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All in the Family: Towards a New Representational model for Parents and Children

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All in the Family: Towards a New Representational Model for Parents and Children

CYNTHIA GODSOE*

*The presumption that parents act in their children's interests governs both daily life and legal doctrine. This Article demonstrates that this presumption, while usually correct, is problematic when unquestioned because it masks any conflict between parents and children and is at odds with the individualistic framework of the ethical rules governing attorneys. This harms families and puts attorneys at risk. This Article explores this representation problem in the previously largely ignored context of special education for children with disabilities. The Supreme Court, in *Winkelman v. Parma City School District*, recently established that parents and children each have substantive yet "intertwined" rights to a child's appropriate education. Nonetheless, courts and attorneys continue to assume that parents speak for children, even in cases with a high risk of conflict.*

To best serve families and protect attorneys, this Article proposes a novel reconception of representation in education cases. Family representation posits the family as the client, with the attorney owing duties to each member individually and as part of the group. A family representation framework brings four real-world benefits: (1) it recognizes the interconnected nature of the relationships and rights of parents and children; (2) it engages both parties in the process, which is particularly important for children who have previously been overlooked; (3) it is economical in that it increases the number of represented parties but not the number of attorneys; and (4) it brings attorney practice into accord with ethical standards. This model has ramifications beyond the educational sphere as it could also be fruitfully applied in torts and benefits actions by a parent and child against the state or other third party. Ultimately,

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reconceiving the attorney's role as representing the family while respecting the voices of each member harmonizes the competing principles of individual autonomy and family unity to the benefit of parents, children, and attorneys.

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INTRODUCTION

A mother seeks damages for a doctor’s malpractice on behalf of her six-year-old daughter. A father files a claim for his disabled ten-year-old to receive social security insurance (SSI). A couple enrolls their two teenaged children in a private school.

In each of these instances, we assume that the parents’ interests are aligned with those of their children. This presumption governs both daily life and our legal system: Parents are empowered to act in their children’s interests and deemed to be the primary guardians of their legal rights. Although correct most of the time, this presumption can become problematic when a family seeks legal assistance as it both silences the child’s voice—masking potential conflict between parents and children—and is at odds with the ethical standards governing attorneys.

This Article explores the disjunction between the presumption of aligned interests between parents and children (“the presumption”) and the individualistic client representation model in the context of special education and proposes changes in legal ethics to better serve families. Education is of pivotal importance to both parents and children: A child needs it to grow into a healthy and

successful adult, while a parent has a fundamental right to direct her child's education. The dual nature of the interest in education is further reflected in the governing statutory systems, in particular the Individuals with Disabilities Education Improvement Act (IDEIA) governing the education of children with disabilities—a 25 billion dollar program serving over six and a half million children.¹ The IDEIA guarantees disabled children publicly-funded, appropriate educational placements, mainstreamed in general education to the maximum extent possible, and grants parents procedural rights to enforce their children's entitlements to such an education. The Supreme Court in *Winkelman v. Parma City School District* recently further highlighted this presumed alignment of interests by clarifying that the child's right and the parent's right under the IDEIA are "intertwined."²

Because both parents and children have substantive rights under the IDEIA, special education differs from most situations where attorneys represent children or parents. On the one hand, children are entitled to their own attorneys or *guardians ad litem*³ ("GALs") in situations where they have significant interests at stake that often differ from those of their parents, such as abuse/neglect and delinquency cases. On the other hand, parents are entitled to make decisions for their children in non-IDEIA education matters, even decisions that go against the children's interests and wishes,⁴ and they routinely direct attorney representation on behalf of their children in civil matters to recover damages or benefits. Yet the entitlement to an appropriate educational placement under the IDEIA gives children rights they do not have in regular education and renders this situation more nuanced and complex than the average civil matter involving children—a child's school setting is second only to her home in its impact on her life.

Nonetheless, children's voices are often still ignored in this realm and conflicts between parents and children under-identified, due to the presumption that their interests align.⁵ To return to one of the examples above, suppose one of the

1. Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400-1482 (2006). Although the name of the statute was changed to IDEIA when it was amended in 2004, many courts and advocates still refer to it by its former name IDEA (Individuals with Disabilities Education Act).

2. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007). The Court also clarified, however, that a parent has an independent substantive right to her child's education. *Id.*

3. A *guardian ad litem* or GAL is a special guardian appointed by the court to represent a minor in litigation. The GAL may be an attorney or a layperson, depending upon the rules of the jurisdiction making the appointment. Even if the GAL is an attorney, her role is often not the traditional attorney role—rather than advocating for the client's wishes, she advocates based upon the client's best interests. There is some confusion about the GAL's role, and attorneys are sometimes appointed to represent children in a hybrid GAL/counsel role. See *infra* notes 78, 193-94 and accompanying text.

4. For instance, a parent can choose to send his daughter to a parochial school, preferring the disciplinary policies or single-sex nature of the school, even if the child would benefit academically from enrollment in a highly regarded public high school.

5. I do not argue that the presumption is wrong because most of the time in these cases, it is not. I contend, instead, that the presumption should not be unquestioned so that children's voices are not heard out of the assumption that parents speak for them. If left unquestioned, the presumption would justify itself via flawed

teenagers enrolled in private school by her parents has a mild learning disability and is thus eligible for educational services under the IDEIA. Frustrated with the sixteen-year-old's behavior outside of school, such as her sexual activity and alcohol use, and wanting respite from caring for two teenagers, the parents advocate for her to be placed in a restrictive residential "behavior management" school out-of-state, although the child could be appropriately educated at many other schools in her community. The child opposes the residential placement. The attorney for the parents and child, however, follows the parents' direction with no independent investigation, assuming they would only act in their child's interests. The hearing officer for the IDEIA case makes the same assumption and, mistakenly believing that the attorney has spoken with the child, does not hear from the child herself. The child is sent to the residential school where her academic performance suffers and she repeatedly tries to run away. In this way, the failure of attorneys and fact-finders to hear children's views and to recognize real conflicts between parents and children in the educational sphere can result in harm to the child and ethical violations by attorneys.

The presumption of aligned interests embodied in substantive law also clashes with the individualistic structure of attorney practice standards.⁶ The *ABA Model Rules of Professional Conduct* ("Model Rules") and other practice standards presume the attorney's undivided loyalty to her client, disfavor joint representation, and make no exception for family relationships. This framework is at odds with the reality that the presumption of aligned interests is correct much of the time and that it is economically unfeasible to have separate counsel for each IDEIA-eligible child and his parent. The *Model Rules'* broad definition of conflict also fails to account for the practical reality that a successful educational plan needs the buy-in of both the child and the parent. This disjuncture not only impacts families negatively but also puts attorneys at risk for failing to meet their duties to clients.

How to represent families ethically has been the subject of considerable discussion by legal scholars and practitioners. Scholars have debated whether the family should be represented as a communal unit or whether its members must be treated as unconnected individuals under the *Model Rules*.⁷ Scholars have also

circular reasoning—the children do not disagree so the presumption must be correct—but any disagreement would never be uncovered since children's views are not aired. See *infra* note 90 and accompanying text.

6. Scholars have noted this disjuncture in other contexts, such as the joint representation of spouses. See, e.g., Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 *FORDHAM L. REV.* 1253, 1277-79 (1994); Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 *SEATTLE U. L. REV.* 97, 98 (1998) ("[A]ny representation involving multiple parties causes problems for the typical account of representation and . . . marital representation brings its own peculiar difficulties because of the intimacy and dependency that characterize marriage.").

7. See, e.g., Pearce, *supra* note 6 (advocating family representation); Cahn & Tuttle, *supra* note 6 (same); Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *FORDHAM L. REV.* 1453 (1994) (concluding that family representation poses risks to the weaker family members and attorneys); Geoffrey C.

discussed the proper role of parents and attorneys in cases involving children.⁸ To align practice standards with the reality of families, some commentators have proposed a communal “family” representation model, in which an attorney views the family as a whole, rather than any individual member, as the client, and accordingly construes conflicts strictly to permit expanded joint representation.⁹

I argue for an application of the family representation model to parents and children in education cases.¹⁰ In doing so, I seek to expand the discussion of family representation and the relationship between attorneys, children, and their parents. I aim to do so in three ways. First, the scholars outlining family representation models have thus far considered only adult family members, either spouses or parents and their adult children. This Article seeks to fill in the gap by discussing the unique issues raised in the co-representation of parents and minor children. And although commentators have identified problems in the dual representation of parents and children in the abuse/neglect and delinquency realms,¹¹ little attention has been paid to this issue in the education law context.¹²

Second, looking at conflicts in the education realm—where the parties’ interests are complex and separate yet intertwined—can bring a richer understanding of the determination of conflicts and the nature of representation in other types of cases involving parents and children. Although I focus on the education context here, the family representation model is not so limited—rather, where there is no absolute conflict between parents and children, as in abuse and neglect matters for instance, families could benefit from more communal representation. A family representation model could thus be fruitfully applied to other cases, such as those in which a parent and child seek state benefits or bring an action in tort or contract to recover against a third party.

Third, from a normative perspective, an expanded representation model brings

Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 3 (1994) (opposing family representation).

8. See, e.g., Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836 (2006); Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

9. For a further elaboration of these models, see discussion *infra* at pp. 342-44. Family representation proposals have largely been in the estate-planning context. See, e.g., Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Pearce, *supra* note 6. Scholars have also noted the increasing use of collaborative lawyering in family law and other matters involving children. See, e.g., Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1288 (2008); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 317-20 (2005) (arguing for the utility of collaborative lawyering in delinquency cases).

10. I use the term education cases to mean IDEIA cases, which form a large part of education litigation.

11. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1318 (1996) [hereinafter *Fordham Recommendations*]; Henning, *supra* note 8.

12. The few commentators who have addressed potential conflicts between parents and children in education cases did so pre-*Winkelman*. See Kim Brooks Tandy & Teresa Heffernan, *Representing Children with Disabilities: Legal and Ethical Considerations*, 6 NEV. L.J. 1396 (2006); Nancy J. Moore, *Conflicts of Interest in the Representation of Children*, 64 FORDHAM L. REV. 1819 (1996).

significant real-world benefits: It recognizes the reality of family structures, increases the child's participation in educational advocacy, which is often lacking under the current system, and brings attorney practice into accord with ethical standards. Rethinking the attorney's role as representing the family while respecting the voices of each member thus harmonizes the competing principles of individual autonomy and family unity underlying the representation of parents and children.

This Article is divided into three Parts. Part I discusses the presumption that parental interests are aligned with those of their children. It illustrates how this presumption underlies the IDEIA statutory framework and how the recent *Winkelman* decision further strengthened parental rights in the education realm. It also discusses how attorneys' adherence to the presumption can obscure the child's voice. Part II demonstrates that there are sometimes conflicts between parents and children in education cases, but that most of these go unrecognized. Part III proposes an expanded array of representation options for families. It begins by outlining the individualistic framework of the *Model Rules* and exploring the weaknesses of this framework. It then describes family representation and argues that this model can be effectively applied to the parent and child dyad in education cases, as it reflects the intertwined nature of their entitlements, engages both parties in the process, reduces conflict, and is pragmatic and economical. Allowing families greater choice in how their representation will be structured—individually or communally—will best ensure that attorneys achieve appropriate educational placements for eligible children while also meeting their ethical obligations.

I. PRESUMPTION THAT THE INTERESTS OF PARENTS AND CHILDREN ARE ALIGNED IN EDUCATION CASES

Parents have an unparalleled interest in and ability to care for their children. Indeed, the premise that “natural bonds of affection lead [them] to act in the best interests of their children” governs our legal system.¹³ Accordingly, parents have tremendous discretion to choose how their children will be raised.¹⁴ The presumption is particularly strong in the case of education; the Supreme Court has repeatedly affirmed parents' fundamental right to “control the education of

13. *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also Troxel v. Granville*, 530 U.S. 57, 65, 69 (2000) (recognizing a parent's right to raise her children as she sees fit as “perhaps the oldest of the fundamental liberty interests recognized” in our country and citing the “traditional presumption that a fit parent will act in the best interest of his or her child”).

14. *See Troxel*, 530 U.S. at 72-73 (affirming as unconstitutional an order granting grandparents visitation with grandchildren over the mother's objection because there was no allegation that the parent was unfit and thus the decision about visitation was hers to make).

their own.”¹⁵

The presumption forms the dominant narrative of parents and children in part because it is correct much of the time—children, especially younger ones, depend upon their adult family members for “identity, affection, and belonging,”¹⁶ in addition to the more practical realities of physical care and, to a large degree, access to education.¹⁷ In return, parents usually know the most about what their children like and need and offer valuable advice and assistance in many different situations, including involvement with the legal system.¹⁸ Yet the presumption is also based upon the societal construct of even older adolescents as incapable of having a voice and children’s historical treatment as the property of their parents.¹⁹ Forty years ago in his dissenting opinion in *Wisconsin v. Yoder*, Justice Douglas pointed out that a parent’s views may conflict with a youth’s own wishes and called for a greater consideration of children’s views and interests in education issues.²⁰ The strength of the presumption, however, leads many attorneys and courts to continue to assume that parents’ and children’s interests are aligned without hearing from the children themselves or counsel representing them. This Part outlines the doctrinal underpinnings of that presumption and how these underpinnings influence attorney practice in education cases to overlook both children’s voices and potential conflicts.

15. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that parents may choose to have their children taught a language in addition to English in school); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that parents have the right to select their children’s school); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”). Of course, this presumption assumes that both parents agree on what is in the child’s interest. There are numerous issues raised when the parents disagree about the child’s educational plan. This Article will assume, however, that if there are two parents with legal custody, they agree on the educational plan for their child.

16. Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 625 (2008).

17. This dependence may be heightened for some of the children who are eligible for IDEIA protections, as they are by definition disabled, and may be more dependent upon adults in their life than typically developing youth.

18. See Henning, *supra* note 8, at 839–41 (discussing, in the delinquency context, the dependence of children upon their parents for guidance and effective decision-making throughout a case and the therapeutic and rehabilitative value of parental involvement); see also Christine Gottlieb, *Children’s Attorneys’ Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1263 (2006) (“[I]f you want to figure out what is best for a child, ask her parents.”).

19. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

20. *Yoder*, 406 U.S. at 244 (Douglas, J., dissenting) (“On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views.”).

A. ALIGNED INTERESTS UNDER THE IDEIA

1. PARENT AS CHILD'S NATURAL ADVOCATE UNDER THE STATUTORY SCHEME

The special education statutory scheme reflects this general presumption that a parent's and her child's interests are aligned.²¹ Thus, although the IDEIA grants children with disabilities²² aged three to twenty-one the right to a "free appropriate public education" (FAPE),²³ it guarantees this right by according procedural protections to both parents and children.²⁴ The system works as follows: Once a child is deemed eligible by an evaluation designating her a child with a disability in one of the covered categories,²⁵ the family and school collaboratively develop an educational plan. The entitlement to an appropriate education is personal—each eligible child receives an individualized education plan (IEP) and his educational instruction and related services should be "specially designed . . . to meet [his] unique needs . . ." ²⁶ Thus, the concept of FAPE is very flexible. An educational placement that might work for one child with a learning disability might not work for another, depending upon the child's abilities, needs, and progress. The IEP must be updated each year and is developed by a team of people, including the child's teachers, the parent, a school district representative, and, whenever "appropriate," the child herself.²⁷ The IDEIA also requires that children with disabilities be educated with their non-disabled peers in the Least Restrictive Environment (LRE) possible.²⁸ Thus, a child should be mainstreamed as much as possible in a classroom or school with typically developing children.

Since parental involvement is seen as the primary mechanism for protecting children's educational entitlement, most of the expressly enumerated procedural rights, such as notice of a proposed change in educational placement, accrue primarily to the parents.²⁹ School districts are responsible for encouraging or

21. See Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 84-85 (2000). Recent amendments to federal regulations further strengthen parental rights over special education by allowing parents to refuse consent for services for their children under certain situations. See 34 C.F.R. § 300.300(b)(4) (2008).

22. See 20 U.S.C. § 1412(a)(1)(A) (2006) (defining a child as "between ages of 3 and 21").

23. *Id.* §§ 1400(d)(1)(A)–(B).

24. See *id.* § 1415(a).

25. See *id.* §§ 1401(3)(A)(i)–(ii) (defining a child with a disability as a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . [who] needs special education and related services").

26. *Id.* § 1401(29); see also *id.* § 1401(26)(A) (explaining that "'related services' means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child. . .").

27. *Id.* § 1414(a)(2)(B)(ii), (d)(1)(B)(i)–(vii).

28. *Id.* § 1412(a)(5).

29. *Id.* § 1415(b)(3). Other procedural protections include the right to: (1) participate in meetings about the child's educational placement and examine records, 34 C.F.R. § 300.501 (2010); (2) object to evaluations,

mandating parental participation in numerous ways, and interference with a parent's participation rises to the level of a substantive violation.³⁰ The statute does not anticipate any conflict between parents and children, but it does require appointment of a surrogate parent to protect the child's rights in extreme events of parental failure, such as where the state is unable to locate a child's parents or where the child is a ward of the state.³¹

Special education is a massive public program—having a total budget of approximately 25.4 billion dollars and serving 6.6 million children.³² Although most children receive services at local public schools, some children with more severe needs are educated in private schools at public expense. A high proportion of special education litigation centers on these private school placements,³³ probably because these schools are very expensive, with annual tuition ranging from \$39,000 to \$80,000 for day schools and \$125,000 to over \$200,000 for residential schools.³⁴

Most IDEIA matters are resolved informally by the family and the school at the school level. When the process does break down, however, any party can request a due process hearing.³⁵ The hearing may be appealed to federal court.³⁶ There is a growing bar of attorneys practicing in this field—one professional association has thousands of members.³⁷ Although most attorneys get involved at the hearing or court stage, the high financial stakes at issue mean that an increasing number of families retain attorneys to participate in the IEP development process and informal pre-hearing advocacy.³⁸

recommendations, and placements, 20 U.S.C. § 1415(f)(1)(A); 34 C.F.R. §§ 300.507, 300.512; and (3) be awarded attorney's fees as a prevailing party (defined on the plaintiff's side not as the child but as the parent of a child with a disability), 20 U.S.C. § 1415(i)(3)(B).

30. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). They must, for instance, ensure that: (1) parents' concerns for enhancing the education of their child are considered by the IEP team, *id.* § 1414(d)(3)(A)(ii); (2) parents have an opportunity to examine all pertinent records, *id.* § 1415(b)(1); and (3) parents unable to attend IEP meetings can participate via telephone conference calls, 34 C.F.R. § 300.322.

31. 20 U.S.C. § 1412(a)(6); 34 C.F.R. § 300.519.

32. See *Digest of Education Statistics: 2009*, NAT'L CTR. FOR EDUC. STAT., <http://nces.ed.gov/programs/digest/d09> (population served for 2007-08); *Individuals with Disabilities Education Act—Funding Distribution*, FED. EDUC. BUDGET PROJECT, <http://febproject.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution> (budget figures for fiscal year 2008).

33. For instance, the last two IDEIA cases decided by the Supreme Court, *Winkelman* and *Forest Grove School District*, involved the parent's attempt to gain reimbursement for a child's private school placement. See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

34. Matt Carroll, *Low Pay an Issue at Special-Ed Schools*, BOSTON GLOBE, Sept. 10, 2006, http://www.boston.com/news/education/k_12/articles/2006/09/10/low_pay_an_issue_at_special_ed_schools/.

35. 20 U.S.C. § 1415(b)(6).

36. *Id.* § 1415(i)(2).

37. See COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, 2009–2010 ANNUAL REPORT (2010), available at www.copaa.org/pdf/2009-2010%20annual%20report4-12-10.pdf (COPAA has 1200 members).

38. For instance, numerous parents who seek reimbursement for private school placements for their children retain an education attorney to submit their reimbursement request each year and deal with any administrative hearings, even though the case will likely never go to court. Recognizing the importance of the right educational

2. INTERTWINED PARENT AND CHILD RIGHTS UNDER *WINKELMAN v. PARMA*

Until recently, a parent was seen primarily as a vehicle to act on her child's behalf and secure the child an appropriate education, rather than as a real party in interest under the statute.³⁹ Accordingly, most courts held that parents did not have independent substantive rights under the IDEIA, but rather had only procedural rights to enforce their children's entitlement to a FAPE.⁴⁰ However, in 2007, the Supreme Court in *Winkelman v. Parma* held that a parent has "independent enforceable rights . . . encompass[ing] the entitlement to a free appropriate public education for [his] child."⁴¹ The Court thus held that the Winkelmans could proceed *pro se* in federal court to pursue their own right to appropriate educational placement for their son, Jacob, who has autism spectrum disorder.⁴²

In reaching this conclusion, the Court relied both on a plain reading of the statutory language—including a statement of purpose ensuring that "the rights of

placement to a child's other legal interests, some public interest attorneys representing children in other matters, such as delinquency cases, also engage in informal IDEIA advocacy on behalf of their clients.

39. Attorneys disagree about whether children have standing to independently pursue their claims under the statute; some believe that children can pursue claims only through their parents. Compare Tandy & Heffernan, *supra* note 12, at 1396-97 ("[A]ttorneys can effectively provide legal representation to the child as the client, rather than the parent, in IDEA cases . . ."), with SUPERIOR COURT OF THE DIST. OF COLUMBIA FAMILY COURT, ATTORNEY PRACTICE STANDARDS FOR SPECIAL EDUCATION PANEL ATTORNEYS (2003), available at <http://www.dccourts.gov/dccourts/docs/09-03Attachment.pdf> [hereinafter D.C. PRACTICE STANDARDS] (stating that "the right to make educational decisions on behalf of a child are rights of the parent, and thus the parent is the client of the Special Education Attorney" but conceding that attorneys can represent children and parents together if there is no conflict). However, courts have repeatedly articulated children's independent need for legal counsel/GAL under the IDEIA, thus clarifying that either the child or his parents have a claim in the case. See, e.g., *Muse' B. ex rel. Hanna B. v. Upper Darby Sch. Dist.*, No. 06-CV-00343, 2007 WL 2973709, at *1 n.1 (E.D. Pa. Feb. 14, 2007), *aff'd* 282 F. App'x 986 (3d Cir. 2008); see also *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998), *overruled on other grounds by Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (holding that a child was an interested party with a claim to bring).

40. See, e.g., *Mosely v. Bd. of Educ. of Chi.*, 434 F.3d 527 (7th Cir. 2006); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998). But see *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003).

41. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007) (abrogating *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005)). The Court reversed the Sixth Circuit, which had prohibited the Winkelmans from proceeding *pro se*, alleging a lack of FAPE for their child. The Circuit Court reasoned that the parents could not proceed *pro se*, as they were litigating FAPE only on their son's behalf, and were barred from proceeding *pro se* on behalf of their son by the longstanding common law rule against representing another person *pro se*. *Winkelman v. Parma City Sch. Dist.*, 150 F. App'x 406, 406-07 (6th Cir. 2005) (citing *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005)). The Supreme Court reversed and held that parents have an independent enforceable right to FAPE, and thus the Winkelmans could proceed *pro se* on their own behalf. *Winkelman*, 550 U.S. at 535. The dissent by Justice Scalia (joined by Justice Thomas) posits the traditional vision of the IDEIA, wherein the parents can pursue *pro se* claims of violations of their own due process rights, but not when they pursue claims of an inappropriate FAPE because they have no independent right to FAPE. *Id.* at 535-36 (Scalia, J., concurring in part and dissenting in part).

42. Although it is arguable that *Winkelman* was wrongly decided, that discussion is beyond the scope of this Article. Instead, my aim here is to address what representational model best fits the current state of education doctrine, which includes the Court's decision that both parents and children have substantive rights under the IDEIA.

children with disabilities and parents of such children are protected”⁴³—and on the historical fundamental right of parents to raise their children as they see fit.⁴⁴ This holding reflects a conventional view of the family, wherein the parents always have their child’s best interests at heart: “Without question a parent of a child with a disability has a particular and personal interest” in ensuring the appropriate education of his child so that the child can become an independent and fulfilled adult.⁴⁵ The Court articulated the view that parents have long held these same rights over their children’s education, stating that it was not granting a new “distinct class of people” independent rights under the IDEA, but rather was merely imposing the same requirements on the states to which they had always been subject.⁴⁶ Thus, the rights of parents and children have always been and remain “intertwined.”⁴⁷ The Court declined to recognize any potential conflict between parents and children and did not address whether a parent can proceed *pro se* on behalf of her child, leaving ambiguous the degree to which the two are independent parties for purposes of representation.⁴⁸ Justice Scalia’s dissent criticized this view of “communal ‘family’ rights.”⁴⁹

Winkelman can be read either as strengthening the alignment of parent-child interests or as clarifying a child’s independent rights, and courts have interpreted it both ways. In one sense, the presumption of parental control over her child is even stronger—now the parent has claims of her own, not only on the child’s behalf. Following this view, some courts have stated that the parent’s case encompasses the child’s as their claims are “identical,” “intertwined,” or “coterminous,”⁵⁰ or even that parents alone can sue on their child’s and their own behalf.⁵¹ Thus, their interests are assumed to be aligned until proven divergent.⁵²

43. 20 U.S.C. § 1400(d)(1)(B).

44. *Winkelman*, 550 U.S. at 528-29 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

45. *Id.* at 529.

46. *Id.* at 534.

47. *Id.* at 531-34.

48. *See id.* at 535. The decision has been criticized, however, for implicitly undermining the traditional rule against one party proceeding *pro se* on another party’s behalf. *See Logan Steiner, Playing Lawyers: The Implications of Endowing Parents with Substantive Rights Under the IDEA in Winkelman v. Parma City School District*, 31 HARV. J.L. & PUB. POL’Y 1169 (2008).

49. *Winkelman*, 550 U.S. at 541 (Scalia, J., concurring in part and dissenting in part).

50. *See Blanchard v. Morton Sch. Dist.*, 260 F. App’x 992, 993 (9th Cir. 2007) (finding it not necessary to determine whether the child was party to the action because the parents’ claims for recovery were “identical” to the child’s); *see also Alexandra R. ex rel. Burke v. Brookline Sch. Dist.*, No. 06-CV-215, 2007 WL 2669717, at *1 (D.N.H. Sept. 6, 2007) (finding that “the rights and interests of parents and their children under the IDEA are coextensive” and thus allowing parents who had previously sued on behalf of their child to sue on their own behalf with no counsel for the child).

51. *See J.L. v. Ambridge Area Sch. Dist.*, No. 06-CV-1652, 2008 WL 2798306, at *9 (W.D. Pa. July 18, 2008); *Russell v. Dep’t of Educ.*, No. 03-00654, 2007 WL 2915616, at *3 (D. Haw. Oct. 2, 2007). Several courts have even expanded the *Winkelman* holding to allow parents to proceed on claims under the ADA and Section 504 of the Rehabilitation Act. *See, e.g., Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007). *But see D.A. ex rel. K.A. v. Pleasantville Sch. Dist.*, No. 07-4341, 2008 WL 2684239, at *7 (D.N.J. June 30, 2008)

In accordance with this presumption, few courts have questioned whether children, as parties with real interests under the statute, should be represented by separate counsel and have instead assumed that they were represented by parents and/or parents' counsel.⁵³

On the other hand, by highlighting parents' independent rights, the *Winkelman* decision has also led some courts to clarify that children have claims independent of their parents and require their own attorney to pursue those claims, thus calling into question the presumption of aligned interests and representation of children's claims by their parents.⁵⁴ Under the IDEIA, therefore, children with disabilities actually have *more* rights to direct their education than other children because they are entitled to receive an appropriate education in the least restrictive environment and to have decisions made for them only on the basis of their abilities and needs under the IDEIA. As one court put it:

I am mindful of a parent's fundamental constitutional rights to make decisions on the care . . . and education of her child This case, however, does not involve an infringement on such basic constitutional rights. Rather, it is a statutory action under the IDEIA [The child's] mother retains her right to make decisions on such basic questions as how [he] should be raised and the type of schooling he should receive, e.g. religious, private, or public.⁵⁵

Thus a parent who could send a typically developing child to military school, or dictate her high school courses, does not have the same freedom to direct the education of a child with a disability due to the state's statutory mandate to identify and serve these children under IDEIA.

Nonetheless, since a parent may proceed *pro se* but a child generally may not,⁵⁶ practically all education cases will be resolved by the parent's claims unless the court appoints an attorney for the child or directs the parent to hire one. And most still do not.⁵⁷ For instance, one court stated that a child "may seek to

("This Court respectfully disagrees with the extension of *Winkelman* into the context of the ADA and Rehabilitation Act.")

52. See, e.g., D.K. *ex rel.* Kumetz-Coleman v. Huntington Beach Union High Sch. Dist., 554 F.3d 780, 780 (9th Cir. 2009) (declining to decide whether a parent can represent his child *pro se* as the rights of parents and child under the IDEIA are "coterminous" and such a ruling would be premature "[u]nless and until the rights or interests of the parents diverge from those of the child").

53. *But see* Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 125 (stating that the district court should have looked to appointing an attorney for the child in that case rather than focusing only on the parents' need for an attorney because the child is an interested party with a claim to bring).

54. B.D.S. v. Southold Union Free Sch. Dist., No. CV-08-1319, 2009 WL 1875942, at *14 (E.D.N.Y. June 24, 2009).

55. Muse' B. *ex rel.* Hanna B. v. Upper Darby Sch. Dist., No. 06-CV-00343, 2007 WL 2973709, at *4 (E.D. Pa. Feb. 14, 2007), *aff'd* 282 F. App'x 986 (3d Cir. 2008) (appointing separate counsel/GAL for the child).

56. FED. R. CIV. P. 17.

57. See, e.g., B.D.S., 2009 WL 1875942, at *14 (ordering plaintiff mother to obtain counsel or move for appointment of counsel for the plaintiff child or the child's claims would be dismissed without prejudice). There, the court stated that the mother could proceed with her own claims even if she did not obtain counsel for

rejoin the action, should he obtain representation of an attorney in the future.”⁵⁸ Yet the court did not appoint counsel, so the *pro se* parent alone proceeded on her claims. Similarly, another district court declined to consider the school district’s motion to appoint independent counsel/GAL for the child in an IDEIA action due to a conflict with the mother because the mother was “plainly suing” to enforce her own right to the child’s FAPE, which was coextensive with the child’s right.⁵⁹ The child was thus not a plaintiff in the case and the mother was not required to obtain counsel for him.⁶⁰ Accordingly, the court amended the caption to remove the child. In neither case did the court appear to ascertain the child’s views before these rulings. Nor have the children subsequently brought claims on their own behalf, and they are unlikely to do so with no access to counsel.

These practices render the separation of the child’s and parent’s claims largely semantic—the parent’s claims are the only ones to go forward, and thus the child’s case is disposed of via the parent’s claims. They also demonstrate that, post-*Winkelman*, most courts continue to assume that children’s interests are aligned with those of their parents in education cases without ascertaining the children’s views or ensuring that they are represented by counsel (either jointly or individually). Thus, the presumption remains largely intact despite the Court’s recognition of a child’s and parent’s individual interests under the IDEIA.

B. ATTORNEY PRACTICE REFLECTING THE PRESUMPTION

Attorney perceptions and practice can influence whether an attorney-client relationship is formed—and thus who the client is—increasing the risk of conflict and/or rendering it unlikely that such a conflict will be uncovered.⁶¹ Neither a parent nor a child has an entitlement to an attorney in an IDEIA case, but there is a growing bar of attorneys working in this field.⁶² In this section, I will outline the

her child, and it is unclear whether the court would appoint counsel for the child *sua sponte*. *Id.*; see also *Lenker v. Gray*, No. 2:07-0274, 2008 WL 4613534, at *5-6 (N.D. Ind. Oct. 10, 2008) (dismissing the child’s claim but then holding that its denial of the motion to appoint counsel for the mother and child together did not adversely affect the child’s claim since the mother was proceeding *pro se* on mother’s claims).

58. *L.J. ex rel. N.N.J. v. Broward Cty. Sch. Bd.*, No 06-61282, 2007 WL 1695333, at *2 (S.D. Fla. June 8, 2007); see also *B.J.S. v. State Educ. Dep’t/Univ. of N.Y.*, No. 08-CV-513A(F), 2010 WL 502796, at *1 (W.D.N.Y. Feb. 9, 2010) (“[T]he court must consider appointment of counsel for [the child] in the absence of which the court would be required to dismiss [his] claims.”).

59. *B.J.S.*, 2010 WL 502796, at *3.

60. *Id.* Interestingly, the attorney for the mother in that case has expressed an intent to file an amended complaint, re-adding the child as a party, and will represent both mother and child in the action, because she does not want to risk a non-final deal as the family approaches settlement with the school district. Telephone Interview with Russell Engler, Attorney for the Sch. Dist. in *B.J.S.* (June 24, 2010).

61. Moore, *supra* note 12, at 1824-25.

62. See COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, *supra* note 37. After *Gault*, children have a constitutional right to attorney representation only in delinquency proceedings, but they are sometimes entitled by federal or state statutes to representation either by attorneys or lay people (as a GAL/CASA) in other proceedings, such as abuse and neglect, custody, and status offenses proceedings. See *In re Gault*, 387 U.S. 1 (1967); Child Abuse Prevention and Treatment and Adoption Reform, 42 U.S.C. §§ 5101-5116 (2006). Thus

usual attorney-client contexts in education cases and identify how the presumption may shape these relationships to obscure children's voices and parent-child conflicts, thereby putting attorneys at risk for violating ethical standards.⁶³

It is often difficult to discern the precise attorney-client relationship in education cases, as there is considerable confusion among both families and attorneys about who the attorney is actually representing.⁶⁴ Because most cases are initiated by a parent who privately retains counsel, the attorneys in these cases generally represent parents.⁶⁵ Nonetheless, other attorneys do represent children, whether they are court-appointed, public interest attorneys at non-profits, or private-sector attorneys paid for by parents.⁶⁶ Numerous others represent both children and parents, although, as outlined further below, duties to both parties may arise without an explicit agreement for joint representation.⁶⁷

many members of the children's bar, who represent children in abuse and neglect, custody, and delinquency cases, do not litigate IDEIA cases despite their recognition of the importance of education to these other proceedings. This, however, will hopefully change as experts and children's advocates increasingly recognize that effective representation for children in other proceedings entails knowing about and addressing a child's educational needs. *See, e.g.*, NATIONAL JUVENILE DEFENDER CENTER, PRINCIPLES IN PRACTICE: PROMOTING ACCOUNTABILITY, SAFETY AND FAIRNESS IN JUVENILE DELINQUENCY PROCEEDINGS 5-6, available at http://www.njdc.info/pdf/principles_in_practice.pdf (listing educational advocacy as one of ten core principles that should guide juvenile defenders because so many of their clients have educational needs and the "[l]ack of appropriate education and mental health services by schools and communities can be the underlying cause of the crime"); ABA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES III.F (2003) [hereinafter ABA CUSTODY STANDARDS], available at http://www.abanet.org/family/reports/standards_child_custody.pdf (stating that the attorney may need to address issues (including education issues), especially for a child with a disability).

63. This section draws in part on my experience representing children in abuse/neglect, delinquency, and special education cases and as a member of the Education and Juvenile Justice Bar Committees of the New York City Bar Association.

64. At a recent presentation of this paper at the University of Oregon School of Law, a special education practitioner told me that she and her colleagues were never quite sure whether they represented the parents or the children or both. These comments echo my conversations with other education law attorneys. Identification of the client is also a frequent problem in other types of cases involving the representation of family members. *See Moore, supra* note 12, at 1824.

