A Good IDEA: Analyzing the Ineffective Enforcement of IDEA Due to Limitations on the Recovery of Attorneys' Fees

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I. INTRODUCTION

Nearly 14% of students in America's public schools—over seven million children—are students with disabilities.[1] Historically, American public schools were not kind or inclusive places for these students,[2] but a series of social and legislative changes transformed public schools into an invaluable resource for them and their families. Quality Special Education programs are now considered an essential element of our national policy of ensuring equality of opportunity.[3] One of the critical pieces of legislation securing rights for students with disabilities is the Individuals with Disabilities Education Act, or IDEA.[4] Importantly, IDEA ensures that students with disabilities can protect their rights through specific enforcement procedures, many of which depend on the ability of the prevailing party to recover attorneys' fees.[5]

However, the enforcement of special education laws remains flawed. The National Council on Disability (NCD) noted in 1995 that "the majority of problems which have occurred in special education have not been the result of problems with the law itself, but with its implementation."[6] Indeed, a significant portion of the research and academic discussion regarding the enforcement

[1] Katherine Schaeffer, *As schools shift to online learning amid pandemic, here's what we know about disabled students in the U.S.*, PEW RSCH. CTR. (April 23, 2020), https://www.pewresearch.org/fact-tank/2020/04/23/as-schools-shift-to-online-learning-amid-pandemic-heres-what-we-know-about-disabled-students-in-the-u-s/.
[2] *A History of the Individuals With Disabilities Education Act*, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (last modified March 18, 2022), https://sites.ed.gov/idea/IDEA-History.
[3] Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(1).
[4] 20 U.S.C. § 1400.
[5] 20 U.S.C. § 1415.
[6] NAT'L COUNCIL ON DISABILITY, IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ED ACT: MAKING SCHOOLS WORK FOR ALL OF AMERICA'S CHILDREN, (1995), https://ncd.gov/publications/1995/09051995.

of special education laws is dedicated to the role of private parties rather than federal agencies. [7] Specifically, enforcement of IDEA relies on parent advocacy.[8] However, parents may not have access to the resources needed to enforce special education laws properly. Many parents rely on the ability to recover their attorneys' fees after bringing an action against a noncompliant school district and advocating for their child to receive services.[9] If parents are unable or unsure if they will be able to recover attorneys' fees, many families will not pursue enforcement. Therefore, effective advocacy depends on parents having access to a strong and effective provision to recover attorneys' fees.

This comment argues that, through conflicting and complicated judicial interpretations, the IDEA's attorneys' fees provision has become so burdensome that the overall effectiveness of IDEA has been hindered. Part II of this comment will explain the evolution of legislation regarding children with disabilities and public schools,[10] emphasize the goals and policies IDEA serves,[11] and outline IDEA's procedures.[12] Part III of this comment introduces the attorneys' fees recovery provision included in IDEA and its purpose.[13] Part IV will explore the limitations prevailing parties face when seeking to recover attorneys' fees, such as the inability to recover any fees if the parties

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[7] Eloise Pasachoff, *Advocates, Federal Agencies, and the Education of Children with Disabilities*, 29 OHIO ST. J. ON DISP. RESOL., 461 (2014).

[8] *See* Denise Marshall, *The Parent Right to Recover Attorneys Fees is One of IDEA's Most Important Procedural Safeguards*, COUNCIL OF PARENT ATT'Y AND ADVOC.: NEWS & PRESS (Tuesday, November 14, 2017), https://www.copaa.org/news/374491/The-Parent-Right-to-Recover-Attorneys-Fees-is-One-of-IDEAs-Most-Important-Procedural-Safeguards.htm. *See also* Julie F. Mead and Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents' Rights to Advocate for Children with Disabilities under the IDEA*, 34:2 J. of Legislation, 123, 136, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1066&context=jleg (arguing that "[w]ith regard to parental rights, a close reading of both the statute signed on June 4, 1997 by President Bill Clinton and the 1999 regulations promulgated to implement the changes can only be read as an enhancement of parental rights under the law")

[9] *See* Denise Marshall, *The Parent Right to Recover Attorneys Fees is One of IDEA's Most Important Procedural Safeguards*, COUNCIL OF PARENT ATT'Y AND ADVOC.: NEWS & PRESS (Tuesday, November 14, 2017), https://www.copaa.org/news/374491/The-Parent-Right-to-Recover-Attorneys-Fees-is-One-of-IDEAs-Most-Important-Procedural-Safeguards.htm.

[10] *See infra* section II.A.

[11] *See infra* section II.B.

[12] *See infra* section II.C.

[13] *See infra* section III.

settle,[14] the additional requirements to qualify as a "parent" and "prevailing party,"[15] and a circuit split resulting in an inconsistent statute of limitations applied to attorneys' fee actions.[16] Finally, Part V will conclude by analyzing the impacts these limitations have on the effectiveness of IDEA.[17]

II. BACKGROUND: INCLUSIVE EDUCATION WAS ACHIEVED SLOWLY, THROUGH LEGISLATION AND SOCIAL CHANGE.

A. *History of IDEA: Consistently failing to educate children with disabilities necessitated comprehensive legislation.*

It was not until the early 1970s that the Supreme Court first established the responsibility of states and localities to educate children with disabilities.[18] The federal government had previously passed legislation in the spirit of inclusion, such as Captioned Films Acts of 1953, which made captioned films more widely accessible to those with hearing disabilities,[19] but major inclusion legislation was still necessary. [20]

This need was satisfied when President Ford signed the Education for All Handicapped Children Act, or the EHCA, in 1975.[21] The EHCA later became the Individuals with Disabilities Education Act (IDEA)[22] and laid the groundwork for many of the policies and goals that would motivate future education legislation. Today, it is accepted that students with disabilities have a

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[14] *See infra* section IV.A.
[15] *See infra* section IV.B.
[16] *See infra* section IV.C.
[17] *See infra* section V.
[18] Pa. Ass'n for Retarded Citizens v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971); Mills v. Bd. of Educ. of the Dist. of Columbia, 348 F. Supp. 866 (D. D.C. 1972).
[19] Deaf, Loan Serv. of Films, Pub. L. No. 85-905, 72 Stat. 1742 (1958).
[20] *1950s, 1960s, and 1970s: Initial Federal Response*, A History of the INDIVIDUALS WITH DISABILITIES EDUCATION ACT (last modified March 18, 2022), https://sites.ed.gov/idea/IDEA-History#1950s-60s-70s.
[21] *1975: Public Law 94-142*, A History of the INDIVIDUALS WITH DISABILITIES EDUCATION ACT (last modified March 18, 2022), https://sites.ed.gov/idea/IDEA-History#1975.
[22] *A History of the Individuals with Disabilities Educ. Act*, A History of the INDIVIDUALS WITH DISABILITIES EDUCATION ACT (last modified March 18, 2022), https://sites.ed.gov/idea/IDEA-History.

