

The Yeast of *Schaffer v. Weast*: Proper Ingredients to Raise Parental Involvement  
in Baking Individualized Education Programs.

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ABSTRACT

After the Supreme Court's ruling in *Schaffer v. Weast* parents, educators, and advocates for students with disabilities must focus on the construction of the Individualized Education Plan (IEP) to circumvent unnecessary litigation and to assure students with disabilities are provided a free and appropriate public education. This paper reviews the book How Well Does Your IEP Measure Up: Quality Indicators for Effective Service Delivery to extract the best methodology for creating IEP's. The paper then provides strategies for school district representatives and parents of students with disabilities to collaborate effectively in constructing IEP's. Finally, the paper offers avenues for future scholarship on the Individuals with Disabilities Education Act relative to the No Child Left Behind Act.

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## INTRODUCTION

Since the Individuals with Disabilities Education Act<sup>1</sup> [hereinafter IDEA] was promulgated, it has given birth to a steadily increasing number of lawsuits.<sup>2</sup> The purpose of the IDEA was simple, “to assess, and ensure the effectiveness of, efforts to educate children with disabilities.”<sup>3</sup> The number of students currently being served under IDEA is also simultaneously rising.<sup>4</sup> The most recent special education lawsuit, *Schaffer v. Weast*,<sup>5</sup> has made its way to the United States Supreme Court. At issue in *Schaffer* was who bears the burden of proof and persuasion after a due process challenge is raised before an administrative law judge.<sup>6</sup> The Supreme Court categorically ruled on November 14, 2005, that both the burden of proof and persuasion falls on the moving party on appeal.<sup>7</sup> Writing for the six-member majority (Justice Roberts recused himself because of his association with a representing attorney)<sup>8</sup>, Justice O'Connor's relied on the absence of legislative intent on the issue, therefore the majority ruled that the history of the rules of evidence should prevail.<sup>9</sup> Justices Ginsburg and Breyer filed dissenting opinions arguing primarily that given congressional silence on the issue and the school district's superior resources they should bear the burden.<sup>10</sup>

The importance of the *Schaffer* decision lay in its implication for parents and advocates of special education students. Previously the burden of proof question was split among the

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<sup>1</sup> 20 U.S.C. § 1400 *et seq.*

<sup>2</sup> See Judith Deberry, *Comment, When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. at 504 (2003) (“While education litigation in general has declined in recent years, lawsuits concerning special education issues have continued to increase rapidly.”).

<sup>3</sup> 20 U.S.C. § 1400(d)(4) (2004).

<sup>4</sup> Jake Wagman, *Districts Adapt to Rise in Special Education*, ST. LOUIS POST-DISPATCH, June 6, 2004, at Metro Section. (“The number of special education students nationwide has gone up steadily for the last three decades, according to the National Center for Education Statistics. The center's most recent figures put the number of special education students at 6.3 million, more than 13% of the total public school enrollment.”).

<sup>5</sup> 126 S.Ct. 528 (2005) [hereinafter, *Schaffer*].

<sup>6</sup> *Id.* at 529.

<sup>7</sup> *Id.* at 537.

<sup>8</sup> See, e.g., Wrightslaw, *Schaffer v. Weast*, <http://www.wrightslaw.com/news/05/schaffer.weast.htm> (last visited Dec. 5, 2005) (stating that, “Chief Justice Roberts recused himself and did not take part in the case.”).

<sup>9</sup> *Id.* at 533-537.

<sup>10</sup> See, e.g., *id.* at 541 (Breyer, dissenting). “On the other hand, one can reasonably argue to the contrary, that, given the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information, the risk of nonpersuasion ought to fall upon the district.”

circuits.<sup>11</sup> Notwithstanding this decision by the Supreme Court, statistics reveal school districts typically prevail in due process challenges brought by parents 60% of the time.<sup>12</sup> Therefore, the pragmatic implication of *Schaffer* coupled with the overall special education lawsuit statistics compel those interested in the education of students with disabilities to focus on the IEP Team meeting and the resulting IEP as a way to circumvent unnecessary litigation and more importantly to assure that students with disabilities are being provided a free and *appropriate* education.

Peter W.D. Wright, a leading advocate for students of special education, has noted that the reason so much litigation occurs within special education is not that parents are especially litigious nor that schools are unwilling to provide the necessary related services for students with disabilities to achieve an adequate education, instead not enough weight is given to the construction of IEP's.<sup>13</sup> Thus, the target of this paper is to "focus on the science of writing clear, understandable and measurable objectives,"<sup>14</sup> detailing how parents and advocates of students with disabilities can participate in IEP's.

