239-40; see also *Special Education Needs Tribunal*, *supra* note 14, at § K14.

60. Harris, *supra* note 50, at 228-35.

61. Compare CURRENT LEGAL CONCEPTS IN EDUCATION 15 (Lee O. Garber ed., 1966) (failing to mention special education or disabled students), with SCHOOL LAW IN REVIEW 11-1, 12-1, 13-1 (1999) (including three articles related to special education and IDEA out of thirteen articles total).

62. Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 208 (Jay P. Heubert ed., 1999). Between 1970 and 1995, the number of children institutionalized with developmental disabilities in the United States has dramatically decreased, from over 90,000 to approximately 3,500. *Id.*

of 1975),⁶³ the principle laws concerning special education in the United States are Section 504 of the Rehabilitation Act of 1973,⁶⁴ and the Americans with Disabilities Act (ADA).⁶⁵ Each statute affects the way state education agencies (SEAs) accommodate students with disabilities.⁶⁶ The U.S. system generally handles special education disputes through lawsuits on a case-by-case basis or through regulatory enforcement of provisions in local school districts.⁶⁷

A. *The Individuals with Disabilities Education Act*

Like the United Kingdom, the United States has a focused statute specifically governing special education. IDEA was enacted to ensure that students with disabilities receive "free appropriate public education" (FAPE).⁶⁸ States that guarantee FAPE for all students receive federal funds for children with disabilities to ensure equal protection of the law.⁶⁹ Free and appropriate public education also emphasizes "special education and related services" to meet the unique needs of students with

63. 20 U.S.C. §§ 1400–1487 (2000).

64. 29 U.S.C. § 794 (2000).

65. 42 U.S.C. § 12101 (2000).

66. Section 504 of the Rehabilitation Act of 1973 and the ADA prohibit discrimination based on disability. Thomas A. Mayes & Perry Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62, 65 (2000). Section 504 eligibility for special school accommodations, however, "is not based on a categorical analysis of disabilities." COMMUNITY ALLIANCE FOR SPECIAL EDUCATION & PROTECTION AND ADVOCACY, INC., SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES 1–5 (1998) [hereinafter SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES]. In language reminiscent of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000), Section 504 provides specifically:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of . . . his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . 29 U.S.C. § 794 (2000).

In *Southeastern Community College v. Davis*, 442 U.S. 397, 398 (1979), the U.S. Supreme Court clarified that an "otherwise qualified" person under Section 504 is one who meets a program's criteria despite a handicap. It does not mean someone "who would be able to meet the requirements in every respect except as to limitations imposed by the handicap." E. EDMUND REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 172 (1994).

67. Hehir & Gamm, *supra* note 62, at 205.

68. 20 U.S.C. § 1412(a)(1)(A) (2000); *Smith v. Indianapolis Pub. Sch.*, 916 F.Supp. 872, 875 (S.D. Ind. 1995).

69. *See* 20 U.S.C. § 1400(c)(6); *see also* 20 U.S.C. § 1412(a)(1)(A) (2000).

disabilities.⁷⁰ These services are provided at public expense under public supervision.⁷¹

These regulations mandate that each student with a disability has a right to an “individualized education program” (IEP).⁷² IEPs describe the student’s educational goals and arise out of assessments and negotiations between parents, educators, therapists, administrators, and any other significantly interested party.⁷³ The IEP describes the kind of accommodations the student needs, similar to a LEA’s assessment under the Education Act 1996.⁷⁴ The IEP, however, is a collaborative, rather than adversarial, meeting between parents and school officials.⁷⁵ Attorney participation, therefore, is usually discouraged, but not forbidden.⁷⁶

Student accommodations must be provided in the “least restrictive environment” (LRE).⁷⁷ Generally, LRE requires that students with disabilities spend as much instructional time as possible with their peers.⁷⁸ The goal is towards “mainstreaming” whereby each state establishes procedures to assure that, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.”⁷⁹

Most importantly, IDEA provides that any parents who believe a local or state school district has not properly identified, evaluated, or placed their child in accordance with FAPE⁸⁰ can

70. 20 U.S.C. § 1400(d)(1)(A) (2000). In addition, FAPE should “prepare them for employment and independent living.” *Id.*

71. 20 U.S.C. § 1401(8)(A) (2000).