right under the equal protection clause of the United States Constitution to receive a free appropriate public education (FAPE)[23] "in the least restrictive environment."[24]

Today, the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act, and IDEA individually and collectively provide extensive protection for children with disabilities and their families.[25] The protections offered by each often overlap, but key differences exist.[26] Section 504 "prohibits schools from discriminating against students with disabilities" and is enforced by the Office for Civil Rights.[27] The Americans with Disabilities Act also prohibits discrimination against students with disabilities but, unlike Section 504, does not apply to private schools or schools not receiving federal funds.[28] Section 504 and IDEA both require schools to provide a FAPE to all children with disabilities, but IDEA's FAPE requirements are more extensive.[29]

IDEA is unique from these other laws for a variety of reasons. For example, IDEA is "both a grants statute and a civil rights statute,"[30] meaning IDEA creates substantive rights for children with disabilities and provides funds to help schools fulfill these requirements. IDEA is the only federal law that allocates additional federal funds to states and local educational agencies (LEA) to assist with the cost of educating students with disabilities.[31] IDEA creates substantive rights for children with disabilities, while other similar statutes, such as Section 504, do not.[32] These rights

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[23] This comment refers to a free public education as "FAPE," a term of art commonly used by educators and found within the source material.
[24] NAT'L COUNCIL ON DISABILITY, IDEA SERIES: FEDERAL MONITORING AND ENFORCEMENT OF IDEA COMPLIANCE (2018), https://www.ncd.gov/sites/default/files/NCD_Monitoring-Enforcement_Accessible.pdf.
[25] JAMES A. RAPP, 4 EDUCATION LAW § 10C.13, (current through May 2022).
[26] *Id*.
[27] NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[28] NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 18.
[29] U.S. DEPT OF EDUC., OFFICE OF C.R., FREE APPROPRIATE PUBLIC. EDUCATION. FOR STUDENTS WITH DISABILITIES: REQUIREMENTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 (2010), www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html.
[30] NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[31] NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[32] Smith v. Robinson, 468 U.S. 992, 1022 (1984).

require states who accept federal funds to identify, evaluate, and provide a FAPE to all children with disabilities. [33]

Today, IDEA also contains a provision that allows prevailing parties to recover attorneys' fees. IDEA did not initially include a provision providing an award of attorneys' fees for a prevailing party.[34] However, in response to a Supreme Court case that muddled the relief available under various special education claims,[35] Congress passed the Handicapped Children's Protection Act to authorize the award of reasonable attorneys' fees to prevailing parties.[36]

B. ***Policy: IDEA aims to protect the rights of children with disabilities.***

IDEA establishes three primary purposes. First, each child is entitled to a FAPE that emphasizes special education and related services designed to meet the child's unique needs.[37] The FAPE requirement also requires children to learn alongside their peers as much as possible and in the least restrictive environment.[38] The needs of students protected by IDEA vary greatly, and the FAPE requirement protects students no matter what their disability is.[39] Second, IDEA ensures the rights of children with disabilities and parents of such children are protected.[40] IDEA provides mechanisms to assess and assure the effectiveness of efforts to educate children with disabilities.[41] By establishing these mechanisms, IDEA ensures full accountability in federal court for statutory

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[33] RAPP, *supra* note 23 at § 10C13; NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[34] RAPP, *supra* note 23 at § 10C13(5)(a).
[35] *Smith*, 468 U.S. at 1022.
[36] Handicapped Child.'s Prot. Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796-97 (1986).
[37] 20 U.S.C. § 1400(d)(1)(A); Kurtis A. Kemper, Annotation, *Statute of Limitations Applicable to, and Accrual of, Actions for Attorney's Fees Brought Under Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B),* 23 A.L.R. Fed. 2d 553.
[38] 20 U.S.C. § 1406(b)(2).
[39] 20 U.S.C. § 1401(3) (IDEA covers 13 categories of disabilities: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment (including ADHD), specific learning disability (including dyslexia, dyscalculia, dysgraphia, and other learning differences), speech or language impairment, traumatic brain injury, visual impairment, including blindness).
[40] 20 U.S.C. § 1400(d)(1)(B).
[41] Kemper, *supra* note 35.

violations committed by state educational authorities who receive federal financial assistance under IDEA.[42] Third, IDEA assists states, localities, educational service agencies, and federal agencies by providing for the education of all children with disabilities.[43] Because IDEA is a grant program, IDEA provides participating states with the funding necessary to carry out its legal requirements.

These objectives pursue the best interests of children with disabilities and protect those interests through private enforcement. Congress enacted IDEA after reviewing thirty years of research and testimony related to the best interests of children with disabilities and how best to improve their education.[44] IDEA's enforcement mechanisms further support the goals of the students' best interests by ensuring that LEAs will remain committed to executing IDEA's provisions and goals.

C. *Procedure: IDEA provides specific procedures for dispute resolution and enforcement.*

As introduced above, IDEA enforcement mechanisms and extensive procedural safeguards promote compliance.[45] The Office of Special Education and Rehabilitative Services (OSERS) at the U.S. Department of Education monitors these procedural safeguards.[46] However, these safeguards are flawed, inadequate, and have even elicited criticism from the National Council on Disability. [47] Many of these criticisms—such as the Department of Education's continued funding to noncompliant school systems and a general lack of funding for enforcement— are outside the scope of this comment but are

[42] A.W. v. Jersey City Pub. Sch., 341 F.3d 234 (3rd Cir. 2003).
[43] 20 U.S.C. § 1400(d)(1)(C).
[44] 20 U.S.C. § 1400(c)(5).
[45] *Parents Should Recover Attorneys Fees When Settle*, COUNCIL OF PARENT ATT'Y AND ADVOC., https://www.copaa.org/page/Buckhannon (last visited October 3, 2022); NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[46] NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[47] *Id*.

noteworthy when analyzing the effects enforcement procedures have on parents enforcing IDEA.[48]

At the federal level, IDEA enforcement is monitored mainly by the U.S. Department of Education, which "reviews and reports on states' IDEA implementation annually."[49] Although OSERS does communicate with states,[50] there is no designated monitoring framework at the state level.[51] Without reports and support from state agencies, OSERS is simply unable to monitor the nationwide execution of IDEA effectively. Therefore, OSERS must focus on systematic, or "big," enforcement issues.[52] By focusing on major, national issues, many specific, or "small," issues may slip through the cracks in enforcement.