This paper is divided into three parts. The first part of this paper critically reviews the book How Well Does Your IEP Measure Up?: Quality Indicators for Effective Service Delivery because of its ubiquitous use by parents, teachers, and advocates alike. This critical book review will serve as a backdrop to discuss the second and third portions of this paper. The second portion focuses on strategies for both school districts and parents to utilize when they are in conflict. Finally, the third portion of this paper analyzes the contemporary implications of special education students in a No Child Left Behind<sup>15</sup> [hereinafter NCLB] age.

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<sup>11</sup> See generally Christopher Thomas Leahy & Michael A. Mugmon, *Allocation of the Burden of Proof in Individuals with Disabilities Education Act Due Process Challenges*, 29 VT. L. REV. 951 (Summer, 2005) (Revealing that the First, Third, Fourth, Fifth, Sixth, and Tenth circuits had already allocated the burden of proof on the parents, while the Second, Third, Eighth, and Ninth circuits had allocated the burden on the local education agencies).

<sup>12</sup> See James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD 469, 474 (1999).

<sup>13</sup> See generally PETER W.D. WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSLAW: SPECIAL EDUCATION LAW* (2004).

<sup>14</sup> See Peter W.D. Wright, review on back cover of DIANE TWACHTMAN-CULLEN & JENNIFER TWACHTMAN-REILLY, *HOW WELL DOES YOUR IEP MEASURE UP?: QUALITY INDICATORS FOR EFFECTIVE SERVICE DELIVERY* 12 (2002) [hereinafter *MEASURING UP*].

<sup>15</sup> 20 U.S.C. § 6301 *et seq.*

I. Part One: A Critical Book Review

Mother-Daughter duo, Diane Twachtman-Cullen<sup>16</sup> and Jennifer Twachtman-Reilly,<sup>17</sup> begin their book How Well Does Your IEP Measure Up?: Quality Indicators for Effective Service Delivery<sup>18</sup> with the Chinese Proverb, 'A journey of a thousand miles begins with the first step.' The authors had three purposes in mind when they began their journey: (1) to crystallize the problems with many present-day IEP, (2) to propose solutions to these problems, and (3) to show how effective service delivery is inextricably linked to the IEP process. If a book is best judged by whether it has met its purposes, then the dynamic duo have made great strides rather than small steps. This book review analyzes the authors' three purposes, suggesting areas for improvement while simultaneously underscoring the authors' strengths. In the final analysis, this critical book review argues that the authors should be commended for empowering parents with the requisite tools to help create an effective IEP in conjunction with their local educational agency.

The Text from Above

Before analyzing the authors' three purposes, some general observations about the text are warranted. The text is 250 pages long. It is divided into fourteen chapters, including two appendices, a bibliography, and an index. It is topically broken into two parts: (1) The Essential Elements of the IEP, encompassing ten chapters with the remaining four chapters are devoted to (2) IEP Goal and Objective Templates.

The book's only noted criticism is that it is "very ASD [Autism Spectrum Disorder] focused."<sup>19</sup> On the other hand, given that students with ASD often have the most complicated IEP's, parents of students with less severe disabilities are even better equipped to help create

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<sup>16</sup> Diane Twachtman-Cullen, Ph.D., is the Executive Director of the Autism & Developmental Disabilities Consultation Center in Connecticut. Dr. Twachtman-Cullen is a licensed speech-language pathologist and a recognized expert on the subject of autism and related conditions.

<sup>17</sup> Jennifer Twachtman-Reilly, M.S., is a communication disorders specialist as well as a licensed speech-language pathologist. She serves on the Executive Board of the Rhode Island Speech-Language-Hearing Association, and has a published chapter in J.R. CAUTELA & W. ISHAQ (Eds.) CONTEMPORARY ISSUES IN BEHAVIOR THERAPY: IMPROVING THE HUMAN CONDITION (1996).

<sup>18</sup> Published by Starfish Specialty Press, Higganum, CT, in 2002.