72. 20 U.S.C. § 1414(d)(2)(A) (2000).

73. *See* 20 U.S.C. § 1414(d)(B) (2000).

74. Education Act, *supra* note 13, § 324.

75. Deryl W. Wynn et al., *IEP Development and Placement: A “Serviceable Chevrolet” for All, Not a “Cadillac” for Some*, in *SCHOOL LAW IN REVIEW* 11-1, 11-6 n.20 (1999) (citing Proposed Regulations, Question 26 Appendix C to 34 C.F.R. 300).

76. *But see* Steven Marchese, *Putting Square Pegs Into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 *RUTGERS L. REV.* 333, 362 (2001) (explaining that parents’ lawyers can balance the power between parents and school districts).

77. 20 U.S.C. § 1412(a)(5)(A) (2000).

78. *Id.* Ideally, the LRE is the general education classroom in the local public school, but could be a residential school, segregated special education classroom or private school depending, on the demands of the IEP statement. *See* *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 n.4 (1982).

79. 20 U.S.C. § 1412(a)(5)(A) (2000).

80. IDEA focuses on the need for more substantive educational concerns, such as proper teaching accommodations in the classroom for specific disabilities. *See* *Mayes & Zirkel, supra* note 66, at 63–64. For example, students with a medical diagnosis of

formally complain.⁸¹ Parents have a right to an impartial due process hearing when their child has been deprived of his or her rights under IDEA.⁸² At this hearing, attorneys may represent the parents and the school authority.⁸³ The hearing officer issues an administrative conclusion, after which the aggrieved party can either file a civil action or appeal to the state educational authority (SEA) for review.⁸⁴ The state or federal court may grant any appropriate relief, such as an injunction against a school district⁸⁵ to provide compensatory education⁸⁶ or tuition reimbursement.⁸⁷ The court can also award successful parents their attorney's fees.⁸⁸

B. The 1997 Amendments

Nothing illustrates the novelty of the IDEA's individual-right-to-adequate-education approach better than the mandatory mediation provisions established by the IDEA amendments of 1997 (1997 Amendments).⁸⁹ The mediation provisions were a legislative response to an apparent proliferation of students' special educational needs⁹⁰ and deteriorating parent-district ties.⁹¹

attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) alone cannot qualify for special education unless an IEP determines that they meet the federal eligibility standard. The relevant federal standard for ADD/ADHD includes "seriously emotionally disturbed, other health impaired or children with specific learning disabilities." SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES, *supra* note 66, at 1-2 (1998).

81. 20 U.S.C. § 1415(b)(6) (2000).

82. 20 U.S.C. § 1415(f)(1) (2000).

83. THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 162 (2d ed. 2001) [hereinafter GUERNSEY & KLARE].

84. 20 U.S.C. § 1415(i)(1)(2) (2000); *see also* GUERNSEY & KLARE, *supra* note 83, at 171.

85. *See, e.g.*, Blackman v. Dist. of Columbia, 185 F.R.D. 4, 5 (D.D.C. 1999) (ordering a special master to facilitate resolution of motions for preliminary injunctions).

86. *See, e.g.*, Ridgewood Bd. of Educ. v. N.E. ex. rel. M.E., 172 F.3d 238, 249 (3rd Cir. 1999) (stating "[a]n award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of" FAPE).

87. *See, e.g.*, Rome Sch. Comm. v. Mrs. B., 247 F.3d 29, 30 (1st Cir. 2001) (affirming that a school district must reimburse parents for private residential school education).

88. 20 U.S.C. § 1415(i)(3)(B) (2000).

89. *See* Andrea Shemberg, *Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?*, 12 OHIO ST. J. ON DISP. RESOL. 739, 740 (1997).

