

A STATUTORY SOLUTION TO A CONSTITUTIONAL PROBLEM

INTRODUCTION

A fundamental right to education has long been recognized in constitutions around the world.¹ In South Africa, the right to education is outlined in the founding provisions of the constitution which specifically acknowledge “the need to redress the results of past racially discriminatory laws and practices” as a reason for this right.² The Supreme Court of the United States has analyzed the right to education in this country on various occasions, yet the Court has consistently avoided rendering a definitive decision articulating whether a positive right to education is guaranteed by the Constitution itself.³

1 *See generally* LAW LIBRARY OF CONGRESS GLOBAL LEGAL RESEARCH CENTER, CONSTITUTIONAL RIGHT TO AN EDUCATION IN SELECTED COUNTRIES (2016), <https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf> (discussing right to education provided in constitutions of following countries: Argentina, Brazil, People’s Republic of China, Egypt, France, Greece, India, Italy, Japan, Mexico, Nicaragua, Russia, South Africa, Sweden and Turkey) (last visited November 25, 2018).

2 S. AFR. CONST., 1996 § 29. Section 29 of the South African Constitution states:

- (1) Everyone has the right –
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Id.

3 *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding state school funding scheme constitutional when reviewed under equal protection challenge); Plyler v. Doe, 457 U.S. 202 (1982) (holding Texas law permitting schools to deny enrollment to illegal immigrants violated the equal protection clause and noting that if State chooses to provide education, State must do so to all within its borders regardless of citizenship unless it can establish a rational basis for denying the benefits awarded to other residents); Papasan v. Allain, 478 U.S. 265 (1986) (remanding case to court of appeals without deciding whether constitutional right to education exists); Kadrmas v.

Although in 1954 *Brown v. Board of Education* unequivocally established that “in the field of public education, the doctrine of ‘separate but equal’ has no place[.]”⁴ a uniform quality of education throughout the United States has proven to be far from reality. With the passing of the Civil Rights Act of 1964 came the mandate that the Commissioner of Education “conduct a survey and make a report . . . concerning the lack of availability of equal educational opportunities for individuals by reason of race”⁵ The “Coleman Report,” as it came to be known, found that at the time, math and reading scores of the average black twelfth grade student ranked in the thirteenth percentile of scores.⁶ With more than eighty-seven percent of their twelfth grade peers testing higher than black students,⁷ the lack of equal educational opportunities was evident. Nearly a half-century later according to data from the 2013 National Assessment for Educational Progress, the gap remains present. In 2013, the average black student was at the twenty-second percentile in reading.⁸ This lack of progress in educational equality has unsurprisingly had wide-ranging effects. In 2009, the median family income in the United States was \$38,409 for blacks, but \$62,545 for whites.⁹

Lacking a constitutional guarantee to education, let alone the guarantee of a quality education, black and other minority families continue to face an uphill battle as a result of inequality in education.¹⁰ As ordered by the *Brown* Court, where the racial desegregation of public schools was concerned, states were required to act “with all deliberate speed.”¹¹ Although the *Brown* Court deemed the principle of separate but equal to be unconstitutional as it applied to public education in 1954, more than

Dickinson Pub. Sch., 487 U.S. 450 (1988) (holding North Dakota statute permitting school district to charge fee for bus service was constitutional).

4 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

5 Civil Rights Act of 1964 § 402, 42 U.S.C. 2000c-1 (2018) (omitted 1966).

6 See Lauren Camera, *Achievement Gap Between White and Black Students Still Gaping*, U.S. NEWS & WORLD REP. (Jan. 13, 2016), <https://www.usnews.com/news/blogs/damine/2016/01/13/achievement-gap-between-white-and-black-students-still-gaping>.

7 *Id.*

8 *Id.*

9 See *Facts on Achievement Gaps*, THE ACHIEVEMENT GAP INITIATIVE AT HARV. UNIV., <http://agi.harvard.edu/projects/FactsonAchievementGaps.pdf> (last visited Oct. 24, 2018).

10 Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS, <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> (Mar. 1, 1998) (recognizing that “schools with high concentrations of low-income and minority students receive fewer instructional resources . . . [including] fewer and lower-quality books . . . significantly larger class sizes . . . less qualified and experienced teachers . . . and less access to high-quality curriculum.”).

11 *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

three decades later, schools continued to operate under court-ordered desegregation plans while progressing with the mandated “deliberate speed.”¹² Absent existing precedent to constitutionalize a fundamental right to education, statutory law could immediately begin to level the playing field for minority students and attempt to redress the results of the United States’ own discriminatory laws and practices of the past, specifically in the field of public education.¹³

PROPOSAL

Under the Individuals with Disabilities Education Act (“IDEA”) the federal government of the United States mandated that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs”¹⁴ With the guarantee of a Free Appropriate Public Education (“FAPE”) for students with recognized disabilities comes the legally enforceable requirement that all Local Education Agencies (“LEAs”) provide an Individual Education Program (“IEP”) that is reasonably calculated to ensure the student’s success.¹⁵ Procedures outlined in the IDEA provide parents and students with an array of tools ranging from compulsory mediations to appeals of administrative determinations.¹⁶ These tools allow parents and students to hold schools accountable when educational needs go unmet.

The case of *Andrew F.*, a decision rendered by the Supreme Court in 2017, illustrates the force that the IDEA can carry.¹⁷ Believing that his academic and functional progress had stalled, upon receipt of Andrew’s fifth grade IEP, which closely resembled his IEP from fourth grade, Andrew’s parents removed him from his LEA.¹⁸ Following his removal, Andrew’s parents subsequently enrolled him in a private school.¹⁹ After further deciding that the LEA’s modified fifth grade IEP remained

12 See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (holding that good faith effort to eliminate racial segregation in schools to the extent practicable complies with affirmative duty to desegregate even if segregation remains); see also *Freeman v. Pitts*, 503 U.S. 467, 502-03 (1992) (finding that school district complied with desegregation order because then-existing segregation was not the result of unconstitutional conduct).

13 See generally *Students Affected by Achievement Gaps*, NAT’L EDUC. ASSOC., <http://www.nea.org/home/20380.htm>.

14 Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2018).

15 See generally *id.* § 1411(e)(3)(D)(iii).

16 *Id.*

17 See generally *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

18 *Id.* at 996.

19 *Id.* at 991.

inadequate, Andrew's parents sought reimbursement for his private school tuition from the LEA as permitted by the IDEA.²⁰ When their claim was denied by the Colorado Department of Education, Andrew's parents appealed to a federal district court, the Tenth Circuit Court of Appeals, and finally to the United States Supreme Court.²¹ In delivering its opinion, the Supreme Court reiterated that under the IDEA, "for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade."²²

While the practical impact of the Supreme Court's pronouncement is yet to be determined, *Endrew F.* goes to show that the IDEA should not be underestimated. Imagine if minority students at failing schools throughout the country possessed a statutory right to a free and appropriate public education under the IDEA, and they were provided their day in federal court upon each violation of that right. At some point or another, the systematic failure and continuous litigation that could result would become more costly than the alternative option; providing an adequate education to all students enrolled in public schools on an equal basis.

