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Distrust and Disclosure in Special Education Law

Martin Kotler

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Distrust and Disclosure in Special Education Law

Martin A. Kotler*

ABSTRACT

Although the IDEA purports to entitle disabled children to a “free, appropriate, public education” (FAPE), disagreements regarding the concept of “appropriateness” have been an ongoing source of conflict between parents and educators. While parents demand that school districts and other educational service providers program so as to maximize the child’s potential, school personnel frequently insist that an educational program is “appropriate” within the meaning of the Act if it permits a child to make any progress at all. This Article proposes a middle ground under which the “appropriateness” of a program is to be judged on an individualized basis taking into consideration each child’s potential for educational growth.

Additionally, based on personal experience gained in years of litigation with schools over the appropriateness of special education programs and services, many of the common abuses of the system established by the IDEA are identified and changes are suggested.

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*Professor Emeritus, Widener University School of Law. The author is also a member of the Board of Trustees of TALK, Inc., a Pennsylvania non-profit corporation, d.b.a. Talk Institute and School, a private academic school located in Newtown Square, Pennsylvania, that serves children with autism, apraxia, and other communication disorders.

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INTRODUCTION

With the enactment of the Education for All Handicapped Children Act (the "Act") in 1975, Congress sought to guarantee educational rights for disabled children.¹ The Act—largely spurred² by consent decrees in *Mills v. Board of Education*³ and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*⁴—envisioned a system under which, after the identification of children in need of special education, parents of disabled children and school districts would collaborate to design publicly funded

1. See Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 803–04 (2006) (outlining the history of special education legislation prior to 1975). The Act was subsequently reauthorized by Congress a number of times. In 1990, the name was changed to the Individuals With Disabilities Education Act ("IDEA"). This Article will use both names.

2. S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430 (explaining the cases that provided the impetus for the Act).

3. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

4. *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

programs to meet the individualized needs of the children. In the language of the Act, each identified child was to receive a “[f]ree appropriate public education” (“FAPE”).⁵ Recognizing that disagreement between parents and educators as to the appropriateness of the proposed program inevitably would occur in at least some cases, the Act provided for a legal process under which the “aggrieved party”—usually a dissatisfied parent—could challenge either the identification or failure to identify a child as one in need of special education services, the content, or implementation of the proposed program itself.⁶

Soon after the legislation was enacted, it became apparent that the collaborative model was seriously flawed. Some scholars insisted that the very idea of individualized programming was antithetical to the culture of school districts and thus doomed from the outset.⁷ Public schools, seeking one-size-fits-all programming that would adequately serve to educate a large majority (but not all) of their students,⁸ could not

5. 20 U.S.C. § 1412(a)(1) (2012).

6. Whether one must exhaust administrative remedies under the Act to challenge the implementation of an agreed-upon Individualized Educational Program (“IEP”) is a matter of some dispute. See *infra* notes 149–168 and accompanying text. It should also be noted that the 2004 Amendments to the Act required that states take steps to ensure that special education teachers “be highly qualified.” 20 U.S.C. § 1412(a)(14)(C) (2012). Although § 1412(a)(14)(E) specifically declined to provide students with a right of action based on a lack of teacher qualification, to the extent that lack of qualification prevents the provision of an appropriate education, it can be raised as part of a due process challenge. See Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 18–19 (2006).

7. See, e.g., David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 795 (1973) (observing “[t]o the extent that any bright new idea threatens to undermine this culture of the school, it is for that reason [viewed as] suspect”); see also Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1010 (1988). Handler comments:

The procedures [established by the Act] have been distorted by the exigencies of the bureaucracy. The average parent, especially in lower socio-economic classes, does not have the ability to participate. In addition to the psychological burdens of coping with a handicapped child, most parents lack the information and the resources to deal with the school bureaucracy.

Id.

8. See Richard L. Allington, *You Can’t Learn Much from Books You Can’t Read*, 60 EDUC. LEADERSHIP 16, 17 (2002). Allington observes:

Schools have typically exacerbated the [student reading] problem by relying on a single-source curriculum design—purchasing multiple copies of the same science and social studies textbooks for every student. This “one-size-fits-all” approach works well if we want to sort students into academic tracks. It fails miserably if our goal is high academic achievement for all students.

Id. (citation omitted).

truly individualize programming to meet the needs of every child for whom they were made responsible.⁹

The problem, however, is even more complex. This Article argues that the emergence of several political trends combined to undermine the educational goals of the legislation. From its inception, there was a conflict between the two theoretical underpinnings of the Act. The legislation simultaneously embraced both a rights theory and utilitarianism. "A rights theory requires the provision of education as an acknowledgement of the disabled person's dignity as a human being. A utilitarian model, on the other hand, requires the reduction of disability because of the . . . cost effectiveness of such reduction . . ." ¹⁰ In other words, the former demanded the provision of services regardless of cost. The latter required only the provision of cost-effective services. Moreover, the Act did not directly address whether cost effectiveness was to be assessed over the long-term or in the short-term.¹¹

Regardless of what may have been the drafters' original intent, judicial interpretation in the years following enactment increasingly allowed short-term cost considerations to trump both long-term efficiency and a rights approach.¹² The consequence, undoubtedly unintended, was to create a gap between parental expectations and school

9. See William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7, 53 (1985). Clune and Van Pelt explain:

One of the conspicuous failures of the Act was the ideal of individually appropriate education. What occurred instead was the establishment of routinized special programs. Individualized programs fell victim to lack of technical knowledge, budgetary constraints, and the needs of schools for routinized procedures. As organizations with many functions, schools must be able to plan for special education within a finite budget. The idea of a customized education for every handicapped child violated these fundamental organizational precepts.

Id.

10. Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 335 (1994).

11. Although much of the legislative history supports the argument that goals included both long-term cost effectiveness and the dignity of the child. See *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181-82 (3d Cir. 1988). Judge Becker summarized the goals indicated in the legislative history:

The [Act]'s sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, . . . eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.

Id.; see also *infra* note 49 and accompanying text.

12. See *infra* text accompanying notes 97-102.

responsibilities.¹³ The basic problem is simply this: parents of disabled children, often already reeling from the emotional trauma of a diagnosis, enter the world of special education with the expectation that the schools will do their best for the children.¹⁴ School administrators, special education teachers, and therapists of varied specialties encourage and reinforce the parents' assumptions that the parents' goals for their child are shared by the educational establishment, when, in fact, they are not. In some cases, the deception is deliberate—perhaps cynical.¹⁵ In other instances, it is undoubtedly well intentioned.

In any event, when parents learn, or come to believe, that schools are not offering programming designed to meet their expectations, and educators seek to justify their actions by pointing to technical legal requirements, the predictable response is anger and suspicion by the parents and defensiveness by the schools. Although under other circumstances rational discussion of scarce resources might be possible, in the face of perceived betrayal it is a minor miracle that lawsuits are the only result.¹⁶

The other political trend was the emergence (or reemergence) of the view that rights created by contract are superior to, and take precedence over, rights created by law—in this case federal statute.¹⁷ This same trend is observable in the ongoing tension between tort and contract

13. See Kotler, *supra* note 10, at 371–72, 391–92 (proposing that the Act be amended to require disclosure).

14. See Jeannie F. Lake & Bonnie S. Billingsley, *An Analysis of Factors that Contribute to Parent-School Conflict in Special Education*, 21 REMEDIAL & SPECIAL EDUC. 240, 247 (2000). Lake and Billingsley explain:

Parents reported looking to the school as the experts and the people who should know what to do. Parents expressed disappointment when they realized their school's shortcomings. One parent described[:] . . . “When your child is diagnosed with special needs . . . you go through a grief process. Well, you also go through a grief process when you realize the special education system has a disorder.”

Id.

15. See Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 446 (2012) (concluding that the “tension [inherent in the requirement of an ‘appropriate’ education and a chronic shortage of funding] has eroded the collaborative nature of the IDEA and has turned it into a dishonest process of downplaying parental concerns in an effort to guard the school district’s budget”).

16. Parents of disabled children are under significant time pressure as well. The Act covers the child until age 21. 20 U.S.C. § 1412(a)(1)(A) (2012). After age 21, there are virtually no educational programs available. See *infra* notes 69–73 and accompanying text. While school districts can waste a couple of years attempting to find educational programming to which the child might respond, neither the parents nor the disabled child have the luxury of wasting time with false starts.

17. See *infra* notes 122–128 and accompanying text.

rights.¹⁸ Just as there is a view—perhaps ascendant—that contract trumps tort regardless of the relative bargaining power of the parties to the contract,¹⁹ parents’ contracts with school districts for the provision of special education services are being enforced regardless of the consequences to the disabled child or the societal interest in educating children.²⁰

To further complicate matters, while parents come to perceive themselves as victims of deception fighting for their children, others—school district personnel and, increasingly, parents of non-disabled children—often perceive the parents of disabled children as greedy, much as personal injury plaintiffs are portrayed as greedy when seeking compensation.²¹ Not only are parents of disabled children seen as demanding favored treatment, but they are portrayed as doing so at the expense of others.²² Given that our current political climate favors tax reduction and seeks to limit public expenditure, vilifying recipients of public spending is an easy sell.

This Article seeks to offer at least a partial solution to what is seemingly an intractable problem. While I previously argued that the Act should be amended to require disclosure, I have since come to believe that, in many cases, such a disclosure obligation already exists based on the relationship between parents of disabled children and the educational agencies charged with the responsibilities created by the Act. Even if school districts or other local educational agencies are not required to provide optimal programming, educators are required to tell parents what, in their professional opinion, would constitute such a program, even if financial constraints make its provision by the district or agency impossible.²³

18. See GRANT GILMORE, *THE DEATH OF CONTRACT* 112 (1974) (“It may be that, in this centennial year, some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?”).

19. See Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779, 783–87 (2007).

20. See *infra* notes 122–128 and accompanying text; see also *infra* note 27.

21. See Kotler, *supra* note 19, at 795–96.

22. See Erin Phillips, Note, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1825 (2008) (citing Hamilton Lankford & James Wyckoff, *The Allocation of Resources to Special Education and Regular Instruction*, in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 221, 228 (Helen F. Ladd ed., 1996) (noting that “many parents of ‘regular education’ children see special education budgets as encroaching upon the funds available to their own children tend to oppose special education funding”).

23. See Lake & Billingsley, *supra* note 14, at 246 (explaining how “masked” (i.e., unacknowledged) fiscal constraints lead to parental suspicion of educational agencies).

As a practical matter, the recognition of such a disclosure requirement would not only force special educators to investigate programs and thus remain current in their fields, but also to confront shortcomings in the programming being offered. More importantly, a disclosure requirement would also serve to eliminate the gap in expectations between parents and educators and the resulting distrust currently created by the discovery of differing expectations. Finally, if educators are required to confront parents in an open and honest fashion, personal and professional pride should create an impetus to improve programming.

This Article will proceed as follows: Part I, after providing a brief overview of the legislation and certain relevant amendments, articulates the basis for parental distrust of the educational establishment and explores the judicial decisions interpreting the Act and the legislative amendments that have exacerbated the problems inherent in the law. Part II makes the case for a duty to disclose owed to parents and notes some of the remedies that might be available for breach of that obligation to disclose.

I. THE BACKGROUND: WHY THE ACT HAS NOT WORKED AS ENVISIONED

A. *The Basic Structure of the Legislation and the "Appropriateness" Standard*

Because many disabled children had been excluded from public education prior to 1975,²⁴ Congress, through the Act, sought initially to set up a process by which states would find children in need of educational services and bring them into the system.²⁵ Although the Act did not declare education to be a fundamental protected right and subsequent federal judicial decisions have stopped short of giving

24. See Clune & Van Pelt, *supra* note 9, at 15 ("Estimates of the number of children denied educational services in the 1970's ranged from one to two million children. Congress accepted the one million figure in justifying passage of the EAHCA in 1975.") (footnotes omitted).

25. *Id.* (discussing the "Child Find" procedures).

education that status,²⁶ education was generally agreed to be an important right given its obvious personal, political, and economic implications.²⁷

While Congress has repeatedly amended the Act, certain basic features have been left intact. After a child is identified as one in need of special educational services,²⁸ the child is evaluated by a multi-disciplinary evaluation team.²⁹ The team, made up of parents and educators, prepares an Individualized Educational Program (“IEP”).³⁰ The IEP sets forth the agreed-upon educational goals for the child and, if done properly, contains various progress measures so that it can be determined whether the child is meeting the agreed-upon educational goals.³¹

26. See *San Antonio Indep. Sch. Dist v. Rodriguez*, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”). The right has been deemed fundamental in a majority of states. Michael Salerno, *Reading is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 509, 511 (2007).

27. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (unanimously recognizing that “education is perhaps the most important function of state and local governments”). The Court also stated:

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.

Id.

28. See 20 U.S.C. § 1412(a)(3) (2012). Under the 2004 Amendments to the Act, up to 15% of the funds allocated for special education can be diverted to “at risk” students, defined somewhat vaguely as students “who need additional academic and behavioral support to succeed in a general educational environment” but not “otherwise identified as needing special education or related services” under the law. *Id.* § 1413(f)(1).

29. *Id.* § 1414(b)–(c).

30. *Id.* § 1414(d).