90. *See, e.g.*, 20 U.S.C. § 1400(c)(6) (2000) (emphasizing the role of the federal government in assisting states and localities not only to improve education, but also to ensure equal protection).

91. *See* Marchese, *supra* note 76, at 355-56.

The legislature viewed litigation as an adversarial process which nevertheless provided inherent prospects for conciliatory or compromised solutions.

The 1997 Amendments encouraged mediation as a solution to costly litigation by mandating that states establish voluntary mediation as a prerequisite to due process hearings.⁹² Perhaps the 1997 Amendments were meant to purge the system of an abundance of litigated issues. Certainly, IDEA's overarching purpose continues to be to identify and assess the needs of special education students while assisting states in proper placement of such students.⁹³ The mediation provision's design, meanwhile, nurtures and protects positive relationships between parents and the educational authorities.⁹⁴ While other IDEA provisions, such as the "child find" mechanism, outline procedures by which students' individual rights are vindicated,⁹⁵ the mediation provision presents a vehicle for parent-school collaboration.⁹⁶

Nonetheless, litigation involving the rights of children with special needs continues.⁹⁷ Reasons for this continued litigation may include the "extremely high proportion of lawyers" in the United States and the idea that "U.S. society . . . encourages

92. 20 U.S.C. § 1415(e) (2000).

93. 20 U.S.C. § 1400(d)(1)(A)–(C) (2000). "The purposes of [IDEA] are . . . to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services . . . [and] to ensure that the rights of children with disabilities and parents of such children are protected; and . . . to assist States in the implementation . . . of early intervention services . . . [and] to assess, and ensure the effectiveness of, efforts to educate children with disabilities." *Id.*; cf. *Smith v. Indianapolis Pub. Sch.*, 916 F. Supp. 872, 875 (S.D. Ind. 1995) (stating that the basic purpose of IDEA is to ensure that all children have FAPE).

94. See, e.g., Marchese, *supra* note 76, at 356 (describing a successful state mediation system in Madison, Wisconsin where a "close connection between parents and the school district" extended from the district's perception of "parents as partners"); see also Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes First? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 64 (1997) (stating that as a result of a survey of parents in New Jersey who had participated in that state's special education mediations, "we can be optimistic about the fact that one-third of the parents perceived mediation as having improved their relationships with schools").

95. 20 U.S.C. § 1412(a)(3)(A) (2000) (requiring state educational authorities to effectively identify all special needs students within their jurisdictions); see GUERNSEY & KLARE, *supra* note 83, at 51–53.

96. *But see* Kuriloff & Goldberg, *supra* note 94, at 60–63 (discussing participants' general skepticism about mediation's fairness, evinced by "lukewarm satisfaction with mediation" and a "power and resource imbalance" between parents and schools).

97. E.g., *Cedar Rapids Comty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999) (affirming that a local educational authority was financially responsible under IDEA for a paralyzed student's continuous one-on-one nursing); see NASDSE Update, *supra* note 8.

people to view themselves as victimized.”⁹⁸ Whether these statements are true or not, an increase in litigation is not necessarily a detriment to education. More children with special needs are spending more of their school day in the general school population and are going to college.⁹⁹ For example, between 1978 and 1991, the percentage of college freshmen reporting disabilities increased from 2.6 to 8.8.¹⁰⁰ Since President Ford signed the IDEA into law in 1975, it has contributed to a positive increase in the numbers of people with disabilities fully participating in school. Moreover, “[i]t is expected that the next few years will see an increase in the trend toward settlement of disputes through means other than formal due process hearings” because of the 1997 Amendments.¹⁰¹ Still, not everyone views IDEA as a necessary component of special education law.

C. Criticism of the Individuals with Disabilities Education Act

A libertarian criticism of the IDEA is that it is “the largest unfunded federal mandate in American education.”¹⁰² It is estimated that the IDEA now covers 6.1 million school children nationwide at a cost of \$41.5 billion annually.¹⁰³ This figure also “account[s] for 40 percent of all new education funding over the past 30 years . . . [though] . . . only 12.5 percent of the money is provided by the federal government.”¹⁰⁴ States carry the remaining costs.