Therefore, at a practical level, the responsibility and expense of enforcement mostly falls on the students' parents who are advocating their local educational agency for services under IDEA.[53] This parental responsibility requires parents to thoroughly understand IDEA and its guarantees. One of the most common ways parents participate and learn about their child's rights is in meetings regarding their child's Individualized Education Program (IEP). If it is determined that a student has a disability and needs special education to progress in school and benefit from general education programs, parents may participate in creating and executing their child's IEP.[54] The IEP is a formal contract that specifies the services and support the school will provide and identifies the least restrictive environment where the child will learn.[55]

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[48] *Id.*
[49] *Id.*
[50] *Id*. at 27 (OSERS has other enforcement authority, such as the authority to refer non-compliant school districts to the Department of Justice. However, OSERS has never made such a referral, even though OSERS has discovered and documented many instances of noncompliance. Furthermore, this bureaucratic enforcement is often burdensome and lengthy, not providing effective relief to parents and children with disabilities).
[51] *Id*. at 9.
[52] *Id*.
[53] *Id*. at 45.
[54] 20 U.S.C. § 1414(d).
[55] *Id*.

The IEP is the primary mechanism for parent participation and collaboration in their child's education. When parents participate in creating and executing the IEP, they can advocate for their child, hold LEAs accountable, and gain knowledge regarding their child's rights and education experience. Therefore, parent participation in the IEP enforces the goal of IDEA that every student receives a FAPE.

The right of a parent to participate in the development of the IEP is essential because it opens a line of communication between the parent and the educators providing the child's education.[56] Ideally, this line of communication allows parents to resolve conflicts directly within the IEP team. If this option is unavailable or unsuccessful, parents are responsible for the time and money required to challenge a school district's failure to comply with IDEA. Many parents have never formally challenged a school district before, so while parents may represent themselves, many rely on an attorney.[57] The procedures for filing an action under IDEA are specific and complex, and an attorney's expertise is helpful, if not necessary, for a successful complaint under IDEA.[58]

Before an attorney can represent a parent, the parent must be able to pay for that attorney.[59] If obtaining legal representation is a prerequisite for successful challenges under IDEA, then paying for an attorney is also a prerequisite for successful challenges. Because of the high cost associated with hiring an attorney to assist in navigating IDEA's procedures, the recovery of

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[56] 20 U.S.C. § 1414(d)(1)(B).
[57] *Parents Should Recover Attorneys Fees When Settle*, *supra* note 43.
[58] *Id*.
[59] Of course, a parent may be able to hire an attorney on a contingency fee basis and avoid paying any money up front. However, because IDEA litigation is so specific and unique, finding an attorney with the required skillset and willingness to take a client on a contingency fee basis is likely to be difficult task. Because contingency fee agreements consider a variety of factors unique to each case, contingency fee agreements are outside the scope of this comment.

attorneys' fees may be instrumental in determining whether parents are willing or able to ultimately navigate through the procedure and successfully bring a challenge under IDEA.

1. The most common form of dispute resolution under IDEA is through a due process hearing.

IDEA requires each state educational agency (SEA) to provide an administrative complaint process.[60] Disputes can be addressed in various ways, such as mediation, and may be more effective at reaching an agreement satisfactory to both parties. However, it is unclear if parents are aware of options other than the administrative complaint process, so due process complaints are the most common method chosen by parents.[61] Alternative dispute resolution may be more effective at reaching an agreement, but it is unclear if parents are aware of options other than an administrative complaint process.[62]

After filing a complaint, the "parents or the local educational agency involved in such complaint shall have the opportunity for an impartial due process hearing."[63] The hearing procedure will be determined by state law or the SEA and conducted by either the local or the state educational agency.[64] The LEA is responsible for convening a preliminary meeting with the parents and relevant members of the child's IEP team.[65] Interestingly, the school district may not be represented by attorneys during this initial meeting unless an attorney also accompanies the parents.[66]

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[60] NAT'L COUNCIL ON DISABILITY, *supra* note 22 at 17.
[61] *Id*. at 37.
[62] *Id*. at 35.
[63] 20 U.S.C. § 1415(f)(1)(A).
[64] *Id*.
[65] 20 U.S.C. § 1415(f)(1)(B); *see* U.S.C. § 1414(d)(1)(B) for the required parties of an IEP team.
[66] 20 U.S.C. § 1415(f)(1)(B).

If parties cannot reach an agreement within thirty days of LEA's receipt of a complaint, a due process hearing will commence.[67] A parent or agency should request an impartial due process hearing within two years of when the parent or agency knew or should have known about the alleged basis of the complaint.[68] The person conducting the hearing must be an impartial party, meaning they may not be an employee of the SEA or the LEA or have any personal or professional interest in the hearing.[69] The hearing officer must also "possess knowledge of and ability to" understand the provisions of IDEA, conduct hearings in accordance with standard legal practice, and write and render a decision.[70]

2. IDEA allows parties to appeal a decision after the due process hearing.

Following the conclusion of a due process hearing, any aggrieved party retains the right to an appeal.[71] If an LEA conducted the due process hearing, the SEA shall "conduct an impartial review of the findings and decision appealed."[72] This decision is final unless the parties choose to bring a civil action.[73] If an LEA did not conduct the due process hearing, an aggrieved party does not have the right to review by a SEA but instead must rely exclusively on their right to bring a civil action.[74]

Any party may, whether an LEA conducted the due process hearing or not, bring a civil suit "in any State court of competent jurisdiction or in a district court of the United States, without

[67] 20 U.S.C. § 1415(f)(1)(B)(ii).
[68] 20 U.S.C. § 1415(f)(3)(C).
[69] 20 U.S.C. § 1415(f)(3)(A)(i).
[70] 20 U.S.C. §§ 1415(f)(3)(A)(ii)–(f)(3)(A)(iv).
[71] 20 U.S.C. § 1415(g).
[72] 20 U.S.C. § 1415(g)(2).
[73] 20 U.S.C. § 1415(i)(1)(B).
[74] 20 U.S.C. § 1415(i)(2)(A).

regard to the amount in controversy"[75] and must be brought within ninety days of the hearing officer's decision.[76]

3. IDEA allows for the recovery of attorneys' fees for prevailing parties.

After the completion of a due process hearing and any potential appeals, the prevailing party may file an action to recover attorneys' fees based on legal services rendered.[77] The need for an attorneys' fee provision became evident in the 1980s when the Supreme Court held that children with disabilities could only challenge their rights under IDEA rather than Section 504 or the Americans with Disabilities Act, which both allowed for the recovery of attorneys' fees.[78] Congress passed the Handicapped Children's Protection Act to expand relief and encourage the enforcement of IDEA.[79] Recovering attorneys' fees is perhaps the most essential procedural safeguard for enforcing IDEA.[80]