65. *See, e.g.*, *Ashland Sch. Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208, 1211 n.1 (D. Or. 2008) ("[T]he attorney in an IDEIA action usually represents the parents—whose objectives are not always congruent with the views articulated by the child."). A major organization of special education attorneys calls themselves the Council of *Parent Attorneys and Advocates* (COPAA) (emphasis added). Attorneys may also be court-appointed to represent parents.

66. In addition to many public sector attorney organizations, several private attorneys advertise themselves as representing children and youth. *See, e.g.*, Jennifer Laviano, CONN. SPECIAL EDUC. LAW., <http://www.connecticutspecialeducationlawyer.com> (last visited Feb. 22, 2011). In these cases, the parent's role often creates confusion—is the parent a mere liaison between the attorney and the child client, or does she direct the case on her child's behalf? Commentators have pointed out similar confusion in client identity and the roles of various parties in other cases involving family members, particularly elderly family members. *See, e.g.*, Collett, *supra* note 7, at 1461.

67. *See, e.g.*, *Muse' B. ex rel. Hanna B. v. Upper Darby Sch. Dist.*, No. 06-CV-00343, 2007 WL 2973709, at *1-3 (E.D. Pa. Feb. 14, 2007), *aff'd* 282 F. App'x 986 (3d Cir. 2008) (describing how several sets of attorneys had represented both the child and his mother pro bono); D.C. PRACTICE STANDARDS, *supra* note 39; *see also* GREY & GREY, <http://www.greyslaw.com/website/html/home.html> (last visited Feb. 22, 2011); CONNOLLY, JACOBSON & JOHN, <http://www.cjdedlaw.com> (last visited Feb. 22, 2011).

1. ATTORNEYS REPRESENTING PARENTS

Many attorneys representing parents, and paid by parents, interpret parents' rights to direct a child's education to mean that they should not consult with even older children about their education placement.⁶⁸ Some of them are also not well versed in other legal issues related to children; for instance, they are unfamiliar with practice standards for the representation of children that recommend consulting with even non-client children.⁶⁹ As a result, these attorneys do not interview or regularly meet with children.⁷⁰

This results both in a failure to gain valuable information about the case and, often, worse outcomes—children who are not consulted about their educational placement will be less likely to succeed in it.⁷¹ Attorneys who do not regularly meet with the children involved will also be far less likely to uncover important differences in the parties' interests. Moreover, although these attorneys only represent parents, they likely have ethical obligations even to non-client children—the *Model Rules* and practice standards for children and adults in family law cases posit a potential or actual duty to prevent or correct action adverse to the interests of non-client minors.⁷² Accordingly, attorneys should not just blindly follow the presumption that the child's and parent's interests are aligned. Rather, they should attempt to uncover significant differences in interests between parents and child, while meeting their duties to their parent clients and seeking appointment of independent counsel for the child if necessary.

2. ATTORNEYS REPRESENTING CHILDREN

There is a relatively small group of attorneys solely representing children in these matters. They usually do so as court-appointed GAL/counsel, often in conjunction with another case, such as an abuse/neglect or delinquency case.⁷³

68. Henning, *supra* note 9, at 294 (noting that some attorneys representing children in delinquency cases may allow parents to direct the case due to a similar philosophy). This is not to say that public interest education attorneys representing children or families do not also have conflicting interests. They may be motivated by different factors that impinge upon best communicating with clients and identifying conflicts, such as larger ideological goals that are at odds with their actual clients' real interests. See Moore, *supra* note 12, at 1843.

69. See, e.g., D.C. PRACTICE STANDARDS, *supra* note 39, at D-1 (mandating that a lawyer for a parent in a special education case "consult with all relevant parties, including the child and/or the child's representative").

70. My own practice experience and reports from parents and practitioners indicate that many private sector IDEIA attorneys do not regularly meet with the children involved. This is so even where the special needs children are verbal. Of course, some parents' attorneys do regularly meet with children, and some agencies representing parents will not do so unless there is an alignment of the parent and child's interests. I seek here only to outline some trends among some of the bar that impact families in education cases.

71. See *infra* note 259 and accompanying text.

72. See *infra* note 187 and accompanying text.

73. Children's advocates, however, have called for more children's attorneys to represent children in special education proceedings, whether independently or ancillary to other proceedings. *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 Nev. L.J. 592, 597 (2006) [hereinafter *UNLV Recommendations*].

An even smaller number are paid by parents but see themselves as representing children. Many children's attorneys, of course, adequately represent the child's interests.⁷⁴ The presumption, however, does lead some of these lawyers to ignore the child's views and to accord parents a greater role in the attorney-client relationship than permitted under the *Model Rules*. Professor Kristin Henning has termed this "parent-directed advocacy."⁷⁵ For instance, an attorney may reveal confidential information about the case to a parent or allow her to direct the representation.⁷⁶ This may sometimes be the result of conflicting guidance about an attorney's duties.⁷⁷ For instance, the court in *Muse' B. ex rel. Hanna B. v. Upper Darby School District* directed the child's "guardian attorney"—appointed after the court found a conflict between the mother and the child which harmed the child's interests—to keep the mother informed and consult with her as to every aspect of the case, although this could violate the duty of confidentiality to the child client.⁷⁸

74. If the child is represented and the parent proceeds *pro se*, attorneys should proceed with caution. The unrepresented party may not understand the attorney's role and, in the case of a parent, is likely to rely on the attorney for advice or believe the attorney is representing the parent's interests. See Cahn & Tuttle, *supra* note 6, at 101 n.13 (pointing out this danger). There is also a risk that some children's attorneys, particularly in the abuse/neglect context, will not adequately consider the parent's views, instead assuming that once a conflict has arisen in one arena, the parent is not capable of acting in the child's interests in any capacity. This view not only disregards the parent's rights in the education sphere but also may harm the child's need or desire for input from one of the most important people in her life.

75. See Henning, *supra* note 9, at 294-303 (noting this practice and its potential harms in the delinquency context); see also Moore, *supra* note 12, at 1844-48 (pointing this out as a risk in all cases wherein children have claims). The risk of a conflict is increased when a parent pays for her child's attorney, as the parent may feel more entitled to direct the representation and the attorney feels pressure that if she disagrees with the parent, she may be fired. See Tandy & Heffernan, *supra* note 12, at 1402-03. Even *pro bono* counsel for the child or family may be subject to the whims of the parent. See *Muse' B. ex rel. Hanna B. v. Upper Darby Sch. Dist.*, No. 06-CV-00343, 2007 WL 2973709, at *1-3 (E.D. Pa. Feb. 14, 2007), *aff'd* 282 F. App'x 986 (3d Cir. 2008) (noting that the mother had discharged two *pro bono* attorneys appointed to represent her and her son).

76. Even where the attorney does not believe that a parent has a right to direct his child's representation, the child himself may believe so and/or want the parent to do so. For a discussion of the ethical obligations of the child's attorney when the child wants to defer to her parents, see William A. Kell, *Ties That Bind? Children's Attorneys, Children's Agency and the Dilemma of Parental Affiliation*, 29 LOY. U. CHI. L.J. 353 (1998) (concluding that attorneys should respect children's agency where the child is deciding to defer to her parents or act out of affiliation with them, if the attorney ascertains that the child is not impaired nor is being coerced by her parent).

77. Courts' conception of the role of appointed GAL/counsel for children in IDEIA and other cases further compounds the confusion about the role of an attorney for a child. Although the *Model Rules* and practice standards appear to posit the GAL and lawyer/advocate as two separate roles, in practice, children in education cases are usually appointed a GAL/counsel serving a hybrid role. See *infra* notes 171-202 and accompanying text; see also, e.g., *Muse' B.*, 2007 WL 2973709, at *1-3 (identifying a conflict with the mother and appointing an "attorney guardian" for the child "to represent [the child's] interests" and also litigate "three potential issues concerning the implementation of the consent decree" for the child); *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 154 (D. Mass. 2009) (appointing attorney to act both as child's surrogate parent and as his attorney for IDEIA claims). Experts and some courts have repeatedly noted the inherent conflict in one attorney playing both of these roles. See *infra* note 194.

78. *Muse' B.*, 2007 WL 2973709, at *4-5. Parents are not granted an exception to confidentiality between an attorney and a child client. See, e.g., N.C. State Bar, 98 Formal Op. 18 (1999).

The presumption may be so strong that the lawyer does not consult with her own client, the child, assuming instead that only the parents can inform her about the case.⁷⁹ For instance, in one of the rare cases where a court did recognize a conflict between the mother and child in an IDEIA case and appointed the child a separate GAL/counsel, the attorney apparently did not interview her third-grade child client, although she “had numerous discussions with” the mother and other parties about the case.⁸⁰ Thus, the attorney not only failed to recognize and appropriately deal with an already identified conflict, she was at risk of committing malpractice.

3. ATTORNEYS REPRESENTING BOTH PARENTS AND CHILDREN

A lawyer may end up representing both a parent and child without her or the parties explicitly engaging in joint representation—because of the presumption, many attorneys who represent parents believe that they are also implicitly attorneys for the child.⁸¹ Accordingly, many special education attorneys who are initially retained to represent parents purport to be “child advocates” and advertise themselves as advocates for children and youth with disabilities.⁸² They may have children co-sign retainers and/or tell the children themselves they are the children’s attorneys or are working for them.⁸³ (Similarly, some attorneys purporting to represent students characterize themselves as advocates for the

79. Patricia M. Batt, *The Family Unit As Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 323 (1992) (noting the same dynamic of relying on other family members for information in the representation of elder clients).

80. Supplementary Brief of Appellant at 5-6, *Muse’ B. ex rel. Hanna B. v. Upper Darby Sch. Dist.*, 293 F. App’x 133 (3d Cir. 2008) (No. 07-4111), 2008 WL 4005082, at *5-6 (outlining in detail the actions of the GAL for the child, totaling sixty hours, and including discussions with the mother and the child’s teachers, an observation of the child in class, and consultations with the three sets of attorneys who had previously represented the child and his mother).

81. In a special education study, one parents’ attorney characterized himself and his fellow parents’ attorneys “as advocates for the child.” EDWARD FEINBERG & JONATHAN BEYER, *THE ROLE OF ATTORNEYS IN SPECIAL EDUCATION MEDIATION, A BRIEFING PAPER FOR THE CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION* (2000), available at www.directionservice.org/cadre/pdf/The%20Role%20of%20Attorneys%20in%20Special%20Education%20Mediation.pdf.

82. One non-profit primarily represents parents in education cases (albeit only when there is no conflict of interest between parent and child), but is called Advocates for *Children* (emphasis added). As a result, many young people believe, reasonably, that the organization represents them. In 1998, a special education advocacy organization representing parents, Legal Services for Children, changed its name to Partnership for Children to remedy exactly this confusion.

83. For instance, an attorney or parent may say to the child: “I’m here to help you get the best school.” This can give the false impression that the attorney’s main role is to advocate for the child’s wishes. Instead, the attorney could say something like: “I’m here to help your parents get the best school to meet your needs. We are all going to work together, but if you and your parent disagree about what educational placement is best for you, I will be working for your parent to try to get what she thinks is best for you.”

entire family.⁸⁴) This leads to confusion among the parties as both the parent and child may reasonably believe that they are the clients, possibly giving rise to duties by the attorney to both parties or even joint representation.⁸⁵ Even courts appointing *pro bono* counsel may appoint one attorney for both parent and child, without ensuring that the standards for joint representation are met.⁸⁶

Because of the presumption, many of these attorneys will not anticipate divergent legal interests between a parent and child. That is, their belief that parents always act in their children's interests can blind them to potential conflicts.⁸⁷ Compounding this dynamic is the inevitable analysis of the division of power and rights between parent and child that accompanies any determination of a conflict between them.⁸⁸ For instance, an attorney who believes that parents are entitled to decide their child's school placement, including sending him to a restrictive residential school, and, moreover, believes that the child's opposition to the school is merely adolescent stubbornness, is less likely to identify a conflict or recognize that such a conflict could impair the representation. This is compounded by the fact that some of these attorneys, as in the contexts discussed above, do not meet with the children. Finally, the attorney's desire to maintain family harmony may also make her loathe to dredge up conflicts.⁸⁹

These practices both obscure the child's voice and potential conflicts and, in

84. See, e.g., ABA, CAREER PATHS IN CHILD ADVOCACY 11, available at <http://new.abanet.org/child/PublicDocuments/pathprofile.pdf> (attorney notes the challenge of "working with a family unit instead of only one client").

85. Client expectations and perceptions may give rise to duties to a third party non-client and can influence who the actual client(s) are. See Moore, *supra* note 12, at 1824-25, 1843; State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-140 (1992) (ruling that the child was the client in a medical malpractice case for harm to the child, even though the mother retained and directed the attorney, and the attorney thought the mother was his client); BARBARA GLESNER FINES, ETHICAL ISSUES IN FAMILY REPRESENTATION 85 (2010) (discussing attorney duties of confidentiality to people who would not ordinarily be considered clients based upon the circumstances of the communication).

86. See, e.g., *Montclair Bd. of Educ. v. M.W.D.*, No. 05-3516, 2007 WL 1852342, at *2 (D.N.J. June 26, 2007) (allowing the mother to submit application for *pro bono* counsel "on behalf of herself and her son").

87. Some commentators go even further and argue that the presumption entitles parents to direct the representation of the child in most situations, thus making a parent-child conflict basically impossible.

88. See Moore, *supra* note 12, at 1856 (noting that questions of conflicts in the representation of children are integrally tied to issues of the parents' and children's substantive rights, including the rights of parents to direct their children's representation); see also Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*, 22 SEATTLE U. L. REV. 31, 34 (1998) (noting that the decision about whether to jointly represent spouses implicitly reflects the law's view of their relationship and what constitutes a family). A theory of a child's interest also may influence who one believes is an appropriate representative for a child. Rachel F. Moran, *Reflections on the Enigma of Indeterminacy in Child-Advocacy Cases in the Interest of Children: Advocacy, Law Reform, and Public Policy*, 74 CAL. L. REV. 603, 615 (1986) (discussing Professor Mnookin's "paradox of child advocacy"). Thus, if a lawyer believes that parents have strong rights to direct their children's education, she will believe that a parent is a sufficient and appropriate representative of the child's interests in almost all cases.

89. David H. Neely, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 HASTINGS L.J. 1359, 1964 n.20 (1982) (noting that this impulse against identifying

some cases, put the attorney at risk for ethical violations. Coupled with the failure of many courts to ascertain the child's views or appoint counsel (either independently or jointly) for children, the assumed congruence of parent and child interests becomes circular—because the parent speaks for the child and her position is based upon the child's perceived interests, frequently no one obtains a position or independent information from the child.⁹⁰ Thus, it is rarely revealed if the parent's and child's interests *are* in fact aligned.

II. THE PRESUMPTION BREAKS DOWN: CONFLICT BETWEEN PARENTS AND CHILDREN

In this Part, I further outline this central problem with the pervasiveness of the presumption—that it obscures the child's voice and concomitantly any risk of conflict between parents and children.⁹¹ Courts rarely appoint separate counsel for children unless a conflict is uncovered, even where they acknowledge the parties' separate claims.⁹² In recent decades, however, courts and ethics committees have recognized the high risk of conflict between parents and children in several areas such as abuse/neglect and custody cases and barred dual representation in those cases. Nonetheless, conflicts still go virtually unrecognized in the educational context—the presumption remains unquestioned. This is so although some parental actions, such as seeking placement in a residential school for noneducational reasons, are similarly restrictive to the mental health commitment of children where the parent is a movant—a situation flagged as a *per se* conflict in practice standards for children's attorneys.⁹³

A. RECOGNITION OF PARENT-CHILD CONFLICT IN OTHER AREAS

The general assumption that parents act in their children's best interests has given way to a recognition of the risk of parent-child conflict in several limited

conflict between parents and children "may be particularly strong when the legal problem has arisen outside the family, and both parent and child seem united against a common enemy").

90. Professor Catherine Ross has pointed out an analogous problem in the custody context where conflicts between parents and children would not be uncovered if children were not represented by counsel nor their views solicited in custody cases. See Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1583-84 (1996).

91. A similar presumption of aligned interests among married couples or other family members often obscures conflict in those areas as well. See, e.g., Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 *IND. L.J.* 567, 572 (1998).

92. Even where children are entitled to counsel against the state in delinquency proceedings in which the parent is not even a party, see *In re Gault*, 387 U.S. 1, 41 (1967), some commentators argue that a parent can direct his child's delinquency attorney because "the child's right to an attorney is possessed by the family collectively and not the child individually." Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 423, 447 n.102 (1993).

93. See, e.g., *Fordham Recommendations*, *supra* note 11, at 1318. Nonetheless, courts have overlooked conflicts in mental health commitment proceedings as well. See Ross, *supra* note 90, at 1581-83.

areas. The most obvious example is where a parent has been accused of abusing or neglecting her child. In such cases, the ethical guidelines recognize that a parent and child cannot be represented by the same attorney because the risk that their interests are not aligned is too great.⁹⁴ Courts and scholars have also noted the potential divergence between parents' and children's interests in custody and delinquency cases.⁹⁵ In the delinquency context, for instance, there is a risk that a parent may want her child placed out of the home for reasons not in the child's interests.⁹⁶ Courts, bar ethics committees, and scholars have also recognized conflicts between parents and children in a range of cases, including insurance,⁹⁷ trusts,⁹⁸ and medical malpractice.⁹⁹

A more general recognition of the potential for conflict between parents and children is the common law rule that a parent may not represent her child *pro se*.¹⁰⁰ This rule is based on multiple rationales, including the fact that some parents are ill-informed about how best to represent their children's interests, thereby compromising children's claims, and that minors should have some choice in who represents their interests—having a parent represent their legal interests, rather than an attorney, may not reflect a real choice.¹⁰¹ Other parties with similar or aligned interests are not permitted to litigate each other's claims, so parents should not be allowed to do so for their children. As the Second Circuit put it: "There is nothing in the guardian-minor relationship that suggests that the minor's interests would be furthered by representation by the non-attorney guardian."¹⁰² This rule has been applied in numerous IDEIA cases both before and after *Winkelman*,¹⁰³ and appears to contradict the general presumption that

94. Professor Martin Guggenheim argues, however, that children should not have independent lawyers until the presumption that parents are fit is overcome. Guggenheim, *supra* note 8, at 811-12.