31. *Id.* § 1414(d)(1)(A). Section 1414(d)(1)(A) provides:

(i) The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

If the school district has a program in place or can create a program that would meet the child's needs, the child may be assigned to that program. In some cases where the child's needs cannot be met within the district, the child may be assigned to a private school believed to have the personnel and expertise necessary to provide a program to meet the IEP goals. Because of the Act's guarantee of a public education, in cases of public placement in a private school, the district must either pay the private school or reimburse the parents for the costs incurred.³² To level the playing field between parents of disabled children (and the children themselves) and the Local Educational Agency ("LEA"),³³ parents were explicitly provided with legal rights and procedures

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child.

Id.

32. *Id.* § 1412(a)(10)(B). Section 1412(a)(10)(B) provides:

Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

Id.; see also *infra* note 40.

33. See 20 U.S.C. § 1401(19)(A) (2012) (defining "local educational agency" as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State"). For the sake of simplicity, most of this Article refers to "school districts," rather than the technically more accurate LEA designation, though in many cases, they are the same. In fact, LEA may include various educational agencies other than school districts. For example, in Pennsylvania, Intermediate Units have been established to provide younger children with services and, additionally, school districts often contract with Intermediate Units to provide specialized therapies to older children. See 11 PA. STAT. ANN., §§ 875-101-106 (West 2014).

established to compel agency compliance with the law's mandate.³⁴ Parents aggrieved by the school district determination of eligibility or non-eligibility, the contents of the IEP, or recommended assignment to a specified program for the provision of the services and implementation of programming, can demand a hearing before an administrative law judge for a determination.³⁵ The Act also permits, but does not require, the creation of a second-tier administrative process administered by the state department of education to review decisions of the hearing officers.³⁶ If such a second-tier review panel rules against the parents, or if the state maintains a one-tier system and the administrative law judge rules against the parents, the "aggrieved party" may appeal further to a state court of competent jurisdiction or the federal district court (without regard for the amount in controversy).³⁷

34. More recent amendments to the Act and some judicial decisions view the "due process" protections incorporated into the Act as providing rights to the school districts, in addition to the parents and children. This, however, does not appear to have been the original intent of the Act given that both the Fifth and Fourteenth Amendment to the Constitution guarantee due process rights to individuals, not states or state entities. *See also* Kotler, *supra* note 10, at 393–94 (proposing the Act be amended to make it clear that only parents and children should have the right to appeal an adverse decision).

35. *See generally* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401 (2006) (discussing the scope of hearing officers' authority under the Act as interpreted by the courts).

36. 20 U.S.C. § 1415(f)–(g). Section 1415(f)–(g) provides, in part, as follows:

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

Id.; *see also* Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL. STUD. 3, 3 (2010) (noting that "[u]nder the IDEA provision for due process hearings . . . , states have a choice of a one-tier system that is limited to the hearing officer level, or a two-tier system that provides a second officer review level to the administrative dispute resolution system prior to either party resorting to court action").

37. Although the Act specifies that the reviewing court "shall hear additional evidence, at the request of a party[.]" 20 U.S.C. § 1415(e)(3), in fact, courts are

From its inception, the Act further provided as follows:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.³⁸

This so-called pendency or stay put provision was to act as an automatic injunction maintaining an agreed-upon placement, thereby precluding the school district from removing the child from the public school or private school program in which the child had been placed.³⁹

If the parents and the district were unable to agree on the appropriateness of the goals to be set forth in the IEP, or if the parents believed that the program proposed by the educational agency could not achieve the IEP goals, the parents could unilaterally place the child in a program that they believed could meet the child's needs. However, if the parents unilaterally placed the child, the parents had to absorb the cost unless it was ultimately determined that they were correct in acting as they did at the time they acted.⁴⁰ Upon such a finding, the parents were

increasingly deferring to hearing officers and disposing of appeals summarily without the consideration of additional evidence even though it was proffered by a party. See Susan G. Clark, *Judicial Review and the Admission of "Additional Evidence" Under the IDEA: An Unusual Mixture of Discretion and Deference*, 201 EDUC. L. REP. 823, 823–24 (2005) (proposing a rule of limiting evidence to "adhere[] to the standards of deference set by the Supreme Court").

38. 20 U.S.C. § 1415(e)(3).

39. See, e.g., *Taylor F. ex rel Jon F. v. Arapahoe Cnty. Sch. Dist.*, 5, 954 F. Supp. 2d 1197, 1201 (D. Colo. 2013) (noting that "[b]ecause Plaintiffs are not attempting to enforce an existing "stay put" order, the Court finds that they need not satisfy the traditional test for injunctive relief. Rather, this case is governed by the automatic injunction provisions of the IDEA").

40. 20 U.S.C. § 1412(a)(10)(C). Section 1412(a)(10)(C) states:

Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or

then entitled to reimbursement for the costs incurred.⁴¹ This procedure of unilateral placement followed by legal action seeking reimbursement is commonly referred to as “place and chase.” The chasing portion of the process can take years as the case proceeds through the administrative process specified by the law and then through the courts. Generally speaking, unless the educational agency agreed to the outside placement or the parents received a favorable ruling, the pendency rule, which would require the school district to pay for the outside placement on an on-going basis,⁴² did not apply.

1. The Creation of Parent-Educator Distrust

In 1982, the U.S. Supreme Court handed down its decision in *Hendrick Hudson Board of Education v. Rowley*.⁴³ The case arose out of a disagreement between parents and the school district as to the district’s obligation to provide an in-class sign-language interpreter for a hearing-impaired child. The parents claimed that the FAPE language of the statute required the school to provide programming that would maximize their child’s potential. The lower court agreed.⁴⁴ The Supreme Court rejected this argument and ruled that an educational program was “appropriate” within the meaning of the Act if it provided “some benefit.” In the Court’s language:

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States

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.

Id. Initially, many believed that the parents needed only to show that they were right as things turned out, *i.e.*, the child did well in the program in which he or she was unilaterally placed. In *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993), the court held that the “appropriateness” of a proposed IEP was to be judged by what was known at the time it was formulated, even though later experience demonstrated the parent’s prescience and the districts lack thereof.

41. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

42. *See, e.g., Delaware Cnty. Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1222 (E.D. Pa. 1993). Judge Robreno observed:

[I]t is true that Paul’s parents assumed the initial financial risk that they would not be reimbursed when they decided to reject the IU’s IEP and place Paul in Lovaas training. That does not mean, however, that they must endure this risk even after their initial decision is later validated by state authorities.

Id. (citing *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 373–74 (1985)).

43. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

44. *See Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980) (“This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.”), *aff’d*, 632 F.2d 945 (2d Cir. 1980), *rev’d*, 458 U.S. 176 (1982).

maximize the potential of handicapped children “commensurate with the opportunity provided to other children.” That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act.⁴⁵

* * *

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of “free appropriate public education,” in addition to requiring that States provide each child with “specially designed instruction,” expressly requires the provision of “such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education.” § 1401(17) (emphasis added). We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.⁴⁶

Since the child in *Rowley* was passing her courses without the assistance of a sign language interpreter and passing from grade to grade, the school district was found to have met its statutory obligation, even though she might have been earning As and Bs instead of Cs had better programming been provided.⁴⁷

The dissent, on the other hand, argued that the drafters of the Act intended to provide disabled children with more than just access to education. Justice White, joined by Justices Brennan and Marshall, wrote:

The Act requires more [than just access to specialized instruction]. It defines “special education” to mean “specifically designed instruction, at no cost to parents or guardians, to *meet the unique needs* of a handicapped child . . .” [20 U.S.C.] § 1401(16) (emphasis added). Providing a teacher with a loud voice would not meet Amy’s needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter,

45. *Rowley*, 458 U.S. at 189–90 (quoting 483 F. Supp. at 534).

46. *Id.* at 200–01.

47. *Id.* at 209–10.

comprehends less than half of what is 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.⁴⁸

Furthermore, the dissent noted that the congressional record contained statements from numerous senators stressing the importance of the Act's goals of providing equal opportunity and of maximizing the child's potential.⁴⁹

The Court's decision resulted not only in limiting the substantive educational goals of the Act, but also created a schism between parents of disabled children and the educational establishment.⁵⁰ As any policy commentator seeking to identify the sources of parent-school conflict within the context of special education must ultimately acknowledge, lack of trust is a major factor impeding the realization of the collaborative model envisioned when the Act was first introduced.⁵¹

The "trust literature" distinguishes between two specific definitions of the term. As Bernard Barber explained:

The first of these two specific definitions is the meaning of trust as the expectation of technically competent role performance. *** In a society like ours, where there is such an accumulation of knowledge and technical expertise, expectations of trust in this sense are very common. The competent performance expected may involve expert knowledge, technical facility, or everyday routine performance.

The second meaning of trust . . . concerns expectations of fiduciary obligation and responsibility, that is, the expectation that some others in social relationships have moral obligations and responsibility to

48. *Id.* at 215 (White, J., dissenting) (footnotes omitted).

49. *Id.* at 213–14. Justice White reasoned:

The Act itself announces it will provide a "full educational opportunity to all handicapped children." 20 U.S.C. § 1412(2)(A) (emphasis added). This goal is repeated throughout the legislative history, in statements too frequent to be "passing references and isolated phrases." These statements elucidate the meaning of "appropriate." . . . The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

Id. (some internal citations omitted).

50. Although the 2004 amendments to the Act have arguably mandated a revision of the *Rowley* definition of "appropriateness," most courts that have since considered the issue have declared the ongoing validity of the *Rowley* definition. See Chopp, *supra* note 15, at 442 (referencing the argument made by Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 377–78 (2008)). See also *id.* at 442–44 (discussing cases).

51. See, e.g., Lake & Billingsley, *supra* note 14, at 250 (noting that "[i]n this study, parents reported that when trust was broken, actions on the part of the school to remedy the situation were perceived as 'too little, too late'").

demonstrate a special concern for other's interest above their own.

Trust as a fiduciary obligation goes beyond technically competent performance to the moral dimension of interaction. Technically competent performance can be monitored insofar as it is based on shared knowledge and expertise. But when some parties to a social relationship or some members of a social system cannot comprehend that expertise, performance can be controlled by trust. A fiduciary obligation is placed on the holder and user of the special knowledge and skill with regard to the other members of his social system. Trust of this kind, then, is a social mechanism that makes possible the effective and just use of the power that knowledge and position give and forestalls abuses of that power. . . . [H]owever, trust as fiduciary obligation is never wholly sufficient or fully effective as a control mechanism and requires a set of functional alternatives and complements.⁵²

The basic structure of the Act, often referred to as “legalist,”⁵³ sought to create the “alternatives and complements” referred to by Professor Barber in the form of legal enforceability of the substantive rights it created. In other words, the structure both creates rights and provides procedural mechanisms for the enforcement of those rights.⁵⁴ Whether this “legalist” approach is workable remains subject to considerable dispute.⁵⁵

Although they illustrate their general thesis with examples unrelated to special education disputes, Professors Sitkin and Roth have precisely defined the problem.⁵⁶ Reviewing the “trust” literature, they observe that although “legalism” envisions “the use of contracts, sanctioning capabilities, or legalistic procedures,” such institutional arrangements serving as “administrative or symbolic substitutes for trust . . .” are thought “to enhance the legitimacy of otherwise suspect arrangements.”⁵⁷ However, prior research suggests that:

52. BERNARD BARBER, *THE LOGIC AND LIMITS OF TRUST* 14–16 (1983).

53. See *supra* text accompanying notes 33–37; see also *infra* notes 55–60 and accompanying text.

54. See 20 U.S.C. § 1415 (2012).

55. In addition to other articles referred to in the notes that follow, see Mark G. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891, 895 (“Legalization rests on the idea of individual rights, particularly procedural entitlements against the state, which may or may not advance the collective interest.”).

56. See generally Sim B. Sitkin & Nancy L. Roth, *Explaining the Limited Effectiveness of Legalistic “Remedies” of Trust/Distrust*, 4 ORG. SCI. 367 (1993).

57. *Id.* at 369 (footnotes omitted).

Attempts to “remedy” trust violations legalistically frequently fail because they paradoxically reduce the level of trust rather than reproducing trust. The adoption of legalistic “remedies” (i.e. institutionalized mechanism that mimic legal forms and exceed legal/regulatory requirements) imposes a psychological and/or an interactional barrier between the two parties that stimulates an escalating spiral of formality and distance.⁵⁸

Sitkin and Roth go on to suggest that:

Legalistic responses are more or less effective depending on the specific nature of the expectations that have been violated. They can restore trust expectations effectively when violations are specific to a particular context or task. However, when fundamental values are violated, and perceived trustworthiness is undermined across contexts, then legalistic remedies are ill-suited to restoring lost trust—and can exacerbate the problem due to their effect on perceived interpersonal distance.⁵⁹

* * *

Our perspective—while a sharp departure from much of the literature on trust—is consistent with the frameworks, terminology, operationalizations, and concepts used in that literature. For example, Zucker suggests that disruption of trust arise when . . . “background expectations” (i.e. common world understanding) are violated.⁶⁰

Why is this important? If parents simply believed that a particular educational program was not being properly implemented, perhaps because there was a competence or performance problem that needed to be addressed, school districts and parents might well be able to work things out either informally or, in extreme cases, through the legalistic procedures established by the Act. That, however, often is not the critical issue. The problem is more fundamental and reflects a completely different set of expectations and values.⁶¹ At least upon their initial entry into the world of special education, too many parents believe

58. *Id.* (footnotes omitted).

59. *Id.* at 370 (footnote omitted).