Based on history alone, recognizing the improbability of either a constitutional amendment or a Supreme Court decision acknowledging a positive fundamental right to education, the IDEA could provide a necessary solution. As a creature of the legislative process, the IDEA can be altered as readily as it was enacted. By adding "poverty" as a qualifying disability under the IDEA in order to "redress the results of . . . racially discriminatory laws and practices"²³ that have plagued the United States for centuries, the federal government could align itself more closely with the nations that already provide a constitutional right to education for all students.

Studies have found that over "60 percent of African American and Latino students attend schools where the majority of students in the school are poor."²⁴ Further, in the country's most impoverished schools, more than "80 percent of students are African American and Latino."²⁵ Adding "poverty" to the list of qualifying disabilities would allow for a greater level of educational equality throughout the nation and could aid in

20 *Id.*; see also 20 U.S.C. § 1412(a)(10)(C)(ii) (2018).

21 See *Endrew F.*, 137 S.Ct. at 991.

22 *Id.* at 1001.

23 S. AFR. CONST., 1996 § 29(2)(c).

24 DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 12 (2013).

25 *Id.*

substantially shrinking the achievement gap that has lingered in public education for far too long.

This note will first examine the history of the right to education in the United States and the Supreme Court's hesitation to recognize a positive fundamental right in comparison to South Africa's unambiguous constitutional recognition. Part II will discuss the IDEA and its present applicability to students with qualifying disabilities. Finally, Part III will examine the achievement gap and explore the potential impact that IDEA procedural protections could have on students in underprivileged communities attending underperforming schools.

I. HISTORY

A. *United States: The American Way*

The United States, through legislative enactment or judicial interpretation, has never recognized a positive fundamental right to education.²⁶ Absent constitutional or statutory law acknowledging federal authority over public education, the would-be federal power is "reserved to the states respectively" through the operation of the Tenth Amendment.²⁷ By ceding authority over public education to the individual states, the federal government facilitated the creation of fifty individual educational jurisdictions, which has made a uniform standard that could ensure equality in education nearly impossible to accomplish.

Although the Supreme Court has never recognized a positive right to education, it has recognized a negative right on various occasions. A negative right is one that, although not expressly granted, is unable to be infringed upon or interfered with.²⁸ The Supreme Court recognized a negative right to education in *Meyer v. Nebraska*.²⁹ In *Meyer*, a state law forbidding the instruction of students in foreign languages prior to a certain age was declared unconstitutional because it interfered with the

26 Krysten Urchick, *U.S. Education Law: Is the Right to Education in the U.S. in Compliance with International Human Rights Standards?*, DIGITAL COMMONS AT MICH. ST. U.C.L. 1, 1 (2007), <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1091&context=king>. ("In the United States, there is no explicitly enumerated positive fundamental federal constitutional right to education.")

27 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.")

28 Urchick, *supra* note 26, at 3 ("A negative right to education is the right to have the government not interfere with your attempt to acquire learning.")

29 *See generally Meyer v. Nebraska*, 262 U.S. 390 (1923).

right of students “to acquire useful knowledge”³⁰ The Court recognized Nebraska’s authority to regulate education; nevertheless, it also noted that such authority was not unrestricted.³¹

Two years after *Meyer*, the Supreme Court again recognized a negative right to education. In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, officials from private primary schools sought injunctive relief from an Oregon statute that made public education for children between the ages of eight and sixteen years old a requirement.³² The Supreme Court began its opinion by again noting the authority of the state to regulate within the field of public education.³³ Nonetheless, in affirming *Meyer* the Supreme Court found the Oregon statute to “unreasonably interfere[] with the liberty of parents and guardians” as the state had no right to “standardize its children”³⁴

In contrast to the negative right to education outlined in *Meyer* and *Pierce*, as noted above, the Supreme Court has never recognized a positive right. A positive right to education would do much more than proscribe states from infringing upon the liberty interests of students and parents. Such a right would require state governments to ensure that a certain quality of education was being provided.³⁵ In *Brown v. Board of Education*, the Court indicated support for a positive right to education; however, whether that right existed was not essential to the disposition of the case and consequently, was not decided.³⁶

30 *Id.* at 399 (noting various liberties previously acknowledged by the Supreme Court, the right “to acquire useful knowledge” was recognized without a doubt).

31 *Id.* at 401 (“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.”).

32 *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 530-32 (1925).

33 *Id.* at 534. The Supreme Court stated:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id.

34 *Id.* at 534-35.

35 Urchick, *supra* note 26, at 3 (“A positive right would be an affirmative right that the government must provide a certain quantum or quality of education.”).

36 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The Supreme Court stated that Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the

B. *Judicial Tango*

In the decades following *Brown v. Board of Education*, the Supreme Court danced around the question of whether a positive fundamental right to education exists in the United States. In *San Antonio Independent School District v. Rodriguez*, the Court was asked to decide whether a Texas statute that financed public education through local property taxes was constitutional.³⁷ The Court first noted that “the importance of a service performed by the State” is not dispositive of its fundamental nature.³⁸ Lacking explicit or implicit constitutional support for the right to education, the Supreme Court found that it was not a fundamental right.³⁹ The Court went on to apply its rational basis review of the Texas system which only required “that the system be shown to bear some rational relationship to legitimate state purposes.”⁴⁰ In doing so, the Court found that the Texas system did not “result[] in the absolute deprivation of education” and consequently, the system “abundantly satisfie[d] this [rational basis] standard.”⁴¹ The Court recognized the societal importance of education yet remained unequivocal in noting that importance alone did not create a positive fundamental right.⁴²

armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

37 See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973).

38 *Id.* at 30 (“[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”).

39 *Id.* at 33.

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id.

40 *Id.* at 40. (“A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.”).

41 *Id.* at 55. (“We hold that the Texas plan abundantly satisfies this standard.”).

42 Urchick, *supra* note 26, at 6 (“The court made it clear that education is important to society but this importance does not alone support an implicit finding of a positive fundamental right to education in the Constitution.”).

Following *Rodriguez*, the Supreme Court was provided with another opportunity to address, in clear terms, the existence or absence of a fundamental positive right to education. In *Plyler v. Doe*, the Supreme Court reviewed the constitutionality of a Texas law that denied educational opportunity to would-be students who were also undocumented immigrants.⁴³ Affirming *Rodriguez*, the Supreme Court reiterated that education is not a fundamental right.⁴⁴ Although the Supreme Court struck down the law and found it to be a violation of the Equal Protection Clause, it was done so based on the suspect class involved.⁴⁵ Thus, a fundamental right to education remained unrecognized. The Court did however note that public education was not “merely some governmental ‘benefit,’” hinting at the possibility of a higher level of scrutiny to be used when determining the educational rights of students.⁴⁶

The Supreme Court was again asked to clarify the uncertainty surrounding the right to education in *Papasan v. Allain*.⁴⁷ However, in determining the constitutionality of a Mississippi statute that purported to disproportionately distribute educational land trust funds, the Supreme Court again avoided addressing the fundamental nature of the right to education by finding that no question of material fact had been presented.⁴⁸ The *Papasan* Court squandered an opportunity to “bring resolution to this question” and confirmed that the privileges accompanying the previously recognized negative right to education remained unsettled.⁴⁹

After decades of unsuccessful attempts by the judiciary to delineate the bounds of the right to education in the United States, Congress intervened in an effort to equalize the quality of public education. In 2002, Congress enacted the No Child Left Behind Act (the “NCLB”) which aimed to improve student achievement.⁵⁰ More specifically, the NCLB ordered the states to take measures to improve academic achievement among

43 See generally *Plyler v. Doe*, 457 U.S. 202 (1982).

44 *Id.* at 223.