In order to file attorneys' fees, the prevailing parties must file an action with a forum that has jurisdiction to award fees rather than the hearing officer who has been involved in the matter thus far.[81] While hearing officers have the express authority to hear claims under IDEA and issue binding verdicts, they do not have the authority to award attorneys' fees.[82]

IDEA provides that a district court[83] has the discretion to "award reasonable attorneys' fees as part of the costs to a prevailing party who is the parent of a child with a disability."[84]

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[75] 20 U.S.C. § 1415(i)(2)(A).
[76] 20 U.S.C. § 1415(i)(2)(B); *see* discussion *infra* Section IV.C. (this provision is sometimes substituted as the time period required to file an action for attorneys' fees).
[77] 20 U.S.C. § 1415(i)(3)(B)(i).
[78] Smith v. Robinson, 468 U.S. 992, 1022 (1984).
[79] Handicapped Child.'s Prot. Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796-97 (1986). *See* discussion *supra* Section II.A.
[80] 20 U.S.C. § 1415(i)(3).
[81] 20 U.S.C. § 1415(i)(3)(B).
[82] El Paso Indep. Sch. Dist. v. Richard R., 591 F.3d 417, 423 n. 4 (5th Cir. 2009); Unified Sch. Dist. No. 259 v. Newton 673 F. Supp. 418, 422 (D. Kan. 1987).
[83] 20 U.S.C. (i)(3)(A) (federal district courts have the jurisdiction to hear claims for attorneys' fees, regardless of the amount in controversy).
[84] 20 U.S.C. § 1415(i)(3)(B)(i).

Additionally, the court may award attorneys' fees to a prevailing party who is an LEA or SEA if the action was "frivolous, unreasonable, or without foundation"[85] or was "presented for any improper purpose," including needlessly increasing the cost of litigation.[86] Attorneys' fees must be calculated based on "rates prevailing in the community"[87] and may not include certain expenses, such as the cost of expert witnesses.[88]

III. PURPOSE OF ATTORNEYS' FEE PROVISION: THE ABILITY TO RECOVER ATTORNEYS' FEES ENFORCES THE POLICY GOALS OF IDEA.

Indeed, the provision for attorneys' fees recovery is an essential element to the enforcement by private parties that IDEA relies on for effective enforcement. Including recovery of attorneys' fees helps further three critical policy goals.

First, obtaining representation is often necessary to successfully challenge a local educational agency under IDEA. Parents who obtain representation are much more likely to succeed in their claims. School districts already have access to legal counsel, disadvantaging parents who attempt to challenge a local educational agency alone.[89] In a study published in 2014, parents have a 58% chance of prevailing on their claim when both the parents and the district are represented by attorneys.[90] This likelihood drops to 14% when the district is represented by an attorney but parents are not.[91] Although the study did not prove that a lack of representation

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[85] 20 U.S.C. § 1415(i)(3)(B)(i)(I).
[86] 20 U.S.C. § 1415(i)(3)(B)(i)(II). There is no parallel provision that the court may award prevailing parties who are parents attorneys' fees if a LEA or SEA needlessly increases the cost of litigation.
[87] 20 U.S.C. § 1415(i)(3)(C).
[88] Arlington Ctr. Sch. Dist. v. Murphy, 548 U.S. 291, 297-98 (2006).
[89] NAT'L COUNCIL ON DISABILITY, *supra* note 22, at 45.
[90] Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?* 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 263 (2014), https://digitalcommons.pepperdine.edu/naalj/vol34/iss2/1.
[91] *Id*.

for parents *caused* their dramatic decrease in success due to the complex nature of IDEA procedures,[92] it is logical that lack of representation led to difficulty navigating the process.

Second, the ability to recover attorneys' fees promotes the *equal* enforcement of IDEA by allowing poor and marginalized groups to enforce the rights provided to them. Obtaining and paying counsel is a privilege that not all families can afford, meaning many poor and marginalized groups will be unsuccessful in enforcing their rights without the ability to recover costs for attorneys' fees.[93] Congress required states to provide FAPE at no cost to parents, intending that this requirement would be enforced by all parents, regardless of economic means.[94] Thus, any interpretation of the IDEA must consider access for students' families irrespective of wealth or status.[95] The provision to recover attorneys' fees provides that, in theory, everyone will have an equal opportunity to file a complaint and advocate for services under IDEA.

Third, by allowing parents who prevail in their claims to recover attorneys' fees, local educational agencies are incentivized to provide services required under IDEA before hiring an attorney is necessary. Attorneys' fees must be paid out of a state or school district's funds, so the potential for extra costs naturally encourages IDEA compliance to avoid costly litigation.[96] Local educational agencies are more likely to comply with the requirements of IDEA when they are aware of the mere possibility that failure to do so could require payment of parents' attorneys' fees out of the district's funds.

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[92] NAT'L COUNCIL ON DISABILITY, *supra* note 22.
[93] Eloise Pasachoff, *Advocates, Federal Agencies, and the Education of Children with Disabilities*, 29 OHIO ST. J. ON DISP. RESOL. 461 (2014).
[94] Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 65 OHIO ST. L.J. 357, 369 (2004).
[95] Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, Inc. In Support of Appellees and Affirmance at 9-11, Krawietz v. Galveston Independent School Dist., 900 F.3d 673, (5th Cir. 2018) (No. 17-40461).
[96] 34 C.F.R. § 300.517 (2022).

IV. LIMITATIONS ON RECOVERING ATTORNEYS' FEES: RECOVERING ATTORNEYS' FEES UNDER IDEA IS DIFFICULT DUE TO EXCESSIVE LIMITATIONS.

Excessive limitations to awarding attorneys' fees contradict and hinder the goals of IDEA. Although attorneys' fees should be ordinarily awarded unless special circumstances exist to make an award unjust,[97] there is no presumptive entitlement as to the award of fees.[98] Excessive limitations reduce the effectiveness of this provision. Because the effectiveness of IDEA primarily rests on private enforcement, the effectiveness of IDEA as a whole is limited when the attorneys' fees provision is limited.

Of course, the ability to recover attorneys' fees should not be without limits. Some limits in place do reinforce the goals of IDEA. For example, IDEA requires the fees awarded to be "based on rates prevailing in the community" where the action arose and that no multiplier or bonus may apply.[99] This provision requires attorneys' fees to be reasonable and prevents the amount owed from becoming punitive. Therefore, this limitation on the recovery of attorneys' fees promotes the goals of IDEA by limiting the available recovery to parents' necessary, unavoidable expenses.