60. *Id.* (citing L.G. Zucker, *Products of Trust: Institutional Sources of Economic Structure, 1840-1920*, in 8 RESEARCH IN ORGANIZATIONAL BEHAVIOR 53, 59, 102 (Barry M. Staw & L.L. Cummings eds., 1986)).

61. Professor Chopp attributes the “breakdown of trust between parents and educators” to the chronic lack of funding for special education. She concludes that while “[p]arents should be able to trust their children’s schools to operate in their best interests[.] . . . the tension between ‘free’ and ‘appropriate’ leads many schools to mask denial of services in assertions of inappropriateness.” Chopp, *supra* note 15, at 460.

the school shares their goal of maximizing the potential for their child and too many school districts, for whatever reason—differing expectations, fiscal constraints, fungibility of children and, as an institution, not having to deal with the long-term consequences of their decisions⁶²—seek to provide the bare minimum allowed by law. The particular cliché, which dates back at least to 1993, is that school districts are required to provide the Chevrolet of special education programming—not the Cadillac.⁶³ This cliché is virtually never announced until parents realize that school districts are not seeking to maximize their child’s potential and object on that basis.

Educators, given legal license to not perform the jobs for which they were trained, naturally respond with defensiveness and ambivalence, further fanning the flames of the conflict. Are they now to tell parents “we are sorry, but we can’t help your child,” or “we could help your child but we are not going to”? Or are they going to lie or at the very least remain silent about issues that are of supreme importance to the students and their parents?

2. Long-Term Cost-Benefit Analysis in the Face of Short-Term Fiscal Constraints

To further understand the problems and potential for conflict created by the Court’s interpretation in *Rowley*, it is necessary to grasp the vast array of disabilities suffered by students who require services. While the *Rowley* child’s ability to benefit from public education could apparently be measured along a continuum directly proportionate to the level of special services provided, this is not, in fact, typical for many types of disabling conditions. For many children, educational benefit is possible only if highly intensive programming is provided. If anything short of highly intensive programming is provided, the result is not lesser benefit, but no benefit at all.⁶⁴ In other words, though school districts

62. The Act only covers children through age 21. Thereafter, though the school districts’ failures remain a societal problem of enormous magnitude, the cost is borne by entities other than the schools. See *infra* notes 69–73 and accompanying text.

63. See *Doe v. Bd. of Educ.*, 9 F.3d 455, 459–60 (6th Cir. 1993); see also *J.L. v. Francis Howell R-3 Sch. Dist.*, 693 F. Supp. 2d 1009, 1014 (E.D. Mo. 2010); *Metro. Nashville & Davidson Cnty. Sch. Sys. v. Guest*, 900 F. Supp. 905, 909 (M.D. Tenn. 1995); *Hudson v. Bloomfield Hills Pub. Sch.*, 910 F. Supp. 1291, 1305 (E.D. Mich. 1995).

64. See, e.g., Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Inferring Program Effects for Special Populations: Does Special Education Raise Achievement for Students with Disabilities?*, 84 REV. ECON. & STAT. 584, 592 (2002). Hanushek, Kain, and Rivkin note in passing:

[T]he effects of special education are very small and statistically insignificant for students classified as speech-impaired. While speech impairments may

commonly assert that they are not required to provide the best programming, only programming that provides some benefit, parents can justifiably point out that towing a drowning man halfway to shore is not a benefit.⁶⁵ To push the analogy a step further, if there are two drowning people, but the resources necessary to save only one, towing both halfway to shore may, in some sense represent fairness or equality, but no one would claim such an action to be representative of an acceptable public policy position.

Moreover, the Court's approach in *Rowley* was inherently problematic. The drafters of the Act, in addition to recognizing the moral imperative of protecting the inherent dignity of the disabled child and the importance of education from a political perspective, clearly justified the law on the basis of its long-term cost benefits. Arguing that children in the three- to five-year-old range should be covered by the Act,⁶⁶ sponsoring senators acknowledged the states' fiscal concerns, but asserted: "[W]e feel that it is imperative to point out that the benefits of early identification and education, both in terms of prevention of future human tragedy, and in the long-term cost effectiveness of tax dollars, are so great as to justify continued emphasis upon preschool education for handicapped children."⁶⁷

Nevertheless, subsequent decisions of the lower courts frequently allow short-term fiscal constraints both to negate the claim that the Act created a right to education and to trump the long-term cost-benefit underpinnings of the Act. This approach is based not only on some unfortunate language in the *Rowley* decision⁶⁸ but also on the essential

have adverse effects on reading comprehension (which could spill over into math achievement for some students), most receive targeted services for roughly one-half hour per week, leaving little reason to expect large program effects for most students with speech impairments.

Id.

65. This is a variation on a sample illustration used by Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 476 (1974) ("[I]f I am on a desert island, subsisting solely on coconuts and oysters and beginning to hate it a lot, and across the bay from me there is another island, lush and fertile, I do not improve my position in life by swimming half way across.")

66. Subsequent to its original enactment in 1975, eligibility under the Act has been repeatedly expanded to cover younger children. See generally Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1155-57 (2007).

67. S. REP. NO. 94-168, at 81 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1479. The proposed change in eligibility was made in the 1986 amendments to the Act, Pub. L. No. 99-457, 100 Stat. 1145 (1986). See also *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181-82 (3d Cir. 1988).

68. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 199 (1982). The Supreme Court quoted the D.C. District Court opinion in *Mills v. Board of Education*, 348 F. Supp. 866, 876 (D.D.C. 1972):

approach to the funding of special education and, for that matter, all education.

Throughout the course of public education, students move from one funding stream to the next. As one commentator recently explained:

The IDEA consists of three different funding programs. The main one, Part B, provides grants to states to support the education of school-aged children with disabilities. Part C provides smaller grants to support states' efforts to aid infants and toddlers with disabilities, and Part D provides other small grants for a variety of national activities. In recent years, Part B has been funded at around \$11.5 billion each year, making the second largest federal education program, after Title I. Part C and D together have recently been funded approximately \$1 billion each year.⁶⁹

Infants and toddlers (birth to three years of age) are potentially covered by Part C.⁷⁰ Preschool-aged children (three to five years of age) are covered under Part B's Preschool Grants Program.⁷¹ Upon reaching

If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.

Rowley, 458 U.S. at 199.

69. Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 630 (2013).

70. 20 U.S.C. § 1431(b) (2012). Section 1431(b) provides the policy:

It is the policy of the United States to provide financial assistance to States--

(1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families;

(2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);

(3) to enhance State capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families; and

(4) to encourage States to expand opportunities for children under 3 years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.

Id.

71. *Id.* § 1419. Regarding preschool grants:

(a) In general

The Secretary shall provide grants under this section to assist States to provide special education and related services, in accordance with this subchapter--

school age, the responsibility for disabled children's educational programming and related services shifts to the school district, which retains that responsibility until age 21.⁷² Once the child ages out of public education, if his or her condition is such that further services are required—for example, if he or she is permanently disabled—Medicaid or a Medicaid waiver program may take over, though eligibility and space are limited.⁷³ From the perspective of the pre-school funding agency and later the school district, there is a financial incentive to move

(1) to children with disabilities aged 3 through 5, inclusive; and

(2) at the State's discretion, to 2-year-old children with disabilities who will turn 3 during the school year.

(b) Eligibility

A State shall be eligible for a grant under this section if such State--

(1) is eligible under section 1412 of this title to receive a grant under this subchapter; and

(2) makes a free appropriate public education available to all children with disabilities, aged 3 through 5, residing in the State.

Id.

72. *Id.* § 1412(a)(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.").

73. See Janice Zalen & Harvey M. Tettlebaum, *Restructuring the Medicaid Long-Term Care System*, in HEALTH LAW HANDBOOK § 12:3 (Alice G. Gosfield ed., 2005). Zalen and Tettlebaum explain:

Congress established the Home and Community Based Services ("HCBS") waiver program in 1981 to afford states the flexibility to develop and implement alternatives to facility settings. HCBS waivers are the major financing mechanism for Medicaid community-based long-term care services, accounting for 66% of community based benefits. Under the waiver authority, states are permitted to provide the following services that are not otherwise covered under Medicaid: case management, homemaker services, home health aides, personal care services, adult day health, habilitation and respite care. Other services allowed under the waiver include those that are requested by the state because beneficiaries needs them to avoid facility placement, such as transportation, in-home support services, meal services, special communication services, minor home modifications, and adult day care.

HCBS waiver programs can be organized around specific target population groups, *e.g.*, people with developmental disabilities or people with traumatic brain injury; or can be organized around a broader group of beneficiaries such as the aging/disabilities waiver program. Waiver programs for people who are aged/have disabilities accounted for over half of waiver participants in 2001, but for only 21% of waiver program spending. HCBS waiver programs for persons with mental retardation or developmental disabilities accounted for only 38% of waiver participants in 2001, but almost three-quarters of waiver program spending.

Id.

the child through the system to the next funding stream. In other words, no single entity evaluates the long-term cost of disability or has the impetus to eliminate or minimize it. All too often, the goal is simply to spend as little as possible while moving the child into some other agency's funding stream.⁷⁴

a. The Early Cases

The early decisions considering cost factors need to be distinguished from some of the more recent decisions. At first, the primary issue before the courts in this regard was which services were educational, and thus within the Act, and which were medical, and thus arguably excluded. The waters were muddied by the language of the Act itself that defines a "child with a disability" as "a child"—

(i) 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; and

(ii) who, by reason thereof, needs special education and related services.⁷⁵

"Free appropriate public education" ("FAPE") is also defined so as to include both special education and "related services."⁷⁶ "Related services" are defined as:

(A) [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling,

74. See Elizabeth Burleson, *Perspective on Economic Critiques of Disability Law: The Multifaceted Federal Role in Balancing Equity and Efficiency*, 8 IND. HEALTH L. REV. 335, 349 (2011). Burleson noted:

Investing in education can reduce support cost later on. A given school, however, does not directly benefit from the costs that are saved in the individual's adult years. Therefore, there is a lack of local incentive to pay the price of benefits to other sectors of society in the future.

Id.

75. 20 U.S.C. § 1401(3)(A)(i)–(ii).

76. *Id.* § 1401(9).

orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.⁷⁷

In *Detsel v. Board of Education*,⁷⁸ the court considered whether the Act required the school district to provide skilled nursing care to a child who suffered from serious, life-threatening medical conditions.⁷⁹ In holding that the related services provision did not extend that far, the court distinguished “related services” covered by the Act from those which fell into the Act’s medical services/devices exception. The court noted that

[T]he EAHCA does not require the defendant’s school district and board of education to provide a severely physically disabled child with constant, in-school nursing care. As recognized in the *Tatro* decision, the “medical services” exclusion evidences Congress’ concern that schools might otherwise be subjected to excessive costs and the burden of health care. On the other hand, simple school nursing services do not similarly burden the schools, and, therefore, are permissible under [20 U.S.C.] § 1401(17) of the EAHCA. In the case at bar, the services in question do not fall squarely within the terms of the “medical services” exclusion because they need not be performed by a physician, nor do they qualify as simple school nursing services. *See Tatro* (finding the CIC a simple procedure which did not even require the services of a nurse). The extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by § 1401(17) of the EAHCA. Even though they do not fulfill the “physician” requirement set forth in [the federal regulations], the exclusion of the disputed services is in keeping with its spirit. Furthermore, the *Tatro* decision does not require the provision of all health services, regardless of their magnitude, if performed by one other than a physician. The Supreme Court held

77. *Id.* § 1401(26)(A)–(B).

78. *Detsel v. Bd. of Educ.*, 637 F. Supp. 1022 (N.D.N.Y. 1986).

79. *Id.* at 1023.

only that school nursing services of a simple nature are not excludable as therapeutic “medical services.”⁸⁰

The “medical services” limitation, however, soon risked spilling over to other situations where the services necessary for the provision of a FAPE, while expensive, could be satisfied by the school districts if they would pay for private school placements. For example, a half-dozen years after the enactment of the Act, the Third Circuit decided *Kruelle v. New Castle County School District*.⁸¹ The case involved a seriously disabled child who resided in Pennsylvania with his parents.⁸² In 1978, with the agreement of both his parents and the relevant educational authorities in Pennsylvania, he was placed in a 24-hour residential treatment facility at public expense.⁸³

The family then relocated to Delaware and sought to have him placed in another residential facility.⁸⁴ When the local school authorities objected, insisting that a day program was sufficient, the parents sought an administrative hearing under the Act and ultimately appealed to the federal district court, which ruled in the parents’ favor. The school district brought the case to the Third Circuit.⁸⁵ After analyzing the Act, the Court of Appeals concluded:

Admittedly, the unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap . . . places a substantial burden on states in certain instances. The language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable. * * * Under the Education Act . . . schools are required to provide a comprehensive range of services to accommodate a handicapped child’s education needs, regardless of financial and administrative burdens, and if necessary, to resort to residential placement. The district court’s order, consequently, did not impose a duty beyond the contemplation of the Education Act; rather it carried out the implications of an undeniably broad statutory intent.⁸⁶

Of course, not all circuits went as far as *Kruelle*. The First, Second, and Sixth Circuits appear to have adopted a balancing test under which cost

80. *Id.* at 1027 (quoting and distinguishing *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)). CIC is “clean intermittent catheterization.” *Id.*

81. *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687 (3d. Cir. 1981).

82. *Id.* at 689.

83. *Id.*

84. *Id.*

85. *Id.* at 690.