95. See, e.g., *Fordham Recommendations*, *supra* note 11, at 1318-19.

96. Henning, *supra* note 8, at 858.

97. See generally Mot. to Appoint Guardian Ad Litem for Defendant Minors, *Nationwide Life Ins. Co. v. Von Hohn*, No. 609CV00087, 2009 WL 2411107 (W.D. Tex. June 12, 2009) (appointing GAL where mother sought to be sole beneficiary of a life insurance policy of her deceased husband and conflict existed between her and her two children, who were also potential beneficiaries); Mot. for Appointment of Guardian Ad Litem, *Tilley v. Barrs*, No. 508CV00434, 2009 WL 1418041 (M.D. Ga. Apr. 3, 2009).

98. See generally Joint Mot. for Appointment of Guardian Ad Litem, *Raoul v. Whitaker*, No. 4-08-CV-139, 2009 WL 1946423 (N.D. Ga. Feb. 6, 2009).

99. See generally State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-140 (1992).

100. See, e.g., *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990). The same desire to protect the child's legal interests prohibits parents from waiving a child's right to counsel. Moore, *supra* note 12, at 1831.

101. See Steiner, *supra* note 48, at 1176-80; see also *Devine v. Indian River Cnty. Sch. Bd.*, 121 F.3d 576, 582 (11th Cir. 1997) (stating that the rule exists "because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents"); *Elustra v. Mineo*, 595 F.3d 699, 706 (7th Cir. 2010) (noting that the rule is to protect the represented party against, *inter alia*, a waiver of his rights by the representative and that this rationale is particularly strong in the case of minors who cannot appear in court themselves).

102. *Cheung*, 906 F.2d at 61.

103. See, e.g., *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281 (2d Cir. 2005).

parents are the best voice for their children and that they can consequently direct litigation on behalf of the child.

B. RISK OF CONFLICT IN EDUCATION CASES

Although lower than in abuse/neglect or custody cases, there is a risk of conflict between the interests of parents and children in education cases. In fact, the risk in education cases is higher than in numerous other civil litigation contexts, because a free appropriate public education is a nuanced and individualized concept, which can change dramatically over the course of a child's education. Moreover, education impacts a child's life in a fashion that money damages and other financial benefits do not.¹⁰⁴ The presumption that parents act in their children's interests and the widespread practice of attorneys and courts not to ascertain the child's views, however, obscure many of these situations; as a result, few courts or hearing officers have addressed these issues.¹⁰⁵

Even when noting obstructionist action on the part of a parent, courts and hearing officers often decline to appoint counsel or a GAL for the child.¹⁰⁶ Yet an analysis of IDEIA case law reveals several situations where there is a conflict between the parents and children, even if the court does not expressly label it as such. The risk of conflict arises in three main areas: where a parent acts against a child's legal interests; where the parent and child disagree over educational services and placements; or where a parent is unwilling to adequately advocate for her child's education under the IDEIA, as she has been entrusted to do under the statutory scheme.¹⁰⁷ All of these situations are conflicts under the *Model*

104. Conflicts over education issues also become more common as children mature. Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own"*, 11 CORNELL J.L. & PUB. POL'Y 481, 499 (2002).

105. For instance, although a few IDEIA opinions indicate that a GAL/counsel will be appointed to represent a child, or mention a motion therefore, no such motions are published. *See, e.g.*, B.J.S. v. State Educ. Dep't/Univ. of State of N.Y., No. 08-CV-513A(F), 2010 WL 502796, at *1 (W.D.N.Y. Feb. 9, 2010). One state, New York, however, appears to anticipate some conflicts as it enacted legislation specifically mandating the appointment of a GAL in an administrative hearing under the IDEIA where the interests of the parents and students diverge or the child's interests would be best served by a GAL appointment. N.Y. Comp. Codes R. & Regs. tit. 8, § 200.5(j)(3)(ix) (2008). As with attorneys/GALs appointed for minors in federal court (*see supra* note 77), the GAL's role is somewhat unclear—she is to “represent the interests” of the child, but may be either a pro bono attorney or a lay person who is qualified to serve as a “surrogate parent.” N.Y. Comp. Codes R. & Regs. tit. 8, § 200.1(s).

106. *See, e.g.*, Ashland Sch. Dist. v. Parents of Student R.J., 585 F. Supp. 2d 1208, 1211-12, 1224 (D. Or. 2008); Application of a Child with a Disability, Appeal No. 96-43 (N.Y. State Educ. Dep't Sept. 27, 1996), available at <http://www.sro.nysed.gov/decisionindex/1996/96-43.htm> (declining to appoint a GAL for the child, despite the mother's repeated attempts to delay the hearing, and affirming the mother's “abandonment” of the action, thus leaving the child with no educational placement).

107. I am indebted to my colleague Professor Marsha Garrison for pointing out that conflicts tend to be noticed, if at all, when a parent seeks a more restrictive placement than is in the child's interests, because such placements are expensive and the school district often objects. Because a parent now has the right to completely

Rules; the same attorney cannot represent two clients with conflicting legal interests or different stated goals, or where one client (the parent) is obstructing the ability of the other client (the child) to receive the educational placement to which he is entitled.

1. PARENT ACTS AGAINST A CHILD'S LEGAL INTERESTS

A parent who takes a position in her child's education case for reasons other than the child's educational benefit is clearly not acting to enforce the child's legal interests. There may be a variety of financial and personal factors motivating parents' actions, subsequently giving rise to a potential conflict between the parent and child.¹⁰⁸ For instance, parents of one disabled child refused to allow their child to be physically examined, although this was a necessary part of her evaluation for special education, because they feared that such an examination would jeopardize their insurance case regarding an automobile accident in which their daughter was injured.¹⁰⁹ This refusal, coupled with the parents' placement of the child in a private school not approved to educate children with disabilities, resulted in the child stagnating without meaningful instruction for several years.¹¹⁰ These parental actions seemingly against the child's interests led the state appellate hearing board for education matters to order a determination of whether the child required appointment of a GAL.¹¹¹

A parent's emotional issues, such as being overwhelmed by a child's needs and behavior at home or feeling shameful or protective of the child's disability, may also lead to a divergence in the interests of parents and children.¹¹² These non-educational concerns sometimes cause parents to seek overly restrictive educational settings, such as residential placements, which are directly contrary

decline IDEIA services for her child, *see supra* note 21, and school districts may not object to providing less services than required, a conflict where a parent does not seek sufficient services for her child may go unnoticed.

108. Commentators have pointed out a similar conflict in delinquency cases where parents act as advisors to their children or direct their legal case but have other motivations, such as having the children placed out of the home because the parents do not approve of the child's behavior. *See supra* note 96 and accompanying text. Interestingly, some of the minors discussed in the cases *infra* were arrested and involved with the juvenile justice system. *See, e.g.*, *W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. J.S.*, No. Civ. 04-3459, 2005 WL 2897494, at *6, 9 (D.N.J. 2005); *J.M. v. Kingsway Reg'l Sch. Dist.*, No. 04-4046, 2005 U.S. Dist. Lexis 18110, at *5-6 (D.N.J. 2005).

109. *Application of a Child with a Disability*, Appeal No. 98-44 (N.Y. State Educ. Dep't May 5, 1999), available at <http://www.sro.nysed.gov/decisionindex/1998/98-44.html>.

110. *Id.*

111. *Id.*

112. *See, e.g.*, *Application of a Child with a Disability*, Appeal No. 01-099 (N.Y. State Educ. Dep't Apr. 24, 2002), available at <http://www.sro.nysed.gov/decisionindex/2001/01-099.htm> (affirming hearing officer's appointment of a GAL for an autistic child because the mother had tried "to avoid participating in the process to develop appropriate services for her son and to delay the proceedings" where her son was sexually acting out and the mother was uncomfortable addressing his sexual behavior).

to the child's right to be educated in the least restrictive environment.¹¹³ For instance, the mother of a mentally retarded daughter sought residential placement under the IDEIA for her child largely in order to gain "relief for herself," and was thus "essentially passive in matters pertaining to [her daughter's education], and proactive only in seeking temporary or permanent placements for [her daughter] out of the home."¹¹⁴ Although the court found the mother's motivations sympathetic, it concluded that such an overly restrictive placement was not in the child's legal interests under the IDEIA.¹¹⁵

The risk of conflict from a parent seeking an overly restrictive placement for non-educational reasons is particularly high with older children who demonstrate behavior problems at home. For instance, in *Ashland School District v. Parents of Student R.J.*, parents removed their teenaged daughter from a mainstream public school to have her "escorted" to an extremely restrictive private "behavioral modification facility" in another state.¹¹⁶ The decision was largely prompted by the minor's behaviors outside of the home, which included being defiant, acting out in response to her parents' divorce, and having relationships with a possibly abusive boyfriend and an older man, rather than academic problems.¹¹⁷ The child's educational progress declined dramatically at the facility and her behavior worsened.¹¹⁸ After being expelled from that facility, she was sent to a more restrictive one operated by the same for-profit company.¹¹⁹ The court found no evidence that the child needed such a restrictive level of placement.¹²⁰ The court recognized that the parents had acted in their own, rather than their daughter's, interest when it amended the caption to reflect that they were the real parties in interest and noted that the parents' "objectives are not always congruent with the views articulated by the child."¹²¹ Similarly, in *J.M. v. Kingsway Regional School District*, a mother sought residential placement for her son, a sixteen-year-old diagnosed with ADHD, only after he was arrested for stealing her car and going

113. Of course, there are many cases where parents advocate for a residential placement based on educational reasons and a belief that it is the most appropriate placement for their child.

114. *D.B. v. Ocean Twp. Bd. of Educ.*, 985 F. Supp. 457, 527-28 (D.N.J. 1997). As with all services under the IDEIA, residential placement, if deemed the appropriate educational setting for the child, would be at no cost to the parent since the child is guaranteed a *free* appropriate public education.

115. *Id.* at 528. The court did not explicitly find a conflict between the mother and child, perhaps due to the presumption, but did decline to place the child in a residential institution. *Id.*

116. *Ashland Sch. Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208, 1211-12, 1224 (D. Or. 2008) (residents are limited to one phone call a week, monitored by staff, and family visits are infrequent). The mother also sought to have her daughter's disability classification changed from other health impairment (ADHD) to emotionally impaired so that she could qualify for the very restrictive residential school. *Id.* at 1217. The facility is part of a national chain of for-profit facilities for minors who have "demonstrated oppositional behavior." *Id.* at 1224.

117. *Id.* at 1220-21, 1224, 1230-32.

118. *Id.* at 1224-25.

119. *Id.* at 1225.

120. *Id.* at 1225-26, 1231.

121. *Id.* at 1211 n.1, 1231.

on a high-speed chase.¹²² Residential placement was a much more restrictive placement than his current setting, where he was mainstreamed with some in-class support, and the school district believed that the evaluations the mother relied on to advocate for residential placement addressed only in-home behaviors. The mother refused to allow additional evaluations of her son and, feeling “physically threatened” by her son, unilaterally placed him in a private boarding school in Utah and sought reimbursement from the school district.¹²³ Nonetheless, the mother and her son were represented by the same attorney in the matter.¹²⁴

Thousands of children with disabilities are placed in these facilities pursuant to the IDEA.¹²⁵ Yet there is significant evidence that children in behavioral modification facilities, such as those in the cases discussed above, are often inadequately educated, subjected to humiliating and ineffective “therapy,” and even abused.¹²⁶ Many such programs are not state certified, are exempt from licensing requirements, and are staffed by untrained teachers using poor education materials.¹²⁷ A recent General Accountability Office (GAO) investigation found that in some facilities, mandated special education services were not

122. *J.M. v. Kingsway Reg'l Sch. Dist.*, No. 04-4046, 2005 U.S. Dist. Lexis 18110, at *2, 5-6 (D.N.J. Aug. 18, 2005).

123. *Id.* at *16. The school, SunHawk Academy, describes itself as an “Adolescent Recovery Center” for youth with substance abuse issues. SUNHAWK ADOLESCENT RECOVERY CENTER, <http://www.sunhawkrecovery.com> (last visited Jan. 22, 2011).

124. *J.M.*, 2005 U.S. Dist. Lexis 18110, at *1; *see also* *W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. J.S.*, No. Civ. 04-3459, 2005 WL 2897494, at *4, 19-20 (D.N.J. Oct. 31, 2005) (holding that a residential school was not educationally necessary where parents unilaterally placed their teenaged daughter in a very restrictive residential school with unclear educational credentials because of her alcohol abuse, sexual activity, and other behaviors outside of the school environment, although she had maintained decent grades and school attendance).

125. U.S. GOV'T ACCOUNTABILITY OFFICE, RESIDENTIAL FACILITIES: IMPROVED DATA AND ENHANCED OVERSIGHT WOULD HELP SAFEGUARD THE WELL-BEING OF YOUTH WITH BEHAVIOR AND EMOTIONAL CHALLENGES 79 (2008) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d08346.pdf> (citing Department of Education data showing that in the Fall of 2006, 9373 students aged six through twenty-one with “emotional disturbance” were placed in private residential facilities). In fact, the child at issue in a recent high profile Supreme Court case was placed by his parents in a behavior modification facility, which has since been closed permanently following an investigation by the State of Oregon revealing conditions seriously endangering children’s health and safety. *See Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009); Amy Hsuan, *Mount Bachelor Academy in Prineville to Close by Dec. 9*, OREGONIAN, Nov. 9, 2009, available at http://www.oregonlive.com/business/index.ssf/2009/11/prineville_boarding_school_to.html. The Court ruled that the parents could be reimbursed for the child’s education in the facility without addressing whether such a placement was appropriate for the child. *Forest Grove*, 129 S. Ct. at 2496.

126. *See, e.g.*, GAO REPORT, *supra* note 125, at 3; BAZELON CENTER FOR MENTAL HEALTH LAW, U.S SUPREME COURT TO DECIDE FOREST GROVE V. T.A.: PARENTS SHOULD WIN, BUT BAZELON CENTER OPPOSES THERAPEUTIC BOARDING SCHOOLS (2009), available at <http://bazelon.org.gravitahosting.com/LinkClick.aspx?fileticket=Ch60k9tJe9s%3d&tabid=321> (citing statistics showing that these facilities are ineffective at addressing the mental health and education needs of the youth placed there and that a high number of abusive and even fatal incidents have been reported at such facilities).

127. BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 126.

provided.¹²⁸ Numerous states do not monitor the educational programming at such facilities, nor does the federal government.¹²⁹

Thus, any parent advocating for such a placement for her child—no matter how well intentioned—is arguably acting against her child’s legal interests to a FAPE in the Least Restrictive Environment.¹³⁰ Attorneys in such situations are not only failing to recognize the conflict between parent and child, but are also violating the requirement that they advocate for the least restrictive environment for clients with diminished capacity.¹³¹

2. PARENT AND CHILD DISAGREE OVER EDUCATIONAL GOALS AND SERVICES

Conflicts may also arise between a parent and child where they have different opinions as to the appropriate placement or differing educational priorities.¹³² For instance, a child may feel he learns better with familiar teachers and peers whereas a parent may feel it is in his best interests to change placements.¹³³ Since the parent and child have separate claims under *Winkelman*, and the *Model Rules* mandate that many children be treated like regular clients entitled to direct their representation,¹³⁴ a conflict may arise if the parent and the minor directly disagree on an issue of classification or placement. The lawyer cannot advocate two opposing viewpoints simultaneously, and thus his representation of one party would “materially limit” his responsibilities to the other.¹³⁵

One area of potential disagreement is the identification of the need for special education, and a student’s classification with a particular disability. These decisions entitle a child to services, but also may carry a stigma.¹³⁶ Thus, where the parent advocated for a child’s designation as disabled with an “emotional

128. GAO REPORT, *supra* note 125, at 17-18 (as of 2008 when the study concluded).

129. *Id.* at 4, 25. However, the abuses and safety risks documented in the GAO reports and testimony have inspired federal legislation to address these problems. See Stop Child Abuse in Residential Programs for Teens Act of 2009, H.R. 911, 111th Cong. (2009).

130. Woodhouse, *supra* note 104, at 492-98 (arguing that parents’ right to direct their child’s education should not include the power to send them to behavior modification facilities where they are at risk of harm, and there is no showing that such facilities are necessary or effective).

131. MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt.7 (2010) [hereinafter MODEL RULES]. Commentators have also noted the attempt to place one family member in a residential facility over her objections to be a conflict in the elder law setting. Batt, *supra* note 79, at 327.

132. There is very little case law addressing these types of conflicts, probably because the fact that children generally are not represented by counsel (individually or jointly) in these proceedings means that their viewpoints are often not even part of the record. Even where courts do appoint a GAL/attorney due to a potential conflict, they often do not expressly outline the child’s views. However, in many of the cases of potential conflict outlined above, the child likely disagrees with the educational placement that the parent is seeking. See, e.g., *Ashland Sch. Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208, 1223-25 (D. Or. 2008).