Other limitations do not promote the goals of IDEA. This comment will focus on the inability to recover fees after settlement, [100] restrictions on the definition of "parent" for purposes of recovering fees,[101] and inconsistencies in the timing of filing an action for attorneys' fees.[102] Recent Supreme Court decisions and judicial interpretations of IDEA have created unnecessary barriers to obtaining attorneys' fees, even when parents prevail

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[97] Borengasser v. Arkansas State Bd. of Educ., 996 F.2d 196, 199 (8th Cir. 1993).
[98] Ex re. William A. v. Rice Lake Area Sch. Dist., 417 F.3d 704, 710 (7th Cir. 2005).
[99] 20 U.S.C. § 1415(i)(3)(c).
[100] *See* discussion *infra* Section IV.A.
[101] *See* discussion *infra* Section IV.B.
[102] *See* discussion *infra* Section IV. C.

on legitimate claims. Because of these barriers, the ability to recover attorneys' fees under IDEA has become too restrictive, negating enforcement of IDEA and, therefore, the law's purpose.

A. *IDEA's policy goals are frustrated by parents' inability to recover attorneys' fees after settlement.*

Most due process complaints are resolved without a hearing.[103] Approximately 17% of IDEA cases since 1995[104] have been resolved through settlement, one of the most efficient and cost-effective forms of resolution. Conversely, almost an equal number of cases are resolved through a fully litigated dispute. In the 2014-2015 school year, approximately 15% of cases, or "2,571 of the 17,107 due process complaints . . . resulted in fully adjudicated hearings."[105] However, prevailing parties cannot recover attorneys' fees when they reach a private settlement before an administrative hearing.[106] Further, many school districts are careful to address attorneys' fees in their settlement agreements, including stipulations that no attorneys' fees will be paid or recoverable in their settlements.[107]

When Congress amended IDEA to include an attorneys' fees provision, parents could recover attorneys' fees after settling under the "catalyst theory."[108] Under this theory, parents could recover attorneys' fees if their "case was the 'catalyst' that caused the

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[103] NAT'L COUNCIL ON DISABILITY, *supra* note 22, at 45.
[104] 257 out of 1,538 cases. *Number of Cases by Resolution Graph*, LEXIS+ JURY VERDICTS AND SETTLEMENTS: IDEA (last visited October 5, 2022).
[105] NAT'L COUNCIL ON DISABILITY, *supra* note 22.
[106] Bingham v. New Berlin Sch. Dist., 550 F.3d 601, 603 (7th Cir. 2008).
[107] Shelly C. v. Venus Indep. Sch. Dist., 878 F.2d 862, 863 (5th Cir. 1989); Ostby v. Oxnard Union High, 209 F. Supp. 2d 1035, 1037-1038 (C.D. Cal 2002); Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1191 (5th Cir. 1990).
[108] *Parents Should Recover Attorneys Fees When Settle*, *supra* note 43.

defendant to change its conduct."[109] For example, if parents file a complaint against a school district for refusing to test their child for autism, this may cause the school district to comply with the request. Under the catalyst theory, the parents could recover attorneys' fees for services up to that point.[110]

However, the catalyst theory was overruled in certain contexts by the United States Supreme Court in 2001.[111] In *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.*, the plaintiffs challenged the application of a state-imposed requirement and ultimately prevailed.[112] After the plaintiffs filed suit against the state and state agencies, the state legislature eliminated the state-imposed requirement at issue.[113] Plaintiffs requested attorneys' fees, arguing they qualified as "prevailing parties" under the catalyst theory because their suit caused the relief and change they sought, namely the dismissal of the case and the elimination of the state-imposed requirement.[114] However, the court found that the "catalyst theory is not a permissible basis for the award of attorneys' fees under the FHAA and ADA."[115] Because the Court specifically includes the FHAA and ADA, courts were split as to whether *Buckhannon* applied to IDEA.[116] Today, a majority of federal courts of appeals have held that a party only prevails "when it obtains a judgment on the merits or court-ordered consent decree,"[117] applying *Buckhannon* to IDEA.

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[109] *Id.*
[110] *Id.*
[111] Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).
[112] *Id.* at 600.
[113] *Id.* at 601.
[114] *Id.* at 601.
[115] *Id.* at 610.
[116] J. Douglas Klein, *Does* Buckhannon *Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond*, 13 DUKE ENV'L LAW & POL'Y FORUM 99, 99 (2002).
[117] Michael Giuseppe Congiu, *An End to Empty Distinctions: Fee Shifting, the Individuals with Disabilities Education Act and* Doe v. Boston Public Schools, 80 CHICAGO-KENT L. REV. 963 (2005).

Circuits applying this theory effectively deny parents the right to recover if they settle because a settlement does not constitute a judgment on the merits. Denying recovery of attorneys' fees after settlement takes away one of the main goals of the attorneys' fees provisions—a school district's incentive to proactively self-enforce IDEA's requirements. School districts may neglect or refuse to implement IDEA's requirements until they face a legal challenge without penalty. If parents may recover attorneys' fees after a settlement, school districts are incentivized to ensure a settlement is unnecessary. Without this incentive, school districts may be noncompliant with the requirements of IDEA and only choose to comply whenever faced with an imminent challenge from parents.

Parents also face potentially higher legal fees by being unable to recover attorneys' fees after a settlement. School districts may cause the parents to incur substantial legal fees only to avoid liability for those fees by ultimately settling or granting the parents' request.[118] However, the attorneys' fee provision works differently when school districts are the prevailing party. IDEA allows school districts to recover attorneys' fees whenever a parent brings or continues to litigate a claim that is "frivolous, unreasonable, or without foundation."[119] There is no risk of parents running up litigation costs they can avoid by later settling. Therefore, school districts may frivolously increase the cost of litigation, while parents may not.

Parents unable to recover attorneys' fees without a verdict will logically be less willing to settle their claims. Indeed, IDEA settlements have decreased by 60%, presumably

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[118] Denise Marshall, *The Parent Right to Recover Attorneys Fees is One of IDEA's Most Important Procedural Safeguards*, COUNCIL OF PARENT ATT'Y AND ADVOC.: NEWS & PRESS (Tuesday, November 14, 2017), https://www.copaa.org/news/374491/The-Parent-Right-to-Recover-Attorneys-Fees-is-One-of-IDEAs-Most-Important-Procedural-Safeguards.htm.