86. *Kruelle*, 642 F.2d at 695–96.

might be a factor to be taken into consideration, at least if all other factors are equal.⁸⁷

Nevertheless, the appropriateness of private school placements in cases where school districts could not or would not provide sufficient educational opportunity within public school settings was confirmed by the U.S. Supreme Court in *Florence County School District Four v. Carter*.⁸⁸ In *Carter*, when the school district failed to offer a FAPE, the child's parents unilaterally placed their child in a private school and sued the school district for reimbursement.⁸⁹ Rejecting the school district's claim that unilateral placement would entail excessive cost, the Court stated:

The school district also claims that allowing reimbursement for parents such as Shannon's puts an unreasonable burden on financially strapped local educational authorities. The school district argues that requiring parents to choose a state approved private school if they want reimbursement is the only meaningful way to allow States to control costs; otherwise States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive it may be.

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.⁹⁰

87. See also *Bartlett v. Fairfax Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991) ("Although we agree with plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school could provide if given access to unlimited funds."); *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 517 (6th Cir. 1984) ("[C]ost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education."); *Doe v. Anrig*, 692 F.2d 800, 806 (1st Cir. 1982) (citing *Pinkerton v. Moye*, 509 F. Supp. 107, 112-13 (W.D. Va. 1981)) ("[I]n determining the 'appropriate' placement of an individual handicapped child, one must balance the important personal needs of the individual handicapped child, and the realities of limited public monies."). See generally Katherine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, 48 LAW & CONTEMP. PROBS. 7 (1985); Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11 (1992).

88. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

89. *Id.* at 10.

90. *Id.* at 15.

Subsequent amendments to the Act have incorporated the place and chase procedure, although they have added the requirement that parents give notice to the school district of their intent to unilaterally place their child in a private school⁹¹ and have added the additional requirement that parents be advised of their rights to unilateral placement.⁹² Furthermore, the 1997 Amendment to the Act limited *Carter* by adding several provisos including that parents were not entitled to reimbursement “upon a judicial finding of unreasonableness with respect to actions taken by the parent.”⁹³ In addition to the statutory limitations, courts have added the limitation that reimbursement may be denied if the equities of the situation warrant such an outcome.⁹⁴

b. More Recent Cases

While the earlier cases sought to achieve some balance between the long-term cost-benefit goals of the Act and the fiscal constraints faced by the school districts, more recent decisions and amendments to the Act have begun to swing toward emphasizing the fiscal constraints faced by the districts and the perceived inequality to the disabled children’s non-disabled peers.⁹⁵ Interestingly, courts taking this view appear to reach their decisions by conflating the reasonable accommodation requirement of § 504 of the Rehabilitation Act⁹⁶ with the FAPE mandate of the IDEA.⁹⁷ For example, recently, in *Ridley School District v. M.R.*,⁹⁸

91. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)–(bb) (2012).

92. *Id.* § 1415 (d)(2)(H).

93. *Id.* § 1412(a)(10)(C)(III).

94. *See, e.g., Carmel Central Sch. Dist. v. V.P. ex rel. G.P.*, 373 F. Supp. 2d 402, 417 (S.D.N.Y. 2005) (citing *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir. 2000)) (“The third prong of *Burlington* requires the parents to demonstrate that the equities favor awarding them tuition reimbursement. As noted above, the Second Circuit has long held that parents who refuse to cooperate with their local [school district evaluation team] . . . equitably forfeit their claim for tuition reimbursement.”).

95. *See Phillips, supra* note 22.

96. 29 U.S.C. § 794(a) (2012).

97. 20 U.S.C. § 1412(a)(1) (2012). The relationship between § 504 and IDEA needs to be addressed for the sake of clarity. In *W.B. v. Matula*, the court stated:

While IDEA is phrased in terms of a state's affirmative duty to provide a free, appropriate public education, the Rehabilitation Act is worded as a negative prohibition against disability discrimination in federally funded programs. The latter provides:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. § 794(a). We will refer to this provision as “§ 504.”

parents challenged the school district's choice of a particular reading program on the basis that its efficacy for children like M.R. had not been demonstrated. The court observed that "[i]n selecting special education programs, a school district must be able to take into account not only the needs of the disabled student, but also the financial and administrative resources that different programs will require, and the needs of the school's other non-disabled students."⁹⁹

The notion that education funding is a zero sum game and thus money expended to satisfy the requirements of the IDEA must necessarily be obtained by corresponding reductions in general education has gained increasing currency within the schools. For example, a 1999 student note observed:

Professional educators and school administrators fault the legally required rising costs of special education for cuts to general education funds and services. In Massachusetts, for example, educators commented that schools are forced to siphon money away from general education academic expenses to pay for special education students. In a 1996 report, the Massachusetts Association of School

To establish a violation of § 504, plaintiffs must demonstrate that (1) E.J. is disabled as defined by the Act; (2) E.J. is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) E.J. was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995). Concerning "reasonable accommodation," one court explained, "An employee can succeed on a reasonable accommodation claim under the Rehabilitation Act only if the employee can demonstrate that a specific reasonable accommodation would have allowed her to perform the essential functions of her job." *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 232 (3d Cir. 2000). Why some courts see a "reasonable accommodation" component in the obligation to provide a FAPE, is something of a mystery. *See, e.g., Campbell v. Bd. of Educ.*, 58 F. App'x. 162, 166 (6th Cir. 2008) ("Generally, the Individuals with Disabilities Education Act ('IDEA'), as amended, 20 U.S.C. §§ 1400-20, informs a Rehabilitation Act discrimination claim which is buttressed by allegations that a public school district failed to appropriately accommodate a handicapped student's extraordinary educational needs.").

98. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260 (3d Cir. 2012).

99. *Id.* at 279 (citing *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 70 (2d Cir.2000)). In *J.D. v. Pawlet School District*, the Second Circuit, discussing reasonable accommodation under the Rehabilitation Act stated:

We have also held that in evaluating the accommodation offered by a defendant, courts should be "[m]indful of the need to strike a balance between the rights of [the student and his parents] and the legitimate financial and administrative concerns of the School District." *Rothschild v. Grottenthaler*, 907 F.2d 286, 293 (2d Cir.1990) (holding that requiring school district to provide sign-language interpreter for deaf parents of student at school-initiated conferences incident to student's education, but not at voluntary extra-curricular activities, was "reasonable accommodation").

224 F.3d at 70-71.

Superintendents warned that the increased cost of special education is seriously compromising regular education programs. The same report showed that money originally budgeted for raising school standards and creating new general education academic programs instead is being funneled into special education mandates.¹⁰⁰

It is an attitude widely shared by parents of general education students¹⁰¹ and, not surprisingly, by more than a few judges and legislators. The judicial response has been noted. The legislature responded by amending the Act and, in doing so, further shifting the balance of power so as to favor the school districts in their dealings with parents of special education students.¹⁰²

B. Changes in the Act: The Conflict Between Private Contract and Statutory Guarantees

When the Act was amended in 1997, a number of provisions were added. For the purposes of this Article, two provisions are of particular interest: provision for voluntary mediation¹⁰³ and, more importantly, a provision specifying that settlement agreements between parents and school districts were to be formally memorialized. Specifically, the amendment provided that “[a]n agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.”¹⁰⁴ Whatever the intent may have been, the effect was to undercut the federal guarantee of a free appropriate public education.¹⁰⁵ The reason underlying the decision to provide explicitly for a formal written settlement agreement between parents and school districts was not immediately apparent given that under state law procedures,

100. Gregory F. Corbett, Note, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. REV. 633, 635 (1999).

101. See Phillips, *supra* note 22.

102. See *infra* note 105.

103. 20 U.S.C. § 1415(e) (2000). Section 1415(e) provided, in part:
(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

Id.

104. *Id.* § 1415(e)(2)(F).

105. See, e.g., *infra* note 127 and accompanying text.

mediation and settlement had previously been possible. On their face, the 1997 amendments simply codified the existing mediation and settlement possibility.¹⁰⁶

When the Act was amended again in 2004, it added a provision requiring the parties to attend “resolution conferences”¹⁰⁷ and further specifically provided for the judicial enforceability of any agreement reached at such a conference.¹⁰⁸ However, because attorney fees incurred in connection with mediation or participation in resolution conferences are generally not recoverable,¹⁰⁹ parents were essentially provided with a disincentive to retaining counsel during the sessions at which settlement agreements are negotiated.¹¹⁰

To fully understand how the addition of the mediation provisions changed the legal landscape, it is useful to examine a leading case on settlement agreements. In 1997, the Third Circuit, in a 2-1 panel decision, held, in effect, that a settlement agreement between a school

106. Nevertheless, some commentators have argued that mediation undercut “the IDEA’s overall focus on due process and parental involvement as guardians of a disabled child’s education.” Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 337 (2001).

107. 20 U.S.C. § 1415(f)(1)(B) (2012).

108. Section 1415(e)(2) further provided for the execution and enforceability of settlement agreements as follows:

(F) Written agreement

In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that--

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

Id. § 1415(e)(2).

109. *See infra* notes 180–181.

110. Not only were the substantive guarantees lost, but the disparities in negotiating power, which had always favored the school districts, were exacerbated. Perhaps the largest club wielded by parents in negotiations with school districts was the danger that they would ultimately prevail and be able to recover attorneys’ fees as the prevailing party. Under the Act, as amended, however, states are given discretion to permit attorneys’ fees for participation in mediation. 20 U.S.C. § 1415(i)(3)(D)(ii) (“Attorneys’ fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).”).

district and a disabled child's parents was enforceable against the parents and child notwithstanding the fact that its enforcement served to deprive the child of a FAPE otherwise guaranteed under federal law.¹¹¹

The underlying facts were not only simple and straightforward but also increasingly common in today's world of special education law. D.R. was a child with multiple disabilities, and his entitlement to special education services under the IDEA was never in dispute.¹¹² At age four, he was enrolled in a special education day program near his home.¹¹³ By the end of the 1991-92 school year, his parents became convinced that the program was not meeting his needs.¹¹⁴ They requested that the Board of Education pay for a private residential placement and, when the Board refused, sought an administrative due process hearing under the IDEA.¹¹⁵

In the interim, his parents unilaterally placed him in an out-of-state residential facility on a trial basis.¹¹⁶ Thereafter, the parents and school district representatives met at a mediation conference that ultimately resulted in the execution of a settlement agreement.¹¹⁷ Under its terms, the District agreed to pay a pro-rated portion of the residential center's annual tuition of \$27,500 for the current and following school year plus 90 percent of any increase in tuition for the second year.¹¹⁸

During the 1991-92 school year, the residential center provided one-on-one aides necessary for D.R. to function.¹¹⁹ At some point, however, the school determined that it could not continue to provide one-on-one assistants at the existing tuition rate.¹²⁰ Therefore, the parents (and subsequently the school district) were advised that two personal aides would be required for an additional cost of \$16,640 per aide.¹²¹ In other words, the cost of keeping D.R. at the residential center more than doubled, increasing from \$27,500 in 1991-92 to \$62,487 for the 1992-93 school year.

The case eventually made its way to the federal district court, which "concluded that New Jersey could not refuse to provide educationally necessary services . . . [since such] services are the right of the disabled

111. *D.R. v. E. Brunswick Bd. of Educ.*, 109 F.3d 896, 898 (3d Cir. 1997).

112. *Id.* at 898.

113. *Id.*

114. *Id.*

115. *Id.*

116. *D.R.*, 109 F.3d. at 899.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *D.R.*, 109 F.3d. at 899.

individual and cannot be waived by a contract to provide something less.”¹²²

Disagreeing, the Third Circuit reasoned:

Once a school board and the parents of a disabled child finalize a settlement agreement and the board agrees to pay a certain portion of the school fees, the parents should not be allowed to void the agreement merely because the total cost of the program subsequently increases. A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes.¹²³

Going on to note “the federal policy of encouraging settlement agreements,” in that they “promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts,”¹²⁴ the majority enforced the agreement and entered summary judgment in favor of the district.¹²⁵

The dissent, on the other hand, apparently was not persuaded that the certainties of state budgeting or reduction in the courts’ work load justified the outcome, noting agreement with the district court that “held that IDEA creates certain rights to education assistance that cannot be waived by the guardians of a handicapped child and certain duties that cannot be bargained away by school boards.”¹²⁶

In other words, according to the majority, settlements arrived at through the Act’s mediation process were not to be controlled by the substantive requirements of the Act itself. Specifically, parents and school districts could enter into enforceable agreements even if the agreements did not result in the provision of a free, appropriate public education otherwise mandated by law.¹²⁷ Moreover, other substantive guarantees under the Act—notably the pendency requirement—apparently were now subordinated to private agreement.¹²⁸

Traditionally the threat of public litigation and both the monetary and reputational risks it entailed for the school district gave parents some

122. *Id.* at 900.

123. *Id.* at 901.

124. *Id.*

125. *Id.* at 902.

126. *D.R.*, 109 F.3d. at 902.

127. *Id.*; *see also* Ballard *ex rel.* Ballard v. Phila. Sch. Dist., 273 F. App’x. 184, 188 (3d Cir. 2008) (“A parent can waive her child’s right to a FAPE. The fact that Ms. Ballard entered into a settlement agreement, which she now contends falls short of providing her daughter with a FAPE, does not inherently violate law or public policy.”).