133. Tandy & Heffernan, *supra* note 12, at 1403.

134. See *infra* notes 171-91 and accompanying text.

135. MODEL RULES R. 1.7(a).

136. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 36 (1990).

disturbance” so that the child could receive services, and the child believed this designation was not appropriate and that he did not require special education services, there was a conflict between the two parties.¹³⁷ There, the court appointed an attorney/GAL for the child and allowed the mother to proceed *pro se*—although it did not expressly note a conflict between the two—and found the teenager not to be emotionally disturbed nor eligible for special education services.¹³⁸

3. PARENT IS UNABLE OR UNWILLING TO ADVOCATE FOR HER CHILD’S EDUCATIONAL RIGHTS

The area of potential conflict most frequently resulting in the appointment of an attorney/GAL for the child is where the parent is unable or, more often, unwilling to advocate for her child’s FAPE.¹³⁹ (Yet even here courts and hearing officers are reluctant to identify conflicts.) Because the special education scheme is premised on parental advocacy, parents are expected to cooperate with school districts in the statutory procedures.¹⁴⁰ Their failure to do so can cause delays and disputes that hinder the child achieving FAPE.¹⁴¹ As one court found where the mother’s “spite or distrust” of the school district caused her to delay proceedings and frequently change her position: “Even a cursory review of the administrative record reveals two ugly truths: 1) those involved in planning Ariel’s educational program seem to be unable to agree on the best educational program *for Ariel*; and 2) Ariel has suffered for it.”¹⁴² Parents of children with disabilities may feel overwhelmed by the system or by the child’s needs and may be unable or

137. St. Joseph-Ogden Cmty. High Sch. Dist. No. 305 v. Janet W., No. 07-CV-2079, 2008 WL 170693, at *7-8 (C.D. Ill. Jan. 17, 2008) (noting that the child stated that he had no disability, was not currently depressed, and was not currently receiving special education, which was “okay by him”).

138. *Id.* at *7, 13-15.

139. The special education system is complex and difficult to navigate, especially for those without ample resources. Thus, most courts do not find a conflict unless the parent’s behavior seems willful or extremely detrimental to the child, and I do not argue that they should find conflicts outside of these scenarios. To determine otherwise, and over-identify conflicts, would paralyze the advocacy system with a lack of any representation, especially for poorer families. Instead, families should be assisted in obtaining the information and resources necessary to best ensure an appropriate education for all children with disabilities.

140. Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 565, 567 (2d Cir. 1989).

141. Scholars have also noted a potential conflict between parents and children in the delinquency realm when a parent misunderstands the law and, as a result, counsels his child or directs the case in a manner not consistent with the child’s legal interests. *See, e.g.*, Henning, *supra* note 8, at 851-52. One commentator has posited that there is a conflict of interest between a parent and a child in delinquency cases where a parent is merely “apathetic”—this is even more the case in IDEIA matters that are expressly premised on parental advocacy and in which children are not entitled to independent counsel, as they are in delinquency cases. *See Moore, supra* note 12, at 1840. These arguments are also analogous in some ways to the arguments against allowing a parent to represent her child *pro se*. *See supra* notes 101-04 and accompanying text.

142. Ariel B. v. Fort Bend Indep. Sch. Dist., 428 F. Supp. 2d 640, 659 (S.D. Tex. 2006). Despite the judge’s obvious frustration with the mother’s refusal to advocate appropriately for the daughter, and his note that a prior judge on the case had made great efforts in working on this issue with no effect, he did not appoint a GAL/attorney for the daughter, whose interests were presumably represented only by her mother’s attorney. *Id.*

unwilling to attend education conferences and hearings or utilize other procedural remedies.¹⁴³ Likewise, a parent's difficulty in appropriately controlling a child and ensuring his attendance at school also raises a risk of conflict if the same attorney is representing both parties.¹⁴⁴ All of these situations can result in the child not receiving the placement, services, or least restrictive environment to which she is entitled.¹⁴⁵

The child's rights under the IDEA outweigh the parent's rights and role as an advocate under the statutory scheme where the parent repeatedly has demonstrated that she cannot fulfill that role and is harming the legal interests of her child.¹⁴⁶ Accordingly, the court in *Muse' B. ex rel. Hanna B.* appointed a GAL/counsel for an autistic child where the mother was taking "irrational and inconsistent positions," thus making it impossible to implement a consent decree that would help her son.¹⁴⁷ The mother had discharged numerous *pro bono* attorneys appointed to represent them.¹⁴⁸ Finding that "a legal challenge under the IDEA . . . requires the presence of a trained legal advocate to assist the child," and having made numerous efforts to "preserve [the mother's] role as an advocate for her child," the court decided that the child needed separate counsel/GAL.¹⁴⁹ The court appointed one, despite its stated concern for preserving the mother's parental rights because "[t]he compelling circumstances in this case substantially outweigh any perceived infringement on the parental rights of [the] mother."¹⁵⁰

In sum, the presumption and practice that parents and children are largely one

143. *See, e.g.*, Application of a Child with a Disability, Appeal No. 09-110, at 2-3 & n.3 (N.Y. State Educ. Dep't Nov. 24, 2009), available at <http://www.sro.nysed.gov/decisionindex/2009/09-110.pdf> (explaining that a guardian ad litem was appointed to protect the child's interest because, *inter alia*, the purported parent was "difficult[]" to "deal[] with," and did not appear at a scheduled IEP meeting, resolution session, and impartial hearing).

144. *Id.* at 2 n.3. This would have to be limited to extreme cases, however, to avoid punishing a large number of parents of older children whose school attendance may be difficult to enforce.

145. A parent's obstruction can also hurt the child's case in other ways. For instance, a parent's failure to cooperate with the school district and produce the child for updated evaluations can be grounds to deny a request for private school tuition reimbursement. *Id.*

146. *Muse' B. ex rel. Hanna B. v. Upper Darby Sch. Dist.*, No. 06-CV-00343, 2007 WL 2973709, at *4 (E.D. Pa. Feb. 14, 2007) ("Even assuming the appointment of a [GAL/counsel for the child] in this case could be viewed as somehow infringing on the parental rights of Muse' B's mother, there is an overriding and compelling need that [the child's educational placement] be resolved in a timely manner consistent with goals of the IDEA.").

147. *See Muse' B. ex rel. Hanna B. v. Upper Darby Sch. Dist.*, 282 F. App'x 986, 989 (3d Cir. 2008) (affirming district court's appointment of a GAL).

148. *Muse' B.*, 2007 WL 2973709, at *1-3. Interestingly, sometimes the court refers to these attorneys as representing the child, sometimes as representing the mother, and sometimes as representing both the child and mother.

149. *Id.* at *4-5. Although the court granted the GAL/counsel final authority on matters relating to the consent decree, it ordered that she consult with the mother on all matters and advise her of any developments in the case. *Id.* at *5. This would seem to conflict with the attorney's duty of confidentiality to the child client under the *Model Rules* and other standards. *See supra* note 78 and accompanying text.

150. *Muse' B.*, 2007 WL 2973709, at *5 ("[The appointment] is narrowly tailored to protect the right of [the] mother as a parent in all other aspects of [the child's] life.").

unit in education cases both obscures conflicts and poses other ethical quandaries for attorneys because it is at odds with the current individualistic representation framework under the *Model Rules* and other standards. In the next Part, I critique the individualistic representation model and propose instead a family-oriented representation framework.

III. A FAMILY-CENTERED REPRESENTATION FRAMEWORK

The importance of what representation framework attorneys follow cannot be overstated—representation models can greatly influence who the clients are, the attorneys' duties and practices, and the outcomes of cases.¹⁵¹ No representation model perfectly fits the messy reality of families—particularly the relationship between parents and children.¹⁵² The needs and abilities of a parent and a severely disabled, non-verbal young child will be very different from those of parents and a teenager with a moderate disability.

To address the under-identification of parent-child conflict, several commentators have recommended expanding the appointment of GALs/independent counsel for children so that it is automatic in certain types of special education cases, or even in all cases where the family challenges the school district.¹⁵³ These remedies, however, are too sweeping because the presumption that the interests of parents and children are aligned is usually correct in these cases. The problem is not the presumption itself—rather, it is the fact that children's voices are not heard so that instances where the presumption fails are uncovered.¹⁵⁴ Thus, a better solution is to expand the range of representation models, giving

151. Teresa Stanton Collett, *And the Two Shall Become As One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 119-22 (1993); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1120-22 (1992) (arguing that lawyers have great power to affect a client's interests and outcomes by their characterization of the representation).

152. Because the parent-child relationship varies so much as the child matures, and yet is more permanent than many other family relationships, such as marriage, it presents unique complexities.

153. See, e.g., Justin J. Farrell, Note, *Protecting the Legal Interests of Children When Shocking, Restraining, and Secluding Are the Means to an Educational End*, 83 ST. JOHN'S L. REV. 395 (2009) (recommending appointment of a GAL in cases of behavior restraints for children with autism); Charles J. Russo, *The Rights of Non-Attorney Parents Under the IDEA: Winkelman v. Parma City School District*, 221 EDUC. L. REP. 1, 15 (2007) (proposing that school boards should seek appointment of a GAL for each student with an IEP when challenges arise to "attempt[] to sever the interests of children from those of their parents[,] thus hopefully avoiding unnecessary litigation). Professor Russo's suggestion seems to posit a child's GAL/counsel as assisting school boards in settling these cases, thus assuming that the school board will often be acting in the child's interests when the parent is not. However, this assumption is not always correct; the child is a distinct third party and sometimes her interests do not align with those of either the parent or the school district. In fact, the school district has a financial interest in providing the lowest legally permissible level of services to a child—something that is usually not in the child's interest.

154. See *supra* note 5.

families more choice and attorneys more tools to meet their clients' needs.¹⁵⁵ Scholars have posited a family representation model in the context of other family relationships, such as dual spousal representation and the intergenerational representation of parents and adult children.¹⁵⁶

As outlined below, a family representation model can bring virtually the same benefits to most families in education and similar cases as individualistic representation—and do so more economically. It does so by balancing a parent's interest in and right to rear her child with the child's voice and claim, as a party with a real interest, to participate in effective advocacy for an appropriate education. This holistic framework for families would also align the doctrinal presumption with attorneys' ethical obligations and allow conflicts to be better identified and resolved, resulting in improved outcomes for families.¹⁵⁷ To these ends, I propose changes to the *Model Rules* and attorney practice to allow for family representation.¹⁵⁸

A. LIMITATIONS OF INDIVIDUALISTIC REPRESENTATION

1. THE CURRENT INDIVIDUALISTIC REPRESENTATION MODEL

a. Model Rules of Professional Conduct

The *Model Rules* posit one attorney for one client and disfavor joint representation.¹⁵⁹ The lawyer's primary duties of loyalty, confidentiality, and zealous advocacy adhere to his single client. As the oft-quoted phrase puts it: The

155. There are other possible solutions to the representation problems in the education context discussed herein, such as amendments to the IDEIA to more clearly articulate to whom which rights belong and when and to whom counsel should be appointed. A full exploration of these ideas is beyond the scope of this Article, but they would complement, rather than supplant, a changed representation model to best further the educational rights of children.

156. *See supra* note 9.

157. Of course, family representation will not work for all families. Thus, lawyers and families would not be required to choose one or the other, but rather an expanded range of options would allow lawyers to address the varied reality of families and best represent children and parents. *See Collett, supra* note 151, at 124 (opining that the family representation model should not be the "required norm" for estate planning representation, but acknowledging that it should be permissible for an attorney and clients to choose it).

158. Similar results in terms of expanded joint representation could possibly be achieved by an interpretation of attorney duties to parents as including duties to non-client children, similar to the duties of counsel for a fiduciary to a beneficiary, and sanctioning attorneys who did not comply. *See infra* note 187. I am arguing here for a changed representation model rather than expanded duties to non-clients because a family representation model would alter the *process* of representation to explicitly include the child as a party and to recognize her voice in educational matters, which according further fiduciary duties to attorneys would not necessarily achieve.

159. Commentators have termed this the "one lawyer for each client" ideal." Cahn & Tuttle, *supra* note 6, at 101; *see also* Kell, *supra* note 76, at 367 (arguing that the *Model Rules* fail to account for human interdependence). Under this framework, the representation of multiple clients in a matter is disfavored. MODEL RULES R. 1.7 cmt. 29.

lawyer “knows but one person in all the world, and that person is his client.”¹⁶⁰ Accordingly, the representation of multiple parties in the same matter is discouraged because, *inter alia*, the attorney will likely be unable to meet his duties of confidentiality and loyalty to both clients if one client requests that she not disclose relevant information to the other client.¹⁶¹

In keeping with the individualistic bent of the *Model Rules*, their definition of a conflict is broad, thereby favoring individual representation over compromise and dual representation.¹⁶² A lawyer’s duty to current or former clients, her responsibilities to third parties, or her own interests may lead to a conflict.¹⁶³ A conflict exists where the interests of the two clients or parties are directly adverse or if there is a significant risk that the lawyer’s duties to one would “materially limit” his responsibilities to another.¹⁶⁴ In the parent-child situation, conflicts can arise either where the parties are jointly represented by the same attorney or, equally common, where the child is being represented but the parent is an interested third party.¹⁶⁵ Payment for representation by a third party is prohibited unless the client gives informed consent, confidentiality is protected, and “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”¹⁶⁶ In assessing whether a conflict exists when representing multiple plaintiffs in the same matter, as with a parent and child in an education case, attorneys should take into account the availability of substantially different possibilities of settlement.¹⁶⁷ There is almost always some risk of conflict between co-plaintiffs in civil litigation, as they could substantially disagree over settlement,¹⁶⁸ but the conflict may be waived. Clients cannot waive a conflict where the lawyer reasonably believes she will be unable to represent each client competently and diligently.¹⁶⁹

160. Collett, *supra* note 7, at 1462 (quoting the famous statement of Lord Brougham).

161. MODEL RULES R. 1.7 cmts. 30-31; *see also* Collett, *supra* note 151, at 124, 141-42 (joint representation is “necessarily superficial” because of the tension caused by the attorney’s duties to the multiple parties).

162. In fact, as Professor Russell Pearce notes, “the very existence of conflicts rules illustrate the individual orientation of legal ethics.” Pearce, *supra* note 6, at 1278.

163. MODEL RULES R. 1.7 cmt. 9.

164. MODEL RULES R 1.7(a).

165. Moore, *supra* note 12, at 170-71.

166. MODEL RULES R. 1.8. Of course, often the parent will be paying for an attorney for the child. She can then decide to terminate the representation when a conflict arises between the child’s wishes and her own. *See* Tandy & Heffernan, *supra* note 12, at 1403-04 (giving an example of such a scenario). In such a situation, however, the attorney could petition the court for an attorney to be appointed for the child, although some courts might not do so if the parent proceeds on her claims, depending upon the court’s interpretation of *Winkelman*. *But see* State Bar of Mich. Standing Comm. on Prof’l and Judicial Ethics, Op. RI-140 (1992) (finding that the child is the client even where the mother retains the attorney, and thus the attorney cannot drop a valid claim for the child at the mother’s direction).

167. MODEL RULES R. 1.7 cmts. 8-10.

168. Moore, *supra* note 12, at 1833 n.70.

169. MODEL RULES R. 1.7.

b. Model Rule 1.14

Attorneys for children are subject to the same rules of professional conduct as other attorneys—the *Model Rules* make no exception to the principles of individual loyalty and zealous advocacy for parents and children. Even parents who pay for representation of their children are not permitted to direct the representation.¹⁷⁰ In fact, the *Model Rules* scarcely mention the unique challenges and responsibilities of representing minors, except in Rule 1.14 governing clients with diminished capacity.¹⁷¹ The standard for diminished capacity is high, and thus many minors would not even qualify as being of diminished capacity.¹⁷² A client's insistence on a view of her own interests that the lawyer considers unwise should not be taken as evidence of incompetence.¹⁷³ Rather, a child is only unable to direct her own case when she “clearly . . . is not capable of understanding the nature of the case or the significance of the decisions concerning the representation.”¹⁷⁴ A parent may be “appointed” as a child's legal representative for the direction of a case only when the child meets this high standard of diminished capacity.¹⁷⁵

Even when representing individuals with diminished capacity, attorneys must conform to the traditional attorney representation model as closely as possible.¹⁷⁶ This includes directing the objectives of the case, per Model Rule 1.2. The Comment to Rule 1.14 clarifies that even clients with diminished capacity “often [have] the ability to understand, deliberate upon, and reach conclusions about matters affecting [their] own well-being[.]” noting that the opinions of children as young as five and certainly those of ten- or twelve-year-olds are routinely given weight in custody proceedings.¹⁷⁷ An attorney should thus communicate with and treat a person of diminished capacity as a client even where the client

170. Moore, *supra* note 12, at 1856.

171. As a result, the *Model Rules* have been criticized as diminishing parental rights by allowing attorneys to disregard the parents' views in favor of the child's. See Hafen, *supra* note 92, at 447. Nor do the *Model Rules* make exceptions for other family members. See, e.g., Dolgin, *supra* note 88, at 50 (“[L]awyers representing spouses must see even their most apparently traditional clients as individuals whose conjoined interests potentially conflict.”).

172. See, e.g., Or. State Bar Ass'n Bd. of Governors, Formal Op. 2005-159 (2005) (“Short of a client's being totally noncommunicative or unavailable due to his condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation.”).

173. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24 cmt. c (2000).

174. State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-140 (1992).

175. See also Henning, *supra* note 8, at 880 (opining that the *Model Rules* only allow for reliance on the parents for direction where the child is incompetent and the parents have no legal, financial, or psychoemotional interests conflicting with those of the child and can be objective in evaluating the child's options).

176. MODEL RULES R. 1.14; see also Hawkins v. Principi, No. 03-2108, 2004 U.S. App. Vet. Claims LEXIS 94, at *5 (Vet. App. Feb. 20, 2004) (“Model Rule [1.14] suggests that counsel should maintain [the attorney-client] relationship as normally as possible.”).

