

# CONSIDERING THE INDIVIDUALIZED EDUCATION PROGRAM: A CALL FOR APPLYING CONTRACT THEORY TO AN ESSENTIAL LEGAL DOCUMENT

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## INTRODUCTION

The IDEA<sup>1</sup> has revolutionized the way children with disabilities are educated in the United States. A unique statutory scheme requiring public schools to open their doors to children with disabilities, the IDEA rejected a one-size-fits-all concept of education and armed families with an unprecedented right to an education.<sup>2</sup>

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<sup>1</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012) (referred to throughout as “the IDEA” or “the Act”).

<sup>2</sup> Prior to enactment of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (the IDEA's predecessor in name), students who were deemed “uneducable and untrainable” were segregated from the general population and, in the early 1970s, suspensions of thousands of students were employed to exclude special needs children from education. S. REP. NO. 104-275, at 7, 10–11 (1996), available at <http://www.gpo.gov/fdsys/pkg/CRPT-104srpt275/pdf/CRPT-104srpt275>

Public schools would be required to figure out how to educate students with a myriad of differences through classroom accommodations, services and supports in the “least restrictive environment.”<sup>3</sup> The Act seeks to empower the weakest parties in the administrative process: children with disabilities and their parents.<sup>4</sup> The primacy of this value is explicit in the precatory section of the current IDEA, which states that “[a]most 30 years of research and experience ha[ve] demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role and responsibilities of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.”<sup>5</sup>

To effectuate its goals, the statute establishes by positive mandate a collaborative process in which schools and parents identify, evaluate, and determine each child’s educational needs and needs for related services. The end product of this process is a document called an Individualized Educational Program (IEP).<sup>6</sup> The IEP provides a “written statement”<sup>7</sup> of a student’s educational goals as well

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.pdf. See also Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 421–22 (2011); Gabriela Brizuela, Note, *Making the “IDEA” a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595, 597–600 (2011); Jeffrey A. Knight, Comment, *When Close Enough Doesn’t Cut it: Why Courts Should Want to Steer Clear of Determining What is—and What is Not—Material in a Child’s Individual Education Program*, 41 U. TOL. L. REV. 375, 377–388 (2010); Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J. L. & EDUC. 523, 531–32 (1996); Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 603–04 (1995).

<sup>3</sup> 20 U.S.C. § 1412(a)(5). See generally Melvin, *supra* note 2.

<sup>4</sup> See Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J. L. & PUB. POL’Y 171, 174–75 (2005); Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT’L ASS’N ADMIN. L. JUDIC. 423, 425 (2012); Romberg, *supra* note 2, at 438; Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J. L. REF. 331, 340 (1994); David M. Engel, *Law Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 168 (1991).

<sup>5</sup> 20 U.S.C. § 1400(c)(5). See also S. REP. NO. 104-275, at 14–15 (1996) (recognizing that parents often “feel largely left out of the IEP process” and “their unsuccessful efforts to obtain appropriate services for their children”). But see Philip T.K. Daniel, *Education of Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 5 (2000) (considering the expanded protection for parents under the 1997 amendments to the IDEA and stating that a lack of effective consequences encourages school districts to “take only minimal steps” toward “collaboration with parents”). The paucity of effective consequences remains a truth under the subsequent 2004 amendments to the IDEA.

<sup>6</sup> 20 U.S.C. § 1401(14).

<sup>7</sup> *Id.*

as the educational program and related services that will be provided by the school district.<sup>8</sup> Thus, execution of the IDEA mandates occurs at the local school district level, subject to state regulations and the IDEA.<sup>9</sup> Each state's regulations are unique.<sup>10</sup>

The IDEA requires states to establish procedures parents may use to challenge decisions made by their local education agency relative to their child's education, including the sufficiency of the education offered to their child as expressed in the child's IEP.<sup>11</sup>

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<sup>8</sup> The IDEA encompasses a continuum, starting with identification and evaluation of a student to determine whether they qualify to be classified as disabled under the IDEA. *See* 20 U.S.C. § 1414(a). Once a determination has been made that a student is disabled within the meaning of the statute, the process of formulating an individualized program begins. 20 U.S.C. § 1401(14). The statute provides no standard with regard to implementation, and this issue has been addressed through litigation. Parents can challenge a school district at any point along the continuum, from refusal to evaluate or classify through failure to implement an IEP. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(i) (2013). The most common dispute arises over the legal adequacy of an IEP, and parents most commonly seek "specialized services, private school tuition and compensatory education." *See* David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student of a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 75, 86–87 (2010). Note also that the terms "district" and "school" will be used interchangeably in this Article.

<sup>9</sup> Local determinations, however, are informed by regulations promulgated by the U.S. Department of Education and regulations promulgated by state education departments, which vary by state.

<sup>10</sup> Regulations of the New York State Education Commissioner will be the ones referred to in this Article, since the case that is the subject of this Article arose in New York. Massachusetts regulations, for example, differ from New York's. Whereas New York regulations contain absolutely no substantive, qualitative standard for what a school must provide, Massachusetts requires an education that permits a student to progress effectively in the general education program, which means the acquisition of knowledge and skills "according to the individual educational potential of the student." 603 MASS. CODE REGS. 28.02(17) (2011). Massachusetts regulations also confer upon parents the "right to observe any program(s) proposed for their child." *Id.* 28.07(1)(a)(3). Differences are also seen in the IEP forms developed by each state. Though the contents are primarily dictated by the IDEA, forms vary among the states. The Massachusetts form, for example, includes a "vision statement" for each student based on prospective educational expectations. New York's form asks for identification of the student's "expected rate of progress in acquiring skills and information and learning style." N.Y. COMP. CODES R. & REGS. tit. 8, § 2001(i)(a).

<sup>11</sup> 20 U.S.C. § 1415(b)(6). These complaints are referred to, interchangeably, as "due process complaints" or "impartial hearing requests." New York has a two-tiered administrative process for resolving disputes between parents and school districts. A dispute, if not resolved by mediation or within the thirty-day resolution period commencing upon filing of a complaint, is heard by an Impartial Hearing Officer (IHO) and may be appealed to a State Review Officer (SRO), with a right to appeal to state supreme or federal district court. *See* N.Y. EDUC. LAW §§ 4404.1–4404.3 (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)–(k). Massachusetts, in contrast, has a single level of review by the Bureau of Special Education Appeals, which promulgates its own rules. *See* MASS. GEN. LAWS ch. 71B, § 2A (2010); 603 MASS. CODE REGS. 28.08. The right to appeal to a state or federal district court is found in Rule

In general, parents who reject an IEP may select an alternative placement and proceed against the school district for tuition reimbursement.<sup>12</sup> Though the IDEA plainly specifies that the IEP serve as a written statement of, among other things, the services the school will provide to the child, an open issue is whether contract law concepts should be called upon in this area of jurisprudence.<sup>13</sup>

The recent case of *R.E. v. New York City Department of Education*,<sup>14</sup> decided in September 2012, expressly addressed this issue. The case consolidated the claims of three different families. The families had asserted that their children's IEPs failed to include services necessary to an educational program for their children that could meet the IDEA's requirements. One of the issues addressed concerned whether school district testimony about how those very services—which were not described in the respective children's IEPs—would have been provided had the children enrolled in the public program.<sup>15</sup> Thus, the court was presented with the issue of whether the sufficiency of an IEP is to be judged exclusively by reference to the writing, or whether to consider testimony given after formulation of an IEP about how a child might have been given supports and services that were not otherwise provided for in the written document. The Second Circuit rejected a rule that would have restricted evaluation of the offered education to an IEP document, but stated that after-the-fact testimony could not be offered to remedy an otherwise defective IEP.

To place the discussion in perspective, this Article will first dis-

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XIV of the Massachusetts Department of Elementary and Secondary Education Hearing Rules for Special Education. See 603 MASS. CODE REGS. 28.08(6).

<sup>12</sup> 20 U.S.C. §§ 1412, 1415(a)(10)(C)(iii).

<sup>13</sup> Congress did not intend for the IEP to be a contract between parent and school or a guarantee of any particular outcome; instead, the writing was to "ensure adequate involvement" of the parent and child. S. REP. NO. 94-168, at 11-12 (1975), available at <http://files.eric.ed.gov/fulltext/ED112561.pdf>. The Senate Committee further recognized that outcomes could not be guaranteed, but that the written plan would "emphasize the process of parent and child involvement and . . . create a written record of reasonable expectations." *Id.* The statutory requirement of a writing is not "merely technical"; instead, it creates "a clear record of the educational placement and other services offered to the parents." *Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994)).

<sup>14</sup> *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012), cert. denied, 133 S. Ct. 2802 (2013). In this Article, the New York City Department of Education will be referred to as the DOE.

<sup>15</sup> *Id.* at 185. The court also considered the level of deference to be accorded to administrative decisions in the IDEA context and whether failure to strictly adhere to state regulations constitutes a per se IDEA violation. See *id.* at 188-90. This Article evaluates the court's decision relative to retrospective testimony only.

cuss the IDEA's history, with special attention to the legislative history as it pertains to the intended legal function of the IEP. The next section will discuss the current IDEA statutory framework, also focusing primarily on IEP formulation and content requirements and provisions for dispute resolution procedures. The *R.E.* decision will then be discussed in detail. Finally, the Article will analyze the legal import courts should confer upon the IEP document, taking into consideration legislative intent and additional case law.

The fuzzy terminology in the IDEA has impeded the efficacy of the IEP as a protective device. Notwithstanding provisions for administrative procedures to resolve disputes between families and school districts,<sup>16</sup> the IDEA, in fact, has blunt teeth.<sup>17</sup> This Article will argue that courts should recognize IEPs as quasi-contracts and apply contract law concepts to IEP disputes. Alternatively, Congress should rephrase its characterization of the IEP, calling it—at a minimum—a written agreement. This appellation would promote the IDEA's normative values, recognize the descriptive constructs that have developed over the thirty years of the IDEA's existence,<sup>18</sup> and empower and protect parents of children with disabilities.

## I. HISTORY OF THE IDEA

Prior to the 1960s, exclusion of people with disabilities from mainstream education was accepted and even upheld.<sup>19</sup> In fact, at that time, special education was reserved for students with behavioral problems. The physically or intellectually disabled were barred from mainstream schools, as well.<sup>20</sup> The 1960s ushered in an overall progressive societal shift. A movement emerged that was bent on eradicating political structures that marginalized minorities and the poor, with the objective of opening the doors of opportunity to all. Education did not escape this shift.

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<sup>16</sup> 20 U.S.C. §1415(b)(6)(A).

<sup>17</sup> See Daniel, *supra* note 5.

<sup>18</sup> See Caruso, *supra* note 4, at 175–76. (“The use of contractual jargon makes and is designed to make a powerful impression upon both parents and school district personnel . . . IEPs are referred to as contracts; therefore parents are led to believe they must be different. Administrators also share the sense that a contract is a higher, more immediate and accountable form of commitment toward children with disabilities than their generic duty to implement state and federal laws . . . an IEP is not a contract in a formal sense.”)

<sup>19</sup> See Romberg, *supra* note 2, at 421–22 (citing Kotler, *supra* note 4, at 343); Fester, *supra* note 8, at 77; Daniel, *supra* note 5, at 5. See also *Levine v. State Dep't of Insts. & Agencies*, 84 N.J. 234 (1980) (stating that the constitutional right to an education does not extend to children classified as “subtrainable”).

<sup>20</sup> Knight, *supra* note 2, at 378; Melvin, *supra* note 2, at 603–04.