128. *See infra* text at notes 134–137 and accompanying text.

leverage, though commentators agreed that parents were at a distinct disadvantage in dealing with the school.¹²⁹ If a parent's statutory rights can be waived, the parents' disadvantage is magnified.¹³⁰ Professor Marchese explained:

[C]onflict may be necessary to induce the parties, particularly the school district, to adopt more reasonable positions. Where there is a power imbalance, information inequities, and an unwillingness of the parties to compromise, the availability of voluntary mediation does little to add to the process. This is not meant to suggest that children whose families contest their placements through due process hearings always end up with more "appropriate" placements than with mediations. Rather, in the guise of a more flexible, collaborative approach, the IDEA drafters may have inadvertently made it easier for school districts to win concessions from parents that they normally would not be able to obtain at due process hearings. Although the legalistic approach, as exemplified by the due process hearing, often results in more formalized relationships and an emphasis on rights to the possible exclusion of other important concerns, the threat of conflict and the costs it would impose keep the focus on the underlying statutory goals.¹³¹

In light of the 1997 and 2004 amendments to the Act, however, the argument that the settlement agreement should not be enforceable because it violates the public policy set forth elsewhere in the Act loses some of its force. After all, since the Act specifically provides for an alternative dispute resolution process and further provides for the judicial enforceability of agreements reached either through mediation or at the

129. Compare Marchese, *supra* note 106, at 350–51 (observing that in mediation lies "[t]he danger [of yielding] . . . results that are unfair to the very people the IDEA was designed to empower"), with Damon Huss, *Balancing Acts: Dispute Resolution in U.S. and English Special Education Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 347, 359 (2003) (expressing the opinion that mediation "nurtures and protects positive relationships between parents and the educational authorities").

130. See Chopp, *supra* note 15, at 449–60. In the course of discussing the factors that slant the balance of negotiating power in favor of the districts, Professor Chopp notes parents' lack of access to legal counsel and school districts' liability insurance. In other words, disparities in resources coupled with the congressional refusal to fully fund special education, has created a situation in which "it is difficult to conceive how disabled students will receive the full guarantee of FAPE." *Id.* at 460; see also Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179, 188 (2012) (arguing that "[u]nsympathetic courts coupled with the prominence of a power imbalance between [parents and school districts] . . . results in unfair settlements"); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 61 (1997) (expressing concern about parent-school district disparities of power in the absence of legal representation); Phillips, *supra* note 22, at 1828–29 (discussing the limitations on effective parental advocacy).

131. Marchese, *supra* note 106, at 357.

resolution conference, it is hard to determine which of the multiple policies underlying the law should be enforced when the provisions conflict. Though it may seem obvious that the procedural provisions should not be permitted to negate the Act's primary substantive goal, a number of cases allowing parental waiver of a child's right to a FAPE would seem, on balance, to indicate where the law is going.¹³²

In any event, the Third Circuit's decision to elevate contract right over rights granted to parents and disabled children under the Act gave school districts an even stronger negotiating position. Not only was the basic promise of a substantively "appropriate" education subordinated, but school districts took the position that other provisions intended to protect children from school district attempts to evade the letter and spirit of the Act could also be compromised.¹³³ Thus, it has become common for school districts to demand that parents waive the provisions of the "stay put" provision in return for the agreement to place children in private schools for a year or two.¹³⁴ Previously, under the Act as interpreted by the U.S. Supreme Court in *Burlington School Committee v. Department of Education*,¹³⁵ if a district agreed to place a child in a private school, that would become the pendent placement. As such, the school district would be obligated to continue to pay for it until such time as the parties agreed otherwise or, following the legal processes set forth by the Act, a court upheld the school district's decision to place the child in another program.¹³⁶ Once pendency has been waived, however, school districts can and do stop paying for the private placements as soon as the contract term expires. This forces parents to initiate due process while unilaterally paying for the previously agreed-upon program in addition to repeatedly paying for the attorney fees associated with these disputes.¹³⁷

132. See *D.B.A. ex rel. Snerling v. Special Sch. Dist. No. 1, No. 10-1045 (PAM/FLN)*, 2010 WL 5300946, at *5 (D. Minn. Dec. 20, 2010) (concluding that settlement agreements were enforceable); *Mr. J. v. Bd. of Educ.*, 98 F. Supp. 2d 226, 239 (D. Conn. 2000) (upholding agreement); *E.D. ex rel. Dukes v. Enterprise City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1269 (M.D. Ala. 2003) (enforcing agreement, but examining terms to determine whether FAPE was denied as a consequence); see also Mark C. Weber, *Settling Individuals With Disabilities Education Act Cases: Making Up Is Hard To Do*, 43 LOY. L.A. L. REV. 641, 654 (2010) (noting that "[q]uestions exist about courts' jurisdiction to enforce settlements").

133. See, e.g., *I.K. ex rel. B.K. v. Sch. Dist.*, 961 F. Supp. 2d 674, 692 (E.D. Pa. 2013) (finding that parents were estopped to assert their child's right to a FAPE even in the absence of a valid settlement agreement).

134. Copies of settlement agreements on file with author.

135. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985).

136. See *supra* note 42 and accompanying text.

137. The imbalance of power in the negotiating process is exacerbated by the fact that school districts are routinely covered by "due process defense insurance" covering not only the cost of out-of-district placements, but also their attorney's fees (less the

C. *The Emergence of the Perception of Parental Greed*

The initial legislative decision to utilize a legalist model in structuring the Act was based on the widespread perception that not only were disabled children being denied educational opportunity, but that parents were largely powerless in their attempts to deal with the educational establishment on the child's behalf. By providing both rights and legal processes to enforce those rights, the earlier unfairness could be rectified. As the progressive impulses that characterized legal change during the 1970s and early part of the 1980s faded, however, the public perception of those who sought to utilize the legal system to redress rights changed.¹³⁸

The changes were reflected both in judicial interpretation and in legislative amendment aimed at limiting the power that earlier had been granted. Utilizing the approach that had proven so successful in tort reform, the primary target was legal representation. There are at least two primary ways to limit legal representation. First, if damages can be capped or eliminated altogether, the incentive to represent those unable to afford representation will be reduced. Second, if restrictions can be placed on the availability of statutory attorneys' fees to parents who prevail, it will inevitably reduce the number of attorneys willing to assume representation. Both approaches have been successfully implemented in special education litigation.

1. Limiting Damages

It is undisputed that claims under both the IDEA and § 504¹³⁹—failure to provide a FAPE and discrimination on the basis that a FAPE

policy-specified deductible) and liability for the parents' attorneys' fees, if any are recovered. See Chopp, *supra* note 15, at 453–57; see also EL DORADO COUNTY OFF. EDUC., www.edcoe.org/ (last visited Sept. 18, 2014); Memorandum from Robert J. Kretzmer, Dir., Kern Cnty. Superintendent of Sch., to District Superintendents et al. (Mar. 16, 2013), available at <http://sisc.kern.org/pl/wp-files/pl/2013/04/SEVCP-Annual-district-signup.pdf>. The memo describes a California self-insurance program covering:

up to an aggregate of \$75,000 of legal fees and of costs insured during each fiscal year . . . in the defense of due process claims resulting from the filing of due process complaint(s); . . . legal fees . . . up to a maximum hourly rate of \$150.00[;] [f]ees for expert witnesses . . . up to a maximum hourly rate of \$125.00.

Id.

138. See, e.g., Renae Waterman Groeschel, *Discipline and the Disabled Student: The IDEA Reauthorization Responds*, 1998 WIS. L. REV. 1085, 1096 (“[O]f all the federal regulatory statutes in the United States, the IDEA ranks fourth in the amount of litigation it generates. According to the Director of Special Education for Montgomery County, Maryland public schools, ‘Special education has become an ambulance—and the lawyers are chasing it.’”).

139. 29 U.S.C. § 794(a) (2012).

was not provided—can be brought simultaneously.¹⁴⁰ However, whether one could bring a claim for damages under § 1983 of the Civil Rights Act¹⁴¹ in addition to a claim under IDEA has been the subject of much litigation, resulting in a split among the circuits. The Third Circuit’s treatment of the issue is instructive. In the 1995 case *W.B. v. Matula*,¹⁴² the court held that the IDEA was not an exclusive remedy and a § 1983 claim could also be brought. The court concluded:

[T]he traditional presumption in favor of all appropriate relief is not rebutted as to § 1983 actions to enforce IDEA. Defendants have identified no “clear direction” in the text or history of IDEA indicating such a limitation, and indeed there is strong suggestion that Congress intended no such restriction. Certainly the plain language of § 1983 authorizes actions at law or equity, and our prior holding in *Diamond* compels the conclusion that, as a matter of law, an aggrieved parent or disabled child is not barred from seeking monetary damages in such an action.¹⁴³

A dozen years later, however, in *A.W. v. Jersey City Public School*,¹⁴⁴ the Third Circuit reconsidered the issue and concluded that § 1983 actions were not available for redress of violations of the IDEA, holding:

The IDEA includes a judicial remedy for violations of any right “relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child.” § 1415(b)(6). Given this comprehensive scheme, Congress did not intend § 1983 to be available to remedy violations of the IDEA such as those alleged by A.W.¹⁴⁵

140. 34 C.F.R. § 104.33(a) (2013) (interpreting § 504 and requiring that “[a] recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap”).

141. 42 U.S.C. § 1983 (2012).

142. *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995).

143. *Id.* at 495 (referring to *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986)).

144. *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007).

145. *Id.* at 803. The court made a somewhat subtle distinction between the use of § 1983 to remedy violations of the IDEA and the use of § 1983 to vindicate other rights arising in the parent-school relationship. In other words, § 1983 allows a remedy for violation of rights arising under the Constitution or federal statute. The former are actionable, rights arising out of the IDEA are not. The court noted:

By preserving rights and remedies “under the Constitution,” section 1415 [(I)] does permit plaintiffs to resort to section 1983 for *constitutional* violations, notwithstanding the similarity of such claims to those stated directly under IDEA. But section 1415[(I)] does not permit plaintiffs to sue under section

A majority of the Federal Courts of Appeal have agreed with the Third Circuit,¹⁴⁶ and at last count, only the Seventh¹⁴⁷ and Second Circuits¹⁴⁸ have continued to permit the use of damage remedies available under § 1983 to redress violations of the IDEA. If a particular jurisdiction were to follow the minority position, an interesting collateral issue involving the validity of an agreement purporting to waive a child's right to a FAPE arises. In *Somoza v. New York City Department of Education*,¹⁴⁹ the court stated:

Notwithstanding the general enforceability of agreements settling IDEA claims, a court confronted with questions regarding the validity of such an agreement must take into account that it involves the waiver of a vital civil right. Recognizing this essential interest, the Third Circuit has held that the standards applicable to reviewing the validity of a waiver of a civil rights claim, rather than general contract principles, apply to the interpretation of a settlement of claims under the IDEA. See *W.B. v. Matula*, 67 F.3d 484 (3d Cir.1995) (holding that a waiver of IDEA claims must be "knowing and voluntary" as judged by the "totality of the circumstances."¹⁵⁰)

In any event, assuming that the plaintiff does have independent constitutional or other federal or state law claims against the school district, there still remains the question of whether one is required to exhaust the administrative procedures established by the Act as a condition to pursuing those claims. In that context, courts have disagreed on the extent to which and the circumstances under which

1983 for an IDEA violation, which is *statutory* in nature. Nothing in section 1415 [(f)] overrules the Court's decision in *Smith* to the extent it held that Congress intended IDEA to provide the sole remedies for violations of that same statute.

Id. at 798 (citing *Sellers v. Sch. Bd.*, 141 F.3d 524, 530 (4th Cir. 1998)).

146. See generally Sarah Kaltsounis, *Cause of Action for Violation of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)* [20 U.S.C.A. §§ 1400 et seq.], in 37 CAUSES OF ACTION SECOND SERIES 447 (2008) (collecting cases through 2013).

147. *Marie O. v. Edgar*, 131 F.3d 610, 619 (7th Cir. 1997).

148. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987).

149. *Somoza v. N.Y.C. Dep't of Educ.*, 475 F. Supp. 2d 373 (S.D.N.Y. 2007), *rev'd on other grounds*, 538 F.3d 106 (2d Cir. 2008). In *Matula*, the court named the following five factors to be considered in assessing whether under the "totality of the circumstances" an IDEA claim waiver was given voluntarily and knowingly:

[W]hether (1) the language of the agreement was clear and specific; (2) the consideration given in exchange for the waiver exceeded the relief to which the signer was already entitled by law; (3) the signer was represented by counsel; (4) the signer received an adequate explanation of the document; (5) the signer had time to reflect upon it; and (6) the signer understood its nature and scope.

W.B. v. Matula, 67 F.3d 484, 497 (3d Cir. 1995) (internal citations omitted).

150. *Somoza*, 475 F. Supp. 2d at 387–88.

exhaustion is required prior to filing the independent federal or state law claims.