45 *Rodriguez*, 411 U.S., at 40; see also Urchick, *supra* note 26, at 6 (“[T]he court determined this case using intermediate scrutiny based on the suspect class involved . . .”).

46 *Plyler*, 457 U.S., at 221 (“Public education is not a ‘right’ granted to individuals by the constitution . . . [b]ut neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”).

47 See generally *Papasan v. Allain*, 478 U.S. 265 (1986).

48 *Id.* at 286 (“[T]hey allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.”).

49 Urchick, *supra* note 26, at 7.

50 *Id.* at 9.

economically disadvantaged students.⁵¹ Although its effectiveness has been debated, the NCLB's intent to ensure educational equality was evident.⁵² If nothing else, the NCLB demonstrated a federal willingness "to provide some guaranteed right to education."⁵³

C. *An Alternate Approach – South Africa*

The right to education in South Africa is guaranteed within the Bill of Rights of the Constitution.⁵⁴ Because it is placed within the Bill of Rights, the right to education can only be restricted "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors"⁵⁵ The right to education in South Africa has been recognized as an "immediate and

51 *Id.*

The more vital of these provisions purport that states must take steps to improve academic achievement among the economically disadvantaged if the states are to receive federal funds, highly qualified teachers must be trained and recruited, improved English proficiency must be provided to students that have English as a second language, schools shall become more accountable for academic achievement, research based teaching methods that have been proven effective must be used, and parents shall be afforded better school choice especially if the local schools are inadequate.

Id.

52 *See generally* No Child Left Behind, 20 U.S.C. Ch. 70, Subch. I, Pt. A (2018); Urchick, *supra* note 26, at 9 ("The intended purpose of NCLB is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.").

53 Urchick, *supra* note 26, at 9 ("[The NCLB] provisions appear to express willingness by the federal government to undertake an obligation to provide some guaranteed right to education and federal supervision and accountability of that right if the states do not abide or follow the mandates of the act.").

54 The Law Library of Congress, *supra* note 1, at 40.

55 S. AFR. CONST., 1996 § 36(1).

§ 36 Limitation of rights -

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Id. § 36(1)-(2).

unqualified right” which establishes in each South African an individual right for which relief must be granted when it is infringed.⁵⁶

In providing an individual right to education in the Bill of Rights, the South African constitution resembles constitutions of the majority of nations around the globe. Roughly eighty percent of national constitutions protect an individual’s right to receive a basic education.⁵⁷ South Africa and the various nations that have undertaken to constitutionalize education were likely influenced by previous pronouncements made by the United Nations when deciding to do so. The 1948 Universal Declaration of Human Rights (the “Declaration”), promulgated by the General Assembly of the United Nations (“General Assembly”), provided an international standard for education that has more than likely influenced numerous constitutions worldwide.⁵⁸ Article 26 of the Declaration first acknowledges that “[e]veryone has the right to education.”⁵⁹ Section two of article twenty-six speaks to the General Assembly’s intent to protect the right to education in order to promote the peacemaking activities of the United Nations.⁶⁰ This included equipping individual citizens with the tools necessary to develop personally while also promoting core values essential to a well-functioning society.⁶¹ Section three provides parents with the ability to direct what type of education their child ultimately receives.⁶²

Similar to the Declaration, the International Covenant on Economic, Social and Cultural Rights (the “Covenant”) ratified in 1966 by the General Assembly also discusses the right to education on an international

⁵⁶ See Scott R. Bauries, *American School Finance Litigation and the Right to Education in South Africa*, 27 S. AFR. PUB. L. 409, 411 (2012).

⁵⁷ See Yoram Rabin & Matan A. Gutman, *Right to Education*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Grote et al. eds., 2016).

⁵⁸ *Id.*

⁵⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26(1) (Dec. 10, 1948) (“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”).

⁶⁰ Richard Pierre Claude, *The Right to Education and Human Rights Education*, INT’L J. ON HUM. RTS., 36, 41 (2005) (recognizing that where education is concerned maintenance of peace should be the chief goal of the United Nations).

⁶¹ *Id.* art. 26(2) (“Education shall be directed to the full development of the human personality and . . . strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations . . .”).

⁶² *Id.* art. 26(3) (“Parents have a prior right to choose the kind of education that shall be given to their children.”).

level.⁶³ Article thirteen of the Covenant begins by establishing that “[t]he States Parties to the present Covenant recognize the right of everyone to education.”⁶⁴ Ranging from primary school to higher education, section two of article thirteen discusses the various levels of education that should be made available by the nations that are bound by the Covenant.⁶⁵ Much like the Declaration, section three of article thirteen empowers parents and “legal guardians to choose for their children schools” that are aligned with their personal preferences.⁶⁶ Lastly, section four of article thirteen provides that nothing in the Covenant shall limit an individual’s or group’s ability to establish their own educational institutions.⁶⁷

63 See generally International Covenant on Economic, Social and Cultural Rights, art. 13(1), Dec. 16, 1966, 993 U.N.T.S. 3.

64 *Id.*

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Id.

65 *Id.* art. 13(2).

- (a) [P]rimary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Id.

66 *Id.* art. 13(3).

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Id. See also G.A. Res. 217 (III) A, *supra* note 65, art. 26(1).

67 International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 13(4).

No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Id.

The Declaration and the Covenant likely influenced the incorporation of the right to education into the text of the South African constitution and into numerous constitutions across the globe. Although some variance exists among the individual constitutions, the right to education is commonly understood by many nations as creating three distinct rights.⁶⁸ These rights include: the right to receive education, the right to select education, and the right to an equal education.⁶⁹ For the purposes of this discussion, the focus will be directed toward the right to receive education and the right to an equal education.

D. The Distinct Rights

1. The Right to Receive Education

The right to receive education is often called a “social right” and is characterized by a positive right to receive educational services funded by the state.⁷⁰ As was outlined in section three of article thirteen of the Covenant, the education provided can be offered through primary, secondary, or higher education.⁷¹ Most constitutions that have set out to provide a positive right to education do so at the primary or secondary level.⁷² Much like South Africa, Ireland, Spain, Switzerland, and Belgium have constitutionalized the right to education at the elementary and high school levels.⁷³ France, Greece, Portugal, Russia, Ukraine, Armenia, and Haiti have taken the additional step by guaranteeing the right to a free higher education in their respective constitutions.⁷⁴

68 See Yoram Rabin, *The Many Faces of the Right to Education*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 265, 266 (Daphne Barak-Erez & Aeyal M. Gross eds., 2008).

69 *Id.* at 266 (“[T]he right to education encompasses three elemental rights that should be distinguished from one another: the right to receive education, the right to choose (a stream of education and the right to equal education.”).

70 *Id.* at 267.

71 International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 13(3).

72 Rabin, *supra* note 74, at 267.

73 *Id.* at 267 n.8.