*Brown v. Board of Education*<sup>21</sup> addressed the inequities of educational systems that segregated black children, holding that separate educational facilities were inherently unequal and thus violated the Fourteenth Amendment.<sup>22</sup> In *Brown*, the Supreme Court noted the importance of education to society, stating:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>23</sup>

*Brown* also introduced a conceptual tension between education as an exclusively local service as opposed to a broader matter implicating constitutional rights and served to encourage people with disabilities to seek parity.<sup>24</sup>

President Johnson's Great Society program continued the trend and led to enactment of educational programs for economically disadvantaged children in 1965 through the Elementary and Secondary Education Act (ESEA).<sup>25</sup> Through amendments to the ESEA in 1966, Congress added a grant program for education of

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<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> *Id.* at 493–95.

<sup>23</sup> *Id.* at 493.

<sup>24</sup> See Knight, *supra* note 2, at 377–78. See also Romberg, *supra* note 2, at 421–22; Brizuela, *supra* note 2, at 597–98; Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 161 (2010); Melvin, *supra* note 2, at 606–07; PETER W.D. WRIGHT & PAMELA DARR WRIGHT, SPECIAL EDUCATION LAW 12–13 (Harbor House Law Press, 2d ed. 2010).

<sup>25</sup> Knight, *supra* note 2, at 378 (calling the ESEA a “centerpiece of President Lyndon Johnson’s ‘Great Society,’” and noting that President Johnson played an integral role in introducing the ESEA bill into Congress and seeing to its rapid passage—with no amendments and little debate—in just eighty-seven days). Knight notes, however, that none of the programs developed by the states under the ESEA “produced the results that Congress, and advocates alike, sought to achieve.” *Id.* See also Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1358 (2010) (noting that the ESEA was the federal government’s first attempt to equalize funding in public schools through provision of supplemental funds).

handicapped children.<sup>26</sup> The Education of the Handicapped Act (EHA) was enacted in 1970, and continued the grant for development of programs for students with disabilities by the states, but set neither substantive educational standards nor procedural requirements.<sup>27</sup>

In this atmosphere, parents of children with disabilities sought to effect radical social change in the direction of inclusion.<sup>28</sup> The seeds of what ultimately became the IDEA are attributed to two cases, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (*P.A.R.C.*) and *Mills v. Board of Education of D.C.* (*Mills*).<sup>29</sup> The courts in these two cases held that due process and equal protection under the United States Constitution require what have become the basic articles of faith in special education: where a state has undertaken to educate its children, children with disabilities living within the state are entitled to a free, appropriate education in public schools that meets their individual needs and capacities; that states have an obligation to identify children with disabilities; and that parents are entitled to involvement in decision-making and can seek to enforce their children's rights.<sup>30</sup>

The germs of the phrase "free and appropriate public education," now firmly entrenched in the law of special education, are found in the *P.A.R.C.* decree.<sup>31</sup> Other elements of the *P.A.R.C.* de-

<sup>26</sup> See S. REP. NO. 104-275, at 7 (1996).

<sup>27</sup> *Id.* See also Engel, *supra* note 4, at 170–71.

<sup>28</sup> DeMonte, *supra* note 24, at 160–61. See also Knight, *supra* note 2, at 380; Lauren A. Larson, Comment, *Beyond Conventional Education: A Definition of Education Under the Education For All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 63, 67–68 (1985); Melvin, *supra* note 2, at 606–07.

<sup>29</sup> 334 F. Supp. 1257 (E.D. Pa. 1971) [hereinafter *P.A.R.C.*]; 348 F. Supp. 866 (D.D.C. 1972). See also Romberg, *supra*, note 2, at 422–24 (noting that after the decisions in *P.A.R.C.* and *Mills*, Congress enacted the EAHCA, incorporating "many of the robust procedural rights granted to disabled children" in those decisions); Knight, *supra* note 2, at 379 (noting that these two landmark cases signaled the advent of change); Engel, *supra* note 4, at 171–73 (noting that the EHA adopted the use of procedural protections to promote the legal rights of children with disabilities); Brizuela, *supra* note 2, at 598–600 ("*P.A.R.C.* and *Mills* established the principle that students with disabilities are entitled to a FAPE."). See also Daniel, *supra* note 5, at 6 (noting the "sordid history" of parental exclusion from educational decision-making until the advent of *P.A.R.C.* and *Mills*, as well as persistence of other advocates, leading to the ESEA's enactment).

<sup>30</sup> See Knight, *supra* note 2, at 379; Brizuela, *supra* note 2, at 598–600; Engel, *supra* note 4, at 171–73.

<sup>31</sup> *P.A.R.C.*, 334 F. Supp. at 1266. The consent decree obligated Pennsylvania to provide a "free public education of education and training appropriate to [the child's] learning capacities" to the mentally retarded and "exceptional" children. Pennsylvania was further barred from applying statutes denying exceptional children access to public education and was charged with developing programs to educate

cree that were ultimately incorporated into the IDEA were the concept of notice and a parental due process right concerning educational decisions, biennial evaluations and reimbursement of private school tuition if the public school could not accommodate the child's learning needs.<sup>32</sup>

Plaintiffs in *Mills*<sup>33</sup> also asserted that they were deprived of their due process rights when their exceptional children were excluded from the public general education school system without hearings. Some were intellectually disabled and others had behavioral problems resulting from hyperactivity or emotional disturbance. The District of Columbia ultimately conceded its obligation to provide education suited to the respective needs of the individual plaintiffs and entered into a consent decree that it then failed to implement. Summary judgment was ultimately entered enforcing the *Mills* decree.<sup>34</sup>

By granting summary judgment enforcing the decree, the court extended the *Brown*<sup>35</sup> principle of education as a civil right; excluding exceptional students from compulsory education was tantamount to segregation and rose to the level of a deprivation of due process, contravening the Fifth Amendment.<sup>36</sup> The decree in *Mills* required staffing of a special education department, an identification component, a due process and hearing procedure, and individual plans for each child.<sup>37</sup> The prospect of educational benefit, a precursor of the *Rowley*<sup>38</sup> standard, was another factor to be considered in determining a child's educational placement under the *Mills* decree.<sup>39</sup>

The final decree in *Mills* required the District of Columbia to provide any child with "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or

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exceptional children. Notice to the affected class was also mandated. *Id.* at 1258–60. The decree called for biennial evaluation of exceptional students enrolled in Pennsylvania's programs. *Id.* at 1266.

<sup>32</sup> *Id.* at 1262–63.

<sup>33</sup> *Mills*, 348 F. Supp. at 866.

<sup>34</sup> *Id.* at 878.

<sup>35</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Melvin, *supra* note 2, at 606 ("Constitutional theories of equal educational opportunity for children with disabilities are rooted in the United States Supreme Court's decision in *Brown*.").

<sup>36</sup> *Mills*, 348 F. Supp. at 875.

<sup>37</sup> *Id.* at 878–83.

<sup>38</sup> *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (establishing that the substantive standard for an "appropriate" education was one that induced progress).

<sup>39</sup> *Mills*, 348 F. Supp. at 878.



emotional disability or impairment.”<sup>40</sup> The District of Columbia was ordered to compile a list identifying causes for nonattendance, including “educable mentally retarded, trainable mentally retarded, emotionally disturbed, specific learning disability, crippled/other health impaired, hearing impaired, visually impaired, multiple handicapped.”<sup>41</sup> This list provided the footprint for the various classifications of disabilities currently found in today’s IDEA.<sup>42</sup>

*Mills* also enumerated what would become the IDEA’s procedural foundations and the elements of the IEP. Specifically, all students were to be “provided with a publicly-supported educational program suited to his needs” and parents were to be notified of the proposed program, with an opportunity to have a hearing if they found the proposal objectionable.<sup>43</sup> Notice of the program had to be in writing and the notice had to advise the parent of their right to object.<sup>44</sup>

Though *P.A.R.C.* and *Mills* established a public obligation to educate children with disabilities, no supportive statute existed. The Rehabilitation Act of 1973 prohibited discrimination on the basis of disability, but did not mandate inclusion of children with disabilities in public school or expressly address the educational needs of those children.<sup>45</sup> Congress held additional hearings exam-

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 879.

<sup>42</sup> The IDEA defines a child with disabilities as  
a child with intellectual disabilities, 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 who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A) (2012). Children ages 3 through 9 are considered disabled if they experience

developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development . . . who, by reason thereof, need [ ] special education and related services.

*Id.* § 1401(3)(B).

<sup>43</sup> *Mills*, 348 F. Supp. at 878–80.

<sup>44</sup> *Id.* at 880–81. *Mills* also placed the burden upon the school district to establish the sufficiency of the offered educational program. As in the current state of the law, the *Mills* decree gave parents the right to cross-examine a school district’s witnesses and to present their own witnesses. *Id.*

<sup>45</sup> See Knight, *supra* note 2, at 381; WRIGHT & WRIGHT, *supra* note 24, at 294.

ining the status of children with disabilities in education, resulting in the passage of the Education for All Handicapped Children Act (EAHCA)<sup>46</sup> in November of 1975. The EAHCA incorporated the elements articulated in *P.A.R.C.* and *Mills*, conferring a legal right to a free, appropriate education and, in effect, codified the holdings of those cases and afforded parents a means of enforcement.<sup>47</sup> The primary objective of the law was to guarantee parents a say in their children's education and to foster the collaborative process.<sup>48</sup>

The lynchpin of the EAHCA was a prescribed meeting between parents and school districts at which an "individualized education program" would be planned and developed. From the outset, the IEP had to be formulated by the beginning of the school year,<sup>49</sup> and the formulation needed to be in writing.<sup>50</sup> However, the Senate Committee that considered the EAHCA explicitly stated in its report to the Senate: "It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship."<sup>51</sup>

An IEP formulated under the EAHCA encompassed merely five components:

- (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including

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<sup>46</sup> Education for All Handicapped Children Act (EAHCA) of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (2000 & Supp. 2005)). See also WRIGHT & WRIGHT, *supra* note 24, at 14; Knight, *supra* note 2, at 381; Romberg, *supra* note 2, at 424.

<sup>47</sup> See S. REP. NO. 94-168, at 8 (1975) ("The Education Amendments of 1974 incorporated the major principles of the right to education cases. That Act added important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature of severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . ." *Id.*). See also Knight, *supra* note 2, at 381; Rebell & Hughes, *supra* note 2, at 534-35 ("[*P.A.R.C.*] and *Mills* led directly to Congress' passage of the Education of All Handicapped Children's Act . . . the predecessor of the IDEA, in 1975.").

<sup>48</sup> See S. Rep. No. 94-168, at 11.

<sup>49</sup> See 20 U.S.C. § 1414(d)(2)(A) (2012).

<sup>50</sup> EAHCA § 602(19), 89 Stat. at 776.

<sup>51</sup> S. REP. NO. 94-168, at 11.

short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.<sup>52</sup>

The IEP team envisioned by the EAHCA was also simple: an IEP could be formulated in “any meeting” of “a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child.”<sup>53</sup> The EAHCA included procedural safeguards to protect parents. Educational agencies could not evaluate a child, change their classification or educational placement without first notifying the parent in writing.<sup>54</sup> The EAHCA also provided for an enforcement procedure, mandating states to develop administrative venues for resolving disputes under the Act and permitting appeals to either state or federal court.<sup>55</sup>

The EAHCA resulted in an increase in the number of children receiving special education, but this progress was far from perfect, and the EAHCA was fine-tuned in successive amendments.<sup>56</sup> The 1990 amendments<sup>57</sup> introduced the name by which the Act is currently known—the Individuals with Disabilities in Education Act or IDEA.<sup>58</sup>

The IEP requirements remained unchanged until the 1997

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<sup>52</sup> EAHCA § 602(19), 89 Stat. at 776.

<sup>53</sup> *Id.*

<sup>54</sup> *See* EAHCA § 615(a), 89 Stat. at 788.

<sup>55</sup> *See id.* § 615(b)–(e), 89 Stat. at 788–89.