177. MODEL RULES R. 1.14 cmt. 1. Children's opinions on other important matters are taken into account or are even determinative. For instance, virtually all states require that children of a certain age consent to their

has a legal representative, such as a parent.¹⁷⁸

Moreover, although attorneys may “look to parents as natural guardians” and legal representatives for children with diminished capacity in some cases where their interests are not at odds, the parents’ decision-making power is still quite limited by the *Model Rules*—the lawyer must allow the client the maximum decision-making power possible.¹⁷⁹ For instance, where a mother retained a lawyer to bring a medical malpractice suit alleging injury to her thirteen-year-old child with a learning disability, the state bar ethics committee found that the child, not the mother, was the client: “If it is the child’s claim that is being investigated then it is the child who is the client and the lawyer’s first responsibility is toward the child.”¹⁸⁰ This was in contrast to the attorney’s assumption that the mother was his client, because she had retained him and signed the contingent fee contract. Thus, when the mother wanted to drop the claim, the attorney could not do so where this would be against the child’s interests or direction.¹⁸¹

Particularly pertinent to the special education context, attorneys must at all times be aware of any law requiring them to advocate for the least restrictive option for a client.¹⁸² Relatedly, the *Model Rules* allow protective action on behalf of a client with diminished capacity, including consulting with family members or seeking appointment of a GAL, only when a high standard is met—the lawyer reasonably believes her client is at risk of substantial harm and cannot act in his own interest or maintain a normal attorney-client relationship.¹⁸³ Even then, the GAL or parent’s decision-making power is not absolute—the attorney should still independently determine the client’s interests, monitor the guardian’s assertion of those interests, and periodically assess the client’s competence.¹⁸⁴ At least one court has found that the attorney for a child—even a very young child—may advocate a position different from that of the child’s GAL.¹⁸⁵ The GAL argued that because she was appointed as the child’s legal representative, the attorney was bound to follow the GAL’s position; however,

own adoption, some as young as age ten. *See, e.g.*, ARK. CODE ANN. § 9-9-206 (2010); N.J. STAT. ANN. § 9:3-49 (West 2002).

178. MODEL RULES R. 1.14 cmt. 2.

179. MODEL RULES R. 1.14 cmts. 3-5, 7.

180. State Bar of Mich. Standing Comm. on Prof’l and Judicial Ethics, Op. RI-140 (1992).

181. *Id.*

182. *See* MODEL RULES R. 1.14 cmt. 7.

183. *See* MODEL RULES R. 1.14 cmts. 5, 7; MODEL RULES R. 1.14(b); *see also* Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission’s Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103, 105 (2008) (noting high standard for protective action under Rule 1.14).

184. Or. State Bar Ass’n Bd. of Governors, Formal Op. 2005-159 (2005).

185. *Schult v. Schult*, 699 A.2d 134, 139-42 (Conn. 1997). The child in the custody dispute between the Schults was a three-year-old with psychological and developmental problems. *Id.* at 135. It is not clear why the court appointed a GAL in addition to an attorney for the child, but the child’s young age and disabilities could have led the court to presume the child was incapacitated.

the court found that although this would ordinarily be the case, attorneys were not required to look to the child's guardian for guidance in every case.¹⁸⁶ This same principle is applicable to parents who are the legal representatives of children—attorneys may look to them for guidance but should not follow their direction if it would be against the child's interests. Finally, even if the lawyer represents only the parent, not the child, he "may have an obligation" to prevent or correct action adverse to the non-client child's interests.¹⁸⁷

All the regular duties of a lawyer, including confidentiality of information, are due the child client.¹⁸⁸ Accordingly, another state bar ethics committee ruled that a lawyer for a minor in a delinquency case could not disclose confidential information to the minor's parent/legal guardian unless the information was necessary to make a legally binding decision about the subject matter of the representation and the lawyer believed that the parent was acting in the minor's interests.¹⁸⁹ In sum, the fact that a client is a minor is "immaterial" unless she is so young or disabled that she is of diminished capacity and unable to understand the case.¹⁹⁰

186. *Id.* at 142.

187. MODEL RULES R. 1.14 cmt. 4 (attorneys for parents may have some fiduciary duties to children who are not their clients). Ethical rules for lawyers representing parents in other situations also imply such a duty. For instance, aspirational ethical guidelines for matrimonial attorneys posit that the attorneys for parents in custody and related actions have a "fiduciary duty for the well being of a child" and thus "must competently represent the interests of the client, but not at the expense of the children." AM. ACAD. OF MATRIMONIAL LAWYERS (AAML), THE BOUNDS OF ADVOCACY: CHILDREN § 6 (2000), available at http://www.aaml.org/sites/default/files/AAML_Chapter_Handbook_Tab_6_Bounds_Advocacy.pdf; see also *id.* at Preliminary Statement (stating that attorneys for parents in matrimonial matters should consider the well being of the children in counseling the client as to her best interests and noting that many such attorneys view themselves as obligated to act in the children's best interests as well as advocating for their client's goals). This duty is based in part on the analogous duty of an attorney for a trustee or fiduciary to the beneficiaries to whom the fiduciary is obligated. Since parents have a fiduciary duty to act in their children's best interests, attorneys for parents have the same obligation. *Id.* § 6. Accordingly, the guidelines recommend that "an attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children." *Id.* Part of this obligation includes a duty to counsel the parent client against, and to refuse to participate in, multiple evaluations of the child for the parent's own litigation goals. *Id.* § 6.1. Although custody disputes are more acrimonious than most education cases, parents' attorneys in IDEIA cases should similarly be cognizant of their impact on and obligation to the children who are the subjects of these cases.

188. See, e.g., S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 06-06 (2006) (reminding lawyers that the duty of confidentiality continues to apply to clients with diminished capacity, although "some [minimal] information may have to be divulged to protect the client's interests"); L.A. County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Ethics Op. 504 (2000), available at www.lacba.org/files/lal/Vol23No11/1171.pdf (looking to Model Rule 1.14 for guidance and concluding that an attorney may not violate confidentiality to reveal that a competent minor is being sexually abused in her court-ordered foster care placement, even where the attorney believed that the decision not to disclose was not in the minor's best interest).

189. N.C. State Bar, Formal Ethics Op. 18 (1999).

190. State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-140 (1992).

c. Practice Standards for Attorneys Representing Children

As the *Model Rules* offer little specific guidance on the representation of minors, attorneys representing children and youth rely heavily on specialized practice standards developed by various professional organizations and groups of children's advocates to identify and address ethical representation issues.¹⁹¹ The practice standards primarily outline a vision of the child as an autonomous actor with a right to the full panoply of an attorney's duties to her client.¹⁹² This is consistent with the belief of most children's advocates that a child's attorney should represent a child's expressed interests or legal interests as a traditional attorney, not her best interests as a *guardian ad litem*.¹⁹³ This view is consistent with Rule 1.14.¹⁹⁴ Accordingly, practice standards emphasize that a child's attorney should be free to exercise "uncompromised representation[.]" including retaining full authority over her actions per the client's direction, free from the influences of the court and other parties, even if another party, such as a parent, pays for the lawyer.¹⁹⁵ In order for the child to have the maximum opportunity to direct the case as an adult client might, attorneys for children not only have a duty to ensure that the child has the requisite information to make an informed decision, including counseling and advice, but also "not to overbear [her]

191. Practice guidelines exist both generally, *see, e.g., Fordham Recommendations, supra* note 11, and for specific children's practice areas, *see, e.g., NAT'L ASS'N OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC REVISED VERSION)* (1999) [hereinafter NACC STANDARDS], available at <http://www.naccchildlaw.org/resource/resmgr/Docs/juvenilejustice.doc>. There are no widely accepted specific educational practice guidelines for children's attorneys. *But see* D.C. PRACTICE STANDARDS, *supra* note 39.

192. *See, e.g., Jane M. Spinak, Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385 (2005); *Fordham Recommendations, supra* note 11, at 1301. *But see* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2007), available at http://www.law.upenn.edu/bl/archives/ulc/rarccda/2007_final.pdf (proposing two types of attorneys for children—both a traditional "child's attorney" and a GAL-type "best interests attorney").

193. *Fordham Recommendations, supra* note 11, at 1301; *UNLV Recommendations, supra* note 73, at 609. If a child is unable to express her wishes due to age or disability, the attorney must attempt to determine the child's wishes in another fashion and advocate accordingly. NACC STANDARDS, *supra* note 191, at B-4(1). If a child does not or will not express a preference for an outcome, the attorney shall advocate for the child's legal interests. *Id.* at B-4(2); *see also* ABA CUSTODY STANDARDS, *supra* note 62, at IV.B and commentary. Courts have noted that it is a conflict for an attorney to play the role both of a child's attorney and his or her GAL. *See, e.g., In re S.B.*, 916 N.E.2d 1110, 1114 (Ohio. Ct. App. 2009) ("[T]he duty of a lawyer to his client and the duty of a *guardian ad litem* to his ward are not always identical and, in fact, may conflict." (citation omitted)).

194. This discussion assumes an expressed-interests representation model. Many of the risks of conflict described herein would not exist under a best interests model as the attorney/GAL would not be bound to follow the child's direction and could instead advocate for the child's best interests, which might be a position more deferential to the parents' views.

195. NACC STANDARDS, *supra* note 191, at G-1 & cmt. The Commentary for G-1 clarifies that the attorney for a child should never, however, be paid by a child's parent in an abuse/neglect case; *see also* ABA CUSTODY STANDARDS, *supra* note 62, at III.C.

will.”¹⁹⁶ Children’s expressed or legal interests are represented in many states in matters involving complex and delicate issues such as abuse or neglect, delinquency, and custody. Commentators have noted that education cases are also appropriate for an expressed-interest representation model.¹⁹⁷ That is, the attorney should follow the direction of the child client as to the goals of the education case, rather than following what the attorney or a parent believes to be the child’s best interests.

Because a minor’s attorney is bound to represent her legal interests if her wishes cannot be determined, a conflict may still exist, even if a child does not express a contrary preference to another party the attorney represents, if the legal interests of that party and the child conflict. The standards outline a broad array of impermissible conflicts, including the dual representation of children and parents in abuse/neglect, custody, delinquency, and status offense cases.¹⁹⁸ They do not explicitly prohibit the dual representation of parent and child in education cases, although the Recommendations from the Fordham Conference on Ethical Issues in the Legal Representation of Children do identify this as a potential conflict situation and deem a civil commitment proceeding where the parent is a movant to be an outright conflict.¹⁹⁹

The practice standards are mostly tailored to cases of explicit parent-child conflict, such as alleged abuse or neglect, and so propose a limited role for parents. Children’s advocates have expanded this bifurcation of parents’ and children’s interests to other spheres, such as delinquency.²⁰⁰ They are also, however, increasingly recommending that attorneys consult parents about a child’s needs and preferences and consider the child in context—acknowledging that a parent has a role in a child’s life even where there is conflict between her and her child.²⁰¹ Nonetheless, both the *Model Rules* and specific practice standards for children do not make exceptions to general conflict rules for parents and children and allow dual representation only in a narrow category of cases. Thus, this framework is at odds both with the doctrinal presumption that parents and children’s interests are aligned and with attorney practice in education cases.

196. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B-4 & cmt. (1996), available at http://www.abanet.org/family/reports/standards_abuseneglect.pdf.

197. Tandy & Heffernan, *supra* note 12, at 1405.

198. *Fordham Recommendations*, *supra* note 11, at 1318.

199. *Id.*

200. *See, e.g.*, Henning, *supra* note 8.

201. *UNLV Recommendations*, *supra* note 73, at II.A.3.e (recommending that, with certain exceptions, attorneys representing children of diminished capacity give special weight to the parents’ opinion of the child’s best interests); *see also* NACC STANDARDS, *supra* note 191, at B-4 cmt. (advising attorneys to consult “significant persons in the child’s life” to ascertain the child’s needs, goals, and experiences).

2. A CRITIQUE OF THE INDIVIDUALISTIC MODEL AS APPLIED TO PARENTS AND CHILDREN

The *Model Rules* and other ethical standards posit the client as entitled to direct the case without input from another party, unless she meets the high standard for diminished capacity. This model is at odds with the “real world” of families, failing to account for family relationships and disfavoring joint representation.²⁰² Confusion about their duties can cause the practice of the education bar to sometimes diverge from ethical guidance. Moreover, individualistic representation in effect often means representation for parents alone, leading to a failure to include children in the process and a risk of unidentified conflicts.

Supporters of the individualistic model for families generally assume that all interested parties have independent representation or joint representation as narrowly envisioned under the *Model Rules*. They also often assume that all of the parties are competent adults. Under these assumptions, the system has several potential advantages for family members and attorneys. For instance, it best ensures that the attorney is unimpaired by loyalties to other parties or the group as a whole. It also follows the usual rights structure of our legal system—one of individual rather than communal rights.²⁰³ Accordingly, in the estate planning context, Professors Geoffrey Hazard and Teresa Stanton Collett prefer individualistic to family representation, arguing that it: (1) is necessary to realize the rights of individuals; (2) results in the most zealous representation; and (3) reflects the current family structure, which is characterized by contract not status.²⁰⁴ They also support this framework as the least ambiguous one for attorneys—representing one client in a particular matter leaves no question about where duties of loyalty and confidentiality lie.²⁰⁵ By positing the family as a collection of equal individuals together by choice, the current representation model can also help to overcome persisting inequities between family members, such as husbands and wives.²⁰⁶

Analogously, an independent attorney for the child may similarly help to overcome the historic—and still prevalent—treatment of children as parental property.²⁰⁷ Accordingly, Professors Barbara Bennett Woodhouse, Katherine

202. MODEL RULES R. 1.7 cmt. 29.

203. As Justice Scalia pointed out in the *Winkelman* dissent, most constitutional and statutory rights accrue to individuals rather than groups. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 541 (2007) (Scalia, J., concurring in part and dissenting in part).

204. Hazard, *supra* note 7, at 9; Collett, *supra* note 151, at 123, 128-29 (citing no-fault divorce, *inter alia*, as evidence of the contract nature of the modern family). This notion, however, may ignore the ongoing economic and social power imbalances between men and women in marriages. Professor Collett also points out that individual representation brings the parties greater privacy, both in terms of communications with the attorney and decisions about the case. Collett, *supra* note 7, at 1471.

205. Hazard, *supra* note 7, at 9; Collett, *supra* note 151, at 123, 128-29.

206. Dolgin, *supra* note 88, at 31, 37-38, 54-55 (concluding that this model is preferable because it reflects the individual presumption dominating contemporary family law, as it relates to marriage).

207. See *supra* note 19 and accompanying text.

Hunt Federle, and others have emphasized the importance of hearing children's stories and recognizing their unique abilities, rather than focusing only on their needs and their parents' view of their children's wishes.²⁰⁸ Having their own counsel is a significant step for children in having their voices heard and their rights enforced.²⁰⁹ Counsel for children can also bring valuable insight to the court or decision-making body by presenting the child's voice, unfiltered by parents.²¹⁰

Yet these arguments for independent counsel for children have been made outside the educational context, for situations where a parent child conflict is much more likely. For most families in education and similar cases, the individualistic model's shortcomings outweigh its advantages—family representation can bring virtually the same benefits and is a more pragmatic and economic way to structure the attorney-client relationship. Before outlining the individualistic model's shortcomings, let me clarify that I am not proposing family representation for cases such as abuse/neglect or delinquency, where the high risk of parent-child conflict or the child's interests against incarceration by the state make independent representation for the child essential. Even in the education context, collective representation is inappropriate in those limited categories of cases where there is an irresolvable conflict between the parent and child.²¹¹

The individualistic model has numerous failings for both families and attorneys in the education context. First, as a practical matter, parents and children are each going to have their own attorneys in very few education cases—it is economically infeasible and neither party is entitled to appointed counsel.²¹² Because of this, and the fact that joint representation under the current

208. Woodhouse, *supra* note 19; Federle, *supra* note 183, at 112 (“It is indisputably good that the child’s voice is heard without an adult filter . . .”). Numerous other scholars and children’s advocates have also called for recognition of independent legal rights for children. *See, e.g.*, JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 63-67 (2006) (proposing expanded relationship rights for children as consistent with the philosophical framework of adult relationship rights); ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 7 (Beacon Press 1999) (decrying the “blood bias” which allows the rights of biological parents to override the rights of children to grow up in a safe and nurturing environment); BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008) (proposing rights for children based on both their needs and capacity and incorporating human rights values); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1693-97 (1996) (arguing for a reconceptualization of our rights framework to accord rights to the powerless, most of all children).

209. *See* Ross, *supra* note 90, at 1574-80 (calling for the appointment of independent counsel for children in a wide range of cases and noting that children have historically not been appointed independent counsel in part out of deference to parental rights); Federle, *supra* note 183, at 113 (stating that the child’s lawyer “is in the best position to insist that the child’s rights are respected, valued, and considered”).

210. Federle, *supra* note 183, at 112.

211. Nonetheless, in those cases, a family representation model can still facilitate the recognition and possible resolution of conflicts.

212. *See* Cahn & Tuttle, *supra* note 6, at 101 (pointing out the economic burden of having separate counsel for spouses in estate matters).

system is limited by broad conflict rules not adapted to the needs of families, the individualistic model reduces the overall number of people with counsel.²¹³

The doctrinal and practice presumptions mean that it is almost always the child who remains unrepresented while the parent has counsel or proceeds *pro se*.²¹⁴ In the many cases where neither the parent's attorney nor the court inquires into the child's views, this system effectively silences the child about his educational placement—a matter of central significance to him. Children, particularly older ones, are unlikely to buy into an educational plan about which they have not been consulted. Moreover, this system has costs in terms of the information and context available to both the parent's attorney²¹⁵ and, ultimately, the fact finder.²¹⁶

Even in the highly unlikely scenario where both parent and child have independent attorneys despite no irresolvable conflict, the individualistic model is still not the best model as it focuses on the family's disagreements rather than its strengths.²¹⁷ In fact, the presence of more attorneys may even create additional antagonism among the family members.²¹⁸ Even the proposed solutions to conflict under the current *Model Rules* may harm clients, as they leave the parents and children with the same conflicts and, often, no representation at all for the family—withdrawal assists only the attorney.²¹⁹ Because it requires families to be left thus after withdrawal, Professor Thomas Shaffer has argued that the *Model Rules* are “corrupting” and promote “irresponsible” lawyering.²²⁰ Withdrawal can be especially difficult for children as they have more difficulty than most adults understanding the attorney role and trusting the nature of the relationship. As a result, they can be particularly disappointed and harmed when the

213. Commentators have noted an analogous result of the current *Model Rules* framework in the representation of elderly clients and/or their families. See, e.g., Batt, *supra* note 79 (proposing family representation in part to aid in the ethical representation of elderly clients). There is already a shortage of competent education counsel, especially for low- and middle-income families. See, e.g., Lynn M. Daggett, *Special Education Attorney's Fees: Of Buckhannon, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. JUV. L. & POL'Y 1, 39-44 (2004).