For examples of national constitutions that grant basic education see: Art 29(1), South Africa’s Constitution; Art 42(4), Ireland’s Constitution; Art 27(4), Spain’s Constitution; Art 19, Switzerland’s Constitution; Art 24(1), Belgium’s Constitution; Art 34(2), Italy’s Constitution; Art 16(1), Finland’s Constitution; Art 26(3), Japan’s Constitution; Art 70(2), Poland’s Constitution; Art 23(1), Luxembourg’s Constitution; Art 160(1), Taiwan’s Constitution.

Id.

74 *Id.* at n.9.

2. *The Right to Equal Education*

The right to an equal education is a substantive right founded on the principle of equality.⁷⁵ As the drafters of the South African Constitution recognized, in order to provide an equal education, the allocation of resources provided by the state may vary depending on special needs, economic status, and past discrimination affecting the citizens who are afforded the right.⁷⁶ Many constitutions also provide additional protections to minority groups in order to assist in preserving their traditions and cultures which are often times different than the traditions or cultures of the majority of the population.⁷⁷ Supplemental rights afforded to minority groups in order to promote an equal education are justified by the majority's ability to maintain status quo simply by existing as the majority.⁷⁸ Although supplemental rights for minorities may raise arguments of inequitable treatment, it should not be forgotten that majorities regularly resort to the legal system in order to avoid any disruption of the social order.⁷⁹

In contrast with the unqualified right to education provided to everyone throughout the nation of South Africa, the constitution of North Carolina is the only constitution in the United States that guarantees an individual right to education.⁸⁰ Easily distinguished from an individual constitutional right to education, most state constitutions only require that the state legislatures create an education system.⁸¹

E. Additional Protection

To further protect the right to education guaranteed by the South African constitution, the legislature enacted the South African Schools Act

⁷⁵ *Id.* at 277.

⁷⁶ *See id.* at 277-78 (“In order to achieve the goal of equal education, variance must be accepted as a governing constraint, meaning that more resources should be allocated to underprivileged, children with special needs requiring special types of education and groups formerly suffering historic discrimination in educational institutions.” (citation omitted)).

⁷⁷ *Id.* at 278.

⁷⁸ *Id.* (“The special/supplemental rights awarded to minorities, rights that allegedly introduce inequality, can, however, be justified by the majority culture’s capacity – based on its being the majority culture – to sustain a fairly homogeneous environment even without the benefit of special/supplemental rights.”).

⁷⁹ *Id.* (“We should recall, however, that in many cases the majority maintains its homogeneity by recourse to other mechanisms, such as immigration and citizenship laws.”).

⁸⁰ *See Bauries, supra* note 62, at 412.

⁸¹ *Id.* (“Rather than securing rights, American state constitutions generally impose on state legislatures affirmative duties to provide for an education system.”).

of 1996 (the “Schools Act”).⁸² Section (3)(1) of the Schools Act requires that South African children attend school from age seven to fifteen.⁸³ Section (3)(3) goes on to order that a sufficient number of schools be made available in each province in order to allow children the opportunity to attend school as required by section (3)(1).⁸⁴ School-aged children in South Africa are only exempted from the compulsory attendance requirement outlined in section (4)(1) of the Schools Act if it is deemed to be “in the best interests of the learner” by a Head of Department.⁸⁵

In section 34, the Schools Act details the financial responsibilities of the State as it relates to education.⁸⁶ Most importantly, section 34(1) requires the State to fund public schools “on an equitable basis in order to . . . redress . . . past inequalities in education provision.”⁸⁷ The emphasis on an equitable education found within the Schools Act reinforces the constitutional right to education afforded to all South Africans. Furthermore, it once again illustrates the desire to reverse the effects of apartheid’s discriminatory regime.

F. The Ugly Truth

Although both the constitution and the Schools Act purport to establish in each South African a fundamental and sacrosanct right to education, economic realities have created difficulties in offering education on an equitable basis.⁸⁸ Despite the requirements for an equitable system, a lack of resources has caused poor blacks in South Africa to endure a much

⁸² See generally South African Schools Act 84 of 1996.

⁸³ *Id.* § 3(1).

Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

Id. (emphasis omitted).

⁸⁴ *Id.* § 3(3) (“Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2).” (emphasis omitted)).

⁸⁵ *Id.* § 4(1) (“A Head of Department may exempt a learner entirely, partially or conditionally from compulsory school attendance if it is in the best interests of the learner.” (emphasis omitted)).

⁸⁶ See *id.* § 34.

⁸⁷ *Id.* § 34(1) (“The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.” (emphasis omitted)).

⁸⁸ See Eric Berger, *The Right to Education Under the South African Constitution*, 103 COLUM. L. REV. 614, 628 (2003).

different educational experience than their more affluent counterparts.⁸⁹ The disparity between poor blacks and others within the existing system is rooted in apartheid, the lingering effects from which the drafters of the constitution attempted to escape by way of article 29.⁹⁰ While apartheid existed as the rule of law throughout South Africa, schools for black children were purposefully designed to train students “in subservience and manual labor.”⁹¹ Although apartheid eventually came to an end and a new constitution was adopted in 1996 aiming to reverse apartheid’s discriminatory effects, much of the damage done in the field of public education has proven difficult to undo.⁹²

As the Minister of Education stated in 2001, “South Africa is two nations, poor and rich [T]he higher education system, in large measure, continues to reproduce the inequities of the past.”⁹³ As mentioned above, limited resources played a major role in limiting South Africa’s ability to live up to the remedial ideologies serving as a backdrop to the constitution. Nevertheless, the privatization of education and the decrease of educational expenditures by the government has also impacted the state of education in the country after apartheid.⁹⁴ Once the budgets for schools serving black students were reduced due to less government spending, the schools that were already poor sprang into a downward spiral characterized by subpar faculty, “inferior facilities and supplies,” high student-to-teacher ratios, and low matriculation rates.⁹⁵ Interestingly, many of these factors were highlighted by the United States Supreme Court in *Green v. Cty. Sch. Bd.* as indicators of a segregated system of education.⁹⁶ In South Africa, these factors taken together also made it

89 *Id.* at 614 (“[South Africa] has included the right to education in its emphatically modern Constitution, but . . . schools, particularly for poor blacks, remain woefully inadequate. The explanation for these shortcomings is obvious—the nation simply lacks the resources to address all its citizens’ needs—and yet the consequences are significant.” (citations omitted)).

90 *Id.* at 616.

91 *Id.* (“[N]ational education policy was an integral part of apartheid’s dehumanizing segregation. African schools were thus designed accordingly, training students in subservience and manual labor.” (citations omitted)).

92 *See, e.g., Education in South Africa: Class Action*, THE ECONOMIST (Oct. 26, 2013), <https://www.economist.com/middle-east-and-africa/2013/10/26/class-action> (discussing increase in private education resulting from low standards and results prevalent throughout South African system of public education).

93 Berger, *supra* note 94, at 617.

94 *Id.*

95 *Id.* at 618-21.