<sup>56</sup> *See* 20 U.S.C. § 1400(c)(2) (2012). Between 1976 and 1977, 3,694,000 students were provided with special education; for the period between 2009 and 2010, this figure increased to 6,481,000. *See Students with Disabilities*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=64> (last visited Oct. 29, 2013). *See also* Ferster, *supra* note 8, at 78 (“Today, over six million students with disabilities are served under the Act in public schools.”); 20 U.S.C. § 1400(3) (“Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children [have] access to a free appropriate public education and in improving educational results for children with disabilities.”).

<sup>57</sup> Pub. L. 101-476, 104 Stat. 1103 (1990).

<sup>58</sup> *See* H.R. REP. NO. 101-544, at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, at 1783.

amendments,<sup>59</sup> in which the IEP requirements were greatly amplified. The 1997 amendments combined provisions referring to evaluations, reevaluation, and IEP development and review into section 614 and called for a more comprehensive, sophisticated IEP document.<sup>60</sup> The law introduced a nominal substantive educational standard; the plan had to foster advancement in “attaining the annual goals,” as well as enable the child “to be involved and progress in the general curriculum.”<sup>61</sup> Identification of the participants in the IEP team was also expanded. The team was now mandated to include the parents, teachers familiar with the child in the educational setting, and special education teachers or other specialists involved in addressing the child’s special needs.<sup>62</sup> The 1997 amendments required that IEPs include measurable goals, benchmarks, and short-term objectives and specification of how progress would be reported to parents.<sup>63</sup> However, an overly rigid document was not envisioned by Congress; the need for “specific day-to-day adjustments” was acknowledged, but no adjustment mechanism was codified.<sup>64</sup>

The last amendments of note were made in 2004.<sup>65</sup> The 2004 amendments further refined the IEP development process.<sup>66</sup> The Amendments added procedures that allowed the IEP to be a more

<sup>59</sup> Pub. L. 105-17, 111 Stat. 37 (1997).

<sup>60</sup> See *id.* at 81, 86–88. The 1997 amendments also added 20 U.S.C. § 1412(a)(10)(C), predicated reimbursement of tuition for parents who unilaterally enroll their children in private schools upon notice to the school district. See *id.* at 63. See also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (holding that reimbursement for the cost of private-school special education is authorized under the IDEA “when a school district fails to provide a [free appropriate public education] and the private-school placement is appropriate”).

<sup>61</sup> 111 Stat. at 84.

<sup>62</sup> See *id.* at 85.

<sup>63</sup> See *id.* at 83.

<sup>64</sup> See S. REP. NO. 105-17, at 19–21 (1997), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt17/pdf/CRPT-105srpt17.pdf> (“Specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child’s IEP team. However, if changes are contemplated in the child’s measurable annual goals, benchmarks, or short term objectives, or in any of the services or program modifications, or other components described in the child’s IEP, the [local educational agency] must ensure that the child’s IEP team is reconvened in a timely manner to address those changes.” *Id.* at 20.).

<sup>65</sup> Pub. L. No. 108-446, 118 Stat. 2647 (2004). The 2004 amendments renamed the act the Individuals with Disabilities in Education Improvement Act, but the act is still generally referred to as the IDEA.

<sup>66</sup> While recitation of benchmarks and short-term objectives were eliminated to reduce paperwork, periodic progress reports remained for parent protection. S. REP. NO. 108-185, at 28–29 (2003), available at <http://www.gpo.gov/fdsys/pkg/CRPT-108srpt185/pdf/CRPT-108srpt185.pdf>.

fluid document. Informal, interim changes to the IEP are now permitted upon agreement with the parents.<sup>67</sup> States were permitted to apply to participate in a pilot, multi-year IEP program.<sup>68</sup> Parental participation in meetings by telephone or video conference was permitted and, with written consent from the parent, IEP team members whose areas would be unaffected by any IEP changes were excused from development meetings.<sup>69</sup> Unlike earlier versions, the current act emphasizes performance and advancement in alignment with the No Child Left Behind Act of 2001.<sup>70</sup> Also, a qualitative element was added; the services provided must be “based on peer-reviewed research to the extent possible.”<sup>71</sup> Overall, both the process of IEP development and the IEP document itself have increased in complexity since 1975.

Throughout its history, the IDEA required states to maintain an administrative procedure for resolution of disputes between parents and school districts.<sup>72</sup> Under this section, states are required to establish procedures for resolution of complaints concerning “identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,” including mediation.<sup>73</sup> Appeal may be taken from the administrative proceedings to state or federal court.<sup>74</sup> Written notification must be given to parents informing them of their procedural rights.<sup>75</sup>

The IDEA has wrought remarkable change. Its procedures and procedural protections have evolved in complexity. However, the statute’s primary mechanism, the IEP, is still referred to as merely a written statement, and this seriously undermines the potential for forceful protection for families of students with disabilities.

## II. IEPs AND PROCEDURAL PROTECTIONS IN THE CURRENT IDEA

At its most basic, the overall objective of the IDEA is to level the educational playing field for students with disabilities relative

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<sup>67</sup> 20 U.S.C. § 1414(d)(3)(D) (2012).

<sup>68</sup> *Id.* § 1414(d)(5).

<sup>69</sup> *Id.* § 1414(d)(1)(C)(ii)–(iii); *id.* § 1414(d)(C).

<sup>70</sup> Knight, *supra* note 2, at 386; WRIGHT & WRIGHT, *supra* note 24, at 15, 19.

<sup>71</sup> 20 U.S.C. § 1414(d)(1)(A)(IV); Knight, *supra* note 2, at 386.

<sup>72</sup> *Id.* § 1415. *See also supra* note 11.

<sup>73</sup> 20 U.S.C. § 1415(b)(6); *id.* § 1415(b)(5).

<sup>74</sup> *Id.* § 1415(i)(1)–(3).

<sup>75</sup> *Id.* § 1415(d)(1)(A).

to their peers without disabilities.<sup>76</sup> The ultimate aim is to provide these students with a better, long-term outcome in terms of productivity in adulthood.<sup>77</sup> The federal statute sets forth a mandate and prescribes structures to effectuate that mandate, but execution is accomplished at a very local level, with state oversight and federal support.<sup>78</sup> The IDEA's procedural structures also attempt to redress the imbalance of power between parents and school districts.<sup>79</sup>

The overarching mandate of the IDEA is provision of a free and appropriate public education, or FAPE, to children who have been classified as disabled.<sup>80</sup> This is to be accomplished in the "least restrictive environment."<sup>81</sup> Specifically, the statute states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>82</sup>

The statute proscribes four elements of a FAPE, namely an education with related services that have been a) provided at public expense; b) that meet state standards; c) delivered at an appropriate school in the state; and d) that are "provided in conformity with the individualized education program."<sup>83</sup> Twice, the statute re-

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<sup>76</sup> See *id.* § 1400(d).

<sup>77</sup> See *id.* § 1400(a)(5)(A)(ii); S. REP. NO. 94-168, at 9 (1975) ("With proper education, many [children with disabilities] would be able to become productive citizens, contributing to society instead of being forced to remain burdens."). See also WRIGHT & WRIGHT, *supra* note 24, at 14; S. REP. 104-275, at 7 (1996); *Accountability and the IDEA: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2002), 2002 WL 1265416 (statement of Sen. Edward M. Kennedy) (discussing the need for an educational system for students with disabilities that enables success in school and later in life).

<sup>78</sup> 20 U.S.C. § 1400(c)(6); *id.* § 1400(d). Section 1402 established an Office of Special Education Programs within the Office of Special Education and Rehabilitative Services of the U.S. Department of Education. *Id.* § 1402.

<sup>79</sup> See generally *supra* note 4.

<sup>80</sup> See 20 U.S.C. § 1412(a)(1). The substantive dimension of "appropriateness" is not specified in the statute and is instead provided by case law that will be discussed later in this section.

<sup>81</sup> *Id.* § 1400(a)(5) (stating that funding allocations cannot "limit or condition the right of a child with a disability . . . to receive a free appropriate public education . . . in the least restrictive environment").

<sup>82</sup> *Id.* § 1412(a)(5).

<sup>83</sup> 20 U.S.C. § 1401(9). But see *M. C. ex rel. v. Voluntown Bd. of Educ.*, 226 F.3d 60

fers to the IEP as “a written statement”<sup>84</sup> setting forth exactly what will be provided in the educational sphere. Thus, the IEP is the cornerstone, expressing the deliverables and outcomes that constitute a FAPE for each particular child.

As for content, the IDEA currently requires that an IEP include an exhaustive description of the child from an academic and social-emotional perspective, as well as an explanation of how the child’s disability impacts her education and social-emotional development, referred to as “present levels of performance.”<sup>85</sup> It must describe the impact of the child’s disability on her “involvement and progress in the curriculum.”<sup>86</sup> A set of “measurable annual goals” must be included in the IEP, along with a statement of what supports, related services, aids and/or modifications will be provided to attain the specified goals.<sup>87</sup> Any decision to educate a student outside of the general population must be explained in the IEP.<sup>88</sup> The IEP must state its effective date, the frequency, location and duration of all services and include transition service plans starting at age fourteen with annual revision.<sup>89</sup>

The statutory scheme emphasizes the rights and obligations of parents and school districts in the IEP formulation process and in

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(2d Cir. 2000) (stating that where FAPE has not been provided, an otherwise appropriate private school selected by the parent need not meet state standards).

<sup>84</sup> 20 U.S.C. § 1402(14). Section 1414 further refines the definition of IEPs and specifies the information they must minimally contain. *Id.* § 1414(d)(1).

<sup>85</sup> *Id.* § 1414(d). The language of the statute, which specifies what an IEP must contain, is repeated in 34 C.F.R. § 300.320, the federal regulation that supplements the IDEA. New York State regulations also repeat the language contained in 20 U.S.C. § 1414(d), but add a requirement that the IEP formulation committee “must consider the results of the initial or most recent evaluation; the student’s strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2) (2013). “Functional performance” is defined as a student’s learning characteristics or learning style. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(w)(3)(i)(a).

<sup>86</sup> 20 U.S.C. § 1414(d)(1)(A)(ii). Plans are also provided for preschool children that must describe how the child’s disability impacts the child’s engagement in “appropriate activities.” *Id.* § 1414(d)(1)(A)(i).

<sup>87</sup> *Id.* § 1414(d)(1)(A). In theory, these objectives are laudable. However, goals are often amorphous in both content and measurability. Material helpful to parents is available on the Internet, providing examples of specific measurable goals. *See, e.g., Smart IEPs*, WRIGHTS LAW, <http://www.wrightslaw.com/bks/feta2/ch12.ieps.pdf> (last visited Nov. 2, 2013).

<sup>88</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(V).

<sup>89</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VII)–(VIII). Transition services under the IDEA contemplate activities that will help a child move beyond school into the community or college. *Id.* § 1401(34). Transition services in New York include services directed toward helping a child move to less restrictive environments. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(fff).

dispute resolution procedures. States must adopt procedures guaranteeing parents and children procedural safeguards, including a guarantee that parents be allowed to attend all meetings concerning, *inter alia*, the “educational placement of the child, and the provision of a free appropriate public education to such child.”<sup>90</sup>

The development of an IEP is supposed to be a collaborative process with a temporal element, within statutorily specified parameters.<sup>91</sup> Participants in the IEP development process must include the child’s parents, at least one “regular education teacher” of the child, one special education teacher of the child, and a representative of the local educational agency, such as the school district.<sup>92</sup> The district’s representative must have supervisory authority in regard to special education, must be knowledgeable about the general curriculum, and must have knowledge of the available resources. One member of the team must be able to interpret the “instructional implications of evaluation results.”<sup>93</sup> Significantly, a sufficient IEP must be in effect by the beginning of the school year.<sup>94</sup> In New York, IEP teams are called the “committee on special education,” or CSE.<sup>95</sup>

Neither the IDEA nor its predecessor statute, the EAHCA, include language defining an “appropriate” education. Instead, this issue has been decided by the courts. In the seminal case of *Board of Education of Hendrick Hudson Center School District v. Rowley*,<sup>96</sup> the

<sup>90</sup> 20 U.S.C. § 1415(b)(1).