<sup>19</sup> All of the three outside reviewers gave the book five out of five stars but noted to some degree that it was ASD targeted See Justin Shreiter, *The Best!!*, AMAZON.COM CUSTOMER REVIEWS, June 22, 2003, at <http://www.amazon.com/gp/product/0966652924/002-5908901-0180045?v=glance&n=283155&s=books&v=glance>.

their children's IEP's. For instance, Chapter 12 offers a template for the goals and objectives for communication, expression, and oral-motor skills that can easily be adapted to a non-English speaking student with a physical disability.<sup>20</sup>

Perhaps another valid general criticism of the text, although not mentioned elsewhere, is that the authors only direct parents to additional resources available in print. The authors neglect to include a single free resource available via the Internet,<sup>21</sup> particularly important given the increasing costs of special education and medical care in the United States and the target audience for the text.<sup>22</sup> Finally, the authors freely admit the text is written with a student bias. However, this should not detract from the success of the book because special education is typically viewed as an issue that crosses party lines. Moreover, teachers and policymakers who are involved in the creation of IEP's ultimately want what is best for the student with a disability, this book gives them the tools to do so.

#### Purposes One & Two: Present Problems & Solutions Proffered

The authors first establish the macro problems of current special education practices by examining its promulgation under Public Law 94-142 in 1975.<sup>23</sup> Most startlingly is that students with ASD were not included in the original Education for All Handicapped Children Act. Originally, educators and parents came to the rescue of ASD students:

Not all that glittered was golden, however, for neither autism nor pervasive developmental disorder (PDD) was recognized as a legitimate disability category under the new law. Necessity being the mother of invention, educators and parents soon found ways to finesse services under P.L. 94-142 by using other disability categories to obtain specialized programming. While

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<sup>20</sup> Although anecdotal, I was first placed in a school for the developmentally disabled upon coming to America and my special education teachers indeed adopted similar strategies in my education. See Michelle Galley, *I Know I'm Here for a Reason*, EDUCATION WEEK, November 29, 2000, at 22. Available online after free registration to edweek.org website at:

<http://www.edweek.org/ew/articles/2000/11/29/13ideaside1.h20.html?levelId=1000&levelId=1000>

<sup>21</sup> See, e.g., MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS at 864 (Aspen 2005). Moreover, a natural-language Google search for "help make your students IEP better" yielded 446,000 results in .31 seconds, November 16, 2005, at <http://www.google.com/search?sourceid=navclient&ie=UTF-8&rls=GGLD,GGLD:2004-17,GGLD:en&q=help+make+your+students+IEP+better>

<sup>22</sup> For example, in St. Louis, Missouri, one in every six children is in special education, attributed to "[p]oor health care, especially in infants, and exposure to drugs and alcohol in the womb...school officials say." Jake Wagman, *Districts Adapt to Rise in Special Education*, ST. LOUIS POST DISPATCH, June 6, 2004, at Metro Section.

<sup>23</sup> Originally the Education for all Handicapped Children Act, it has been renamed IDEA and codified at 20 U.S.C. § 1400 *et seq.*

some of these labels were relatively innocuous (e.g., Other Health Impaired), for the most part, they left much to be desired in the question for educational services that were *individualized* to the specific needs of students with autism and related conditions.<sup>24</sup> (italics in original)

Against this backdrop, the authors explain that the main problem with IEP's is their construction. Thus, their remaining chapters focus on the case for specificity. They begin with Present Levels of Performance (PLP). Intuitively, this is a good place to start because without properly identifying a child's current level of performance an IEP is virtually useless and cannot be individualized. Given the authors' practical experience with special education, they are able to provide actual poorly written PLP's. Their examples are especially helpful because IEP's are typically protected under The Federal Family Educational Rights and Privacy Act of 1974.<sup>25</sup>

The authors provide the following sample PLP's for John, a 7<sup>th</sup> grader:<sup>26</sup>

- (1) Social-Emotional/Behavioral: Has difficulty in this area
- (2) Communication: Has made progress
- (3) Academic/Cognitive: WISC III—V 128; P 111; FS 122
- (4) Woodcock Johnson: Reading 84 ss Math: 109 s Writing 93 ss

Next, they critique in detail why each of the above are poorly constructed. The first PLP is vague. "Difficulty" is an ambiguous term and provides no guidance. The second PLP addresses the end result rather than the present performance. The third and fourth PLP only present results from diagnostic tests and require a testing expert to determine their meaning and are generalized rather than individualized. The authors propose an alternative PLP that address all of these problems:

John is able to manage his time and personal belongings with the use of visual supports, including timers and organizational checklists. Likewise, transitions from one activity to another, or from class to class are accomplished with greater ease if transition markers are used. While John is resistant to the use of these supports, several of his teachers have observed that without them, he functions less competently. Parents concur with this judgment, noting that John also has a great deal of difficulty managing his homework assignments. As a result of his disability, John has difficulty keeping up with his mainstream classmates without the use of supports for his executive function deficits. Hence, he needs to develop greater independence in their use to compensate for his organizational problems.<sup>27</sup>

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<sup>24</sup> MEASURING UP at 2.