96 *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 435 (1968); see also BLACK, *supra* note 24, at 34 (“The [*Green*] Court identifies student assignments, faculty, staff, transportation, extracurricular activities, and facilities as the most important areas of inquiry These six factors serve as the touchstone of courts’ evaluation of school systems.”)

much less likely that a black child would progress through school uninterrupted in comparison to a white child.⁹⁷

It is evident that although the South African constitution and the Schools Act both aim to ensure that the right to education is made available to all students on an equitable basis, in reality, these goals have yet to be accomplished. Blacks, especially those who remain shackled by poverty, continue to be treated as second-class citizens while attending inferior schools.⁹⁸ Further, they are forced to exercise a constitutional right to education that greatly differs from the right enjoyed by their more affluent peers.⁹⁹ With their educational institutions lacking government funds to provide a proper education, most poor students will be unable to overcome the obstacles associated with poverty and as a result, will be stuck in an endless cycle.¹⁰⁰

II. A STATUTORY SOLUTION

The Education for All Handicapped Children Act was originally enacted by Congress in 1975.¹⁰¹ The act has since gone through a series of revisions in addition to being renamed.¹⁰² The current version of the IDEA, as it was renamed in 1990, went into effect on July 1, 2005. Irrespective of the title, since enactment, it has provided a positive right to education for disabled students throughout the United States.¹⁰³

97 Berger, *supra* note 94, at 621 (“Whereas a large majority of white children proceed smoothly through elementary school, schools have had difficulty retaining black students. A recent study of rural black children showed that only 39% progressed from second to seventh grade without some disruption.”).

98 Rajendra Chetty & Christopher B. Knaus, *Why South Africa’s Universities Are in the Grip of a Class Struggle*, THE CONVERSATION (Jan. 12, 2016), <https://theconversation.com/why-south-africas-universities-are-in-the-grip-of-a-class-struggle-50915> (attributing low graduation rates for black Africans from universities to oppressive and ineffective public school system from which they come).

99 Fahmida Miller, *Inequality Haunts South African Students*, ALJAZEERA (Sept. 12, 2018), <https://www.aljazeera.com/news/2018/09/inequality-haunts-south-african-students-180912064447841.html> (discussing educational inequality in South Africa and acknowledging that the social background of South African students determines access to and success of education).

100 Berger, *supra* note 94, at 619 (“Without additional funding to provide remedial literacy training and materials, schools in poor neighborhoods will be unlikely to overcome the educational obstacles inherent in poverty.”).

101 Education for All Handicapped Children Act, Pub. L. 94-142 (1975); *see also* Charles J. Russo & Allan G. Osborne Jr., *United States, in THE LEGAL RIGHTS OF STUDENTS WITH DISABILITIES: INTERNATIONAL PERSPECTIVES* 211-31 (Charles J. Russo et al. eds., 2011).

102 Russo & Osborne Jr., *supra* note 107, at 215. (“[T]he IDEA had its name changed in 1990 and was revised in 1986, 1990, 1997, and 2004; the 2004 version of the IDEA became effective on July 1, 2005.”).

103 Urchick, *supra* note 26, at 8.

To be covered under the IDEA, four requirements must be met.¹⁰⁴ First, the student must be between the ages of three and twenty-one.¹⁰⁵ Second, they must suffer from a statutorily recognized disability.¹⁰⁶ Third, the student must be in need of special education.¹⁰⁷ Lastly, the student must be in need of the services relating to their special education.¹⁰⁸

The act provides a “Child Find” provision which orders states to implement appropriate procedures to identify and evaluate students with disabilities.¹⁰⁹ In doing so, states must ensure that cultural or racial bias is removed from the evaluation process.¹¹⁰ Students are permitted to undergo reevaluation if the LEA deems it warranted or at the request of the student’s parents or teacher.¹¹¹ If “poverty” was recognized as a disability, LEAs would be required to identify and evaluate those students struggling with its effects.

104 Russo & Osborne Jr., *supra* note 107, at 215.

105 Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (a)(1)(A) (2018) (“In general A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”).

106 *Id.*; see also 20 U.S.C. § 1401 (3)(A)(i) (2018): (“The term ‘child with a disability’ means a child – with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . .”).

107 20 U.S.C. § 1412 (a)(1)(A); see also 20 U.S.C. § 1401 (3)(A)(ii) (“[W]ho, by reason thereof, needs special education and related services.”).

108 Russo & Osborne, *supra* note 107, at 215 (“Fourth, children must be in need of related services.”).

109 20 U.S.C. § 1412 (a)(3)(A).

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

Id.

110 20 U.S.C. § 1412 (a)(6)(B).

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for services under this title will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child’s native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

Id.

111 20 U.S.C. § 1414 (a)(2)(A)(i)-(ii) (“[I]f the local educational agency determines that the educational or related special needs, including improved academic achievement and functional performance, of the child warrant a reevaluation”).

If a child has been identified as needing an IEP, a meeting with the LEA must begin within thirty calendar days of such a finding.¹¹² Furthermore, special education and related services must be made available “[a]s soon as possible” following implementation of the IEP.¹¹³ All IEP teams must include certain participants; most importantly, the parents of the student in question.¹¹⁴

The IDEA also provides parents and students with valuable due process procedures that allow them to hold LEAs accountable and ensure that the education being provided is adequate. When disputes arise, the IDEA first permits parents to engage in mediations with the LEA in order to resolve the matter without resorting to litigation.¹¹⁵ In order for a mediation to take place, the parties must voluntarily choose this form of dispute resolution, and it must be conducted by an impartial mediator.¹¹⁶

The time and location of the mediation must be convenient for each party.¹¹⁷ For any mediation that is conducted, including those brought to a disinterested party, “[t]he State shall bear the cost”¹¹⁸ In requiring that the mediation be scheduled at a time and place convenient for both parties, and by mandating that the State bear the costs, the IDEA ensures that neither a parent’s availability nor their economic resources impact their ability to protect a child’s statutory right. If the dispute is resolved through the mediation process, the IDEA requires the parties to execute a “legally binding agreement that sets forth such resolution”¹¹⁹ Lastly, the resolution must also acknowledge that the legally binding agreement can

112 34 C.F.R. § 300.323(c)(1) (2018) (“Each public agency must ensure that . . . [a] meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services”).

113 34 C.F.R. § 300.323(c)(2) (2018).

114 34 C.F.R. § 300.321(a)(1) (2018); see also Russo & Osborne, *supra* note 107, at 217. (“IEP teams must include parents in light of their right to participate actively in the development of IEPs for their children”).

115 20 U.S.C. § 1415(e)(1) (“Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter . . . to resolve such disputes through a mediation process.”).

116 20 U.S.C. § 1415(e)(2)(A).

117 20 U.S.C. § 1415(e)(2)(E) (“Scheduling and location. Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.”).

118 20 U.S.C. § 1415(e)(2)(D) (“The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).”).