<sup>91</sup> See Chopp, *supra* note 4, at 424.

<sup>92</sup> 20 U.S.C. § 1414(d)(1)(B)(i)–(vi); 34 C.F.R. § 300.321(a) (2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.2. Inclusion of the child at the IEP development meeting is discretionary. 20 U.S.C. § 1414(d)(B)(vii). However, one year before the child attains the age of majority, the child must be informed of his or her rights under the IDEA. 20 U.S.C. § 1414(d)(1)(A)(VII)(cc). Moreover, if the purpose of an IEP meeting is to discuss transition goals, the child must be invited. 34 C.F.R. § 300.321(b).

<sup>93</sup> 20 U.S.C. § 1414(d)(1)(B)(v) (2012); 34 C.F.R. § 300.321(a)(5).

<sup>94</sup> 20 U.S.C. § 1414(d)(2)(A).

<sup>95</sup> See N.Y. EDUC. LAW § 4402.1.b.(1) (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(k).

<sup>96</sup> 458 U.S. 176 (1982) (decided under the Education of the Handicapped Act). Amy Rowley was a hearing impaired child who was enrolled in mainstream education. Asserting the need for an in-class interpreter, her parents initiated an impartial hearing and did not prevail at the administrative level. *Id.* at 185. The district court, however, found that the disability was interfering with Amy’s education. They looked to whether there was a disparity between the child’s level of performance as compared to her potential. *Id.* at 185–86. The Second Circuit affirmed by a split panel. *Id.* at 186. Certiorari was granted specifically so that the Supreme Court could examine the substantive confines of a FAPE. The Supreme Court held that Amy had been provided with an appropriate education since she was provided with “personalized instruction and related services” meeting her personal needs and permitting her to advance from grade to grade. *Id.* at 209–10. Justice Blackmun’s concurrence agreed that Amy had



Supreme Court provided guidance on the issue. After extensive examination of the legislative history, the Court, in a decision by Justice Rehnquist, found that the term “appropriate” did not require maximization of each child’s potential. In fact, equal educational opportunity was rejected as an unworkable standard.<sup>97</sup> The standard set was minimal, relying on legislative history indicating that FAPE was to provide a “basic floor of opportunity” and that attaining grades sufficient to advance generally is indicative of “educational benefit.”<sup>98</sup> However, the Court stated that the education must be personalized, provide supports and services, and “must comport with the child’s IEP.”<sup>99</sup> Qualitatively, the Court concluded that the education must enable the child to make progress and not induce regression.<sup>100</sup>

States must establish procedures for parents to contest “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,”<sup>101</sup> with a two year limitations period.<sup>102</sup> There are ample opportunities for parents and school districts to resolve their differences before relief is pursued through the administrative process. Under the IDEA, a parent who rejects the IEP and wishes to enroll their child in a private school must provide ten days’ notice prior to the withdrawal, to which the school district may respond.<sup>103</sup>

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been provided with a FAPE through an IEP permitting her educational opportunity but argued for a strict standard affording greater deference to the administrative hearing officers. *Id.* at 210–12 (Blackmun, J., concurring). The dissent of Justices White, Brennan and Marshall argued that the statute’s objective was to provide “full educational opportunity” and noted that, without a sign language interpreter, Amy comprehended “less than half of what [was] said in the classroom – less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.” *Id.* at 213–16 (White, J., dissenting).

<sup>97</sup> *Id.* at 198–200.

<sup>98</sup> Justice White’s dissent, which was joined by Justices Brennan and Marshall, asserts that the “basic floor of opportunity” contemplated by Congress was one that eliminated “the effects of the handicap” to the extent possible. *Id.* at 215 (White, J., dissenting). States are permitted to adopt a higher standard. The Massachusetts standard is an education that assures maximum development. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990); *Stock v. Mass. Hosp. Sch.*, 392 Mass. 205, 211 (1984).

<sup>99</sup> *Rowley*, 458 U.S. at 202–03.

<sup>100</sup> *Id.* at 203–04.

<sup>101</sup> 20 U.S.C. § 1415(b)(6)(A) (2012). *See also* N.Y. EDUC. LAW § 4404.1 (McKinney 2007).

<sup>102</sup> 20 U.S.C. § 1415(b)(6)(B). *See also* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(1) (2013).

<sup>103</sup> *See* 20 U.S.C. § 1412 (a)(10)(C)(iii). *See also* 34 C.F.R. § 300.148 (2007); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985); *Flo-*

New York has established a two-tiered administrative hearing process along the continuum embraced by the IDEA; parents may file an administrative complaint<sup>104</sup> “with respect to any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student.”<sup>105</sup> A thirty-day resolution period follows.<sup>106</sup> If the dispute is not resolved during that time, an impartial hearing is held before a hearing officer and mediation is available as an alternative.<sup>107</sup> At the hearing, witnesses testify under oath and other evidence may also be received.<sup>108</sup> In New York, “any party aggrieved” by the Impartial Hearing Officer’s decision may appeal to the State Review Officer (SRO).<sup>109</sup> The SRO’s review is based upon the appellate pleadings and the impartial hearing record and the SRO may ask the parties to present oral argument or additional evidence beyond the impartial hearing record.<sup>110</sup> The decisions of the State Review Officer are appealable to either New York State Supreme Court or federal district court.<sup>111</sup>

*School Committee of the Town of Burlington v. Department of Education of Massachusetts*<sup>112</sup> established the standard for determining whether a parent who rejects an IEP and unilaterally places their child in private school is entitled to tuition reimbursement. In *Burlington*, the Supreme Court held that courts have the latitude to award tuition reimbursement “where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate.”<sup>113</sup> The Court also stated “equitable considerations are

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rence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12–13 (1993); M.C. *ex rel.* v. Voluntown, 226 F.3d 60 (2d Cir. 2000).

<sup>104</sup> The complaint is called a “due process complaint” and the proceeding is referred to as an “impartial due process hearing” or an “impartial hearing.” N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(i), (j)–(k).

<sup>105</sup> N.Y. EDUC. LAW § 4404.1 (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(i)(1).

<sup>106</sup> N.Y. EDUC. LAW § 4404.1; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(2)(v).

<sup>107</sup> N.Y. EDUC. LAW § 4404; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(3)(iii). Mediation is voluntary and cannot be used to deny or delay a due process hearing. *Id.* § 200.5(h)(1)(i)–(ii).

<sup>108</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(3)(xii)(c).

<sup>109</sup> *Id.* § 200.5(k)(1). *See also* N.Y. EDUC. LAW § 4404.2.

<sup>110</sup> N.Y. COMP. CODES R. & REGS. tit. 8, §§ 279.9–279.10.

<sup>111</sup> N.Y. EDUC. LAW § 4404.3-a; N.Y. COMP. CODES R. & REGS. tit. 8, §§ 279.9–279.10. *See also* 20 U.S.C. § 1415(i)(2)(A) (2012) (conferring the right to appeal the administrative decision through a civil suit in state or federal court).

<sup>112</sup> 471 U.S. 359 (1985).

<sup>113</sup> *Id.* at 370, 373–74.

relevant in fashioning appropriate relief.”<sup>114</sup> Subsequently, this decision gave rise to the three-pronged *Burlington* test, which considers: (1) whether the school district offered an appropriate program in the IEP; (2) whether the alternative selected by the parents was appropriate; and (3) whether the equities favor the parents.<sup>115</sup>

The IDEA provides that if a parent enrolls their child in a private school without consent from a public agency, then

a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.<sup>116</sup>

Reimbursement may be “reduced or denied” if the parent fails to object to the education offered in the IEP at the IEP formulation meeting or fails to provide written notice of the basis for their objections to the IEP within ten business days prior to enrolling their child in a private school.<sup>117</sup> Reimbursement of private school tuition may also be reduced or denied if the parent has been notified that the district intends to evaluate the child or “upon a judicial finding of unreasonableness with respect to actions taken by the parents.”<sup>118</sup> The initial inquiry, however, is always whether the public educational authority offered a FAPE in the first instance.

Where a child has been identified as having a qualifying disability, the logical starting point of the determination of whether a FAPE has been offered should be the IEP. However, as reflected in the *R.E.* case, school districts have been known to offer testimony about how a child might be provided with services not reflected within the IEP document.<sup>119</sup> *R.E.* purports to resolve the issue of whether the determination is restricted to the information con-

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<sup>114</sup> *Id.* at 374.

<sup>115</sup> *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12–13 (1993); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998). *See also* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 237–38 (2009); *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012). In addition, the statute provides that, after consideration of “a preponderance of the evidence” a court “shall grant such relief as it determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii).

<sup>116</sup> 20 U.S.C. § 1412(a)(10)(C)(ii). This is so even if the student was never classified as disabled under the IDEA nor received special education services in the public school. *See Forest Grove Sch. Dist.*, 557 U.S. at 237–39 (citing *Burlington* in noting that parents are entitled to tuition reimbursement where they had provided school district with independent evaluations and the school district’s refusal to provide an IEP deprived plaintiff of a FAPE).

<sup>117</sup> 20 U.S.C. § 1412(10)(C)(iii)(I)(aa)–(bb).

<sup>118</sup> 20 U.S.C. § 1412(10)(C)(iii)(II)–(III).

<sup>119</sup> *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012).

tained within the four corners of the IEP document only.<sup>120</sup>

### III. *R.E. v. NEW YORK CITY DEPARTMENT OF EDUCATION*: DISCUSSION

*R.E.* is comprised of three companion cases brought by parents of autistic children. All three cases were ultimately appealed to the Second Circuit. In each case, the plaintiff parents claimed that the IEPs created by the New York City Department of Education (DOE) were deficient and failed to offer all of the services necessary to meet the complainant children's educational needs. Instead of placing their children in public schools, the plaintiff parents opted, providing the requisite notice, to place them in private schools.<sup>121</sup> Each of the children involved attended private schools specializing in working with autistic children. The cost of providing specialized education is extremely high, and some tuitions ran into six figures.<sup>122</sup> Parents of these children challenged the IEPs in administrative hearings, claiming that they did not comply with the IDEA's requirements of offering a FAPE. The DOE offered testimony explaining how the children's needs would have been met, even though the services described in the verbal testimony did not appear in the written IEPs.

#### A. *Facts and Procedural History of the Companion Cases*

At issue in the lead case was the IEP developed for the 2008–2009 school year for J.E., an autistic child. The challenged IEP offered placement in a 6:1:1 special class and a full-time, behavior-management paraprofessional, as well as two 30-minute ses-

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<sup>120</sup> *Id.* at 185.

<sup>121</sup> *Id.* at 175–84. New York City has a bifurcated IEP development and school placement process. In addition to parents, IEP development teams include administrators responsible for the various zones within the DOE's purview in addition to the other required IEP team members. See *Who Attends the IEP Team Meeting*, N.Y.C. DEP'T OF EDUC., [http://schools.nyc.gov/Academics/SpecialEducation/SEP/meeting/who\\_attends.html](http://schools.nyc.gov/Academics/SpecialEducation/SEP/meeting/who_attends.html) (last visited Nov. 5, 2013). After the IEP has been developed and provided to the parent, a separate document called a Final Notice of Recommendation (FNR) is mailed to the parent. The FNR identifies the school that the DOE proposes the child attend and where both education and related services will be delivered. See *Final Notice of Recommendation (FNR)*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/Academics/SpecialEducation/SEP/determination/fnr.html> (last visited Nov. 5, 2013).

<sup>122</sup> See *R.E. and M.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28, 37 (S.D.N.Y. 2011) (noting that tuition at issue was \$104,167 for a ten-month program and \$125,000 for a twelve-month program); see also *R.K. v. N.Y.C. Dep't of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at \*2 (E.D.N.Y. Jan. 1, 2011) (noting that full tuition at the private program at issue was \$85,000).