The IDEA’s due process system has also met its critics,¹⁰⁵ who argue that it is costly, unnecessarily adversarial, and otherwise theoretically ill-conceived.¹⁰⁶ On the one hand, students with disabilities are more visible in schools and have the same need for

98. STERNBERG & GRIGORENKO, *supra* note 7, at 223–24.

99. Hehir & Gamm, *supra* note 62.

100. *Id.*

101. NASDSE Update, *supra* note 8.

102. Clint Bolick, *A Bad IDEA Is Disabling Public Schools*, EDUC. WK., Sept. 5, 2001, <http://www.edweek.org/ew/newstory.cfm?slug=01bolick.h21>.

103. *Id.*

104. *Id.*

105. Hehir & Gamm, *supra* note 62, at 214 (stating that early researchers into the due process system argued “that due process has not achieved the objective of providing an accessible dispute resolution mechanism between parents and districts or furthered the ‘least restrictive environment’ requirement”). In a 1993 public television debate, a U.S. senator used IDEA as an example of federal government overextension into education. *Id.* at 209.

106. *See id.* at 214–16; *see also* Bolick, *supra* note 102.

attention and legal advocacy than before the enactment of the IDEA.¹⁰⁷ On the other hand, individualized rights-based adjudication can be costly to school districts, parents, and ultimately the judicial system.¹⁰⁸

The ever-burgeoning school choice movement is often associated with more fiscally conservative or libertarian approaches to education. This attitude generally supports some form of voucher system as a remedy.¹⁰⁹ Parents may remove their children from public school and place their children in a presumably superior private school with the aid of a government voucher.

Other critics challenge the efficiency of the IDEA's mediation and due process provisions and the imbalance of power between low-income parents with limited resources and school authorities.¹¹⁰ This has been a criticism of the IDEA at least since 1997,¹¹¹ and comes with a particular sting because IDEA was meant to remedy a social ill, not to create one.

There have indeed been many obstacles to effective mediation. These obstacles include the lack of equal funds for legal advice and representation of school authorities and low-income parents and their dependence upon the adequate training of the mediator.¹¹² Consequently, low-income parents might have economic disincentives to seek proper placements for their children.¹¹³ They might not be able to afford legal counsel at either the mediation or adjudication stages.¹¹⁴ The availability of advocacy organizations that provide counsel or some form of lay representation varies from state to state.¹¹⁵ Although legal aid

107. See generally Hehir & Gamm, *supra* note 62, at 205–39 (discussing the “positive effects of ‘legalization’ in special education,” such as regulatory enforcement).

108. See *id.* at 225; see also Bolick, *supra* note 102.

109. See Bolick, *supra* note 102; see generally Lamar Alexander et al., *School Voucher: Is a Grand Bargain Between Left and Right Possible?*, 572 ANNALS 115 (2000) (describing former Secretary of Education Lamar Alexander's proposed federal “G.I. Bill for Kids,” a \$500 million voucher program).

110. See Marchese, *supra* note 76, at 361–62; Jennifer A. Knox, *The IDEA Amendments of 1997 and the Private Schools Provision: Seeking Improved Special Education, but Serving Only a Select Few*, 49 CATH. U. L. REV. 201 (1999).

111. Shemberg, *supra* note 89, at 749.

112. Marchese, *supra* note 76, at 350–51.

113. See *id.* at 362.

114. *Id.*

115. See CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION (CADRE), *State Program Database*, available at <http://www.directionservice.org/cadre/state> (last visited Apr. 23, 2003). Sponsored by the U.S.

attorneys may represent parents, they are likely to refer parents to educational advocacy organizations for which funding may be limited.¹¹⁶ Assistance from these organizations, however, is not limited only to low-income families. As a result, poorer parents may be unable to secure an advocate by the time an IEP or mediation session occurs.

If parents participate in mediation without obtaining professional legal advice, they may likely pursue a due process hearing anyway.¹¹⁷ Conversely, parents can end up feeling dissatisfied with mediated settlements that really do not meet their children's needs.¹¹⁸ Either way, the lack of adequate representation for low-income parents in dispute resolution can stymie the fairness of the process.