[119] 20 U.S.C. § 1415(i)(3)(B)(II).

because of the unavailability of fees.[120] Fully litigating every IDEA claim is inefficient and unnecessarily increases the cost of an action. Perhaps most importantly, a student requiring services under IDEA bears the burden of the added delay by needing to wait until the end of litigation for their educational rights to be recognized. Rather than encouraging efficient resolution in the best interest of the child, denying attorneys' fees recovery in settlement hinders the goals of IDEA of securing educational rights for students.

Allowing parents to recover attorneys' fees after agreeing to settle will help realize the policy goals of IDEA.[121] Legislators have attempted numerous times to introduce legislation that would overturn *Buckhannon*.[122] For example, Representative John Lewis introduced a bill in 2008 to amend the Civil Rights Act of 1964 and include the "Settlement Encouragement and Fairness Act."[123] This act would codify the catalyst theory by modifying the definition of "prevailing party" to include "a party whose pursuit of a non-frivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought."[124] Unfortunately, the bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and failed.[125] In order for enforcement of IDEA by private parties and parents to be realistically effective, a provision similar to the Settlement Encouragement and Fairness Act must become law.

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[120] Alegria v. District of Columbia, 291 F.3d 262, 269 (D.C. Cir. 2004).
[121] See *Parents Should Recover Attorneys Fees When Settle*, *supra* note 43.
[122] *See Id*.
[123] H.R. 5129, 110th Cong. (2008).
[124] *Id.* (also permitting prevailing parties who are parents recover the cost of expert witnesses, which is currently not allowed under *Arlington Cent. Sch. Dist. V. Murphy*).
[125] *Id*.

B. *Courts have unnecessarily complicated the definition of "parent" and "prevailing party," excluding otherwise qualifying parties from recovering attorneys' fees.*

Other than awards to school districts, courts can only award attorneys' fees to a prevailing party who is a parent of a child with a disability.[126] At first glance, this seems to mean that the hearing officer must issue a ruling in a parent's favor. However, the definition of "prevailing party" is more complex. At the most basic level, "prevailing party" is defined as "one who has been awarded some relief by the court."[127] Courts have been inclined to interpret the "prevailing party" requirement to help parents recover attorneys' fees when they have prevailed on any significant part of their claim.[128] Stated another way, the legal relationship between the parties must be altered by a judgment on the merits or court-ordered consent decrees.[129] This definition is substantially similar to the definition applied to prevailing parties for the purposes of recovering attorneys' fees found in civil rights cases.[130] This definition of "prevailing parties" is intuitive and is likely the definition most parties expect courts to apply. Once a party prevails in the due process hearing or appeal, they probably expect they are eligible to recover attorneys' fees.

However, the requirement of "prevailing parties" only tells half the story. In addition to being the "prevailing party," parents must also meet the specific definition of a "parent of a child with a disability" as required under IDEA. IDEA defines "parent" as a

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[126] 20 U.S.C. § 1415(i)(3)(B)(i)(I).
[127] Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001).
[128] *See* Weissburg v. Lancaster Sch. Dist., 591 F.3d 1255 (9th Cir. 2010) (holding parents were prevailing parties when their son had already been receiving FAPE but prevailed in the action to change their son's eligibility category to include autism). *See also*, Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007) (holding a prevailing party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit").
[129] Buckhannon Bd. and Care Home Inc. v. W. Va. Dep't. of Health and Human Res., 532 U.S. 598, 605 (2001).
[130] RAPP, *supra* note 23.

biological, adoptive, foster or surrogate parent, a guardian, or an adult acting in the place of a parent with whom the child lives.[131] Although a seemingly simple and inclusive definition, ambiguity can arise when parents are in situations such as divorce[132] or when the child reaches the age of majority.[133]

In addition to meeting this definition of a parent, the parent must also have a child with a disability. This second half of the definition of a parent was one of the important issues in *Meridian Joint School District v. D.A.*[134] The plaintiffs were deemed "prevailing parties" because their son, Matthew, was entitled to educational testing at public expense. Because this was a court-ordered consent decree, this order resulted in the required "alteration in the legal relationship of the parties."[135] However, plaintiffs were ultimately denied attorneys' fees because Matthew was not found to need special education services after the testing.[136] Acknowledging that this definition was limiting and that "Congress could have established a more inclusive fee-shifting provision," the Ninth Circuit held that they were bound by the clear language of the statute.[137]

While the "prevailing party" and "parent of a child with a disability" requirements seemingly serve the goals of IDEA by protecting parents as prevailing parties, this is not necessarily the case. Due to the wide variety of circumstances in family relationships and the timing of when children with disabilities reach the age of majority, families with

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[131] 20 U.S.C. § 1401(23).
[132] *See* Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147 (7th Cir. 2001) (holding that noncustodial parents do not automatically lack standing under IDEA but standing is determined by the divorce decree and may vary based on circumstances).
[133] IDEA allows, but does not require, parents to transfer their parental rights to their child when they reach the age of maturity, except for a child who has a disability who has been determined to be impotent under state law. 20 U.S.C. § 1415(m)(1).
[134] Meridian Joint Sch. Dist. v. D.A., 792 F.3d 1054, 1063– 64 (9th Cir. 2015).
[135] *Id*. at 1065.
[136] *Id*. at 1070.
[137] *Id*. at 1068.

exigent circumstances risk being disqualified from recovering attorneys' fees. For example, if a child grows up in the foster care system, it may be unclear who meets the "parent" definition. If any testing or necessary services were postponed due to the confusion, the child risks losing permanent access to services by reaching the age of majority before bringing a complaint.

The definition of "parent" ought to be revised to clearly provide for procedures for divorced, noncustodial parents and other nonconventional family situations. Being a "parent" should be determined at the time of filing the initial complaint, not at the end of the action for attorneys' fees. Parents likely lack control over the duration of the entire process, so barring them from recovering attorneys' fees for this reason is unfair and does not support the enforcement of IDEA.

There must be a consistent, sensible statute of limitations to recover attorneys' fees through legislation or judicial decisions. A statute of limitations must be applied to filing for attorneys' fees, even though IDEA does not provide a time limitation itself. The policy goals of IDEA would not be fulfilled if parents or school districts could recover attorneys' fees for an action that concluded years ago; neither parents nor school districts would ever be able to financially move forward if such an order could be filed at any moment following an action. However, the statute of limitations must be consistent, sensible, and clear to parents. A sensible, consistent statute of limitations protects both parents and school districts by allowing them to plan their finances after the conclusion of the action accurately.