<sup>25</sup> 20 U.S.C. § 1232 *et seq.*

<sup>26</sup> MEASURING UP at 8.

<sup>27</sup> *Id.* at 12.

Given the lack of specificity in PLP's, it is no wonder that the authors next focus on the underlying conditions governing performance. That is, what types of supports directly related to a student's disability may have a causal relationship to improving their educational performance. A major strength of the text is the authors' use of analogies. For example, what if Mr. Smith wanted to climb Mount Everest. The underlying conditions governing performance might be stated this way, "Given a supply of oxygen and adequate weather conditions, Mr. Smith will climb to the top of Mt. Everest."<sup>28</sup> As with PLP's, underlying conditions are often neglected because the emphasis in IEP's is on goals and objectives rather than on how to reach these goals and objectives. Compare the below:

- (1) Jamie will complete a multi-step art project with a maximum of 3 reminders from staff;
- (2) Given a visual template depicting the sequence of activities, Jamie will complete a multi-step art project with a maximum of 3 reminders from staff.<sup>29</sup>

The second goal includes the tools necessary for the success. Not only does the second objective tell the teacher they will prompt Jamie, but it also informs them of the *type of prompt* (e.g., visual, written, and/or verbal) best suited to Jamie's particular learning style and disability. The second goal also includes the *criterion* to quantitatively measure success. That is, it specifically tells the teacher that s/he is allowed to give a maximum of three visual prompts. Although the criterion here is directed at the teacher and is given an exacting number, criterion can also be developed to measure student performance. Borrowing from the above goal, an example of a criterion on the student may be: Given a visual template depicting the sequence of activities, Jamie will complete nine out of ten art projects throughout the year with a maximum of three reminders from staff for each art project.

Another excellent aspect of the book is the depth of coverage regarding prompts and criterion. While chapter three introduces the concept, chapter five is devoted solely to these subjects. In doing so, the authors conform to the IDEA's mandate that goals and objectives of

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<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.* at 19-20.

IEP's be measurable.<sup>30</sup> Consider the table<sup>31</sup> the authors create and the depth of its treatment of prompt levels:

<b>A PROMPT HIERARCHY</b>	
Level 0*	Independent Performance/Initiation
Level 1	Expectant Waiting/Expectant Time Delay
Level 2	Manual Signs/Gestures or Visual Cues
Level 3	Verbal Cues
Level 4	Combination of Cues
Level 5	Physical Cues Assistance
<p>*Level 0 indicates that no prompts are to be used, since independent performance/initiation is required.</p> <p><b>Note:</b> To use this prompt hierarchy, select the <i>lowest</i> level prompt capable of eliciting the desired behavior, and move toward greater <i>independence</i>, keeping in mind that the selection of prompt levels is <i>always</i> governed by student performance.</p>	

With the emphasis on specificity, criteria, and prompt levels in hand, the authors next consider the “heart and soul of the IEP,” goals and objectives.<sup>32</sup>

Outside of the field of special education goals and objectives are often synonymous, resulting in confusion among parents during the IEP construction process. Even within the field of special education the goal/objective debate obfuscates the obvious: to ensure educational opportunities for students with disabilities. Some special education practitioner’s would like the measurability requirement of IDEA to fall within the goals while others the converse. The authors’ position is that “[w]hile the issue is at best open to interpretation, and at worst, confusing, we believe, that the stringent measurability requirements are best left to the short-term objectives.”<sup>33</sup> Thus, a goal may seek to improve reading comprehension; an objective is more specified including, perhaps, being able to read a short story rather than a single paragraph. The authors rely and appropriately cite R. F. Mager<sup>34</sup> for the components of a well-written objective:

<sup>30</sup> 20 U.S.C. § 1414 (d)(1)(A)(ii)(I).

<sup>31</sup> MEASURING UP at 49.

<sup>32</sup> *Id.* at 63.

<sup>33</sup> *Id.* at 67.

<sup>34</sup> See R.F. MAGER, PREPARING INSTRUCTIONAL OBJECTIVES: A CRITICAL TOOL IN THE DEVELOPMENT OF EFFECTIVE INSTRUCTION at 51 (3rd 1997).

- (1) Performance: It describes what the learner is expected to be able to DO.
- (2) Conditions. It describes the conditions under which the performance is expected to occur.
- (3) Criterion. It describes the level of competence that must be reached or surpassed.<sup>35</sup>

Although specificity and templates are critical in constructing appropriate and individualized IEP's, the question remains: Are they currently employed during the construction of IEP's?