214. See *supra* note 106 and accompanying text (courts are reluctant to appoint a GAL/counsel for the child even where they have identified a conflict). The lack of representation for children is compounded by the fact that children may not proceed *pro se*.

215. Collett, *supra* note 7, at 7.

216. See, for instance, the example outlined in the Introduction, *supra*.

217. Dolgin, *supra* note 88, at 34.

218. See Cahn & Tuttle, *supra* note 6, at 101-02; see also Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 87 (2008) (noting in the custody context that the appointment of an advocate for a child can be unnecessary or even harmful in some cases by “introduc[ing] a potentially intrusive, polarizing, and expensive additional voice in the proceeding”).

219. Under the *Model Rules*, an attorney must cease representing one or both parties when a conflict appears insurmountable. MODEL RULES R. 1.7 cmt. 4. Because an attorney can rarely meet his duties of loyalty and confidentiality to both clients once a conflict is identified, a conflict usually means the end of representation for both clients. MODEL RULES R. 1.7 cmt. 29.

220. Shaffer, *supra* note 9, at 982.

relationship is abruptly ended.²²¹

Finally, and most significantly, this model does not adequately account for the dependent relationship, shared goals, and intertwined rights of children and parents. Commentators note that the individualistic model works best as applied to spouses, for instance, who have adopted, or at least not rejected, somewhat equal roles.²²² The parent-child relationship differs significantly, and obviously, from that between two adults in a family relationship. Thus, the arguments for this representation model in the adult context—that family structures arguably rest on contract and choice instead of status and that lawyers can no longer assume that family relationships are hierarchical²²³—do not apply with the same force, if at all, to many parents and their children. Children are not free to leave their families or neighborhoods and the parent-child relationship, particularly for younger children, is often appropriately hierarchical.²²⁴ The fact that a child is integrally connected to his parents—and that he also has rights to his education—frequently renders the individualistic model inappropriate in these cases.

The individualistic model also poses considerable risk to attorneys practicing in this area. The confusion about to whom the attorney owes duties of loyalty and confidentiality and the failure of many attorneys to consult with the child or adequately identify conflict mean that some lawyers may be routinely violating ethical requirements.²²⁵ Because joint representation sometimes arises in education cases without explicit procedures, and because parents' attorneys likely have duties to non-client children, the benefits of the individualistic model—its clarity about to whom loyalty and duties accrue—often do not apply.

In sum, both pragmatic and normative rationales call into question the efficacy of the individualistic representation model in education cases.

B. A MORE PROMISING APPROACH: FAMILY REPRESENTATION

1. FAMILY REPRESENTATION MODELS

Scholars have proposed a more communitarian representation model, particularly in the spousal estate-planning area, to rectify some of the deficits of the *Model Rules'* individual representational framework.²²⁶ Professor Shaffer de-

221. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-404 (1996) (noting that withdrawal from the representation of clients with diminished capacity, as with some minors, is disfavored); Me. Prof'l Ethics Comm., Op. 84 (1988) (same).

222. Dolgin, *supra* note 88, at 54.

223. *See, e.g., id.* at 40-50.

224. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting that children are not free to move as adults are).

225. *See supra* notes 62-90 and accompanying text (discussing attorney practices).

226. *See, e.g., Pearce, supra* note 6; Cahn & Tuttle, *supra* note 6. Although the *Model Rules* have not been amended to accommodate these proposals, some scholars have suggested it can take place under an interpretation of the existing *Model Rules*. *See, e.g., Cahn & Tuttle, supra* note 6. Moreover, certain professional

cried the disjuncture between the individualistic nature of the *Model Rules* and the realities of people's grounding in family groups and communities.²²⁷ Because the family is "organic and as prior to individuality[.]" the lawyer's exclusive focus on individual rights and interests harms clients.²²⁸ Instead, lawyers should view the family as the client and work to meet the needs and goals of their clients with a view towards the group as more than a collection of individual interests.

Family-oriented representation might take several different forms, but the best model would be one that simultaneously recognizes the family as an entity and acknowledges that it has individual members.²²⁹ Some commentators have outlined models which focus on the family as both a community and a collection of individuals,²³⁰ others have proposed treating the family as an entity similar to a corporation under Model Rule 1.13,²³¹ and some posit both models as beneficial for families.²³² Professors Naomi Cahn and Robert Tuttle propose a more communitarian approach to representation by interpreting ethics codes as allowing parties to waive most conflicts and allowing one spouse to delegate decision-making authority, and even participation, to another spouse.²³³ As an expanded joint representation model, their vision posits the married couple as something more than the sum of the individuals, a vision they acknowledge is not shared by all couples.²³⁴ They also recognize the possibility of abuses resulting from this delegation, and they accordingly outline steps the lawyer should take to ensure that the parties consent to this delegation and communal representation.²³⁵ The lawyer should abide by this consent except where the spouse with the delegated authority acts in a way that potentially "substantially injure[s]" the delegating party.²³⁶ Although differing as to the scope of waivable conflict under the current *Model Rules*, Professor Stephen Hobbs similarly proposes reframing representation so that the lawyer's duty of loyalty accrues to the family as a

standards for attorneys appear to embrace a similar, more communal vision of client identity and representation. See AM. COLL. OF TRUST & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1993) [hereinafter ACTEC] (outlining "the utility and propriety [in estates and trusts law] of representing multiple clients, whose interests may differ but are not necessarily adversarial" and the role these lawyers have "traditionally played as the lawyer for *members of a family*") (emphasis added)).

227. See Shaffer, *supra* note 9.

228. *Id.* at 971, 982-84.

229. See Pearce, *supra* note 6, at 1295-1300 (outlining various models and proposing his own Optional Family Representation model).

230. Dolgin, *supra* note 88, at 37.

231. See, e.g., Batt, *supra* note 79, at 340; Pearce, *supra* note 6.

232. Cahn & Tuttle, *supra* note 6, at 104-05 (stating that both the joint and entity representation models "offer more constructive options" for married couples).

233. *Id.* at 98.

234. *Id.* at 117-19.

235. *Id.* at 122-29.

236. *Id.* at 127-28.

whole, rather than to any individual member.²³⁷ The lawyer's goal then becomes to help the family achieve its stated objectives by presenting the pros and cons of a range of legal options.²³⁸

Other scholars have advocated representation of the family as an explicit entity, wherein the lawyer represents the "best interests" of the family as determined by the objectives of the majority of family members.²³⁹ Dissenting family members then become derivative or third party non-clients and the lawyer is responsible for informing all clients that representation is directed towards the entire family rather than individual family members.²⁴⁰ Professor Russell Pearce has developed the most sophisticated outline of this model, termed Optional Family Representation.²⁴¹ Under this framework, families choose whether to be represented as a group or individually.²⁴² For the former, they must establish that a *bona fide* group identity exists and agree that confidentiality will not exist within the group, while the lawyer must secure informed consent.²⁴³ As with the other variations outlined above, communication and voluntary participation are key to its successful implementation—family members must be kept informed about the pros and cons of the representation as the case progresses and may withdraw at any time from the communal representation.²⁴⁴

2. BENEFITS OF FAMILY REPRESENTATION FOR PARENTS, CHILDREN, AND ATTORNEYS

A family representation model has not yet been explicitly applied to the parent and minor child dyad. But similarities exist between education cases and the estate planning, family business, or elder law situations to which commentators have applied family representation.²⁴⁵ If properly implemented, family represen-

237. Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE U. L. REV. 57, 85, 90 (1994).

238. *Id.* at 90.

239. Batt, *supra* note 79, at 340.

240. *Id.*

241. Pearce, *supra* note 6.

242. *Id.* at 1295-96.

243. *Id.* at 1312-13.

244. *Id.* at 1312-18.

245. Any of the above models would work in this context, but the representation framework should require both parties to participate, even if one is primarily responsible for decision-making. This is essential to overcome the historic failure to hear children's voices in matters important to them. Thus, a model for parents and children should not include a delegation of participation as proposed by some commentators in the marital context (*see, e.g.*, Cahn & Tuttle, *supra* note 6), unless the child is so young or disabled as to make meaningful participation impossible. The fact that most of the family representation models are premised on informed consent is not a barrier to their application to children. Although children are not usually deemed capable of consenting to or waiving representation of, for instance, waiving conflicts or counsel altogether, they have been deemed capable of waiving counsel in delinquency matters. *See* Moore, *supra* note 12, at 1831, 1834-35; Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing A Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1895 (1996). In other cases, the parents usually waive counsel or conflicts which clearly would be inappropriate in a family representation situation. Moore, *supra* note 12, at 1835-38. Moreover, children's

tation can thus provide a fruitful model for collaboration between the lawyer and family in realizing entitlements under the IDEIA.²⁴⁶ It works because the presumption is usually right—most parents act in their children’s interests.²⁴⁷ (Even in cases where parents and children have differing interests, however, a holistic family-based approach will enable the attorney to better identify conflicts *before* engaging in the representation.) Family representation provides benefits to both families and attorneys by harmonizing the presumption of aligned interests with the *Model Rules* and including both parents and children in the process, thus reducing the risk of ethical standards violations and improving outcomes.

This model benefits children and parents in numerous ways. First, it reflects the “truth[.]”²⁴⁸ of their relationship to each other and the fact that they share a common goal in achieving an appropriate education for the child.²⁴⁹ It also accords with the explicit hierarchy in the parent-child relationship—something commentators have noted works well with family representation. It reflects the substantive law presumption that parents act in their children’s interests and the “intertwined” nature of the rights of parents and children under the IDEIA. Yet family representation also avoids the fallacy of relying only on a parent’s view of the child’s needs and wishes and includes the child in the process. Instead, the model compels family members to think about the interests of the other parties and to prioritize both individual and group goals. It recognizes the roles of both parties, empowering children to participate in the representation and ensuring their voices are heard while respecting parents’ rights and central role in children’s lives.²⁵⁰ A collaborative framework such as family representation is

practice standards conclude that attorneys can ethically allow a child to waive conflicts, akin to consenting to family representation, if they reasonably conclude that the child can understand the nature of the conflict and consequences of joint representation. *Fordham Recommendations*, *supra* note 11, at 1319. This is consistent with Model Rule 1.14, which anticipates that even a client with diminished capacity can give direction and make decisions on important matters, and cites children as young as five or six weighing in on custody cases. Accordingly, attorneys in delinquency and abuse/neglect cases often follow an expressed-interest advocacy model with minor clients, especially older children, despite their legal incapacity to consent. *See supra* notes 193-98 and accompanying text. Attorneys are usually court-appointed in such cases, so children do not necessarily consent to representation, but by allowing minors to direct the case, attorneys acknowledge their ability to make significant decisions about their legal interests. Finally, even where children are too young or disabled to consent or express views, a family representation model can shift the attorney’s focus from the parents’ views alone to incorporating the child’s legal interests.

246. I do not propose special ethical rules or exemptions for education cases, as I agree that such rules should apply as broadly as possible to all areas of practice. *See Hazard*, *supra* note 7. Thus, I am using education cases to illustrate that cases wherein there is no absolute conflict between parents and children (unlike abuse and neglect cases, for example) could benefit from a more communal representation model.

247. Family representation will not work for all families but approaching representation holistically can aid in the identification of conflicts, even if the model is not ultimately adopted by the family and attorney in a particular case. *See supra* note 212 and *infra* note 266 and accompanying text.

248. Shaffer, *supra* note 9, at 984.

249. *See Cahn & Tuttle*, *supra* note 6, at 105 (noting that joint or family representation reflects the view of marriage as a “shared project”).

250. This direction, of course, must take into account the child’s ability to express her needs and opinions.

thus particularly suited to the delicate interplay between attorney, parent, and child.²⁵¹ It also comports with the recommendations of some scholars to move from a rights-based, adversarial framework for systems involving parents and children to a more problem-solving model, often incorporating alternative dispute resolution principles.²⁵²

Second, it allows parents and children to choose multiple representation in situations which would otherwise be precluded under the *Model Rules*, thus increasing the family's ability to self-determine and direct its interaction with outside entities, such as courts and the school district.²⁵³ Accordingly, family representation arguably reduces the lawyer's intrusion into the family structure and the existing tendency of some attorneys to impose their own views on the representation of various family members.²⁵⁴

Third, family representation is economically more efficient than either individual or joint representation, since it would result in fewer attorneys yet ensure that more people are represented.²⁵⁵ By minimizing the scope of conflicts, it also results in more continuous representation and fewer harmful withdrawals.²⁵⁶

Fourth, by focusing on the family's needs holistically and engaging the child further in the process, this framework also leads to the best outcomes.²⁵⁷ Having one attorney properly represent both parent and child in an education case can increase the confidence of each family member in the attorney and make the difficult process of securing FAPE—especially if the process involves litigation—more comfortable for both.²⁵⁸ It is clear that both the parent and child need to be engaged for the child's education placement to work. The child's interest in education is obvious and, pragmatically, he may not attend or succeed at school if he were not involved in the process of advocating for his educational placement.

251. Henning, *supra* note 9, at 319-20.

252. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006) (discussing the need for a more collaborative, holistic framework in the child welfare system to best serve children and families).

253. Pearce, *supra* note 6, at 1300; Hobbs, *supra* note 237, at 93; see also discussion *infra* at pp. 351-53 (suggesting changes to the *Model Rules* to facilitate family representation).

254. Pearce, *supra* note 6, at 1299; see also Shaffer, *supra* note 9, at 987 (decrying the "paternalistic approach" of many attorneys to families' desires to define themselves by reference to the group rather than the individual).

255. The importance of the economic justifications for family representation should not be understated—they outweigh the risks in multiparty representation in many cases. See, e.g., ACTEC, *supra* note 226 ("[T]he representation of multiple clients by a single lawyer . . . often provides the clients with the most economical and effective representation—particularly where the clients are members of the same family.").

256. Batt, *supra* note 79, at 337-38.

257. This assumes the model does not allow a delegation of participation, but simply a delegation of decision-making authority. See *supra* note 246.

258. See *Report of Working Group on Conflicts of Interest*, 64 FORDHAM L. REV. 1379, 1385 (1996) (noting in the abuse/neglect context that attorney representation of multiple siblings where the risk of conflict is low could assist the children to feel more comfortable about the sensitive family court case, as well as conserve resources).

Including the child in the representation process thus can reap valuable procedural justice benefits, leading to more success educationally.²⁵⁹ On the other hand, parents not only have rights to their child's education, but they are also extremely important for logistical purposes—it is the parents who will be responsible for bringing a child to school or ensuring she attends.²⁶⁰ Family representation works by focusing on families' strengths rather than their areas of discord, thus increasing collaboration and resulting in better advocacy against the school district for the best educational placement.²⁶¹

In addition to the benefits for parents and children, a family representation model would reduce the risk for education attorneys and help them best represent their clients. Explicitly representing the family as a whole both clarifies who the clients are—parents *and* child—and avoids the risks of under-identification of conflicts so endemic in this area. Even a critic of family representation acknowledged that the dual focus on individual and group interests should inspire attorneys to be more “aware and careful” of client needs.²⁶² The model allows the attorney to take a more communal view of the case, incorporating the parties' interests, their concern for other family members, and the parent-child dyad as a whole.²⁶³ This holistic approach thus accords both with practice guidelines urging lawyers for children to consider their clients within the context of their families and communities and with the reparative lawyering model proposed by commentators in family law matters.²⁶⁴ It also helps to overcome the tendencies of both groups of attorneys practicing in this area—parents' attorneys' tendency to ignore the child's views and children's attorneys' tendency to fail to make use of parents' knowledge about their children.

Because they communicate with both parties regularly, lawyers working within this paradigm will also be better informed about both the unified and disparate views of various family members—making them better equipped to recognize and address conflicts.²⁶⁵ Yet their focus on the family as a whole will allow them to construe conflicts narrowly, in accordance with the unique

259. Scholars have critiqued a best interests representation model—analogueous to a model wherein attorneys represent parents acting in their child's interests—as alienating children or worse by failing to seek their input. See, e.g., Henning, *supra* note 9, at 281-86.

260. It is also the parent, at least in the case of younger children, who will be arranging the child's transportation to and from attorney appointments. See Henning, *supra* note 8, at 846.

261. Pearce, *supra* note 6, at 1300-01. Empowering a child with representation in the family context rather than individually would also avoid the problem noted by some children's advocates that a child who has her own lawyer may be more willing to challenge even appropriate parental authority. Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 946-47 (1999).

262. Dolgin, *supra* note 88, at 55. However, Professor Dolgin is pessimistic that most attorneys can achieve this.

263. Hobbs, *supra* note 237, at 63.

264. *UNLV Recommendations*, *supra* note 73, at 594; Huntington, *supra* note 9, at 1309-10. In a reparative model, the attorney is responsible for considering the interests of even non-client family members in order to reduce harm to the family and try to meet all of the parties' interests. *Id.*

265. Dolgin, *supra* note 88, at 52.

parent-child relationship. For instance, if a parent believes that his child needs related services three times a week yet the child wants it only once a week, an attorney focused on the whole family's needs could work within this framework rather than seeing it as an irresolvable conflict of litigation goals. She could do so by counseling parent and child towards common ground and perhaps advocating for a range of services from the school district that meets the fundamental goals of both the parents and child. Context is important to conflict analysis because not every difference is equivalent to a conflict making collective representation impossible. Attorneys in a family representation model will have the requisite information to make this key distinction.