While more extended time periods best serve the policies of IDEA by making attorneys' fees accessible to parents who are prevailing parties, clearly communicated

statutes of limitations best serve the interests of the parties. Parents are likely unaware of the time period their circuit applies. A longer time period allows parents more grace to learn about the statute of limitations, but parents may still miss their opportunity if the statute of limitations is not communicated clearly. Many circuits have not ruled on what time period they might apply, further complicating matters. The dramatically different periods applied between the circuits discussed above demonstrate the confusing legal landscape parents must navigate in order to file for attorneys' fees.

Parents may be less likely to enforce their child's right to testing if they are unsure if they will qualify as a "parent" and will be able to recover fees. Even though schools are required to provide for testing under IDEA,[138] some parents, such as the parents in *Meridian*, may pay expenses for a lengthy process to enforce their rights with no relief at the end. These limitations do not support the enforcement of IDEA.

C. *A circuit split regarding the statute of limitations to recover attorneys' fees further complicates the procedure and decreases the likelihood that parents will successfully recover attorneys' fees.*

If a parent overcomes all previous hurdles, they may file a claim to recover attorneys' fees at the court's discretion.[139] An action to recover attorneys' fees is separate from the administrative proceeding or appeal and must be filed as an additional, independent court action.[140] IDEA provides a default ninety-day statute of limitations for appeals after the administrative decision if state law does not have an explicit time period.[141] Still, there is no statute of limitations as to when a prevailing party must file an

[138] 20 U.S.C. § 1415(a)(1)(A).
[139] 20 U.S.C. § 1415(i)(3)(B).
[140] Kemper, *supra* note 35.
[141] 20 U.S.C. § 1415(i)(2)(B).

action for attorneys' fees.[142] When an action does not contain a statute of limitations for a federal cause of action, "a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand."[143] The time period that courts therefore impose is subject to a circuit split.[144] Because of this split, courts have applied time limitations that range from thirty days to six years.[145]

This split has primarily resulted from differing perceptions regarding "a fundamental issue: the nature of the action."[146] The Seventh Circuit explained that a claim for attorneys' fees "could simply be considered an independent claim for money damages, or it could be seen as just one part of the underlying dispute over the child's educational placement or educational plan."[147] Some courts classify a claim for attorneys' fees as an independent action, while others classify such a claim as an ancillary action to the dispute.[148]

Courts who hold actions for attorneys' fees to be independent actions consider such actions to be "distinct from the underlying dispute on the merits."[149] These courts have applied statutes of limitations from causes of actions such as damages for injury to property or for claims against state entities, which typically have longer limitation periods.[150]

Oppositely, courts who subscribe to the ancillary view consider the action for attorneys' fees under IDEA to be a necessary extension of the original action.[151] In

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142 Kemper, *supra* note 35.
143 Lampf, Pleva, Lipkind, Prupis & Pegrow v. Gilbertson, 501 U.S. 350, 355 (1991).
144 Kemper, *supra* note 35 (courts are split whether to apply federal or state time periods).
145 *Id.*
146 *Id.*
147 *Id.*
148 Powers v. Indiana Dep't of Educ., Div. of Special Educ., 61 F.3d 552, 555 (7th Cir. 1995).
149 Kemper, *supra* note 35.
150 *Id.*
151 *Id.*

determining that the action for attorneys' fees is an ancillary action, many courts have cited the fact that actions for attorneys' fees often require some level of review of the case's merits.[152] Although an action for attorneys' fees cannot be filed with an administrative officer and therefore is technically a new, independent action, courts have held that an action for attorneys' fees is "inextricably connected" to the original action.[153] Therefore, the action for attorneys' fees is a natural continuation of the original action. If the court finds the motion to recover attorneys' fees ancillary to the initial dispute, they will accordingly borrow state statute limitations for judicial review of administrative agency decisions.[154]

Indeed, the Sixth and Seventh Circuits have adopted this view that an action for attorneys' fees is ancillary to the initial dispute.[155] In *Powers v. Indiana Department of Education, Division of Special Education*—a widely cited case—the Seventh Circuit held that a claim for attorneys' fees under IDEA is ancillary to the initial dispute.[156] There, the appellant parent brought an action to recover attorneys' fees seven and a half months after successfully challenging the special education placement of her child.[157] The court reasoned that an action for attorneys' fees must be ancillary to the initial dispute and that "a return to such a quagmire months after adjudication of the merits would result in a

[152] *See e.g.*, Mayo v. Booker, 56 F. Supp. 2d 597, 598 (D. Md. 1999).
[153] Andalusia City Bd. of Educ. v. Andress, 916 F.Supp. 1179, 1183 (M.D. Ala. 1996).
[154] King v. Floyd Cnty. Bd. of Educ., 228 F.3d 622, 623 (6th Cir. 2000); Powers v. Ind. Dep't of Educ., Div. of Special Educ., 61 F.3d 552, 556 (7th Cir. 1995).
[155] *Powers*, 61 F.3d at 556.
[156] *Id.*
[157] *Id.* at 558.

needless expenditure of judicial energy."[158] The court imposed a thirty-day statute of limitations, time barring the appellant's claim.[159]

The Sixth Circuit came to a similar conclusion in *King ex rel. King v. Floyd County Board of Education*.[160] The court agreed with the Seventh Circuit and applied the thirty-day limitations period prescribed by the Kentucky statute for judicial review of an agency.[161] The court considered an action for attorneys' fees an ancillary action, in part, because IDEA "seems to treat the award of attorney fees as another phase of the administrative proceeding."[162]

The district court had previously applied a five-year statute of limitations from Kentucky's general statute of limitations for actions on statutory liabilities not subject to some other limitations period.[163] The court disagreed that this was the best application, reasoning:

> [T]here would be no claim for attorney fees were it not for the statute. But where the statute creating the claim makes the claim part and parcel of the administrative proceeding, it seems to us that the statute makes the claim analogous to a cause of action for judicial review of the proceeding to which the claim is appended.[164]

Therefore, the court applied the thirty-day statute of limitations from Kentucky state law regarding judicial review of the final order of an administrative proceeding.[165] The court did note that such

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[158] *Id*. at 556.
[159] *Id*. at 558 (the court also imposed a requirement that state agencies give parents clear notice of the thirty-day limitations period to protect the intent of IDEA).
[160] King ex rel. King v. Floyd County Board of Educ., 228 F.3d 622 (6th Cir. 2000).
[161] Judicial Review of Final Orders for Administrative Proceedings. Ky. Rev. Stat. Ann. § 13B.140(1); *King*, 228 F.3d at 627.
[162] *King*, 228 F.3d at 625.
[163] *Id*. at 626.
[164] *Id*.
[165] *Id*.

a short limitation period might conflict with the "IDEA goal of parental participation."[166] However, the court dismissed this concern, reasoning that "30 days was still acceptable because 'we do not run the risk of hurting vulnerable unrepresented parents.'"[167]