Unfortunately, for most students with disabilities the answer is no.<sup>36</sup> Therefore, the authors' third purpose is critical.

### Purpose Three: Effective Service Delivery Must Be Built into the IEP

Unfortunately, school districts have always viewed the construction of IEP's as their sole province. Given that the IDEA is only thirty years old, it was not until recently<sup>37</sup> that advocacy organizations and the media have empowered parents to take a more active role in the construction of their children's IEP. Even with heightened awareness, "most school districts consider the subject of methodology to be taboo, and many refuse (albeit politely) even to discuss it at the IEP planning and placement team meeting."<sup>38</sup>

The authors make a strong case for parents to be equal partners with school districts during the construction of their child's IEP. Indeed, the authors do not contend that parents should be or are afforded primacy in this collaboration under the law; rather, "for schools and parents to work *collaboratively* to determine the methodology best suited to the student's unique needs."<sup>39</sup>

Insofar as the authors provide the tools for parents to play an active role in the construction of IEP's, it should be noted that the organization of the text is somewhat disjointed.

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<sup>35</sup> MEASURING UP at 75.

<sup>36</sup> See *generally* Pa. Ass'n of Retarded Citizens (PARC) v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa 1971) (education for the developmentally disabled); Mills v. Bd. Of Educ. of D.C., 348 F. Supp. 866 (D.C. 1972) (extending PARC to other students with disabilities); Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (establishing a definition for appropriate education under IDEA); Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (addressing related services for FAPE); Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66 (1999) (fusing related services with integration component of IDEA); and Sacramento Cty. Unified Sch. Dist. v. Rachel H, 14 F.3d 1398 (9th Cir. 1994) (addressing Least Restrictive Environment component of IDEA).

<sup>37</sup> *Id.* at 27, "First and foremost, students with significant special needs being welcomed into the public schools is a relatively recent phenomenon."

<sup>38</sup> *Id.* at 25.

<sup>39</sup> *Id.* at 27. (emphasis added).

That is, the discussion on methodology occurs in chapter four of the textbook. A more intuitive organizational pattern would place this chapter earlier in the text. Doing so would allow parents or other advocates of students with disabilities to feel empowered before becoming bogged down in the minutia of what constitutes effective PLP's, prompt levels, and criteria.

Diane Twachtman-Cullen and Jennifer Twachtman-Reilly began their book noting that 'A journey of a thousand miles begins with the first step.' Extending on the authors' use of the Chinese Proverb, the Great Wall of China spans 4, 611 miles long. In fact, the question of whether the Great Wall of China can be viewed from space has been answered: it can be.<sup>40</sup> The book How Well Does Your IEP Measure Up?: Quality Indicators for Effective Service Delivery takes the sojourner of special education not just a step but a great leap toward the Great Wall's apex. The authors should be commended for tackling a sensitive subject with grace, empowering parents with the tools necessary to proactively participate in the IEP Team meeting, and doing their part to ensure that *all* citizens of the United States receive a free and *appropriate* public education.

## II. Part Two: Strategies for Schools and Parents when in Conflict

Given that the book review shows the reader how to properly bake an IEP, the next ingredient in properly constructing an IEP is to circumvent unnecessary litigation. The reason for the controversy as briefly noted in the book review is that the IDEA is equivocal in the role that parents should play in the IEP Team Meeting: "IDEA's provisions allow parental involvement in decisions that affect their [parents] disabled child's educational program. However, the Act fails to spell out which decisions are assigned to parents and which are the sole responsibility of educators."<sup>41</sup> Thus to cure this defect Judith Deberry offers solutions for state educational agencies, school districts as well as legislatures.

### Role of State Education Agencies, Districts, and Legislatures

On the state level, Deberry suggests that a little education can go a long way. While the IDEA does have reporting requirements for school districts to provide notice to parents of

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<sup>40</sup> Richard Moriarty, *Proof Ends Decades of Debate; Yes, You Can See the Great Wall from Space*, THE EXPRESS, May 14, 2004, at 26.

<sup>41</sup> Judith Deberry, *Comment, When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 506 (2003).

evaluation, placement, and the like, Deberry urges school districts to go beyond what the law requires to foster good relationships with parents thereby avoiding potential costly litigation. Specifically, Deberry argues that “[t]he manner in which state education agencies disseminate information delineating the rights and responsibilities of parents, students, and school districts should facilitate parental involvement in the decision making process.”<sup>42</sup> Moreover, Deberry suggests that state educational agencies provide personnel on the state level or at the very least the district level to “counsel parents of disabled children regarding their rights and responsibilities under federal and state statutes.”<sup>43</sup> Finally, Deberry advocates a uniform approach for all special education services at the state level through effective training programs for any state employee that may need to work with special education students as well as training programs at the state level for parents and advocates of special education students.