119 20 U.S.C. § 1415(e)(2)(F) (“In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution”).

be enforced in an appropriate state court or in a United States district court.¹²⁰

In addition to the mediation process, parents are also entitled to an impartial due process hearing conducted by the state educational agency or by the LEA to help resolve the dispute.¹²¹ Before a due process hearing can take place, the IDEA requires a preliminary meeting between the parent “and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint”¹²² At the preliminary meeting, the parties are required to discuss the “facts that form the basis of the complaint.”¹²³ Presumably to maintain an informal nature, neither party is permitted to bring an attorney to the preliminary meeting.¹²⁴

Following the preliminary meeting, if the LEA is unable to resolve the matter within thirty days of receiving it “to the satisfaction of the parents,” a due process hearing “shall commence.”¹²⁵ The hearing officer presiding over the hearing may not be employed by the state educational agency or the local educational agency tasked with the responsibility of educating the child.¹²⁶ The decision rendered by the officer must be on “substantive grounds based on a determination of whether the child received a free appropriate public education.”¹²⁷

A parent or LEA is free to request a hearing within two years of the date that the party “knew or should have known about the alleged action that forms the basis of the complaint”¹²⁸ However, the two-year time limitation is not applied if the parent was prevented from requesting a hearing because of misrepresentations made by the LEA or if the LEA failed to disclose information to the parent that they were required to share.¹²⁹

120 20 U.S.C. § 1415(e)(2)(F)(iii) (“[I]s enforceable in any State court of competent jurisdiction or in a district court of the United States.”).

121 20 U.S.C. § 1415(f)(1)(A) (“Hearing. Whenever a complaint has been received . . . the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency.”).

122 20 U.S.C. § 1415(f)(1)(B)(i).

123 20 U.S.C. § 1415(f)(1)(B)(i).

124 20 U.S.C. § 1415(f)(1)(B)(i)(III).

125 20 U.S.C. § 1415(f)(1)(B)(ii).

126 20 U.S.C. § 1415(f)(3)(A)(i)(I).

127 20 U.S.C. § 1415(f)(3)(E)(i).

128 20 U.S.C. § 1415(f)(3)(C).

129 20 U.S.C. § 1415(f)(3)(D).

If dissatisfied with the final decision of the hearing officer, any aggrieved party may appeal the decision to the state educational agency.¹³⁰ The state educational agency must then administer an impartial review of the findings and the decision made by the hearing officer and make its own independent decision.¹³¹ In order to further protect the rights of the parties and to ensure that a reasoned decision is made, additional safeguards were included in the act.¹³² Most significantly, both parties attending a hearing may be accompanied by an attorney or other individuals possessing special knowledge as it relates to disabled children.¹³³ Much like an evidentiary hearing, parties are also permitted to call witnesses, to confront and cross-examine them, and to present evidence on their own behalf.¹³⁴ Parents are also permitted to request a written record of the hearing, the finding of facts, and the final decision.¹³⁵

The decision of the state educational agency shall be considered final unless either party exercises their right to bring civil action.¹³⁶ Any party aggrieved by the final determination made by the state educational agency has the right to institute a civil action in state court or in a United States district court.¹³⁷ In any civil action that ensues, the court shall receive records from the previous administrative hearings and receive additional evidence upon the request of either party.¹³⁸ In rendering its decision, the court “shall grant such relief as [it] determines is appropriate,” basing its judgment on the preponderance of the evidence presented.¹³⁹

In order to further facilitate parental use of the administrative process, jurisdiction for civil actions brought in United States district courts shall be granted regardless of the amount in controversy.¹⁴⁰ At the close of litigation, it is also within the district court’s discretion to grant attorneys’ fees to the prevailing party in certain situations.¹⁴¹ Again aiming to mitigate cost concerns and guarantee availability of the full administrative

130 20 U.S.C. § 1415(g)(1).

131 20 U.S.C. § 1415(g)(2).

132 *See* 20 U.S.C. § 1415(h).

133 20 U.S.C. § 1415(h)(1).

134 20 U.S.C. § 1415(h)(2) (“[T]he right to present evidence and confront, cross-examine, and compel the attendance of witnesses . . .”).

135 20 U.S.C. § 1415(h).

136 20 U.S.C. § 1415(i)(1)(B).

137 20 U.S.C. § 1415(i)(2)(A).

138 20 U.S.C. § 1415(i)(2)(C)(i)-(ii).

139 20 U.S.C. § 1415(i)(2)(C)(iii).

140 20 U.S.C. § 1415(i)(3)(A).

141 *See* 20 U.S.C. § 1415(i)(3)(B).

process, the court “may award reasonable attorneys’ fees” when the parent of the disabled child prevails.¹⁴²

Although attorneys’ fees may also be awarded to a state or local educational agency, the circumstances are limited.¹⁴³ When the state educational agency or LEA prevails, fees may be awarded against the attorney of the parent who files a complaint that is found to be “frivolous, unreasonable, or without foundation”¹⁴⁴ Attorneys’ fees may also be awarded against the attorney of a parent, or the parents themselves, if the complaint is found to be for an “improper purpose[.]”¹⁴⁵ Any attempt on a parent’s behalf to harass a state or local educational agency, or to cause undue delay and increase the costs of litigation constitutes an improper purpose.¹⁴⁶

As is best illustrated by the provisions that provide for the award of attorneys’ fees, the IDEA provides parents of children with disabilities the legal structure necessary to ensure the adequacy of their child’s education. If also made available to students living in poverty and victimized by the achievement gap, the IDEA could transform our system of public education.

III. ANALYSIS

As was previously mentioned, the right to education is a common feature found in many constitutions throughout the world.¹⁴⁷ This is so, in large part due to the essential role education plays in facilitating the personal development of individuals and the collective progress of society. First and foremost, education is imperative to the development of “individual autonomy, liberty and human dignity.”¹⁴⁸ Education is often considered to be “essential for the existence of liberty and for its

142 20 U.S.C. § 1415(i)(3)(B)(i): (“In general In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs—”).

143 *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III).

144 20 U.S.C. § 1415(i)(3)(B)(i)(II).

145 20 U.S.C. § 1415(i)(3)(B)(i)(III): (“[T]o a prevailing State educational agency or [LEA] against the attorney of a parent, or against the parent, if the parent’s complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.”).

146 *Id.*

147 *See generally* The Law Library of Congress, *supra* note 1 (listing 15 countries that recognize right to education in their constitutions).

148 Rabin, *supra* note 74, at 267.

realization.”¹⁴⁹ Without some form of education, any exercise of a right to liberty would be severely hindered.¹⁵⁰ Education intrinsically and extrinsically affects human dignity.¹⁵¹ Not only is the level of education obtained by any given individual used as a barometer to determine their capabilities and potential, education is also “a fundamental instrument of social mobility.”¹⁵² Lacking a proper education, many children born into poverty are left without means to escape its grasps.¹⁵³ At the intrinsic level, education cannot be disassociated from “personal development and individual self-esteem.”¹⁵⁴ Education not only has major implications on an individual’s worldview, it also affects an individual’s perception of both self and the personal value they are able to provide in any given situation.

In addition to the vital role education plays in the exercise of personal rights and the personal development of individuals, quality education is also imperative to the exercise of many civil and political rights afforded to citizens.¹⁵⁵ Yet, without an education “the marketplace of ideas characterizing democratic regimes would be emptied of its goods.”¹⁵⁶ Absent educated citizens, not only would the exchange of ideas within the marketplace be devoid of intelligent thoughts, but also the voting population would likely engage in uniformed decision-making due to an inability to understand complex political issues.¹⁵⁷

The right to education is also prevalent throughout constitutions worldwide due to the societal benefits that result from the presence of an educated population. In a capitalistic society like the United States, education is often the key to economic freedom and prosperity. As the California Supreme Court stated, “[e]ducation holds out a bright hope for the poor and oppressed to participate fully in economic life of . . .