Other critics question the validity of "mandatory mediation."¹¹⁹ According to the "child-find" provision (or identification process),¹²⁰ public school districts need to use multidisciplinary teams of professionals to properly identify what, if any, learning disabilities exist.¹²¹

IV. SIMILARITIES AND DIFFERENCES BETWEEN THE TWO SYSTEMS

The IDEA and SENT systems share some structural similarities, albeit at different points of the process. The tribunal

Department of Education's Office of Special Education Programs, the database provides a state-by-state listing of state departments of education and mediation programs.

116. There are a variety of advocacy groups in different states to which legal aid societies refer. *See, e.g.*, THE LEGAL AID SOCIETY OF SANTA CLARA COUNTY, *The Case for CASE*, at <http://www.legalaidsociety.org/education> (last visited Apr. 7, 2003). Some of these organizations provide legal representation, but many of them provide parents with information about IDEA, due process procedures, and policy updates. *E.g.*, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC., *Disability Rights Information*, at <http://www.protectionandadvocacy.com/Legalinformation.htm> (last visited Apr. 7, 2003).

117. *See* Marchese, *supra* note 76, at 350-51.

118. *See* Kuriloff & Goldberg, *supra* note 94, at 42 (indicating that mediation can conceal "coerced settlements behind the facade of mutual agreement"); MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 33 (1997) (indicating that precious funds can be deflected away from underlying problems in schools and into misguided IEPs and mediations).

119. Shemberg, *supra* note 89, at 746-47 (noting that "[m]ediation is a series of compromises; it is not appropriate when both disputants do not wish to cooperate").

120. 20 U.S.C. § 1412 (1994).

121. CORINNE SMITH, PH. D. & LISA STRICK, *LEARNING DISABILITIES: A-Z, A PARENT'S GUIDE TO LEARNING DISABILITIES FROM PRESCHOOL TO ADULTHOOD* 88 (1997).

sometimes resembles an IEP, and at other times a due process hearing. Both the less formal IEP and the more formal SENT can involve a variety of interested parties including educators, parents, and lawyers.¹²² The adversarial SENT and the due process hearing also similarly arise from a dissatisfied parent's appeal to an adjudicative authority.

The systems bear more marked differences. First, each system recognizes the "right to education" in different legal authorities. Whereas, "the English system does not recognize a right to education . . . [but instead] operates by imposing specific duties on local authorities,"¹²³ the United Kingdom now recognizes a right to education through various human rights agreements. The distinction is not trivial, because there really is no explicit right to education under the U.S. Constitution.¹²⁴ In the United States, "children have rights that can be asserted against local educational agencies."¹²⁵ Yet the IDEA has placed the burden upon states, both organizationally and financially, to maintain mediation procedures.¹²⁶ Parents, however, have the choice not to participate in mediation before a due process hearing.¹²⁷

Second, the British tribunal system seems to have produced little litigation despite a weighty number of special educational needs hearings.¹²⁸ Unlike the "conclusions" of U.S. due process hearings, which do not bind the parties to act,¹²⁹ the SENT's decisions are binding. Parents in the United States, therefore, have a better chance for judicial review because they have the right to pursue litigation.¹³⁰

122. Wynn, *supra* note 75, at 11-1.

123. Allen, *supra* note 15, at 389. *But see* Part II.C *supra*.

124. All fifty states do include a right to education in their constitutions, though it is not always phrased literally as a "right." *See* Allen, *supra* note 15, at 396 n.31. For example, the California constitution recognizes that "[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people." CAL. CONST. art. IX, § 1.

125. Allen, *supra* note 15, at 389.

126. *See* 20 U.S.C.S. § 1415(e) (2000).

127. *See* 20 U.S.C.S. § 1415(e)(1)-(2)(B) (2000).

128. The entire SENT heard a total of 1,206 cases in 1999. ONE SYSTEM, ONE SERVICE, Part II, Individual Tribunals, The Special Education Needs Tribunal, *supra* note 9, ¶ 2.