Most recently, the Eighth Circuit has joined the Sixth and Seventh Circuits in holding that the claim for attorneys' fees is ancillary to judicial review of the administrative decision.[168] The court agreed with *King* and held that because parents of aggrieved students have already hired representation, a shorter time period does not risk hurting vulnerable unrepresented parents.[169] Therefore, the Court adopted a ninety-day statute of limitations to recover attorneys' fees by borrowing the time period from Arkansas' statutory framework for IDEA compliance[170] as the most closely analogous state statute of limitations.[171]

However, the time required to file an action to recover attorneys' fees can become inconsistent when courts hold that the claim is more analogous to an independent claim than an ancillary action. The Ninth[172] and Eleventh Circuits reject the argument that a claim for attorneys' fees is "analogous to the appeal of an administrative hearing,"[173] reasoning

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166 *Id*. at 627.
167 *Id*. (quoting Powers v. Indiana Dep't of Educ., Div. of Special Educ., 61 F.3d 552, 555 (7th Cir. 1995); *see also id.* at 628 (Engel, J., dissenting) (arguing that the thirty-day statute of limitations is unfair and unrealistic to parents. Before filing an action for attorney's fees, prevailing parties must first analyze the order "in its nineteen page entirety to determine whether (a) it was in fact a final order, (b) whether the plaintiffs were the prevailing parties and, even if so, (c) whether the order itself was adequate to achieve its intended result. Given the order's complexity, this was not an easy task. Even assuming this analysis was quickly and satisfactorily accomplished, significant additional work might yet be reasonably necessary under the statutes.").
168 Richardson v. Omaha Sch. Dist., 957 F.3d 869, 875 (8th Cir. 2020).
169 *Id.* (quoting *King*, 228 F.3d at 627; *Powers*, 61 F.3d at 558).
170 *Id*.; Ark. Code Ann § 6-41-216(g).
171 *Richardson*, 957 F.3d at 875.
172 Meridian Joint Sch. Dist. v. D.A., 792 F.3d 1054, 1063–64 (9th Cir. 2015).
173 Zipperer by & Through Zipperer v. Sch. Bd., 111 F.3d 847, 851 (11th Cir. 1997).

that a longer time period would "encourage the involvement of parents, as represented by attorneys, in securing appropriate public educations for their children."[174]

While this reasoning helps fulfill the policy goals of IDEA, this approach may lead to a variety of inconsistent statutes of limitations. The inconsistencies can be seen in the analogous state laws the Eleventh Circuit and the Ninth Circuit apply. The Eleventh Circuit has applied a four-year statute of limitations based on Florida state law.[175] However, the Ninth Circuit, while holding that an action for fees is an independent action, did not decide the relevant statute of limitations because the parents' request was timely.[176]

In a widely cited case, *Zipperer v. School Board*, the plaintiffs were found to be prevailing parties in an administrative action because the school district had failed to provide the child with a FAPE.[177] After her request for attorneys' fees was denied by the administrative officer because he lacked authority, the plaintiff waited nearly four years to file for attorneys' fees.[178] The court held that an action for attorneys' fees provides a claim based on statutory liability and therefore is more analogous to the state statute for statutory liability.[179] At four years, the court intentionally imposed a longer statute of limitations in order to allow parents ample opportunity to file for attorneys' fees.[180]

The Ninth Circuit applied a three-year statute of limitation, similar to the Eleventh circuit but still inconsistent.[181] In *Meridian*, plaintiffs were the prevailing party when the

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[174] *Id*. at 852.
[175] Fla. Stat. ch. 95.11(3)(f).
[176] Meridian Joint Sch. Dist. v. D.A., 792 F.3d 1054, 1064 n. 7 (9th Cir. 2015).
[177] *Zipperer* 111 F.3d at 849.
[178] *Id.*
[179] *Id*.; Fla. Stat. ch. 95.11(3)(f).
[180] *Zipperer* 111 F.3d at 851.
[181] Meridian Joint Sch. Dist. v. D.A., 792 F.3d 1054 (9th Cir. 2015) (holding that although parents' claims for attorneys' fees were not time barred, parents could not recover attorneys' fees because the child was not over the age of 18, so plaintiffs were no longer considered parents as the definition of prevailing parties requires); Cal. Code Civ. P. § 338(a).

district court found that their son with Asperger's Syndrome was entitled to an Independent Education Evaluation funded by the school. In district court, the plaintiffs argued that their request for attorneys' fees was timely because IDEA's ninety-day statute of limitation for appealing an adverse decision from a due process hearing applied to actions for attorneys' fees.[182] The District Court rejected this argument, reasoning that "(1) this section applied only to parties that are aggrieved by the hearing officer's decision, not to those who prevailed; and (2) the section was added in 2004 but did not reference, or affect, the provision addressing attorneys' fees."[183] The Court of Appeals ultimately applied a three-year statute of limitations, consistent with Idaho's statute of limitations for statutory liability, reasoning the longer time period best fulfilled the federal policies of IDEA.[184]

In light of the lingering uncertainty, parents must presumably file to recover attorneys' fees as soon as possible. To wait to file is to risk letting an unknown and unclear statutory limitation to deny a prevailing party the right to recover attorneys' fees. A longer time period best serves the overall goals of IDEA,[185] which is to encourage the enforcement of statutory rights under IDEA and the opportunity to bring necessary actions. The inconsistency of procedure effectively serves as another barrier to recovering attorneys' fees, dampening IDEA's effectiveness.

V. CONCLUSION

Recovering attorneys' fees must be limited to some degree, but excessive limitations make enforcing a child's rights under IDEA more difficult and inaccessible. Where

[182] 20 U.S.C. § 1415(i)(2)(B); *Meridian*, 792 F.3d at 1062.
[183] *Meridian*, 792 F.3d at 1062.
[184] *Id*. at 1062-64 (quoting Ostby v. Oxnard Union High, 209 F. Supp. 2d 1035, 1042 (C.D. Cal. 2002)).
[185] *Id*. 1064 n. 7; J.B. By & Through C.B. v. Essex-Caledonia Supervisory Union, 943 F.Supp. 387, 291 (D. Vt. 1996).

necessary, limitations should be sensible, consistent, and clear to parents and school districts. Further, limitations should encourage efficient resolution, not prolonging the conflict or discouraging alternate dispute resolution. Courts should interpret issues relating to attorneys' fee recovery favorably to prevailing parties and remain mindful of the goals IDEA seeks to accomplish. Expanding the ability to recover attorneys' fees will support parents when they advocate for their child's right under IDEA and, therefore, best support the policy goals and enforcement of IDEA.