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sions of group counseling each week with the following related services: five 30-minute individual sessions of speech therapy and five 30-minute occupational therapy sessions.<sup>123</sup> R.E. and M.E. rejected the IEP and enrolled their son in a private school, McCarton, specializing in teaching children with autism.<sup>124</sup> The parents notified the DOE that they objected to the offered program and placement because it did not provide the necessary 1:1 teaching instruction or sufficient speech therapy,<sup>125</sup> and that J.E. was being reenrolled in McCarton.<sup>126</sup>

J.E.'s parents initiated an impartial hearing, which was held in March of 2009. The special education teacher from J.E.'s proposed classroom testified about methodologies used in his classroom.<sup>127</sup>

<sup>123</sup> *R.E. and M.E.*, 785 F. Supp. 2d at 35–36. The IEP was formulated by consideration of reports from McCarton and a report of an observation of J.E. made by the DOE at McCarton. *Id.* at 35.

<sup>124</sup> *Id.* at 37. J.E.'s IEP for 2007–2008 offered placement in a 6:1:1 classroom in a special public school. The DOE conceded that the 2007–2008 placement was inappropriate, and J.E. was enrolled in McCarton for the 2007–2008 school year. *See id.* at 35. A 6:1:1 class has six students, one teacher and one paraprofessional. These classes serve students who are “aggressive, self-abusive or extremely withdrawn and with severe difficulties in the acquisition and generalization of language and social skill development. These students require very intense structured individual programming [and] continual adult supervision.” *Description of Class Staffing Ratios*, N.Y.C. DEP’T OF EDUC., [http://schools.nyc.gov/documents/d75/district/staffing\\_ratios.pdf](http://schools.nyc.gov/documents/d75/district/staffing_ratios.pdf) (last visited Nov. 5, 2013). Paraprofessionals assist in classrooms for children with emotional, cognitive, and/or physical handicaps, autism, and other special needs. They assist with teaching under a teacher’s direction, but otherwise function primarily as aides. Qualifications are minimal. Only a high school diploma or its equivalent, like a GED, is required. Paraprofessionals must pass the New York State Assessment of Teaching Skills exam and take a three-hour online paraprofessional training course given by the New York City Department of Education. *See Substitute Paraprofessionals*, N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/Careers/SubPara> (last visited Nov. 5, 2013).

<sup>125</sup> *R.E. and M.E.*, 785 F. Supp. 2d at 36–37.

<sup>126</sup> *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 176 (2d Cir. 2012). J.E.’s class at McCarton had five children and a 1:1 student/teacher ratio. J.E. received about thirty hours of applied behavior analysis (ABA) therapy, plus five 60-minute individual speech therapy and language sessions weekly and individual occupational therapy for 45 minutes, five times weekly, in addition to three afterschool sessions for reinforcement. *Id.* at 175–76. *See also R.E. and M.E.*, 785 F. Supp. 2d at 34.

<sup>127</sup> *R.E. and M.E.*, 785 F. Supp. 2d at 36. The teacher testified that he used TEACCH, ABA and DIR, but that he was not certified or formally trained in those methodologies. DIR stands for “developmental,” “individual differences,” and “relationship based.” DIR is a trademarked methodology addressing social, emotional, and intellectual capacity. *What is DIR Floortime?*, THE INTERDISCIPLINARY COUNCIL ON DEVELOPMENTAL AND LEARNING DISORDERS, <http://www.icdl.com/DIRFloortime.shtml> (last visited Nov. 5, 2013). ABA therapy teaches behaviors by establishing goals and providing constant reinforcement. The parent is an essential part of the program and must be trained to reinforce lessons. *See What Is ABA Therapy?*, APPLIED BEHAVIOR STRATEGIES, <http://appliedbehavioralstrategies.com/basics-of-aba.html> (last visited Nov. 5, 2013); *see also R.K. v. N.Y.C. Dep’t of Educ.*, No. 09-CV-4478 (KAM), 2011 WL

The IHO found in favor of the parents.<sup>128</sup> The DOE appealed to the SRO,<sup>129</sup> who reversed and denied reimbursement, determining instead that the 6:1:1 class was appropriate.<sup>130</sup> The parents appealed and the district court reversed the SRO.

The district court held that the DOE had failed to offer a FAPE in the first instance and that the SRO erred in relying on “after-the-fact testimony of . . . what the teacher . . . would have done if J.E. had attended his class.”<sup>131</sup> The district court noted “the only information the parents can rely upon as determining whether the proposed program is appropriate for their child is the IEP document itself.”<sup>132</sup> The district court concluded that the SRO improperly relied on the teacher’s testimony “to remedy deficits found by the IHO in the IEP.”<sup>133</sup>

The second plaintiff, R.K., was entering kindergarten in 2008–2009. The CSE meeting held to develop her IEP for the 2008–2009 school year was contentious and resulted in an IEP offering placement in a 6:1:1 class.<sup>134</sup> At the CSE meeting, R.K.’s par-

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1131492, at \*2 (E.D.N.Y. Jan. 1, 2011) (“ABA methodology is frequently 1:1 in nature, and is inherently individualized, as the instructor or therapist assesses the particular child’s behavior; breaks desired skills down into small, discrete steps; and reinforces positive behavior according to the needs and progress of that child. ABA is extremely intensive, often involving 25 to 40 hours of effort per week.”). TEACCH stands for Training and Education of Autistic and Related Communication Handicapped Children and uses visual supports to help autistic students to communicate in highly structured environments in class or at home. See *Training and Education of Autistic and Related Communication Handicapped Children (TEACCH)*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/treatment/training-and-education-autistic-and-related-communication-handicapped-children> (last visited Dec. 8, 2013). Martin Kotler explains that the approach used to teach impaired students either presumes that their abilities are fixed, which he characterizes as passive-acceptant, or can seek to modify and improve their function. A passive-acceptant approach does not admit the possibility of improvement and, in Kotler’s view, is simply another form of exclusion. In contrast, the “active-modificational approach” permits the possibility of functional improvement. Kotler, *supra* note 4, at 333–38, 348–50. TEACCH ultimately seeks to “teach autistic children skills sufficient to avoid institutionalization.” *Id.* at 334. Dr. O. Ivar Lovaas’s behavioral approach (ABA), for its part, was so successful that many of the children he studied were fully integrated into public schools. *Id.* at 334–35.

<sup>128</sup> *R.E. and M.E.*, 785 F. Supp.2d at 38. Among other things, the IHO found that the program offered by the DOE was not appropriate. *Id.* at 37; *R.E.*, 694 F.3d at 177.

<sup>129</sup> New York law provides for appeal to a State Review Officer from an adverse impartial hearing officer’s decision by either party. See N.Y. COMP. CODES & REGS. tit. 8, § 200.5(k)(1) (2013).

<sup>130</sup> *R.E.*, 694 F.3d at 177.

<sup>131</sup> *R.E. and M.E.*, 785 F. Supp. 2d at 41.

<sup>132</sup> *Id.* at 41–42.

<sup>133</sup> *Id.* at 42.

<sup>134</sup> *R.K. v. N.Y.C. Dep’t of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at \*2, \*7–8 (E.D.N.Y. Jan. 1, 2011). The CSE considered evaluations performed in late 2007 and early 2008 by a DOE psychologist and R.K.’s service providers, all of which con-

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ents had objected to the 6:1:1 placement, asserting that a private evaluation from the McCarton Center recommended 1:1 attention.<sup>135</sup> The IEP noted R.K.'s need for constant supervision, but a Functional Behavioral Assessment (FBA) was not performed nor was a behavioral intervention plan (BIP) developed for inclusion in the IEP.<sup>136</sup> Nor did the IEP specify provision of parent training.<sup>137</sup> The parents objected to a lack of an FBA, a BIP or provision of parent training in the IEP.<sup>138</sup> They rejected the IEP as insufficient, enrolled their child at Brooklyn Autism Center (BAC) and initiated a due process hearing seeking tuition reimbursement.<sup>139</sup>

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cluded that R.K.'s extreme inattentiveness required a year-round, highly structured, specialized program with individualized attention and individualized occupational therapy and speech and language therapy sessions each week. *Id.* at \*5–7. *See also supra* text accompanying note 124, which describes a 6:1:1 class.

<sup>135</sup> *See R.E.* 694 F.3d at 179; *R.K.*, 2011 WL 1131492, at \*7 (“The McCarton Report recommended, among other things, ongoing intervention 12 months per year, 7 days a week, in an ABA-based program, with 40 hours of 1:1 ABA therapy weekly, including 15 hours at home; ‘manding’ sessions within each ABA teaching session; [occupational therapy] and speech and language therapy, 60 minutes each, five times a week; and two hours of parent training per week.”).

<sup>136</sup> *R.K.*, 2011 WL 1131492, at \*8. A “functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student’s behavior relates to the environment.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(r) (2013). New York regulations prescribe the methodology for conducting the assessment and specifies that the assessment should identify a baseline of the student’s problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day” and must permit formulation of a behavioral intervention plan. *Id.* § 200.22(a)(3). The code defines a behavioral intervention plan as a plan based upon an FBA that “at a minimum includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior.” *Id.* § 200.1(mmm).

<sup>137</sup> The NYCRR states that “parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child’s individualized education program.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(kk). To the extent that parent training is provided, it must be specified in the IEP. *Id.* § 200.4(d)(2)(v)(b)(5). Parent training must be provided for parents of autistic children. *Id.* § 200.13(d) (“Provision shall be made for parent counseling and training . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home.”).

<sup>138</sup> *R.K.*, 2011 WL 1131492, at \*8. The IEP noted that R.K. engaged in self-stimulation, which interfered with her attention and social interaction, but concluded that her behavior could be addressed by the classroom teacher. *See R.E.*, 694 F.3d at 179.

<sup>139</sup> *R.K.*, 2011 WL 1131492, at \*1. Among other things, the parents claimed that the IEP’s contents were deficient because the DOE failed to perform an FBA for development of a BIP; that mandated services of parent counseling, parent training, and speech and language therapy were either missing or insufficient; and that the 6:1:1 class ratio would not provide sufficient individualized attention. *Id.* at \*8, 14–25. BAC is a school with five teachers serving four students using 1:1 ABA instruction; the school has students rotate among the teachers every thirty minutes and seeks to de-

At the impartial hearing, the DOE offered testimony of R.K.'s proposed public school teacher. She testified about her teaching methodologies, how she would have provided attention to R.K., and how the speech and language therapy would be supplemented through daily classroom instruction.<sup>140</sup> The public school's parent coordinator testified that the school provided referrals to outside agencies, occasional workshops, and parent training on request.<sup>141</sup> The IHO ruled in favor of the parents, holding that the IEP was insufficient.<sup>142</sup>

The DOE appealed and the SRO reversed, relying on the DOE testimony in the record of the impartial hearing to cure deficiencies in the IEP in regard to formulation of a BIP and provision of speech and language services.<sup>143</sup> Relying on hearing testimony of the school's parent coordinator about the availability of parent training services, the SRO determined that failure to list parent training and counseling as a related service in the IEP was immaterial.<sup>144</sup> Tuition reimbursement was denied completely, and the parents appealed to the district court.

The district court reversed the SRO's decision, granting summary judgment to the parents.<sup>145</sup> Significantly, the district court opined that DOE testimony could not cure deficiencies in the IEP.<sup>146</sup> The district court rejected the SRO's conclusion that R.K.'s behavior did not interfere with learning and criticized reliance

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velop "self-care, language skills, socialization, play skills, and pragmatic language." *Id.* at \*9. Parents are required to come to the school for at least two hours monthly for training. *Id.* The DOE refused to consider BAC as a possible placement. *Id.*

<sup>140</sup> The teacher had never observed ABA teaching methods and used a different method called TEACHH. *See R.K. v. N.Y.C. Dep't of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at \*2, \*9 (E.D.N.Y. Jan. 1, 2011); *R.E.*, 694 F.3d at 180.