129. 20 U.S.C.S. § 1415(i) (2000).

130. *See* 20 U.S.C.S. § 1415(i) (2000).

V. THE TRIBUNAL AS A MODEL

Some criticisms of IDEA might be addressed if the IDEA were to assimilate certain features of the British tribunal system. Specifically, IDEA could benefit from (1) a refocus of duty upon LEAs; and (2) an increased impartiality and independence of the due process hearing.

A. A Refocus of Duty Upon Local Educational Authorities

The IDEA contains language allowing for the LEAs to refocus on their duties.¹³¹ Strengthening state power to provide facilities for mediation, guarantee parental representation,¹³² and mediator training¹³³ could address critics' concerns about "power imbalances." This could also channel state energies and resources into settlement with the interests of the child in mind rather than simple cost-cutting interests. Costs are not the primary concern of tribunal review.¹³⁴

Furthermore, the IDEA could institutionalize some form of legal representation for low-income parents who have grievances with their state educational authority¹³⁵ because state constitutions, rather than the federal constitution, provide explicit rights.¹³⁶ Legal aid could be more likely to play a role in U.S. proceedings, whereas in England legal aid "is generally available

131. 20 U.S.C. § 1400(d) (2000) (stating that among the purposes of IDEA, the law must ensure disabled children receive FAPE, and that state and local agencies be empowered to provide it).

132. Marchese, *supra* note 76, at 361.

133. CADRE releases tips to help schools use mediation, THE SPECIAL EDUCATOR, May 08, 2001, LEXIS, LRP Publications (indicating that states have no guidelines for mediator training, and therefore the Department of Education cannot regulate mediator quality). CADRE has recommended that "initial training, regular refresher courses and criterion-based tests may help ensure that mediators are knowledgeable about the law." *Id.*

134. SIR ANDREW LEGGATT, THE LAW SOCIETY, RESPONSE TO TRIBUNALS FOR USERS: THE LORD CHANCELLOR'S DEPARTMENT CONSULTATION PAPER ON THE REPORT OF THE REVIEW OF TRIBUNALS, Nov. 2001, available at <http://www.lawsoc.org.uk/dcs/pdf/taxlaw-tribunalsforusers.pdf> (noting that cost-efficiency is important, but that "if [tribunals] fail to deliver a just result, they are worthless") [hereinafter LAW SOCIETY RESPONSE].

135. Marchese, *supra* note 76, at 361-62.

136. See generally Mayes & Zirkel, *supra* note 66, at 65 (describing the general duties of state educational agencies both to supervise local authorities and to provide services as established under IDEA, Section 504 of the Rehabilitation Act of 1973, and the ADA).

for proceedings before tribunals”¹³⁷ except the SENT.¹³⁸ In fact, critics of the SENT have called for increased funding for low-income appellants.¹³⁹

B. Increased Independence and Impartiality

The IDEA’s mediation procedures are a feature that Sir Leggatt covets.¹⁴⁰ In fact, the SENT constitutes the extent of educational dispute resolution in the United Kingdom.¹⁴¹ The mediation provisions created by the 1997, however, remain a strength of IDEA.¹⁴²

Due process hearings, however, must first be independent and impartial. This could be achieved if they are publicly funded, administered apart from the auspices of the LEAs, and bind parents as well as schools or school districts to hearing decisions.

Second, the SENT’s panel structure could provide a model for more impartial adjudication. The British statutes require panelists to have both legal and educational specialization and require a lawyer chair and two specialist panel members experienced in special education or local government.¹⁴³ Their proceedings are also orchestrated by formal procedural rules.¹⁴⁴ Thus, a due process hearing “panel” comprised of at least one legally trained arbitrator, among other disinterested special education professionals, could help guarantee fact-finding oriented toward

137. COUNCIL OF EUROPE, COMMITTEE OF EXPERTS ON ACCESS TO JUSTICE, LEGAL AID AND ADVICE: REPLIES MADE BY GOVERNMENTS TO THE QUESTIONNAIRE ON LEGAL AID AND ADVICE 22 (1978).