149 *Id.* at 267-68 (“According to this argument, strong and well-defined interests motivate an individual’s right to receive state-provided education because, in modern society, education is essential for the existence of liberty and for its realisation.” (footnote omitted)).

150 *Id.* at 268.

151 *Id.*

152 *Id.* (“Moreover, education—and especially the acquisition of higher education—is often the sole hope a person has to leap the barriers of the lowly economic status to which they were born; stated simply, education is a fundamental instrument of social mobility.”).

153 *Id.*

154 *Id.*

155 *Id.* at 269.

156 *Id.*

157 *Id.*

society.”¹⁵⁸ When education helps transform children into “competent members of society” and allows them to participate in the national economy, the country as a whole stands to benefit.¹⁵⁹ Along with the economic benefits of an educated population that are reaped by society as a whole, education also promotes the “general social well-being” of a nation.¹⁶⁰ Other common non-economic societal benefits that are the product of an educated population include less crime and fewer sexually transmitted diseases.¹⁶¹

Considering the many individual and societal benefits that stem from the exercise of a citizen’s right to education, the reluctance from the United States Supreme Court to recognize the existence of a positive fundamental right to education in the constitution or any federal statute is all the more perplexing.

A. *Understanding the Gap*

Recognizing the vital importance of education in the development of individuals and society, the achievement gap and the factors contributing to its continued presence in the United States education system is all the more concerning. With an estimated twenty-five percent of African-American schoolchildren having a parent presently or previously incarcerated, scholars have pointed to mass incarceration as one factor aiding in the achievement gap’s continued existence.¹⁶² Students with a parent in prison perform worse than their peers academically and have higher dropout rates.¹⁶³ This discouraging truth is undoubtedly linked to the stress endured by students who are affected by parental

158 Berger, *supra* note 94, at 659 (“[A]s the California Supreme Court put it, education prepares individuals to participate in the institutional structures . . . that distribute economic opportunities and exercise economic power. Education holds out a bright hope for the poor and oppressed to participate fully in the economic life of . . . society.”) (quoting *Hartzell v. Connell*, 679 P.2d 35, 41 (Cal. 1984) (internal quotations omitted)).

159 *Id.*

160 Rabin, *supra* note 74, at 269 (“Considered from this perspective, allocation of funds to education represents an investment in the human resources that promote the nation’s economic prosperity as well as its general social well-being . . .”).

161 *Id.* (Additional societal benefits include: “rising levels of culture, decreased crime rates, prevention of sexually transmitted diseases, such as AIDS, and promotion of the war on poverty, among other social goals.”).

162 See Leila Morsy & Richard Rothstein, *High Rates of Parental Incarceration Among African-Americans Means That Criminal Justice Reform Is Now Education Reform*, LONDON SCH. OF ECON. (Feb. 9, 2017), <http://blogs.lse.ac.uk/usappblog/2017/02/09/high-rates-of-parental-incarceration-among-african-americans-means-that-criminal-justice-reform-is-now-education-reform/>.

163 *See id.*

incarceration.¹⁶⁴ It cannot be denied that “our criminal justice system is making a significant contribution to the racial achievement gap.”¹⁶⁵

Along with incarceration, scholars have pointed to numerous additional factors that contribute to the existence of the achievement gap. Professor David C. Berliner from Arizona State University suggested the workings of “[Out-of-School Factors] among the poor that significantly affect the health and learning opportunities of children, and accordingly limit what schools can accomplish *on their own*”¹⁶⁶ Although Berliner suggested seven factors in total, the factors relevant to this discussion include “food insecurity[.]. . . family relations and stress,” and “extended learning opportunities,” or the lack thereof.¹⁶⁷ Due to higher rates of food insecurity existing among households run by single mothers, black households, and households living below the poverty line, any cognitive and behavioral issues that correlate with hunger “will be felt disproportionately in the schools that serve low-income, racially and ethnically segregated Americans.”¹⁶⁸

Accompanying parental incarceration and food insecurity, other common factors that contribute to unhealthy home environments and consequently also impact the achievement gap include child abuse, domestic violence, and, of course, poverty itself.¹⁶⁹ Not only does poverty “predispose[] [individuals] to anxiety and depressive disorders,” causing behavioral issues both in the classroom and at home, but it also affects the verbal skills and language development of children.¹⁷⁰ Research has suggested that, “the less affluent the family, the fewer words said to the child, and the less complex the language used.”¹⁷¹ Highlighting the impact of family relations on the achievement gap, it should be noted that of

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* (“The numbers of children affected has grown to the point that we can reasonably infer that our criminal justice system is making a significant contribution to the racial achievement gap in both cognitive and non-cognitive skills.”).

¹⁶⁶ David C. Berliner, *Poverty and Potential: Out-of-School Factors and School Success*, EDUC. POL’Y RES. UNIT & EDUC. & THE PUB. INT. CTR. 1, 1 (Mar. 2009).

¹⁶⁷ *Id.*

[Out-of-School Factors Include:] (1) low birth-weight and non-genetic prenatal influences on children; (2) inadequate medical, dental, and vision care, often a result of inadequate or no medical insurance; (3) food insecurity; (4) environmental pollutants; (5) family relations and family stress; and (6) neighborhood characteristics [and (7)] extended learning opportunities.

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *See generally id.* at 24-29.

¹⁷⁰ *See id.* at 27-28.

¹⁷¹ *Id.* at 28 (“What this research tells us is that, on average, the less affluent the family, the fewer words said to the child, and the less complex the language used.”).

Americans ages twenty-five to thirty-four with parents who did not finish high school, only five percent have a college degree.¹⁷²

The final out-of-school factor acknowledged by Berliner, extended learning opportunities, unlike the six other factors, has the potential to improve the actual educational experience of minority and low-income students who are most affected by the achievement gap.¹⁷³ Research has found that attending preschool prior to entering kindergarten can have a positive impact on a student's social skills and academic achievements.¹⁷⁴ Starting a student's formal educational development at as young of an age as possible could "do much to reduce the gap between poorer and wealthier students."¹⁷⁵ In fact, the IDEA "allows [LEAs] to use up to 15 percent of their funds to provide 'early intervening services' to students 'in order to avoid 'instructional casualties'"¹⁷⁶

Summer school programs are an additional extended learning opportunity possessing the potential to positively impact the achievement gap.¹⁷⁷ Research has suggested that a large portion of the achievement gap is directly attributable to the lack of educational progress made during the summer by students of low-income families.¹⁷⁸ By enrolling in summer programs and ensuring educational progression year-round, minority and low-income students would be better positioned to achieve academically.¹⁷⁹

After-school programs are a final extended learning opportunity that could potentially affect the achievement gap.¹⁸⁰ After-school programs, particularly those aimed towards "at-risk youth," can produce both positive academic and non-academic results.¹⁸¹ If purposefully designed to recruit minority and low-income students most in need, after-school

172 Eduardo Porter, *Education Gap Between Rich and Poor Is Growing Wider*, N.Y. TIMES (Sept. 22, 2015), <https://www.nytimes.com/2015/09/23/business/economy/education-gap-between-rich-and-poor-is-growing-wider.html> ("Only 5 percent of Americans ages 25 to 34 whose parents didn't finish high school have a college degree. By comparison, the average across 20 rich countries in an analysis by the Organization for Economic Cooperation and Development is almost 20 percent.").