In *Matula*, the court of appeals held that exhaustion was not required because either a § 1983 action seeking damages involves a type of relief that is not available under the IDEA or because exhaustion would be futile.¹⁵¹ Courts, however, continue to express disagreement. A comparison of two federal cases out of Pennsylvania is instructive. In *Vicky M. v. Northeastern Educational Intermediate Unit 19*,¹⁵² the court permitted an action for monetary damages under § 1983, breach of fiduciary duty, common-law assault and battery, and so on, finding that administrative remedies under the IDEA need not be exhausted because of the futility exception.¹⁵³ The court reasoned:

The Third Circuit Court of Appeals, excusing failure to exhaust based on the futility exception, has held that “where the relief sought in a civil action is not available in IDEA administrative proceedings, recourse to such proceedings would be futile and the exhaustion requirement is excused.” In reaching this conclusion, the Court of Appeals looked first to the language of the statute itself. The IDEA states that “before the filing of a civil action under such laws . . . seeking relief that is also available under this subchapter, the procedures under subsection (f) and (g) of this section shall be exhausted . . .” 20 U.S.C. § 1415(*l*) (emphasis added). Recognizing that damages are available under section 1983, but not under the IDEA administrative procedures, the *Matula* court then concluded that “by its plain terms [this section] does not require exhaustion where the relief sought is unavailable in an administrative proceeding.”¹⁵⁴

* * *

While a challenge to the contents of an IEP would require exhaustion of administrative remedies—since school administrators are in the best position to establish appropriate educational programs—exhaustion of administrative remedies when a plaintiff is challenging only a failure to implement an IEP would prove fruitless.¹⁵⁵

In contrast, in *Batchelor v. Rose Tree Media School District*,¹⁵⁶ the court rejected both the argument that an action seeking only damages

151. *Matula*, 67 F.3d at 496.

152. *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437 (M.D. Pa. 2007).

153. *Vicky M.*, 486 F. Supp. 2d at 453–54.

154. *Id.* at 453 (citations omitted).

155. *Id.* at 454 (citations omitted).

156. *Batchelor v. Rose Tree Media Sch. Dist.*, No. 11-6733, 2013 WL 1776076 (E.D. Pa. Mar. 28, 2013).

took the case outside of the exhaustion requirement as well as the claim that a district's failure to implement a program that was previously agreed upon made the exhaustion requirement futile.¹⁵⁷ In *Batchelor*, the plaintiff alleged that an IEP was developed.¹⁵⁸ In response to the mother's complaints that the IEP was not being implemented, the parties entered into a settlement agreement "which provided [the student] with compensatory education services."¹⁵⁹ Allegedly, the district "did not implement the Settlement Agreement, [but] . . . engaged in retaliatory acts."¹⁶⁰ In response, the mother hired a private tutor and filed suit seeking reimbursement, a portion of which was paid.¹⁶¹

The action alleged a failure to provide a FAPE; retaliation in violation of § 504 of the Rehabilitation Act;¹⁶² and state law claims for breach of contract, civil conspiracy, and negligent infliction of emotional distress.¹⁶³ Defendant's motion to dismiss based on failure to exhaust administrative remedies was granted by a federal magistrate on the basis that relief in the form of compensatory education was available through the administrative process, even though plaintiff's complaint did not seek such relief, but only sought monetary damages.¹⁶⁴

Upholding the magistrate's decision, the court reasoned:

Although a Rule 12(b)(1) motion restricts a court's review to the documents before it, substantive issues raised within a court's jurisdictional review may require a consideration of relief beyond what a plaintiff requests. This is especially true in cases such as the one at bar, where Plaintiffs claims they are excused from exhausting the IDEA administrative process, which will dictate whether a court has jurisdiction. When analyzing whether a plaintiff is excused from exhausting its claims, courts will often consider whether the administrative process can provide a plaintiff relief. This is so because the availability of certain relief under the administrative process, including that of compensatory education, may divest a

157. *Id.* at *7–8.

158. *Id.* at *2.

159. *Id.*

160. *Id.*

161. *Id.*

162. 29 U.S.C. § 794(a) (2012).

163. *Batchelor*, 2013 WL 1776076, at *1.

164. *Id.* Whether one can enforce a settlement in court without going through administrative due process is unclear. There was authority that one need not further exhaust administrative procedures in cases of noncompliance with an agreement even prior to the 2004 Amendments to the Act. *See, e.g., Sch. Bd. v. M.C.*, 796 So. 2d 581, 583 (Fla. Dist. Ct. App. 2001); *see also Weber, supra* note 132, at 654 (arguing that "[t]he absence of any mention of an exhaustion requirement implies that if the opposing party violates a settlement agreement reach at either [a mediation or resolution session] . . . , direct enforcement will be available, and exhaustion through a due process hearing will not be necessary").

federal court of jurisdiction. Therefore, when a plaintiff is asserting it is excused from exhaustion and the court is analyzing whether it has jurisdiction under the IDEA based upon the pleadings, the court may consider whether compensatory education is available to a plaintiff—even absent a request for such relief.¹⁶⁵

As to the futility argument based on the district's non-compliance with settlement agreements entered into in the past, the court was similarly unsympathetic, reasoning that:

To the extent Plaintiffs argue that the District's previous noncompliance with prior settlement agreements renders compensatory education inappropriate, this argument is unpersuasive. In the IDEA context, courts generally find that prior inadequate relations between parties do not foreclose or make futile similar relief in the future. This is true even where prior settlement agreements are at issue.¹⁶⁶

The plaintiff's attempted distinction between the creation of an IEP and its implementation was also rejected.¹⁶⁷ Finally, the court distinguished *Vicky M.*, asserting:

Plaintiffs rely on *Vicky M.*, a Middle District case excusing exhaustion where the plaintiff, an autistic child, challenged IEP restraint techniques implemented in a physically abusive manner. Outside of seeking damages for the physical abuse, however, the plaintiffs presented no other educational issues for resolution. Conversely, Plaintiffs' allegations here question the adequacy of tutoring the District implemented, an educational source the administrative process may resolve.¹⁶⁸

In short, the once prevailing view that the IDEA created a federal substantive right, the deprivation of which provided the basis for a damages claim under the federal Civil Rights Act, has now been rejected by a clear majority of the circuits. While independent federal or federal constitutional rights may form the basis of a § 1983 suit and state law claims may be actionable, administrative exhaustion rules and limitations on the futility exception to the exhaustion requirement have become major hurdles to a claim for monetary damages.

165. *Batchelor*, 2013 WL 1776076, at *4 (citations omitted).

166. *Id.* at *6 (citations omitted).

167. *Id.* at *9.

168. *Id.* at *9 n.9.

2. Claims for Monetary Reimbursement for Private Placement

As noted earlier, parents facing a school district placement offer that they believe is inappropriate even under the marginal *Rowley* standard can place their child privately and then pursue a claim against the educational agency seeking reimbursement for the monies expended.¹⁶⁹ Such a claim, arguably, is more in the nature of an action for restitution than a claim for damages, though courts have been less than receptive to this characterization.¹⁷⁰ Nevertheless, there are both practical and technical legal limitations. First, the option is only open to those who could at least initially afford to pay private tuition while seeking a determination of the underlying legal and factual issues. Second, the parents must be able to prevail on the merits by demonstrating that the IEP offered by the school district did not constitute a FAPE and that the private placement unilaterally chosen by them was appropriate. In other words, the parents have to both pay and prove that they were right and the school district was wrong.¹⁷¹

169. See *supra* notes 40-42 and accompanying text.

170. See, e.g., *Parks v. Pavkovic*, 753 F.2d 1397, 1408-09 (7th Cir. 1985). The court reasoned:

Calling what they are asking for “restitution” does not strengthen the plaintiffs’ case. Indeed, since restitution, being measured by the wrongdoer’s profit rather than the victim’s loss, can result in a larger money judgment than damages, and partly for this reason is often reserved for the more serious types of wrongdoing, it is even less likely that Congress intended to subject the states to open-ended liability in suits for restitution than to make them subject to suits for damages. The plaintiffs’ second and third points we reject. Restitution in the only sense in which it might be thought to add a moral weight to the plea for reimbursement refers to the situation where the defendant has been unjustly enriched at the plaintiff’s expense. That might be the situation here if Illinois had taken the plaintiffs’ money and used it for some activity unrelated to the needs of handicapped children. But there is no argument that anything of this sort has occurred. So far as appears, any money that the state saved by not fully reimbursing the parents of handicapped children has gone into programs for the benefit of those children.

Id. (internal citations omitted). While it is true that restitution is often associated with wrongdoing, it is not generally thought to be a requirement. If the educational entity was unjustly enriched by its improper retention of funds that it was under a duty to use for the claimant, restitution (measured by the defendant’s gain) was an appropriate remedy. See RESTATEMENT (THIRD) OF RESTITUTION § 22 cmt. h, illus. 16 (2011).

171. See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246-47 (2009). The Court explained:

Parents “are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act.” And even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. In considering the equities, courts should

One would think that the best way for parents to demonstrate that they were right would be to compare the child's pre-placement testing with the child's test scores after some reasonable period of participation in the private placement, thereby showing relatively rapid progress. Particularly if the district's IEP had called for a continuation of a program that was not getting very good results, marked improvement should be, if not dispositive, at least a strong indication that, from an educational standpoint, the private placement was the better choice for that child.

Unfortunately, however, the courts have not seen it that way. In *Roland M. v. Concord School Committee*,¹⁷² the court held that the "appropriateness" of an IEP offered by the educational agency had to be judged based on the information available and at the point in time when it was offered, not in hindsight.¹⁷³ Therefore, particularly if the child had not been put in a district program and allowed to fail, it became exceedingly difficult to show that the IEP was inappropriate when offered. Even dramatic improvement in a private placement only showed that it was also appropriate.¹⁷⁴ To make matters worse, courts have held that the program being offered by the district did not have to actually exist to be appropriate.¹⁷⁵ The fact that parents could not observe the class to see how it was run and judge how well it would meet

generally presume that public-school officials are properly performing their obligations under IDEA.

Id. (citation omitted). Actually, until the Court decided *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005) (holding that "[a]bsent some reason to believe that Congress intended otherwise . . . the burden of persuasion lies where it usually falls, upon the party seeking relief"), it was widely believed that the burden was on the school district to defend the program that they had offered. See, e.g., *Manchester Sch. Dist. v. Charles M.F.*, No. CIV. 92-609-M, 1994 WL 485754, at *4 (D.N.H. Aug. 31, 1994).

172. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991).

173. *Id.* at 992 (asserting "[a]n 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."); accord *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). *But see* *Marc M. ex rel. Aldan M. v. Dep't of Educ.*, 762 F. Supp. 2d 1235, 1244 n.2 (D. Haw. 2011) (interpreting the Ninth Circuit's position as assessing appropriateness at the time of implementation of the IEP, not at the time of promulgation).

174. See, e.g., *Doe v. Bd. of Educ.*, 9 F.3d 455, 459 (6th Cir. 1993). The court reasoned:

This IEP is aimed at addressing the particular disabilities from which appellant suffers. While the Brehm School undoubtedly can provide superior services aimed exclusively at helping learning-disabled children such as appellant, this is not what the Act requires. This is especially true where, as here, "the IEP was never given a chance to succeed."

Id. (citation omitted).

175. *Fuhrmann*, 993 F.2d at 1093.

their child's needs will not necessarily prevent it from being deemed an appropriate placement.¹⁷⁶

Even if one persuaded a hearing officer that the district's proposed placement was not appropriate and further demonstrated that the parent's selected placement was appropriate, the hearing officer and ultimately the court would still have to find that the equities of the situation favored a right to reimbursement.¹⁷⁷ The 1997 Amendments to the Act, in addition to requiring parents to give notice of their intent to privately place the child,¹⁷⁸ specified that reimbursement was not available "upon a judicial finding of unreasonableness with respect to actions taken by the parents."¹⁷⁹

Given the odds of winning with such a stacked deck, the fact that attorneys frequently counsel settlement, even if that means waiving the stay put rule or accepting less than the payment of full tuition, is hardly surprising.¹⁸⁰

3. Changing the Standard for Recovery of Attorneys' Fees

As mentioned above, the 1997 and 2004 Amendments contain a number of provisions related to the recovery of attorneys' fees. While a full catalogue is beyond the scope of this Article, it is worth noting that fees are probably not recoverable for mediation¹⁸¹ and are clearly not recoverable for resolution conferences¹⁸² or "relating to any meeting of the IEP Team."¹⁸³ A district may make an offer of compromise resulting in fee shifting if the parents fail to do better at hearing.¹⁸⁴ If a parent's complaint is found "frivolous, unreasonable, or without foundation," the state or educational agency can recover fees.¹⁸⁵

Perhaps more importantly, however, in the 2001 case *Buckhannon Board and Care Home, Inc v. West Virginia Department of Health and Human Resources*,¹⁸⁶ the Court held that the "prevailing party" language

176. *Id.*

177. *See supra* note 94 and accompanying text.

178. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)–(bb) (2012).

179. *Id.* § 1412(a)(10)(C)(iii)(III).

180. Keep in mind that the cost of losing is not only private school tuition, but also attorneys' fees. To make matters worse, under the 2004 revisions to the Act, there is the risk of being held liable for the school district's attorneys' fees as well. 20 U.S.C. § 1415(i)(3)(B)(i)(II)–(III); *see infra* notes 184–185 and accompanying text.

181. 20 U.S.C. § 1415(i)(3)(D)(ii).

182. *Id.* § 1415(i)(3)(D)(iii)(I)–(II).

183. *Id.* § 1415(i)(3)(D)(ii).

184. *Id.* § 1415(i)(3)(D)(i)(I)–(III).

185. *See supra* note 180.

186. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

in various federal attorneys' fees statutes did not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."¹⁸⁷

Although *Buckhannon* did not arise under the IDEA, because federal attorneys' fees statutes are normally interpreted consistently across different federal claims,¹⁸⁸ it is not surprising that federal courts of appeal¹⁸⁹ and district courts¹⁹⁰ have found the "prevailing party" approach of *Buckhannon* to be applicable in IDEA cases. For example, in *John T. v. Delaware County Intermediate Unit*,¹⁹¹ plaintiff's counsel was successful in obtaining and enforcing a preliminary injunction. The case settled after the Intermediate Unit ("IU") agreed to a new IEP. Nevertheless, the court held that plaintiff was not the prevailing party within the meaning of *Buckhannon*.¹⁹² Apparently, the federal policy of promoting settlement has its limits.¹⁹³

II. FULL DISCLOSURE AS A PARTIAL SOLUTION

A. *The Duty to Disclose: In General*

At one extreme, particularly prior to the early years of the twentieth century, it was not uncommon for courts to find there was a lack of any disclosure obligation between the parties to a transaction. In the context of sales, this lack of any duty to disclose was captured by the Latin phrase, *caveat emptor* or let the buyer beware. Knowledgeable parties to a transaction, usually sellers, were free to trade on their knowledge when dealing with the ignorant. Tort liability for common-law deceit, like most tort causes of action, required an act by the defendant; mere silence,

187. *Id.* at 600.

188. Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 B.Y.U. EDUC. & L.J. 519, 520 (2003); Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 373 (2004).

189. *See, e.g., Doe v. Bos. Pub. Sch.*, 358 F.3d 20, 26 (1st Cir. 2004); *John T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 556 (3d Cir. 2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 474 (7th Cir. 2003); *J.C v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 123 (2d Cir. 2002).

190. *Antonio ex rel. Mother v. Bos. Pub. Sch.*, 314 F. Supp. 2d 95, 98 (D. Mass. 2004); *Nathan F. ex rel. Harry F. v. Parkland Sch. Dist., No. Civ.A. 03-4714*, 2004 WL 906219, at *4 (E.D. Pa. Apr. 27, 2004).

191. *John. T. v Del. Cnty. Intermediate Unit*, 318 F.3d 545 (3d Cir. 2003).

192. *Id.* at 561.

193. *Cf. supra* notes 123-24 and accompanying text.

a form of nonfeasance, was not actionable.¹⁹⁴ Moreover, attempts to rescind agreements based on nondisclosure were likely to be of no avail given that rescission typically required fraud or, at the very least, mutual mistake.¹⁹⁵ In the absence of a duty to speak, silence could not constitute fraud.¹⁹⁶

Of course, many of these old cases arose in the context of land sale contracts in nineteenth century America, at a time when free market capitalism was at its peak. As one historian explained:

It is nineteenth century America, however, which provided the real impetus for caveat emptor's effect on American law. Government was viewed as a promoter of enterprise (e.g., to provide public goods such as transport, currency, and credit) and not as a paternalistic protector which could impede enterprise. "[T]he Common Law allows parties to make their own bargains, and when they are made, holds them to a strict compliance"¹⁹⁷

In the context of the sale of goods, the rule was not as stringent.¹⁹⁸ Warranty of merchantability—at least that the subject matter of the contract was what it purported to be—began to emerge by the early nineteenth century.¹⁹⁹ Nevertheless, at least in cases where the seller had

194. An insured's obligation to disclose in the case of marine insurance constituted a notable exception to the general rule. In those cases, an insured is held to the standard of *uberrimae fidei* (the utmost fidelity). As explained by the court in *St. Paul Fire and Marine Insurance Co. v. Halifax Trawlers, Inc.*, 495 F. Supp. 2d 232, 240 (D. Mass. 2007), under the doctrine:

[I]t does not matter whether [the insured] omitted the information on the basis of neglect, ignorance or malice. If the information is material, it must be disclosed. Though the notion of materiality is subjective by nature, it has been defined in these circumstances as "that which can possibly influence the mind of a prudent and intelligent insurer in determining whether it will accept the risk."

See also *infra* note 207 and accompanying text.

195. See generally RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).

196. *Doe v. Town of Bourne*, No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *11 (D. Mass. May, 28 2004) (noting that the school had no duty to disclose the child's rape to the parents).

197. See generally Susan Roger Fineran, *Knowing Silence of Nonentrepreneurial Information is not Sporting*, 59 ALBANY L. REV. 511, 520 n.11 (1995) (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 158, 202, 233 (1973)).

198. Anthony J. Vlatas, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases*, 94 COLUM. L. REV. 658, 661 (1994). Vlatas explains:

[T]he caveat emptor doctrine—ascendant in the United States during much of the 19th century—continued to govern the default allocation of legal responsibility for the leasehold's fitness even as courts began to abandon rules based on caveat emptor in the contract context, most notably with respect to sales of goods.

Id. (footnotes omitted).

199. See *Gardiner v. Gray*, (1815) 171 Eng. Rep. 46, 47 (K.B.); 4 Camp. 144, 145. Lord Ellenborough famously asserted:

superior knowledge, using that knowledge to gain advantage appears to have been legally sanctioned and was arguably socially acceptable.²⁰⁰

By the early to mid 1930s, when the Restatements of Torts,²⁰¹ Contracts,²⁰² and Restitution²⁰³ were published, courts had come to recognize the existence of an obligation to disclose. Leaving aside momentarily the obligations that arise out of fiduciary relationships, courts had come to reject the existence of a privilege not to disclose in a variety of circumstances. Thus, for example, the Restatement of Contracts acknowledged that the expression of opinion, normally not actionable, may become so if the opinion is offered by “one who has, or purports to have, expert knowledge of the matter”²⁰⁴ Moreover, comment *b* to § 8 of the Restatement of Restitution, states the general proposition that “[e]xcept in a few special types of transactions, such as insurance contracts and transactions between a fiduciary and his beneficiary, there is no general duty upon a party to a transaction to disclose facts to the other party.”²⁰⁵ Comment *b* goes on to state the exception in cases where

a person who, before the transaction is completed, knows or suspects that the other is acting under a misapprehension which, if the mistake were mutual, would cause the transaction to be voidable, is under a duty to disclose the facts to the other. So, too, if one who has made a statement which was true at the time of speaking discovers that it is

[T]he purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.

Id.

200. See Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 126 (2008). Johnson notes that

For several hundred years, and right up to the last few decades, *caveat emptor* was the staple fare of the law of real estate purchases, at least for buildings already constructed. The purchaser was deemed perfectly capable of inspecting the property and deciding for himself whether he wanted it, and if anyone were foolish enough to buy a pig in a poke, he deserved what he got. Short of outright fraud that would mislead the buyer, the seller had no duties to disclose anything at all.

Id.

201. RESTATEMENT (FIRST) OF TORTS (1934).

202. RESTATEMENT (FIRST) OF CONTRACTS (1932).

203. RESTATEMENT (FIRST) OF RESTITUTION (1937).

204. RESTATEMENT (FIRST) OF CONTRACTS § 474 (1932).

205. RESTATEMENT (FIRST) OF RESTITUTION § 8 cmt. b (1937).

untrue with reference to present facts or if he discovers that a statement which was immaterial when made has become material, he is under a duty of disclosure.²⁰⁶

The relative availability of knowledge (or the existence of a statute) may serve to impose a disclosure obligation under circumstances where it might not otherwise exist. Thus, for example, there has long been an exception to the general rule of nondisclosure that imposes on an insured the obligation to disclose facts to an insurer during the application stage of the creation of an insurance contract—particularly in the case of marine insurance²⁰⁷

By 1977, when § 551 of the Second Restatement of Torts was published, the rule had evolved into the following:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise

206. *Id.*

207. Initially, the obligation to disclose arose in cases of the negotiation of an insurance contract in cases of marine insurance when ships and their cargo were far away from the underwriters and inspection and confirmation of the truth of an insureds' representations were, as a practical matter, simply not feasible. *See* *Compagnie de Reassurance d'Ile de Fr. v. New England Reinsurance Corp.*, 944 F. Supp. 986, 993 (D. Mass. 1996) (explaining the origin of the rule).

To deal with such problems, courts created the obligation of *uberrimae fidei* (the highest degree of good faith) making rescission possible in cases of non-disclosure provided the fact not disclosed "materially affect[ed] the risk being insured" regardless of the existence or non-existence of scienter on the part of the insured. *See* *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 123 (2d Cir. 2001). Later, the rule was expanded to create a duty to disclose and corresponding remedy of rescission in some non-marine cases at least when disclosure was statutorily required. *See, e.g.,* *Great Am. Ins. Co. v. Wexler Ins. Agency, Inc.*, No. CV97-9397 MMM (BQRX), 2000 WL 290380, at *13 n.9 (C.D. Cal. Feb. 18, 2000). The court asserted:

The doctrine of *uberrimae fidei* imposes duties on the parties to an inland marine insurance contract. *See* California Insurance Code § 1900. Since, as a fiduciary, an inland marine agent must fully disclose all material facts, it is logical to define the breadth of the agent's disclosure duty by looking to the duty imposed on parties to the insurance contract, i.e., if an applicant for inland marine insurance must disclose all material facts regarding the risk, an agent's duty of disclosure must be at least as broad. The court need not resolve whether the doctrine of *uberrimae fidei* applies directly to an inland marine agent, however, because general agency principles impose similar duties of full disclosure and the highest good faith.

Id.

reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.²⁰⁸

208. RESTATEMENT (SECOND) OF TORTS § 551 (1977); see also W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 106 (5th ed. 1984) (observing that "there has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed"). Keeton et al. put forth eight factors for consideration, summarized as follows:

- (1) The difference in the levels of the parties' sophistication regarding the subject matter of the contract;
- (2) The relationship between the parties;
- (3) "The manner in which the information is acquired. Information . . . may [be] acquired by chance, by effort, or by an illegal act";
- (4) The nature of the undisclosed fact. In contracts of sale of real property, if the vendor conceals an intrinsic defect not discoverable by reasonable care, the court will be more prone to find a duty to disclose than it would be to find a duty to disclose an extrinsic fact;
- (5) The contracting position of the parties relative to each other. "It is much more likely that a seller will be required to disclose information than a purchaser";
- (6) The nature of the contract. All material facts generally must be disclosed in releases and contracts of insurance;
- (7) The importance of the nondisclosed fact to the parties;
- (8) The active concealment of any material fact

Id. (discussing and summarizing W. Page Keeton, *Fraud, Concealment and Non-disclosure*, 15 TEX. L. REV. 1 (1936)).

While one might argue that parents and school districts are not “parties to a business transaction” within the meaning of the section, such a claim seems rather spurious. After all, parents and school districts negotiate legally enforceable contracts with one another with significant financial consequences for both. Facts dealing with a proposed educational placement seem self-evidently “basic” to “the transaction,”²⁰⁹ as does eligibility for services. The mutual importance of such facts, by themselves, should justify the imposition of a mutual disclosure obligation. In fact, in *School Board v. Fuller*,²¹⁰ the court had no problem in finding parents liable for more than \$170,000 based on a constructive fraud theory for failing to disclose that they did not reside in the county resulting in reliance by the county in providing special education services to the child.²¹¹

1. Real-World Problems Associated with Nondisclosure

While one might think that, given the potentially adversarial nature of the relationship between the parties and placement negotiations (exacerbated by the judicial interpretation of the Act’s FAPE requirement to allow school districts to provide programming with a goal of something less than a maximization of a child’s potential),²¹² the situation would be rife with the potential for school district nondisclosure, if not outright misrepresentation. In fact, there is evidence which suggests this is the case,²¹³ and the Act both implicitly and explicitly acknowledges this possibility.²¹⁴

209. See RESTATEMENT (SECOND) OF TORTS § 551 cmt. j (1977). The comment explains:

“*Facts basic to the transaction.*” The word “basic” is used in this Clause in the same sense in which it is used in Comment *c* under § 16 of the Restatement of Restitution. A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence.

Id.

210. *Sch. Bd. v. Fuller*, 26 Va. Cir. 150 (1991).

211. *Id.* (though it is not entirely clear from the decision whether the parents affirmatively misrepresented that they were living in a townhouse situated in the county or simply failed to disclose that they moved).

212. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189–90 (1982); see also *supra* text at notes 45–49.

213. See, e.g., *infra* note 244.

214. Perhaps the due process procedures set forth in the Act were seen as sufficient. The *Rowley* majority asserted:

Entrusting a child’s education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, . . . and in the formulation of the child’s individual educational program.

Implicitly, the Act requires disclosure of all facts upon which the IEP team takes into account in determining that a particular program or placement (“special education and related services”) is “designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child.”²¹⁵ Because the Act²¹⁶ and judicial decision guarantee parents the right to fully participate in the IEP placement decision,²¹⁷ parents are (or should be) entitled to receive all information that the rest of the IEP team considered in deciding that it is appropriate to recommend a particular program for a particular child. This information includes not only test results, evaluation reports, and the like, specifically required to be provided under § 1415(b)(1), but any other information deemed relevant by the team members. In jurisdictions that have held that program costs or the relative costs of alternative placement options are relevant to the “appropriateness” of the placement decision,²¹⁸ it follows that cost information—both for the program being offered and alternatives—must be shared. Moreover, if the provision of special education is being deemed to have a negative impact on general education or other aspects of the school budget²¹⁹ and this perception of negative impact is being taken into consideration by the team, this must be disclosed as well. In short, the parent’s guaranteed position as a fully participating member of the decision-making team mandates that every other member play with his or her cards face up on the table.²²⁰

That the drafters of the Act contemplated the possibility of outright misrepresentation or non-disclosure and arguably imposed an affirmative obligation to disclose is evident from language in the 2004 amendments. Although the amendments to the Act impose a two-year statute of limitations, 20 U.S.C. § 1415(f)(3)(D)(i) and (ii) provide exceptions to the requirement that a hearing be requested within two years in cases of misrepresentation or non-disclosure by the school district.