138. Harris, *supra* note 50, at 240.

139. See LAW SOCIETY RESPONSE, *supra* note 134, at 21 (stating that educational advocacy groups are “not a satisfactory substitute for specialist legal advice and representation”).

140. See ONE SYSTEM, ONE SERVICE, Part II, Individual Tribunals, The Special Education Needs Tribunal, *supra* note 9, ¶ 15 (stating that “[w]e agree with the Council on Tribunals that SENT cases are particularly suitable for conciliation or mediation”).

141. See Harris, *supra* note 50, at 44–45.

142. The favorable aspects of this system have already been described, especially the maintenance of bonds between parents and schools. It has been suggested that states ought to oversee the training of mediators to be (1) skilled in both facilitative and evaluative mediation (depending upon circumstances); (2) qualified (knowledgeable about special education law); and (3) impartial (independent from SEAs and selected at random). Jonathan A. Beyer, *A Modest Proposal: Mediating Idea Disputes Without Splitting The Baby*, 28 J.L. & EDUC. 37, 53–59 (1999).

143. Education Act, *supra* note 13, § 333.

144. *Id.* § 336. But see ONE SYSTEM, ONE SERVICE, Part II, Individual Tribunals, The Special Education Needs Tribunal, *supra* note 9, ¶ 9 (providing Leggatt’s observation that the SENT had “no formal hearing structure”).

the special education environment. In the "child-find" provision (or identification process),¹⁴⁵ public school districts need to use multidisciplinary teams of professionals to properly identify what, if any, learning disabilities exist.¹⁴⁶ The IDEA currently mandates that the LEA or SEA shall conduct the "impartial due process hearing."¹⁴⁷ These proceedings need to be conducted by an authority apart from the LEA to better safeguard their independence.¹⁴⁸

Third, like the SENT, the due process adjudicators should issue binding decisions. Currently, IDEA allows for dissatisfied parents to appeal hearing decisions to a court. Perhaps the decisions would only be subject to judicial review if a party's fundamental rights were infringed.¹⁴⁹ Perhaps parents and school authorities could also be encouraged to agree to bindedness as a part of mediated settlement agreements. Both of these features would remain consistent with IDEA's authorization of reviewing courts to grant "such relief as the court deems appropriate."¹⁵⁰ Such provisions also exemplify ways the U.S. system of basic rights could adopt and improve upon the SENT model.

VI. CONCLUSION

Under both the U.S. and British systems, parents must persevere at every stage to ensure their children's educational welfare. Karis Lane's mother, for example, needs to remain vigilant in her appeal to the SENT and patiently wait for its decision.¹⁵¹ The tribunal system could provide an effective model for some claims under IDEA while leaving intact the 1997 Amendments.¹⁵² If the due process hearings can be conducted

145. 20 U.S.C. § 1412 (a)(3)(A) (2000).

146. SMITH & STRICK, *supra* note 121, at 88.

147. 20 U.S.C.S. § 1415(f)(1) (2000).

148. The SENT, however, is not necessarily the best model for independence. See ONE SYSTEM, ONE SERVICE, *supra* note 9, § 2.20 (stating that "tribunal decisions seem to us clearly impartial . . . [b]ut it cannot be said with confidence that they are demonstrably independent").

149. This would not allow SEAs and LEAs to be lax in identifying, assessing, and placing children with disabilities in schools.

150. 20 U.S.C. § 1415(i)(1)(A) (2000).

151. *Special Education Needs Tribunal*, *supra* note 14, § K3 (stating that a case before the SENT typically takes three to four months from first receipt to final disposal).

152. There is scant statistical evidence, however, as to whether there are fewer cases being litigated, or simply that more parents are satisfied with the results of mediation. Marchese, *supra* note 76, at 347.

independently with state-sponsored, full-time, trained judicial officers and special education professionals, who issue binding decisions (e.g. as a form of arbitration), then perhaps effective and just implementation of IDEA can continue.

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