At the school district level, Deberry focuses primarily on the Admission, Review, and Dismissal [hereinafter ARD] provisions of the IDEA. She offers several solutions for school districts to assure that they are meeting these provisions of the IDEA. First, given that parents of special education students typically have more constrained schedules, Deberry suggests that districts should provide alternative means for parents and advocates to attend and participate in any of the ARD procedures. Specifically, she suggests that school districts should “allow[] parents to take part via electronic media or telephone...when they are unable to attend an ARD meeting.”<sup>44</sup> Moreover, Deberry notes that school personnel should carefully document any issues discussed in any ARD where parental involvement was impossible *directly* proceeding the meeting so that parents can get a “timely review[]” thereafter.<sup>45</sup> Finally, Deberry notes that school districts should take special measures to ensure that “when a parent expresses concerns or dissatisfaction with the educational services offered to their disabled child, the school district should *immediately* responds to the parent’s concern.”<sup>46</sup> In doing so, school districts can show

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<sup>42</sup> *Id.* at 536.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 537.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

that they are interested in parental input while simultaneously facilitating by example how working collaboratively, or at the very least via mediation, districts and parents can resolve disputes.

The most promising solutions offered by Deberry are the macro solutions. That is, most disputes over IEP's arise out of the age-old dispute over "floor of opportunity" or "maximized potential" under IDEA.<sup>47</sup> State legislatures, suggests Deberry, play an integral role in settling this debate. For instance, in Massachusetts the special education law previously required a "maximum possible development" standard; however, since it was amended to "free and appropriate public education" litigation over this particular issue has quieted.<sup>48</sup> Although, the author of this paper is not suggesting that other states should follow the state of Massachusetts in limiting its role in the education of special education students, such an amendment in favor of an increased role for states created by their respective state legislatures could advance a maximization standard rather than a floor standard. Perhaps most innovatively, Deberry finally suggests that "state legislatures should provide financial incentives to encourage college students and current teachers to obtain the training necessary to enter special education and related fields where there is a shortage of personnel."<sup>49</sup> Incentives such as "stipends, signing bonuses, or tuition credits could encourage students and teachers the additional education needed"<sup>50</sup> to foster the education of students with disabilities and curtail unneeded litigation.

#### Role of Parents and Advocates of Students with Disabilities

While Deberry focuses on the needs of the school districts and advances the rights of school districts, Philip T.K. Daniel is on the other pole, "[p]arental activity in the decision of what is an appropriate education for students with special needs is protected by IDEA, especially by provisions of the 1997 amendments."<sup>51</sup> In advancing greater protection of parental involvement in the IEP process Daniel ultimately offers four tips for parents.

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<sup>47</sup> Compare *Bd. Of Educ. v. Rowley*, 458 U.S. 176 (1982) with *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999).

<sup>48</sup> Judith Deberry, *Comment, When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 540, n. 158 (2003).

<sup>49</sup> *Id.* at 538. These incentives are particularly prudent post No Child Left Behind, See *infra* Part III.

<sup>50</sup> *Id.* at 539.

<sup>51</sup> Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 19 (January, 2000).

First, “Parents should emphasize the unique or special needs of the individual student and not argue for what would be optimum or best or better for the student or what would maximize the students potential.”<sup>52</sup> In doing so, parents can avoid what Deberry is encouraging legislatures to do. That is, parents can argue for an *individualized* education plan regardless of whether the standard in their respective state is a “floor” or the “maximization” criterion. By focusing on the unique needs of their children, parents can overcome any arguments advanced by the school district that their input is designed to maximize their child’s education. Indeed, notes Daniel “[i]f parents can show that an IEP is not individualized, the decision maker may give greater weight to the parents’ alternatives.”<sup>53</sup>

Next, during the IEP team meeting parents should proffer solutions or strategies that have worked well for them at home in the areas of educating, disciplining, or encouraging their child to learn a particular task or rule. Thus, suggests Daniel “[i]t is wise for parents to talk in terms of what program or services are appropriate for the student, not what methodology is preferred by the parent.”<sup>54</sup> Indeed, as the critical book review illuminated earlier, schools often view methodology as their sole province thus any suggestion of methodology is often met with defense. Thus, if parents prefer a particular methodology to another they should focus on imparting the philosophy undergirding the methodology not the methodology itself. For example, in teaching students with Autism Spectrum Disorder or Pervasive Developmental Disorder there are two competing methodologies LOVASS versus TEACCH. LOVASS stresses behavioral modification techniques while TEACHH emphasizes a cognitive approach to learning. Thus, if a parent favors the LOVASS approach they should offer examples of how their child behaves or learns at home based on a reward model.<sup>55</sup>

Third, Daniel suggests that parents know exactly what their goals are for the IEP meeting, regardless of what stage (Admission or Review) the meeting is occurring. Specifically, parents need to bifurcate the non-methodological from the methodological input during the meeting. The rationale for this bifurcation is profound because in reviewing due process

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 21.