<sup>141</sup> *R.K.*, 2011 WL 1131492, at \*10. Additionally, the parent coordinator testified that no home visits were provided. *Id.*

<sup>142</sup> The IHO only awarded partial tuition reimbursement, however, computed by awarding only that part of the tuition covering the shortfall between the amount of 1:1 ABA therapy offered by the DOE and the amount of 1:1 ABA therapy provided by the private school. The parents were awarded \$32,400. BAC's full tuition was \$90,000. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 180 (2d Cir. 2012); *R.K.*, 2011 WL 1131492, at \*11.

<sup>143</sup> *R.E.*, 694 F.3d at 180–81.

<sup>144</sup> *R.K.*, 2011 WL 1131492, at \*21. New York law requires that parent training be included as part of an educational program for autistic students. "Parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(kk) (2013).

<sup>145</sup> *R.K.*, 2011 WL 1131492, at \*30; *R.E.*, 694 F.3d at 181.

<sup>146</sup> *R.K.*, 2011 WL 1131492, at \*2, \*30; *R.E.*, 694 F.3d at 181.



upon the teacher's prospective testimony of how she would have developed a BIP once the child was in her classroom.<sup>147</sup> Nor could failure to identify parent training as a related service in the IEP be cured by DOE testimony about the availability of services at the proposed school.<sup>148</sup> The district court further held that the SRO erred in relying on testimony about classroom activities targeting speech and language skills to make up for deficient provisions for speech and language therapy in the IEP.<sup>149</sup> The court found that the hearing evidence supported a finding that a 6:1:1 class would not afford the attention R.K. required.<sup>150</sup> The district court concluded that the compounded omissions in the IEP constituted a denial of a FAPE and awarded tuition reimbursement.<sup>151</sup>

Like the two other plaintiffs, the third plaintiff, E. Z.-L., was autistic and enrolled in a specialized private school. E. Z.-L.'s mother rejected the 2008–2009 IEP and offered placement in writing, stating her intent to enroll E. Z.-L. in The Rebecca School and to seek tuition reimbursement.<sup>152</sup> The parents then filed an Impartial Hearing request.<sup>153</sup>

The issues in E. Z.-L.'s case, however, differed slightly from the companion cases. E. Z.-L. challenged the ability of the offered placement to implement the IEP and the failure to comply with New York regulations mandating conduct of an FBA in order to formulate a BIP.<sup>154</sup> The IHO found that E. Z.-L. was denied a FAPE

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<sup>147</sup> *R.K.*, 2011 WL 1131492, at \*17–20; *R.E.*, 694 F.3d at 181.

<sup>148</sup> *R.K.*, 2011 WL 1131492, at \*20–21.

<sup>149</sup> *Id.* at \*21.

<sup>150</sup> *Id.* at \*22.

<sup>151</sup> *Id.* at \*2, \*21–22, \*30. The district court also noted that the speech and language instruction incorporated into classroom instruction was insufficient because it was not individualized. *Id.* at \*21–22.

<sup>152</sup> The IEP offered placement in a 6:1:1 special class with four 30-minute sessions of individualized occupational therapy, three 30-minute sessions of individualized speech-language therapy, one 30-minute session of 3:1 speech-language therapy, one 30-minute session of individualized counseling and one 30-minute session of 2:1 group counseling. *E. Z.-L. ex rel. R.L. v. N.Y.C. Dep't of Educ.*, 763 F. Supp. 2d 584, 590 (S.D.N.Y. 2011).

<sup>153</sup> *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 182–83 (2d Cir. 2012). E. Z.-L.'s hearing was held between September 2008 and January 2009. DOE special education teacher, Feng Ye, who had participated in the CSE, and Susan Cruz, the assistant principal at the public school location offered to E. Z.-L., testified. Ye explained the CSE's conclusion that E. Z.-L.'s behavioral issues did not interfere with learning and Cruz testified about the programs and services that would be available at the proffered school. *Id.* at 183–85.

<sup>154</sup> New York regulations predicate formulation of a behavioral intervention plan upon a functional behavioral assessment. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.22 (2013).

and awarded tuition reimbursement.<sup>155</sup> The DOE appealed to the SRO, who reversed the IHO's decision.<sup>156</sup> E. Z.-L.'s parents appealed to the district court, which affirmed the SRO's finding that the CSE team properly determined that E. Z.-L.'s behaviors did not interfere with learning and had properly integrated management strategies into the IEP.<sup>157</sup>

*B. The Second Circuit's Treatment of Each Case*

The Second Circuit arrived at different results in each of the three cases. As to J.E., the Second Circuit determined, in essence, that the SRO had reached the right conclusion for the wrong reason; though he relied on improper testimony, the SRO properly found that the record did not support the parent's claim that J.E. required 1:1 teacher support.<sup>158</sup> In *R.K.*, the Second Circuit affirmed the district court's decision that R.K. was denied a FAPE. The Second Circuit concluded that the SRO had erred in relying on testimony of what would have been provided to R.K. in the classroom, rather than the written contents of the IEP, and the Second Circuit reinstated the reimbursement award.<sup>159</sup> The Second Circuit held that E. Z.-L. had been afforded a FAPE, but also distinguished her claims.<sup>160</sup>

Addressing the overarching evidentiary issues, the DOE argued before the Second Circuit that, as a general matter, an IEP

<sup>155</sup> *R.E.*, 694 F.3d at 183. The basis of the IHO's decision was the failure to comply with the procedural requirements relative to the formulation of a BIP, failure to provide parent training or to provide for a transition plan to help the child change schools. The IHO further found that the private school and after-school programs selected by the parents were appropriate. *E. Z.-L.*, 763 F. Supp. 2d at 592–93.

<sup>156</sup> *R.E.*, 694 F.3d at 183. The Second Circuit stated that the proposed classroom teacher had testified that neither the FBA nor the BIP were necessary. *Id.*

<sup>157</sup> *Id.* at 184. Additionally, the court held that parent training was provided on an as-needed basis and that lack of a transition plan was not fatal. *E. Z.-L.*, 763 F. Supp. 2d at 596–98.

<sup>158</sup> *R.E.*, 694 F.3d at 192–93. The Second Circuit also addressed the issue of the degree of deference that should be accorded to administrative decisions. *Id.* at 192. That discussion is beyond the scope of this Article.

<sup>159</sup> *Id.* at 194. The Second Circuit likewise held that reliance on the prospective teacher's testimony that a BIP would have been created once R.K. was enrolled in the class contributed to the deficiencies that cumulatively denied R.K. a FAPE, stating that "failure to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors." *Id.* at 193–94.

<sup>160</sup> *Id.* at 195. E. Z.-L.'s claims were that the IEP could not be implemented and that failure to comply with procedures requiring an FBA to formulate a BIP amounted to a denial of a FAPE. The Second Circuit held that the IEP was substantively sufficient and that the implementation claim was speculative. The court further determined that, since testimony established that the child's behaviors did not interfere with learning, there was no need for an FBA and thus no procedural violation. *Id.*

should not be the sole benchmark in measuring whether the District had fulfilled its obligations under IDEA's substantive standards.<sup>161</sup> Instead, the DOE contended that testimony about what the child "would have received" in a public school setting, including testimony about services or accommodations not identified in the IEP, should be considered. The plaintiffs urged enunciation of a "four corners" rule, which would have limited the court's determination of IDEA compliance exclusively to examination of the sufficiency of the terms of the IEP. The court struck a balance, adhering to a middle ground:

[W]e hold that testimony regarding state-offered services may only explain or justify what is listed in the written IEP. Testimony may not support a modification that is materially different from the IEP, and thus a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP.<sup>162</sup>

The court was influenced by cases from the Ninth, Third, and First Circuits, all of which dealt with the issue of whether a child's progress or lack of progress may be considered in determining whether an IEP afforded a FAPE and concluded that past or present progress was irrelevant to the determination.<sup>163</sup> The Second Circuit found in these three cases a temporal dimension to the determination of an IEP's sufficiency, calling for examination of an IEP solely by reference to conditions known at the time the IEP was created.<sup>164</sup> Additionally, the court noted a trend of rejecting retro-

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<sup>161</sup> See *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 186. None of the three cited cases involved testimony about services that weren't listed in a child's IEP. Instead, they all dealt with the issue of whether a child's progress or lack of progress may be considered in determining whether an IEP afforded a FAPE and all three cases held that past or present progress were irrelevant to the determination. See *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (noting that an individualized educational program should be examined to see whether it was sufficient at the time it was written, and that progress or provision of supplemental private services are irrelevant to the determination); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) (ruling that appropriateness of an IEP is determined prospectively, such that any lack of progress on the part of the child has no bearing on the sufficiency of the IEP); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (noting that neither lack of progress under previous, identical IEP nor subsequent improvement at a private school permit an inference that the program offered in the IEP was insufficient). The First Circuit further noted: "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Id.*

<sup>164</sup> *R.E.*, 694 F.3d at 185–86.

spective testimony in the Second Circuit's district courts.<sup>165</sup> Though the court declined to adopt a strict four-corners test, it nonetheless found in these cases a limitation permitting examination of the IEP document in determining whether a FAPE had been offered. Thus, the core holding of the *R.E.* decision is that "retrospective evidence" materially altering an IEP is not permissible.<sup>166</sup>

The court properly acknowledged the centrality of the IEP. It noted that the IEP is the primary factor upon which parents base their decisions to enroll their child in a private or public program.<sup>167</sup> By barring testimony about delivery of services not included in the IEP, the decision promotes fairness in the IEP formulation process, admonishing districts not to engage in "bait and switch" tactics. However, application of the rule to each of the cases serves as a cautionary tale to parents and their attorneys to provide a clear record establishing their child's educational needs and that those needs have not been sufficiently met by the child's IEP.<sup>168</sup>

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<sup>165</sup> See *R.E. and M.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28, 37 (S.D.N.Y. 2011); *R.K. v. N.Y.C. Dep't of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at \*2 (E.D.N.Y. Jan. 1, 2011); *Antonaccio v. Bd. of Educ.*, 281 F. Supp. 2d 710, 724 (S.D.N.Y. 2003); *J.R. v. Board of Educ. of Rye Sch. Dist.*, 345 F. Supp. 2d 386, 395 (S.D.N.Y. 2004) ("[W]e therefore must not engage in Monday-morning quarterbacking guided by our knowledge of S.R.'s subsequent progress at Eagle Hill, but rather consider the propriety of the IEP with respect to the likelihood that it would benefit S.R. at the time it was devised.").

<sup>166</sup> *R.E.*, 694 F.3d at 188. Testimony from the proposed classroom teachers was deemed unreliable to justify the programs and services contained in an IEP, since placement with a particular teacher cannot be guaranteed at the time an IEP is drafted. *Id.* at 187.

<sup>167</sup> *Id.* at 188.

<sup>168</sup> Despite the correct result in this core holding, the *R.E.* court improperly stated that good-faith IEP errors and omissions could be remedied during the thirty-day resolution period that follows after a parent has filed a due process complaint, as required by 20 U.S.C. §1415(f)(1)(B). See *R.E.*, 694 F.3d at 188. Permitting reformation of an otherwise deficient IEP—all under the guise of good faith—would be as improper as permitting the after-the-fact testimony barred by the *R.E.* decision. A motion for rehearing *en banc* on this issue was supported by an amicus brief filed by Partnership for Children's Rights, The Legal Aid Society, Advocates for Children of New York, New York Legal Assistance Group, Queens Legal Services, Legal Services NYC-Bronx, and Southern Bronx Legal Services. The amici argued that

the resolution period exception carved out by the panel's decision contravenes the timeliness element of the IDEA's FAPE requirement and could be read to effect a new FAPE standard for private school tuition cases: FAPE may be offered *either* through an appropriate IEP prepared prior to the start of the school year (and prior to the student's enrollment in the private school) *or* through an IEP later modified to remedy the deficiencies, as long as the IEP modifications are made during the

## IV. ANALYSIS

A. *Why the Language of the IEP Should Control*

Valid and important policy objectives are well served by a strict standard limiting resolution of FAPE disputes to examination of the written IEP. In disputes over IEP sufficiency, the initial issue is whether the school district afforded a FAPE.<sup>169</sup> The only evidence relevant to a district's claim that its IEP offered a FAPE is evidence showing that, at the time it was drafted, the IEP provided the services and supports necessary to enable a child to make progress. Thus, a sound rule would limit the evidence to the IEP document and testimony justifying or refuting whether the IEP components would promote the child's progress.<sup>170</sup> This, in fact, is the rule that was announced in *R.E.* and it is the correct result. A restrictive rule promotes the normative values of the IDEA to protect the less powerful party, the parents, giving primacy to the actual IEP in determining whether school districts have complied with the IDEA mandates.