173 See Berliner, *supra* note 172, at 38-39.

174 *Id.* at 38.

175 *Id.* ("Preschool is, however, an [out-of-school factor] that can do much to reduce the gap between poorer and wealthier students at the start of kindergarten or first grade.").

176 See BLACK, *supra* note 24, at 488; see also 20 U.S.C. § 1413(f).

177 See Berliner, *supra* note 172, at 37-38.

178 *Id.*

179 *Id.* at 38.

180 See *id.* at 38-39.

181 *Id.*

programs “could provide a way to improve school achievement”¹⁸²

Viewed together, these out-of-school factors support a simple conclusion: “[E]ducation does not take place only within schools.”¹⁸³ Although the many factors aiding in the achievement gap’s survival create an uphill battle for minority and low-income students, extended learning opportunities could help to level the playing field.

An additional factor occurring outside of the classroom that also has a profound impact on educational achievement is parental involvement.¹⁸⁴ Researchers have called parental involvement the “missing link” to providing education on equal terms.¹⁸⁵ To achieve academically, students need the continual support of their families and their surrounding communities.¹⁸⁶ One element impacting the level of parental involvement in a child’s schooling is the common misconception that all parents interact with schools in the same manner.¹⁸⁷ The socioeconomic status of a parent or their past educational experience can greatly impact their viewpoint on education and as a result, their level of involvement in a child’s learning.¹⁸⁸ Moreover, although diversity within public schools has been on the rise, white teachers continue to dominate the field.¹⁸⁹ The cultural differences existing between teachers and the families of the students that they instruct “present a potential for real and perceived cultural misunderstanding.”¹⁹⁰

For many parents, employment also obstructs their ability to fully participate in their child’s education.¹⁹¹ Because most school activities occur during normal working hours, parents with full-time jobs or multiple

182 *Id.* (“Nevertheless, the overall body of evidence suggests that after-school extended learning programs could provide a way to improve school achievement, particularly if such programs can recruit the students who need them the most and if they coordinate their curriculum with the schools that students attend.”).

183 *Id.*

184 See generally Michelle Larocque, Ira Kleiman & Sharon M. Darling, *Parental Involvement: The Missing Link in School Achievement*, in 55(3) PREVENTING SCHOOL FAILURE 115 (2011).

185 *Id.* at 115 (“Some researchers have suggested that the missing link in educational equity, in terms of educational achievement, is parental involvement . . .”).

186 *Id.*

187 *Id.* (“As a result, parents cannot be viewed as a homogeneous group because they do not participate in the same ways; some have more of a presence in the school than do others.”).

188 *Id.* at 116 (“The sociopolitical factors may include socioeconomic status, parents’ own past experience with schools and schooling, and so forth.”).

189 *Id.* (“The population of our society is becoming increasingly diverse; therefore, the student body in public schools is also becoming increasingly diverse. However, teachers in these schools remain predominantly White and middle class.”) (citations omitted).

190 *Id.*

191 *Id.* (“Logistical barriers often serve as an inhibitor of effective parental involvement for some parents.”).

part-time jobs are often unable to fully participate in their child's schooling.¹⁹² As a direct consequence of their logistical inability to fully involve themselves in their child's education, "the insights of [less-involved] parents [are] often dismissed because they [are] not viewed as . . . knowledgeable of the day-to-day activities of the school."¹⁹³ This often results in further alienation of parents instead of encouraging them to become more involved in their child's education.¹⁹⁴

Coupled with the aforementioned parental incarceration and various out-of-school factors, lack of parental involvement further contributes to the achievement gap that disproportionately impacts minority and low-income students across the United States.

B. Closing the Gap

Classifying poverty as a qualifying disability under the IDEA could have a profound impact on public education. To begin, the "Child Find" requirements would call on LEAs to identify and evaluate students living in poverty.¹⁹⁵ Because LEAs are forbidden from using a single tool to evaluate students, methodologies to evaluate out-of-school factors and the impact they are having on the education of low-income students could be established.¹⁹⁶

If a student living in poverty is determined to need an IEP, an IEP team would be convened and tasked with the producing a plan reasonably calculated to ensure the student's success.¹⁹⁷ Where necessary, extended learning opportunities previously discussed as out-of-school factors could be incorporated into a student's IEP.¹⁹⁸ Moreover, although the IDEA cannot eliminate the logistical realities that hinder parental involvement, it could provide low-income parents with the structure necessary to hold schools accountable when student needs go unmet.

Without first minimizing the out-of-school factors that negatively impact the education of minority and low-income students, eliminating the

192 *Id.* ("These logistical barriers can often inhibit parental participation. Their jobs limit their ability to become involved in schools during regular school hours. Their efforts to advocate for their children lead to frustration because they are unable to participate in school conferences and activities.").

193 *Id.*

194 *Id.* ("Dismissal of their insights further alienate these parents and tends to contribute to their withdrawal from the advocacy role.").

195 20 U.S.C. § 1412 (a)(3).

196 20 U.S.C. § 1414 (b)(2).

197 *Supra* notes 118-119.

198 *Supra* note 119.

achievement gap entirely could prove to be a lofty goal. Nonetheless, conferring rights under the IDEA on low-income families and providing disadvantaged students with an IEP would be a much needed initial step.

CONCLUSION

The achievement gap that has notoriously plagued low-income and minority students can be viewed as a direct consequence of the many laws and practices employed to systematically oppress minorities, particularly people of color. Although it could be argued that labeling impoverished black children as disabled might reduce expectations and “may in turn lead to reduced achievement,” as *Andrew F.* demonstrates, a private cause of action arising upon violation of an IEP can inspire—or force—necessary change.¹⁹⁹

Poverty’s effect on education should not be understated. Not only are there “biological effects of poverty that contribute to an achievement gap in cognition and behavior includ[ing] lower birth weight, poor nutrition, and increased exposure to toxins . . . all of which correlate to educational performance,” there are also many social consequences.²⁰⁰ It has also been noted that, “[l]ow-socioeconomic-status homes display less optimal educational environments, as they have less language stimulation, less direct teaching . . . lower-quality childcare, and less stimulating parenting practices.”²⁰¹ As one researcher put it, “[g]rowing up poor is bad for your brain.”²⁰²

By recognizing poverty as a disability under the IDEA and taking an approach similar to South Africa in order to correct previous discriminatory practices, the United States could begin to eliminate the achievement gap present in its system of public education and continue to progress away from its discriminatory past.

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¹⁹⁹ BLACK, *supra* note 24, at 485 (quoting Theresa Glennon, *Race Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1241 (1995)).

²⁰⁰ *Id.* at 484.

²⁰¹ *Id.*

²⁰² Richard Monastersky, *Researchers Probe How Poverty Harms Children’s Brains*, THE CHRON. OF HIGHER EDUC. (Feb. 29, 2008), <https://www.chronicle.com/article/Researchers-Probe-How-Poverty/5567> (quoting Martha J. Farah).

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