<sup>54</sup> *Id.* at 25.

<sup>55</sup> *Id.* at 30, n.94.

decisions, courts often “lump the issues together and decide unfavorably on all issues if the court suspects that the parent is trying to dictate methodology.”<sup>56</sup>

Finally, even though it may seem obvious, attitude is everything because “[p]arents lose when it appears they are trying to demand from or dictate to the school district rather than trying to participate in a discussion regarding their child’s needs.”<sup>57</sup>

Ultimately to cure these defects within the IDEA both the school district *and* parents have a role in exercising good judgment, restraint, and collaboration.” Thus, parents must be willing to come to the IEP Team meeting with a collaborative rather than aggressive stance.

Ultimately, in order to assure the creation of a proper IEP *both* stakeholders, parents and school districts, are responsible to ensure that innovative strategies are utilized to assure that IDEA is being carried out.

### III. Part Three: Future Implications for Special Education Students because of NCLB

The NCLB has been criticized in recent years for a variety of reasons. However, of particular importance to parents and advocates of students of special education are the standards upon which it imposes funding to school districts nationwide and the additional certification requirements it imposes upon an already small pool of special education teachers.

Before discussing the specifics of NCLB, a discussion on the philosophical framework upon which it is based is warranted. Education Law is premised on two competing approaches: (1) the Authoritarian Approach and the (2) Progressive Approach.<sup>58</sup>

#### Authoritarian Approach

This approach is grounded in centuries of literature, dating as far back as Plato’s *Republic*.<sup>59</sup> The Authoritarian Approach to education emphasizes a unitary system of education where citizens are inculcated with a uniform set of values, beliefs, and civic virtue. The strength of the Authoritarian Approach is that it emphasizes egalitarianism and mandates public education

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<sup>56</sup> *Id.* at 26.

<sup>57</sup> *Id.* at 27.

<sup>58</sup> See generally ALFIE KOHN, *THE SCHOOLS OUR CHILDREN DESERVE* (1999); See also, MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 1-24 (Aspen 2005).

<sup>59</sup> S. CAHN, *CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION* 39-109 (1997).

for all citizens. Since Plato's age, however, the Authoritarian Approach has been criticized for its "one-size fits all" approach to teaching. Given that the large corpus of research on learning styles and levels of understanding, for instance, the Authoritarian Approach to education lacks specificity.<sup>60</sup>

The American Authoritarian Approach to education has its roots in John Dewey's text, *Democracy and Education*. Dewey extending upon Plato's universal education concept explains that education in America should focus on "breaking down those barriers of class, race, and national territory which kept men [sic] from perceiving the full import of their activity."<sup>61</sup> On a macro level the Authoritarian Approach to Education seems to in fact advance the notion that students with disabilities should in fact also be educated; however, what is lacking is the type of *individualized* instruction that is required by the IDEA.

#### Progressive Approach

The Progressive Approach to education has its roots in ideas advanced by Israel Scheffler.<sup>62</sup> The Progressive Approach to Education does in fact embrace all of the public education mandates of the Authoritarian Approach but is more child centered. The Progressive Approach recognizes the unique and indeed different levels of knowledge envisioned by Bloom and advances an individualized educational experience. Moreover, instead of inculcating students with a shared sense of national identity, the Progressive Approach to Education emphasizes the need for independent decision-making.

Therefore, the Progressive Approach is obviously more favorable to students with disabilities and the Authoritarian Approach is not. More importantly, however, is the fact that NCLB has its roots in the Authoritarian Approach to Education. That is, a national curriculum, national tests, and national funding for education all can be traced to the paternalism of the

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<sup>60</sup> See generally BENJAMIN S. BLOOM, *TAXONOMY OF EDUCATIONAL OBJECTIVES* (1984).

<sup>61</sup> S. CAHN, *CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION* 288-293 (1997).

<sup>62</sup> S. CAHN, *CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION* 436-442 (1997).