3. ATTORNEY PRACTICE CHANGES TO ADDRESS CRITICISMS OF FAMILY REPRESENTATION

Critics of family representation center on five main points.²⁶⁶ They argue that: the family is not a recognized legal entity in contrast to a corporation and that our legal system depends upon individual, not communal, rights;²⁶⁷ the model does not reflect the contemporary reality of married couples, which are based on contract and choice rather than status and obligation;²⁶⁸ it reduces individual autonomy and consequently can impair zealous advocacy;²⁶⁹ it results in the stronger parties or the majority overbearing the weaker parties or those in the minority;²⁷⁰ and it grants attorneys too much discretion to impose their view of the family's best interests on the clients.²⁷¹ The first three criticisms do not apply in the parent-child situation due to the child's legal and inherent dependence on his parent and the parental right to be part of important decisions for the child. The last two points are valid concerns but not fatal to a family representation paradigm. Appropriate attorney practice, including increasing children's participation in the process by regularly consulting with and keeping *all* parties informed, effective counseling, and checking attorney biases, can guard against these potential problems.

a. Communication and Counseling to Overcome Power Imbalances

Family representation can reinforce existing power imbalances and result in the domination of some parties by others. However, the structure of the representation, the fiduciary obligations between the parties,²⁷² and, most

266. Some critics, however, still believe that families should be permitted to choose this form of representation. *See, e.g., Dolgin, supra* note 88; Collett, *supra* note 7.

267. *See, e.g., Hazard, supra* note 7, at 12-14, 20-21; Dolgin, *supra* note 88, at 54-55.

268. Collett, *supra* note 151, at 123-24.

269. *See, e.g., Collett, supra* note 7, at 1501; Hazard, *supra* note 7, at 9.

270. Collett, *supra* note 7, at 1492-93.

271. *Id.* at 1495.

272. Parents are seen as having fiduciary duties towards children. *See Pearce, supra* note 6, at 1310-11; Batt, *supra* note 79, at 332; Collett, *supra* note 7, at 1467 n.68.

significantly, the attorney's actions can protect against this. The representation structure should not follow a majority rule, which could, for instance, allow two parents to override one child every time.²⁷³ Instead, the attorney should try to achieve the goals of both parents and children—something that will be possible in most cases.²⁷⁴ He should only agree to representation if he reasonably believes the parents and child share a common goal of achieving the most appropriate educational placement for the child. It is then up to the attorney to ensure that the process is fair and inclusive and that each party is informed about the case and representation, according to the party's capacity.²⁷⁵ In doing so, the attorney should take into account the varying harms or burdens on various family members—thus, the party who is at risk of institutionalization or restriction should arguably have the greatest voice in that matter.²⁷⁶

An important part of effective family representation is regularly keeping all parties informed and checking in with them to ascertain their educational goals and ensure their continued voluntary participation in the family representation. Increasing children's participation in the representation is particularly important as they have routinely been excluded from determining their own educational goals. Throughout the process, the attorney should keep all of the parties informed about their respective roles and his own role as their joint advocate. As noted above, many education attorneys currently do not regularly meet with the children, even those who are their clients.²⁷⁷ This practice should change, and children should be regularly interviewed in the context of education cases, as they are in abuse/neglect, delinquency, and other cases in which they are an interested party. Just as the views of even very young children are solicited and considered in custody cases, so they should be in education cases. Education options are similarly central to children's lives, can be framed in easy to understand terms, and may even involve a more straightforward deliberation and choice on the child's part, as they do not involve the deeply personal family bonds and ruptures of a custody case.

In determining the appropriate roles of parents and children, the attorney must keep in mind the capacity and interests of each. For instance, a child may be able to express general goals such as progressing academically or improving social interactions. He may not, however, be capable of articulating the more specific

273. Batt posits majority rule for family representation. See Batt, *supra* note 79, at 340. However, other commentators do not adopt this structure.

274. Of course, attorneys must turn down or withdraw from representation in cases in which the family members' interests cannot be aligned or in which one will not allow another to be kept informed of critical information. See, e.g., Hobbs, *supra* note 237, at 92 (stating that sometimes individual family members need independent counsel to protect their interests).

275. Pearce, *supra* note 6, at 1311 ("The role of the lawyer would be to protect a minimum level of fairness in group process."); see *infra* notes 292-94 and accompanying text.

276. Collett, *supra* note 7, at 1307 (making this argument in the context of elderly family members).

277. See *supra* notes 68-90 and accompanying text.

methods of achieving these goals for an Individualized Education Plan, such as positive peer interactions as part of a behavioral plan or increasing decoding skills for reading. These more specific goals may be more appropriate for the attorney to work through with the parent.²⁷⁸ Even extensive parental involvement in making decisions about the case may be appropriate in certain instances in which the child's inability to articulate her wishes means that the attorney should look to the child's guardian for guidance.²⁷⁹ In such cases, however, the attorney still has obligations to the child as well, and should not follow the parent's direction without an independent assessment of the child's legal interests and any potential conflicts.

Another significant part of any lawyer's role is counseling his clients to best achieve the clients' goals and protect the clients' legal interests.²⁸⁰ When representing groups such as families, an attorney should use counseling techniques that both protect the autonomy of individual members and advance the interests of the group.²⁸¹ This counseling role is often heightened in the case of children, depending upon their age and capacity.²⁸² An attorney who consults with each family member and investigates the child's disability, needs, and educational options can then appropriately counsel the family as to options, thereby likely leading the family to collectively make the right choice.²⁸³ Sometimes this may entail dissuading one of the parties from pursuing a course of action that is inappropriate and unwarranted by the law and facts in the case. For instance, a lawyer could explain to a child why a hearing officer will not allow her to forego special education services if she has a well documented learning disability that impairs her academic performance. He can then work with the child to identify services that may be more palatable to her than a segregated classroom, and advocate for such services using the least restrictive environment mandate. In addition to achieving the best outcomes for the child, effective counseling can help the child improve her decision-making abilities.²⁸⁴

Counseling can also assist attorneys in overcoming differences in the parties' views, thus reducing conflicts. To this end, an attorney will need to investigate the

278. Tandy & Heffernan, *supra* note 12, at 1406.

279. MODEL RULES R. 1.14 cmts. 3-4.

280. See MODEL RULES R. 2.1.

281. Ellmann, *supra* note 151, at 1132.

282. NACC STANDARDS, *supra* note 191, at B-4(4) cmt. (stating that lawyers for children should counsel their clients when the child's position is "wholly inappropriate" or "could result in serious injury" and that, in so doing, most lawyers can persuade the child to change her position).

283. Numerous agencies engaging in education advocacy use counseling successfully to align children's and parents' interests. Lawyers must be careful, however, not to impose undue influence on either of the parties, especially the child, who by definition is more susceptible to the opinions of others, especially a parent, attorney, or other adult in a powerful position. NACC STANDARDS, *supra* note 191, at B-2 cmt. (noting that when counseling a child client, the attorney "should be careful not to apply undue pressure to a child").

284. See Henning, *supra* note 9, at 308-09. This is true even for clients of limited capacity. See Buss, *supra* note 261, at 905.

reasons for the divergence of opinions and try to find a zone of agreement to present to the adversary and/or the court. For instance, if the parents and child have a shared goal of improving the child's reading ability, but disagree on the methods, the attorney can work with them to agree upon a range of options—different programs with different levels of restrictiveness and different hours—which can then be presented to the hearing officer or court.

b. Checking Biases to Limit Overextension of the Attorney Role

A second major concern of critics is that family representation cedes lawyers too much discretion to determine the interests or goals of the parent-child dyad since the lawyer is not taking the straight direction of any one client.²⁸⁵ How an attorney receives and gives information to each client and how she determines the family's goals and objectives can effectively put the attorney in charge of the family decisions. A determination of whether a party's position has merit or not always has some element of subjectivity. In cases involving children, however, the risk of the attorney's views inappropriately influencing her counsel is heightened—the attorney may impose on the family her own views about what is best for a child or about the parental role.²⁸⁶

To guard against this tendency, the lawyer has to be aware of her biases and check against the tendency to import her values into the goals of the representation. If she limits her inquiry to whether a party's education goals for the child are really warranted under the statute, given the child's disability, academic progress, et cetera—the kind of professional judgment attorneys routinely make about the viability of a particular position—she can avoid overreaching in her role. Implementing a transparent and routine decision-making process for the family in advance will also assist in checking attorney biases.²⁸⁷

C. CHANGES TO THE *MODEL RULES* TO EXPAND OPTIONS FOR FAMILIES

Approaching representation from a family-centered perspective and the concomitant practice changes outlined above will go a long way towards expanding options for families under the existing ethical standards. However, amendments to the *Model Rules* and comments can further these aims by clarifying that families can choose to be represented together in a broader array of circumstances than is currently possible and that lawyers have additional

285. Collett, *supra* note 7, at 1495 ("Nowhere else are lawyers permitted such broad-ranging discretion in defining the objectives of representation.").

286. *See, e.g.*, Guggenheim, *supra* note 8, at 833; *see also UNLV Recommendations, supra* note 73, at 609 (advising attorneys against such a practice).

287. *See infra* notes 292-94 and accompanying text.

obligations in such scenarios.²⁸⁸ This Part proposes such amendments²⁸⁹ and illustrates how this might play out in practice by returning to the example outlined in the Introduction of a teenager whose parents seek to place her in an out-of-state residential “behavior management” school.

The *Model Rules* could be amended to clarify the processes and obligations of family representation via changes to Rule 1.13 to serve the family as a unit or to Rules 1.7, 1.8 and/or 1.14 to expand joint representation. I have chosen here to include them as part of Rule 1.8 governing specific issues of conflicts of interest for current clients. A family representation provision might be worded as follows (with my annotations in parentheses):

Rule 1.8(k): A lawyer may represent two or more family members in an action, or engage in “family representation,” where the following conditions are met:

(i) The representation is not prohibited by applicable law, (consistent with Comment [16] to Rule 1.7), the parties are not directly adverse in litigation, and the proceeding is not of the type which provides such a high risk of conflict that family representation is unworkable (see Comment [1]);

(ii) The lawyer counsels all family members both at the outset and throughout the representation as to the pros and cons of joint representation;

(iii) The lawyer’s regular duties under other parts of these Rules apply to all parties, including clients with diminished capacity under Rule 1.14, except as provided in provision (iv) below;

(iv) The duty of confidentiality shall not apply between family member clients, and the lawyer shall explain this to all the parties at the outset of the representation;

(v) The lawyer takes any necessary steps to ascertain that the family members are dealing fairly with each other, including those obligations consistent with the need to protect the interests of clients with diminished capacity under Rule 1.14;

(vi) If the lawyer reasonably believes that one family member client is acting so as to substantially injure another family member client, he shall cease the communal representation and may take protective action permissible under these Rules to safeguard the interests of the threatened family member; and

(vii) The lawyer is deemed to represent all family members in both their collective and individual capacities for subsequent representation purposes.

Comment:

[1] The types of cases wherein the risk of conflict is so high that family representation is unworkable include cases such as those identified as outright

288. This vision of family representation is based in large part on Professor Pearce’s optional family representation model. See *supra* notes 241-44 and accompanying text.

289. There are numerous practice standards apart from the *Model Rules* that provide helpful guidance for attorneys representing children. See *supra* notes 29-31. The suggested amendments to the *Model Rules* are not intended to overlook these important standards. Rather, I begin with the *Model Rules* because they cover the broadest audience of attorneys, including those who typically represent parents, not children, in education cases.

conflicts by ethics tribunals and professional standards, including the joint representation of a parent and child in an abuse/neglect or custody case, or of a husband and wife in a contested divorce proceeding.

[2] Necessary steps under (k)(v) may include, but are not limited to, verifying with the family at the start of the representation what the decision-making processes will be and regularly communicating with all family members in order to ensure updated knowledge of their positions and their ongoing commitment to the family representation process.

These changes are consistent with many other *Model Rule* provisions and will ensure that family representation operates in as fair a manner as possible for all parties. To this end, the lawyer must counsel each party at the outset about the pros and cons of family representation and continue to do so throughout the representation. This is akin to the attorney's current duty to explain joint representation under Rule 1.7.²⁹⁰ Similar to the attorney's possible duty to ensure that a guardian is acting in the interests of her ward,²⁹¹ an attorney should only engage in family representation if the family has clarified how information will be communicated and decisions made. Moreover, the attorney must, at all times during the representation, believe that the family members are dealing fairly with each other.²⁹² Professor Stephen Ellmann has noted this responsibility for lawyers representing groups of any type, one that may incorporate mediation and other alternative dispute resolution techniques.²⁹³ This also accords with scholars' vision of a collaborative lawyering model, wherein the lawyer is nondirective about the client's ultimate goals but directive as to the decision-making process.²⁹⁴ To comport with these obligations, there should be no delegation of participation available—each member should participate according to his or her capacity—and the attorney should ensure that this occurs.

All the family member clients are entitled to diligent and loyal representation, consistent with Comment 33 to Rule 1.7. Yet family representation cannot properly occur when relevant information is kept confidential from certain members. Thus the proposed Rule clarifies that there is no confidentiality among members and that the attorney has a duty to keep all of the family members informed, tailoring his disclosures and counseling to their varying capacities.²⁹⁵ An attorney should not engage in family representation where one party is acting

290. MODEL RULES R. 1.7 cmt. 32.

291. See *supra* note 187.

292. Pearce, *supra* note 6, at 1311-12. Of course, this must take into account the varying capacities of the family members.

293. See Ellmann, *supra* note 151, at 1152-57 (arguing that a lawyer for a group has an obligation to "monitor the fairness of the group's decision-making processes, and if need be to intervene on behalf of those who are becoming victims within the group itself").

294. Henning, *supra* note 9, at 315.

295. This limitation is consistent with Rule 1.7's outline of the obligations under joint representation. MODEL RULES R. 1.7 cmt. 31.

so as to “substantially injure” another party.²⁹⁶ Because the child is the one actually in the educational placement, it is most likely that the parent would be the injuring party. If this arises, and the attorney cannot counsel the injuring party out of the action, she must withdraw from representation and take any necessary action to protect the potentially injured party, the child, consistent with existing potential ethical obligations to third-party minors.²⁹⁷ Finally, the *Model Rules* should clarify that the family attorney represents all parties in both their collective and individual capacity for subsequent representation purposes.²⁹⁸

How would this work in practice? Let’s return to the example in the Introduction, where parents had enrolled their sixteen-year-old daughter with a mild learning disability in a private school.²⁹⁹ The attorney engaging in family representation would explain the process to the parents and child at the start of the representation and would work with the family to identify common goals and encourage productive communication among the parties.³⁰⁰ Thus, the parents’ frustration with the child’s out of school behavior might not even reach the levels that it would under a different representation model. If it did, and the parents sought placement in a restrictive residential behavior management school, the attorney would be bound to interview the child and learn that she does not want to attend. Some parents who send their children to residential behavioral facilities do not know about the facilities’ ineffectiveness or the abusive behavior of some of its staff.³⁰¹ A properly informed attorney looking out for the interests of both parties would present the parents with this information and propose other educational resources in the community that could both meet the child’s needs and address the parents’ concerns about the child’s behavior. He would also tell the parents that such a program would not likely satisfy the least restrictive environment mandate and that they would thus not be reimbursed for such a school under the IDEIA. Many parents would be persuaded in such a scenario. If the parents remained unconvinced, however, the attorney might be required to withdraw but could also take protective action on behalf of the child. The court would certainly not be left with the impression, as in the original example under an individualistic representation system, that the child’s and parents’ interests were aligned with the attorney representing both. With no court endorsement of the placement and little chance of reimbursement, the parents would be unlikely

296. This standard is taken from Professors Cahn and Tuttle’s model of expanded joint representation. See Cahn & Tuttle, *supra* note 6, at 127-28 (noting that substantial injury can be financial or emotional, and that its meaning will be “context-specific”).

297. See *supra* note 187.

298. Pearce, *supra* note 6, at 1313.

299. See *supra* pp. 306-07.

300. These practices are consistent with the move towards collaborative lawyering by some in cases involving families and children. See *supra* note 9.

301. See Maia Szalavitz, *An Oregon School for Troubled Teens is Under Scrutiny*, TIME, Apr. 17, 2009, <http://www.time.com/time/health/article/0,8599,1891082,00.html>.

to send the child to the residential school and thus harm to the child would be avoided.

Of course, the family representation model will not work for all families. Educational placements and family dynamics are complex. The needs of families change over time and representation of children must take into account children's gradual maturation.³⁰² I chose not to propose a default rule of family representation in order to increase choice for families and attorneys. Thus, these amendments are meant to supplement existing options and serve as a first step in orienting attorneys towards a more communal representation of families rather than dictating one "right way."

CONCLUSION

Current legal doctrine views parents and children as a unified entity in education matters, while the ethical rules governing attorneys are premised on a solitary client model. This disjuncture would at first appear to call for a more individualized representation model, wherein both parents and children have their own counsel. Yet the reality is that the presumption is often correct, and separate counsel for all parties to an education case is economically unfeasible.

This Article begins to address this paradox to better serve families and protect attorneys by proposing a reconceptualization of representation and the attorney's role. Family representation builds on a family's strengths and includes all parties in a collaborative process. Thus, it increases children's voices—often ignored under a system completely governed by the presumption—but also acknowledges the unique relationship between parents and children. Family representation requires that the attorney focus on the family holistically, resulting in the best outcomes for its members and better educational placements for children. Thus, it has the potential to improve the representation of both parents and children. I have applied family representation in the education context here, but family representation also provides a valuable new approach to other types of cases wherein parents and children have claims against the state or another third party.

Family relationships are complex yet durable, and a family is something more than the sum of its individual members. It is time that attorney rules and practice recognize these truths.

302. However, even children who are very young or incapacitated, if they are verbal, can benefit from a respectful hearing from an attorney or factfinder. Buss, *supra* note 261, at 941-42.