Three cases cited by the *R.E.* court as decisions disfavoring consideration of retrospective evidence were not particularly recent. *Adams v. Oregon*,<sup>171</sup> *Carlisle Area School v. Scott P.*,<sup>172</sup> and *Roland M. v. Concord School Committee*,<sup>173</sup>—from the Ninth, Third, and First Circuits, respectively—emphasized that the IEP should be examined by reference to conditions existing at the time of development only. The *Roland M.* court stated the standard clearly:

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30-day resolution period following the filing of the paren's [sic] due process complaint.

Brief for Partnership for Children's Rights et al. as Amici Curiae Supporting Plaintiffs-Appellants, *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012) (Nos. 11-1266-cv, 11-1474-cv, 11-655-cv), 2012 WL 4901037, at \*6. This would allow a school district to reform an IEP in the context of litigation. Additionally, permitting reformation during the resolution period ignores the fact that the IDEA gives parents two years to assert their claims and would thus permit reformation of an IEP for a school year that might have already ended. Furthermore, 20 U.S.C. § 1412 (a)(10)(C)(iii) (2012) permits reduction in the award of tuition to parents who fail to give their school district advance notice of their intent to remove the child to a private school and give the opportunity to cure. The *en banc* motion was denied in an unreported order dated January 8, 2013. See *R.E. v. N.Y.C. Dep't of Educ.*, No. 11-1266-cv (2d Cir. Jan. 8, 2013) (denying petition for rehearing *en banc*).

<sup>169</sup> See *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985); see also *supra* note 115 (listing cases employing the three-prong *Burlington* test).

<sup>170</sup> See *R.E.*, 694 F.3d at 186–87.

<sup>171</sup> 195 F.3d 1141 (9th Cir. 1999) (seeking reimbursement for privately secured supplemental services).

<sup>172</sup> 62 F.3d 520 (3d Cir. 1995) (seeking reimbursement of tuition for residential private school).

<sup>173</sup> 910 F.2d 983 (1st Cir. 1990) (seeking private school tuition reimbursement).

An IEP is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.<sup>174</sup>

*Carlisle*<sup>175</sup> and *Roland M.*<sup>176</sup> also noted that a student’s subsequent performance—either under an IEP or in a parent-selected program—are likewise irrelevant in determining whether a disputed IEP afforded a FAPE.<sup>177</sup>

More recent decisions have consistently held that the IEP document is decisive in determining whether a student has been offered an “appropriate” education, though none of these cases were cited by the *R.E.* court. The Tenth,<sup>178</sup> Fourth,<sup>179</sup> and Sixth Circuits<sup>180</sup> resolved the issue of whether a FAPE had been offered by reference to the IEP only, even if the IEP was in draft form. Courts have also rejected evidence of oral representations about services that might have been provided but could not be considered in determining whether the district had offered a FAPE.<sup>181</sup> In fact, an early Ninth Circuit case, *Union School District v. Smith*,<sup>182</sup> held that failure to identify in the IEP all of the services and programs being offered was not excused by the school district’s presumption that the parents would reject the IEP.<sup>183</sup> The *Union* court explained that the requirement of a written offer should be “rigorously enforced”

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<sup>174</sup> *Id.* at 992.

<sup>175</sup> *Carlisle*, 62 F.3d at 520.

<sup>176</sup> *Roland M.*, 910 F.2d at 983.

<sup>177</sup> See *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 188 (2d Cir. 2012).

<sup>178</sup> *Systema v. Academy Sch. Dist.*, 538 F.3d 1306, 1309 (10th Cir. 2008).

<sup>179</sup> *A.K. v. Alexandria Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007); *Sch. Bd. of Henrico v. Z.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005) (stating services not included in the written draft IEP that had been gratuitously provided could not be considered in determining whether the student had been offered a FAPE).

<sup>180</sup> *Knable v. Bexley Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001). All parties in that case agreed that private school was appropriate but could not agree on which school would be suitable. On the particular facts of that case, identification of the school was deemed critical. Programs that were discussed but not incorporated into the IEP were irrelevant to the issue of whether the district had offered a FAPE.

<sup>181</sup> See, e.g., *Clev. Heights, Univ. Heights S.D. v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998) (noting that a draft IEP was inadequate). Cf. *Burlovich v. Bd. of Ed. of Lincoln Consol. Sch.*, 208 F.3d 560, 568 (6th Cir. 2000) (rejecting parents’ argument that verbal representations made by the district in a March meeting superseded written offer contained in IEP drafted after a subsequent meeting in May; IEP and inquiry was limited to subsequent written document in determining that a FAPE had been offered).

<sup>182</sup> 15 F.3d 1519, 1526 (9th Cir. 1994).

<sup>183</sup> *Id.* The school district claimed that it had omitted a particular program from the IEP because it presumed the parents would reject the IEP. Claiming that they had been deprived a FAPE, the parents did, in fact, reject the IEP, enrolled their child in private school and successfully sued for tuition reimbursement.

because it creates a record of “when placements were offered, what placements were offered and what educational assistance was offered to supplement a placement.”<sup>184</sup> However, none of these cases explicitly applied contract law tests to IEP disputes.

*John M. v. Board of Education of Evanston Township*<sup>185</sup> did apply “four-corners” language in determining whether a student had been afforded a FAPE. The student at issue had received co-teaching services at the middle school level that had not been expressly provided for in the child’s IEP.<sup>186</sup> District representatives maintained that co-teaching could not be provided in high school. The parents sued, asserting that the “stay-put” provisions of the IDEA in 20 U.S.C. §1415(j) mandated provision of co-teaching at the high school level.<sup>187</sup> The court employed contract law terminology in its analysis, stating that it would usually determine the sufficiency of an IEP solely by examination of the information within “the four corners of the document” and would permit extrinsic evidence if the IEP was vague “with respect to how its goals are to be achieved.”<sup>188</sup>

The *John M.* standard gives some protection to parents and motivates school districts to exercise care in drafting IEPs. However, permitting an explanation of “intent” to explain ambiguity opens the door to retrospective testimony rewriting an unclear IEP document. Attempted reformation of an otherwise deficient IEP is easy to envision. Consider, for example, the facts in *R.K.*, where the parents claimed that the IEP was insufficient because it did not provide daily speech and language instruction. The DOE could have argued that *R.K.*’s IEP was merely unclear and offered testimony explaining that the *intent* was to provide daily speech and

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<sup>184</sup> *Id.*

<sup>185</sup> 502 F.3d 708, 715 (7th Cir. 2007).

<sup>186</sup> See *id.* at 716–17. Integrated Co-Teaching (ICT), also known as Collaborative Team Teaching (CTT) consists of a two-teacher team. One teacher is a general education teacher and the other is a special education teacher. The class consists of both general education and education aimed at students with disabilities. See *Integrated Co-Teaching (ICT)*, UNITED FED’N OF TEACHERS, <http://www.uft.org/teaching/integrated-co-teaching-collaborative-team-teaching-ctt> (last visited Dec. 15, 2013). New York limits the total number of students with disabilities that may be in the class. See N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(g)(1) (2013) (limit of twelve students with disabilities in a CTT class).

<sup>187</sup> See *John M.*, 502 F.3d at 712–14. The IDEA’s “stay put” provisions require that a child remain in the “same educational setting” pending the outcome of any proceedings brought under 20 U.S.C. § 1415 when the status quo has changed, such as when the child has progressed from one educational level to another. See *id.* at 714.

<sup>188</sup> *Id.* at 715–16. The court allowed the possibility that, though not included in the written document, co-teaching was an essential component to the IEP and remanded for further consideration. *Id.* at 716–17.

language instruction through classroom activities. A strict rule of IEP construction would not create a hardship for school districts. Instead, it would promote careful drafting practices. Returning to the *R.K.* example, the school district could have included a statement in the IEP reflecting the intent to provide supplemental speech and language instruction through classwork, and the parents would have been fully advised of the full scope of the offer.

Because the *John M.* rule has the potential to excuse omissions and permit subsequent cure of IEP deficiencies after the fact, its standard is not entirely satisfactory. In contrast, *R.E.* limits extrinsic testimony to “explain or justify”<sup>189</sup> the IEP’s written contents, but not to correct or modify the document after the fact. Under *R.E.*, the terms of the document properly drive the analysis. By permitting IEP deficits to be explained away and gaps filled in by testimony in post-IEP formulation challenges, congressional intent to protect parents would be completely undermined.<sup>190</sup>

Parental structural due process rights, expressed through the IEP document, were intended to be central to the policies promoted by the IDEA.<sup>191</sup> Strict rules of IEP construction serves those the statute was designed to protect. Recognition of a “contractualization”<sup>192</sup> right and enforcement of this component of the IDEA’s structural due process is essential to redress power inequities that are anathema to the IDEA. Both *John M.* and *R.E.* attempted to articulate rules consistent with these ideals but refused to characterize the IEP as an agreement or a quasi-contract. In this respect, both decisions fall short.<sup>193</sup> By the same token, the judiciary is lim-

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<sup>189</sup> *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012).

<sup>190</sup> See S. REP. NO. 94-168, at 12 (1975) (noting that “individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child”); see also Brief for Partnership for Children’s Rights et al., *supra* note 168. The resolution period following the filing of a due process complaint is an improper time to modify an IEP. Parents and school districts have the opportunity to settle differences before administrative process is pursued and permitting reformation once litigation has been commenced invites absurd results, especially if the due process hearing relates to a school year that has already ended.

<sup>191</sup> See Daniel, *supra* note 5, at 7.

<sup>192</sup> See Romberg, *supra* note 2, at 421 (noting “contractualization” as a procedural process for direct implementation).

<sup>193</sup> The standard for determining whether failure to implement an IEP results in a denial of a FAPE implicates the issue of whether contract law should be applied to IDEA disputes. It is a significantly complex question that is tangential to this Article. Others have discussed the issue at length, concluding that the IDEA acknowledges a right to contractualization that carries with it a parental enforcement right. See Romberg, *supra* note 2, at 419, 451–64. The IDEA, however, does not confer specific enforcement rights or establish standards for actionable breach. Instead, enforcement



ited by the statutory language provided by Congress, and Congress chose to call IEPs a “written statement,” rather than an agreement or contract. The problem, therefore, lies with Congress and the issue is whether the IDEA should be amended to reflect the cultural construct that has developed over the past thirty years.