Authoritarian Approach to Education. On the other hand, given the IDEA's imperative for "individualized" education plans it necessarily employs the Progressive Approach.<sup>63</sup>

#### NCLB and Students with Disabilities

The headlines abound blaming special education students for schools failing to meet the NCLB standards.<sup>64</sup> Indeed, schools in Indiana are even trying to bus students with disabilities to neighboring schools to "spread the deficiencies" throughout the district in South Bend, Indiana.<sup>65</sup> However, unfair NCLB appears to be toward regular education students, it is even more so toward students with disabilities. It should be first noted, however, that it is far too easy to categorically point the finger at students in special education as the cause for such failure. The reality is there are far more students in regular education across the district and any statistician can attest to the fact that while outlying data can skew results it is the median performers that dictate the output. Put another way, there is something inherently wrong with regular education and the fault cannot all be placed on special education students. Although the primary purpose of this paper is to outline the ways in which parents may more proactively participate in the IEP Team Meeting and consequently their child's IEP, a future implication that must be studied in the future is the impact NCLB has on special education students. Further, the question of isolating the special education student out of the national standards movement seems tempting but the result it may have on the integrity of the special education student's diploma must be studied. Indeed, some proponents of this isolation go further suggesting that regular education students who fail the national standards exam only receive a Certificate of Attendance. Where does this leave the special education student who will not be allowed to participate in national testing whatsoever?

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<sup>63</sup> See, e.g., Alefia Mithaiwala, *The 2004 IDEA: In the Wake of the No Child Left Behind Act*, 1 EDUC. L. & POL'Y F. (2005). <http://www.educationlawconsortium.org/forum/2005/papers/mithaiwala.pdf> (offers a thorough discussion of the inherent conflict between NCLB and IDEA); See also, Courtney Dredden, *No Child Left Behind--Except Poor and Minority Students*, 1 EDUC. L. & POL'Y F. (2005). <http://www.educationlawconsortium.org/forum/2005/papers/dredden.pdf> (combined with Mithaiwala's work shows how NCLB can be aligned with IDEA by utilizing an "overall growth" model for assessment).

<sup>64</sup> James Walsh, *Special-ed scores under scrutiny; Many educators say crucial testing goals are unrealistic for these students.*, MINNEAPOLIS STAR-TRIBUNE, April 28, 2004, at A1.

<sup>65</sup> See Michael Wanbaugh, *Special education service facing unique challenges; New law adds pressure to show student progress*, SOUTH BEND TRIBUNE, April 24, 2004, at A1.

Finally, ever since its passage the IDEA seems to be reigning in more and more special education students, leaving the district to spread an already depleted coffer among the same amount of regular education students and more special education students. Future scholarship should examine what are the causes of such increase. For example, at least one writer has suggested that it is the more affluent who are increasingly demanding their children receive special education.<sup>66</sup>

#### NCLB and Special Education Teacher Certification

Another issue that must be addressed by future scholarship is the resulting impact that NCLB has on the certification of special education students. So germane is this topic that Senate Health, Education, Labor, and Pensions (H.E.L.P) Committee convened a special meeting to address this issue on April 27, 2005.<sup>67</sup> Assistant Secretary Hager of the Office of Special Education and Rehabilitation stated in his testimony that “[t]he field is concerned about special education teachers not having enough time to meet the requirements to become highly qualified...” The issue here is not that special education teachers should not have to be “highly qualified” to meet the demands of NCLB; rather, future research should be concentrated on what states have done to provide assistance for current special education teachers to become highly qualified. Just as some proponents have tried to isolate special education students under the national testing requirement; they are simultaneously suggesting that teachers of special education students should not have to be as highly qualified as teachers of regular education students. This is both antithetical to NCLB as well as IDEA.

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<sup>66</sup> See Alison Leigh Cowan, *Amid Affluence, a Struggle Over Special Education*, NEW YORK TIMES, April 24, 2005, at Section 1, Column 3.

<sup>67</sup> See *Meeting Criteria for Special Education: Hearings Before the Subcomm. on Education and Early Childhood Development of the Senate Health, Education, Labor, and Pensions Committee*, 109th Cong. Congressional Quarterly (2005) (statement of John Hager, Assistant Secretary of Education).

## CONCLUSION

Post *Schaffer v. Weast*, parents need to be more equipped to participate in their children's IEP Team Meetings. The more specific and measurable an IEP is in all of its components (Goals/Objectives in relation to Present Levels of Performance, Criterion, Prompt Levels) the likelihood of litigation decreases. Finally, future scholarship should examine the impact of NCLB on special education students as well as teachers.

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