### B. *IEPs Are Quasi-Contractual*

Notwithstanding legislative history explicitly stating that IEPs are not to be considered contracts,<sup>194</sup> scholars have expressed a different view. Romberg suggests that the analogy of contract enforcement principles in the IDEA context is “compelling.”<sup>195</sup> David Neal and David L. Kirp have described the IEP as “a contract-like document.”<sup>196</sup> Part of the due process right conferred by the IDEA is a right to a writing that is “in effect” a contract for “services and placement” that the school district was otherwise not obligated to provide.<sup>197</sup>

IEPs have significant contract-like qualities. Market-force qualities are present; families compete for resources and some have

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rights have been developed in litigation and there is no consistent standard. *See* Brizuela, *supra* note 2, at 607–16. *See also* Ferster, *supra* note 8. Three standards have been recognized. The substantial or significant failure standard was recognized in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2001) (requiring more than *de minimus* implementation failures and finding fulfillment if significant IEP provisions have been followed). A justifiable failure standard was applied in *Melissa S. v. School District of Pittsburgh*, 183 F. App’x 184 (3d Cir. 2006) (school district’s explanations sufficed to excuse failure to provide daily aide, even though failure required child to stay home on occasion). This standard was rejected in *Manalansan Board. of Education v. Baltimore*, No. Civ. 01–312–cv (AMD), 2001 WL 939699 (D. Md. Aug. 14, 2001). Finally, a materiality standard was applied in *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (rejecting argument that an IEP contract should be construed against the school district drafter and holding that provision of education cannot “materially” differ from IEP provisions). Judge Ferguson, however, wrote a forceful dissent in *Van Duyn*, admonishing that “judges are not in a position to determine which parts of an agreed-upon IEP are or are not material.” *Id.* at 827 (Ferguson, J., dissenting). Thus, articulation of contractualization as part of the package of procedural rights conferred upon parents by the IDEA would also provide consistency in the area of implementation disputes. *See* Romberg, *supra* note 2, at 419.

<sup>194</sup> Providing statutory remedies suggests that violations of an IEP are not to be governed by contract law. *Cf.* S. REP. NO. 94-168, at 11 (1975) (noting how individualized planning conferences were meant for the purpose of “developing, reviewing, and when appropriate and with the agreement of the parents or guardian, revising a written statement of appropriate educational services to be provided for each handicapped child”).

<sup>195</sup> *See* Romberg, *supra* note 2, at 459.

<sup>196</sup> David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 66 (1985).

<sup>197</sup> *Id.* at 71–73.

greater resources to inform their negotiating positions.<sup>198</sup> The process of creating an IEP can take on the feel of a contractual negotiation. IEPs have been described as “written offers” that parents may or may not accept.<sup>199</sup> As Daniela Caruso stated, “IEPs are as close to contracts as it gets in the realm of public services governed by federal law.”<sup>200</sup> Powerful parents—those with resources or experience with the system—arguably exchange consideration with school districts by forbearing suit in exchange for the educational setting and related services they demand.<sup>201</sup>

There are differences, however. Whereas contract law permits latitude in the form of an agreement,<sup>202</sup> the IDEA requires that an IEP must be written, be sufficient at the time of creation, and be in effect by the beginning of the school year.<sup>203</sup> Oral agreements are not permitted by the IDEA and provision of a written offer is the “centerpiece” of the statute and the negotiation stems from a “legal right” rather than a free-market relationship.<sup>204</sup> Moreover, the IEP is part of an administrative process and reflects an individually designed entitlement.<sup>205</sup> Depending on the advocacy skills of the family involved, the end result may or may not comprise a bargained-for benefit.<sup>206</sup> The subject of the IEP is pre-defined—an education that is “appropriate.” Contract law does not concern itself with the appropriateness of the contractual exchange, whereas “appropriateness” of the bargained-for education is central to the examination of every IEP.

In contract law, the “four corners” rule comes into play only when an agreement has been memorialized in writing and only when the terms of that writing are unambiguous.<sup>207</sup> A determina-

<sup>198</sup> See Caruso, *supra* note 4, at 178–180; Chopp, *supra* note 4, at 429–30.

<sup>199</sup> *Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001).

<sup>200</sup> Caruso, *supra* note 4, at 177.

<sup>201</sup> *Id.* at 179–80.

<sup>202</sup> See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1.1, at 3 (4th ed. 1998) (“The term ‘contract’ is . . . used by lay persons and lawyers alike to refer to a document in which the terms of a contract are written. The use of the word in this sense is by no means improper so long as it is clearly understood that rules of law utilizing the concept ‘contract’ rarely refer to the writing itself. Usually the reference is to the agreement; the writing being merely a memorial of the agreement.”).

<sup>203</sup> 20 U.S.C. §1414(d)(2)(A) (2012).

<sup>204</sup> *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 188 (2d Cir. 2012); Knight, *supra* note 2, at 378. See also Engel, *supra* note 4, at 168; Daniel, *supra* note 5, at 7–8.

<sup>205</sup> *R.E.*, 694 F.3d at 175.

<sup>206</sup> See generally Caruso, *supra* note 4 (explaining that assertive families can drive a bargain, whereas weaker families tend to accept whatever is offered).

<sup>207</sup> See 11 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS*, WILLISTON ON CONTRACTS § 30:5 (4th ed. 1993) (explaining that “a clear and unambiguous writing may not be amplified by extrinsic evidence,” but extrinsic evi-

tion of ambiguity considers the extent to which the bargaining parties are conversant in the “particular trade or business” involved.<sup>208</sup> This rule bars consideration of parole evidence beyond the four corners of a written document, limiting resolution of contractual disputes to application of the four corners of a writing that embodies an agreement. Evidence external to the writing may be admitted only to explain ambiguities or to aid understanding of the language.<sup>209</sup> There are sound reasons to borrow elements of this rule in resolving disputes over the sufficiency of IEPs offered to parents by school districts.

“[F]ormalistic procedures to protect parental rights” should “level the playing field between parents and educators.”<sup>210</sup> However, the legal and procedural protections afforded by the Act have done little to redress the imbalance of power and adversarial atmosphere that pervades the IEP development process.<sup>211</sup> Contractualization responds to crucial concerns. First, it provides a document affording greater protection for parents. Additionally, contractualization encourages greater specificity in drafting IEPs and fosters communication between school districts and parents.<sup>212</sup>

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dence may be considered in determining whether a writing is ambiguous); 17A AM. JUR. 2D CONTRACTS § 331 (West, WestlawNext 2013) (a contract is ambiguous if its language is capable of more than one meaning).

<sup>208</sup> 17A AM. JUR. 2D CONTRACTS § 331 (West, WestlawNext 2013).

<sup>209</sup> 17A C.J.S. CONTRACTS § 394 (West, WestlawNext 2013); 11 WILLISTON & LORD, *supra* note 207, § 32:5; *id.* § 33:4 (the writing is the agreement). *See also* 36 AM. JUR. PROOF OF FACTS 3d § 331 (West, WestlawNext 2013).

<sup>210</sup> Kotler, *supra* note 4, at 341.

<sup>211</sup> Romberg, *supra* note 2, at 438.

<sup>212</sup> A primary objective of the 2004 amendments to the IDEA was to improve and foster cooperation among parents and school districts. In reporting the amendments to the full Senate for passage, the Senate Committee on Health, Education, Labor, and Pensions noted:

The committee is discouraged to hear that many parents, teachers, and school officials find that some current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere, in regards to special education. In response, the committee has made changes to promote better cooperation and understanding between parents and schools, leading to better educational programs and related services for children with disabilities.

S. REP. NO. 108-185, at 6 (2003). But precedents have not followed suit. Two cases from the Southern District of New York held that information readily known to the parents need not be included in the IEP. In *M.F. v. Irvington Union Free School District*, 719 F. Supp. 2d 302 (S.D.N.Y. 2010), the court found that procedural concerns of notice were satisfied when a reading program was in the student’s written schedule. *Id.* at 310–11. And in *M.C. v. Katohah/Lewisboro Union Free School District*, No. 10-CV-6268, 2012 WL 834350 (S.D.N.Y. Mar. 5, 2012), the court found no need to specify provision of a reading program in the IEP where the parent was aware that reading was part of the program’s services—and even though reading instruction was speci-

Finally, contractualization recognizes the social construct that has developed over the thirty-year history of the IDEA that views IEPs as contracts.<sup>213</sup> For example, the IEP Process Guide appearing on the website for the Massachusetts Department of Elementary and Secondary Education explicitly states, in bold print, “the IEP is a contract between the school district and the parent.”<sup>214</sup>

*R.E.* made a positive, but not sufficiently forceful contribution to a body of law aimed at parent protection. In addition to precluding retrospective testimony, the *R.E.* court should have declared that an IEP represents an enforceable agreement between school districts that cannot be modified by extrinsic testimony or evidence. At the same time, the court was limited by the IDEA’s terms. Thus, future amendments to the IDEA should characterize the IEP as an “agreement” rather than merely a “written statement.”

#### CONCLUSION

The IDEA has had massive, positive social impact. Opening schools to people of various abilities has profoundly impacted society, making disability “a normal part of the broad range of human experience and personality.”<sup>215</sup> People who would have been hidden away from society in the 1970s are seen in schools, the economic workforce, and even in popular culture.

For those parents who have had to advocate for their children, however, the process often remains daunting, overwhelming and

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fied in a subsequent IEP. *Id.* at \*9–10. These cases illustrate how precedent can erode parental protections.

<sup>213</sup> Caruso, *supra* note 4, at 174–77.

<sup>214</sup> MASS. DEPT. OF EDUC., IEP PROCESS GUIDE 13 (2001), available at <http://www.doe.mass.edu/sped/iep/proguide.pdf>. The guide further notes that “[t]he IEP should reflect the decisions made at the Team meeting and should serve as a contract between the school system and parent(s).” *Id.* The Texas Project FIRST is an informational website developed by the Texas Education Agency to provide accurate information to parents and families of students with disabilities. That site states that “the IEP is like a contract with the school . . . .” *Developing an IEP: The Five “W”s*, TEXAS PROJECT FIRST, <https://texasprojectfirst.org/DevelopingAnIEP.html> (last visited Jan. 28, 2014). Moreover, the Rutgers University School of Law Special Education Clinic has posted an informational pamphlet on its website stating that “[t]he IEP is a contract between the child’s parent/guardian and the school district.” See RUTGERS UNIV. SCH. OF LAW, INDIVIDUALIZED EDUCATION PROGRAM (I.E.P.): A GUIDE FOR PARENTS AND GUARDIANS (n.d.), available at <http://specialeducation.rutgers.edu/ieppamphlet2.pdf>.

<sup>215</sup> Engel, *supra* note 4, at 204. See also S. REP. NO. 104-275, at 7–8 (1996) (noting that since the enactment of the EHCA and the IDEA “children with disabilities are now much more likely to be valued members of school communities, and the Nation can look forward to a day when people with disabilities will be valued members of all American communities”).

exhausting. IEP formulation meetings are often fraught with tension. Parents are faced with the challenge of absorbing a tremendous amount of information; they need to learn about their children's disability, educational methodology, and the law.<sup>216</sup> The balance of resources and information greatly favors school administrators over parents. IEP formulation meetings often involve a lone parent facing a table of teachers and administrators in a meeting that is supposed to be collaborative, but is more often intimidating and tense. One way to redress this imbalance is to strengthen the legal structure intended for parent protection through terminology consistent with contractualization. Until then, however, the *R.E.* rule prohibiting retrospective testimony in disputes contesting IEP sufficiency creeps toward the ideal.

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<sup>216</sup> My own experience advocating for my child from 2010 to 2012 is reflective of this opinion. I spent several years advocating in a public school system on behalf of a child who is gifted but dogged by non-visible, brain-based disabilities. It was unpleasant, aggravating, and tiring for everyone involved. It fell to me to tell the school district how to work with my child. I also met individually with teachers to discuss the disabilities at issue. My impression was that they had no understanding whatsoever of the disabilities identified in the IEP which, being extremely charitable, I will assume they read—and this was in a small, affluent school district. I wish I could say that my experience was unique, but it wasn't—and isn't. In the end, faults in the system fortuitously led to a better situation for my child when the district permitted her to leave early to attend college. I do hope that my efforts at that particular school have led to positive improvements to the benefit of all of the students there. I must also refer to the acknowledgment of similar experience in the works of David M. Engel, *supra* note 4, at 187–89, and Martin A. Kotler, *supra* note 4, both of which were written over twenty years ago.