Section 1415(f)(1)(B) makes a “resolution session” between parents and school districts mandatory unless both sides consent to waive it. It further makes any agreement reached at such a session enforceable in any court of competent jurisdiction.²²¹ However, such agreements are

458 U.S. at 208.

215. 20 U.S.C. § 1401(9), (26)(A) (2012).

216. *Id.* § 1414(d)(1)(B)(i) (providing that parents serve as members of IEP team).

217. *Winklemen ex rel. Winklemen v. Parma Sch. Dist.*, 550 U.S. 516, 524 (2007). *Winklemen* is discussed and quoted *infra* notes 274–286 and accompanying text.

218. *See supra* notes 98–99 and accompanying text.

219. *See supra* note 99.

220. *See infra* notes 284–87 and accompanying text.

221. 20 U.S.C. § 1415(f)(1)(B)(iii)(II).

voidable for three days,²²² although no specific basis for voiding such agreements thereafter is stated.

In fact, many would assert that non-disclosure by school districts has become the norm. For example, because LEAs sometimes find it necessary to contract with outside providers, a review of some of these contract provisions is instructive. The Montgomery County (Pennsylvania) Intermediate Unit²²³ contract, for example, forbids outside providers from expressing programming concerns to a child's parents, reserving "the exclusive right and opportunity" to notify parents of such concerns.²²⁴ The same contract prohibits outside providers from suggesting supplemental services or providing parents with "reports, data, or information, verbally or in writing."²²⁵ Perhaps most tellingly, the same contract prohibits the outside provider from taking a "position, testify[ing], or provid[ing] information to a parent or student receiving services from the [Intermediate Unit] . . . that is inconsistent with the goals and objectives expressed regarding the student by the . . . [Intermediate Unit]."²²⁶

The attempt by school districts and other LEAs to ensure that parents are kept in the dark and unable to share information with other parents similarly situated is further evidenced by the common use of non-disclosure provisions contained in parent-school district settlement agreements. For example, one agreement provides:

The Parties shall maintain the terms of this Agreement in confidence to the extent required by law. In this regard, the Parties agree that they, or anyone on their behalf, will not reveal the terms of this Agreement to any individual or entity, except to the extent required by law or lawful court order or as necessary to effectuate its terms. This Agreement will be deemed breached if either Party violates this confidentiality and the non-breaching Party may pursue any avenue of relief available under the law.²²⁷

222. *Id.* § 1415(f)(1)(B)(iv).

223. In Pennsylvania, Intermediate Units are educational agencies charged with the responsibility of providing services at the regional level, including, but not limited to early intervention services. *See* 11 PA. STAT. ANN. §§ 875-101 (West 2014). The Boards of Directors of the Intermediate Units are composed of school board members from each public school district and are advised by an advisory council made up of the school superintendents of individual counties' school districts.

224. Montgomery Cnty. Intermediate Unit, Special Education Early Intervention Programs Contract for EI Private Provider Therapy Services July 30, 2012 through June 30, 2013 (2012) (on file with author) (contracting for speech therapy).

225. *Id.*

226. *Id.*

227. "John Doe" Sch. Dist., Settlement Agreement and Release (Fall, 2011) (on file with author) (actual name redacted to protect anonymity of source).

In fact, while therapists currently or formerly employed by LEAs are rarely willing to speak for attribution, off the record, most will candidly admit that they are prohibited from making certain diagnoses or treatment proposals.²²⁸ If such a diagnosis or course of treatment is recommended by a therapist to his or her superior or evaluation team, it may not be communicated to the child's parent or guardian.²²⁹

2. School District Employees' Duty to Disclose

From the earliest days of the Act, courts have repeatedly stressed the idea that educators are vested with authority to select the appropriate methodology, as long as its provision results in the child receiving a FAPE.²³⁰ When making such pronouncements, courts are simply acknowledging the obvious—educators normally know much more about programming. Thus, parents are generally dependent upon the educators and are expected to trust their judgment in choosing a program that will provide educational benefit to the disabled child.

There is, however, a more important question for our purposes here—namely, what do school districts have to tell parents given that special education teachers, speech pathologists, occupational therapists, and so on, clearly have (or at least should have) this level of expertise which most parents lack.²³¹ Their expertise often includes not only the ability to professionally evaluate the programming available within the district, but often familiarity with other programs and types of

228. Telephone Interviews with LEA Therapists (2012-13) (notes on file with author).

229. *Id.*

230. In *Board of Education v. Rowley*, 458 U.S. 176, 207–08 (1982), the Court specifically acknowledged the disparity in expertise between the parties in holding that the choice of programming is generally up to the educational agency, rather than the parent. The Court reasoned:

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).

Id. (footnotes omitted).

231. *Id.*

programming that might be more beneficial to the child, regardless of whether the Act, as interpreted by the Court, requires the district to pay for it.

One might think that, in cases where inappropriate or otherwise inadequate programming options are presented to the parents of a disabled child, the special education teacher, speech pathologist, or some other professional member of the IEP team might well be inclined to advise the parent of the program's inappropriateness or at least complain to his or her supervisor. Surprisingly, however, it appears that if such a course of action is pursued, the school district employee might well be jeopardizing his or her job.

The evolution of the law relating to public employees' free speech rights has resulted in a situation that is at best curious and at worst downright coercive. In *Pickering v. Board of Education*,²³² the Supreme Court held that a teacher had a constitutionally protected "right to speak on issues of public importance"²³³ and the exercise of that right "may not furnish the basis for his dismissal from public employment."²³⁴ In 2006, however, the Court reconsidered the issue in *Garcetti v. Ceballos*.²³⁵ The Court distinguished speech made in one's capacity as citizen and speech made pursuant to one's official duties. The former, the Court reasoned, was protected by the First Amendment, while the latter was not.²³⁶ Thus, in the absence of constitutional protection, a public employee may be subject to employer discipline for expressing criticism regarding the appropriateness of a particular program for a particular child or advising a child's parents of other educational options.

If a special education teacher, for example, were to pull a parent aside and make critical remarks regarding the school district's proffered program, would that be considered as speech made pursuant to official duties or a statement on an issue of public interest made as a concerned citizen? Oddly, there have been relatively few cases that provide guidance. In *Reinhardt v. Albuquerque Public Schools Board of Education*,²³⁷ the plaintiff, a speech pathologist, complained about the school district's failure to deliver special education services and

232. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

233. *Id.* at 574.

234. *Id.*

235. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

236. *Id.* at 422. See generally Brenda R. Kallio & Richard T. Geisel, *To Speak or Not to Speak: Applying Garcetti and Whistleblower Law to Public School Employee Speech*, 264 WEST'S EDUC. L. RPTR. 517 (2011).

237. *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126 (10th Cir. 2010).

advocated for the provision of a neuropsychological evaluation and specialized reading instruction for a particular student.²³⁸

In retaliation, the school gave her a more limited contract resulting in a pay reduction.²³⁹ The court found that only because the plaintiff's conduct went beyond her official duties did it retain constitutional protection. The court stated:

Ms. Reinhardt was not hired to ensure IDEA compliance at Albuquerque public schools. She was hired to provide speech and language services to special education students. Ms. Reinhardt's consulting an attorney and filing the state complaint went well beyond her official responsibilities. APS argues that "involving an attorney in the process does not somehow transform otherwise unprotected speech into protected speech." While APS is correct that attorney involvement is not dispositive, involving counsel under these facts suggests that Ms. Reinhardt was acting beyond her job duties.²⁴⁰

On the other hand, in *Fox v. Traverse City Area Public School Board of Education*,²⁴¹ a teacher who complained to her supervisor that her teaching caseload was so large that she could not provide appropriate special educational services was found to be within the performance of her job and, therefore, not constitutionally protected under *Garcetti*.²⁴² The result of cases such as these is the creation of a situation which is, as one commentator described it, disturbingly uncertain:

238. *Id.* at 1130.

239. *Id.*

240. *Id.* at 1136 (internal citation omitted). Importantly, in that case the court also found that her conduct was protected under section 504 of the Rehabilitation Act. *Id.* at 1132. The court stated:

All three forms of Ms. Reinhardt's advocacy on behalf of disabled students constitute protected activity under the Rehabilitation Act. Section 504 and the ADA prohibit discrimination against any individual "because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." 42 U.S.C. § 12203(a) (incorporated by reference by 29 U.S.C. § 794(d)). The school is required to provide a "free appropriate public education" by providing education and related services that "are designed meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons." 34 C.F.R. § 104.33(a) & (b)(1) (2003).

Id.; see also *Sweet v. Tigard-Tualatin Sch. Dist.*, 124 F. App'x 482, 486 (9th Cir. 2005) (holding that retaliation for complaints regarding non-compliance with the IDEA was prohibited under § 504 of the Rehabilitation Act).

241. *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345 (6th Cir. 2010).

242. *Id.* at 349; see also *Stahura-Uhl v. Iroquois Cent. Sch. Dist.* 836 F. Supp. 2d 132, 140, 144 (W.D.N.Y. 2011) (holding no constitutional protection, but possible protection under Rehabilitation Act).

Although some teachers' First Amendment retaliation claims stemming from complaints about problematic school practices or administrator wrongdoing have survived the post-*Garcetti* era, many others, including claims arising from the identification of potentially serious misconduct or the failure to meet legal obligations to vulnerable students, have been doomed by the application of *Garcetti*. Until *Garcetti* is reconsidered or refined, teachers' efforts to expose school dysfunction will remain a hazardous enterprise few may be bold enough to undertake.²⁴³

Thus, one cannot expect individual teachers or therapists to step in. There are two reasons for this in addition to the potential lack of First Amendment protection. First, there is the well-known tendency of professionals employed by school districts to band together in a conspiracy of silence.²⁴⁴ This tendency is the result, at least in part, of the law's failure to explicitly create an obligation of loyalty flowing from the school professional to the client.²⁴⁵ Not surprisingly, among members of all groups of employed professionals there exists a divided sense of loyalty between that owed to their employers, on the one hand, and their clients on the other.²⁴⁶ In cases of such divided loyalty, the

243. Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 308–09 (2012).

244. See, e.g., *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 448 (M.D. Pa. 2007) (internal reference omitted) (“In October of 2003, [assistant teachers] Celli and Medeiros approached the Principal . . . in order to voice their concerns. During this meeting, Defendant . . . accused Celli and Medeiros of ‘breaking a silent code,’ which she likened to a code among police officers.”). *Vicky M.* is discussed *infra* notes 263–68.

245. This is not to say that professional codes of conduct are necessarily silent on the issue. For example, the American Speech-Language Hearing Association, the professional licensing organization for speech pathologists, provides *Principle of Ethics I*: “Individuals shall honor their responsibility to hold paramount the welfare of persons they serve professionally . . .”; *Rule H*: “Individuals shall fully inform the persons they serve of the nature and possible effects of services rendered . . .”; and *Rule I*: “Individuals shall evaluate the effectiveness of services rendered and of products dispensed, and they shall provide services or dispense products only when benefit can reasonably be expected.” The codes of some states are somewhat stronger and more explicit. For example, 49 PA. CODE § 45.102(d) (2014) provides, in part:

(1) A licensee shall hold paramount the welfare of persons served professionally.

(i) A licensee shall use every resource available, including referral to other specialists as needed, to provide the best service possible.

(ii) A licensee shall fully inform a person served, a parent or guardian, of the nature and possible effects of the services.

246. See Jill W. Graham, *Principled Organizational Dissent: A Theoretical Essay*, in 8 RESEARCH IN ORGANIZATIONAL BEHAVIOR 12–13 (Barry M. Staw & L.L. Cummings eds., 1986). Graham explains:

Loyalties in the workplace are multiple and frequently conflict. As a result, the question in most instances is not whether to be loyal, but how to resolve conflicts of loyalty. There can be loyalty as a member of one or more

“organizational ethic” or team loyalty tends to overshadow any conflicting loyalties.²⁴⁷ Furthermore, financial scarcity tends to exacerbate organizations’ tendency to stifle dissent or at least increase hostility toward dissenting members.²⁴⁸ Second, although some states have enacted whistleblower-protection legislation, the uncertainty regarding the legal protection afforded under these laws will undoubtedly have a chilling effect on all but the bravest or most committed.²⁴⁹

Because, as a practical matter, individual school district employees cannot be expected to communicate openly with the parents of disabled children, it is necessary that the disclosure obligation be placed on the educational agency itself. While, as noted earlier,²⁵⁰ it is possible, even likely, that a disclosure obligation exists even in the absence of finding a fiduciary relationship, if such a relationship is found to exist, a duty to disclose follows as a matter of course.²⁵¹

B. *Fiduciaries*

One in a fiduciary relationship has an affirmative disclosure obligation to the other party to the relationship.²⁵² Fiduciary relationships—those involving the highest degree of trust and the obligation to put another’s interests before one’s own—can be established in at least two ways. First, some relationships, simply by definition, are deemed fiduciary. Thus,

organizations, loyalty to co-workers and/or a profession, loyalty to civic, ethical, and religious values, loyalty to friends and family.

Id.

247. *Id.* at 13; see also *infra* notes 259–268 (discussing *Vicky M.*, 486 F. Supp. 2d 437).

248. *Graham*, *supra* note 246, at 33.

249. For a state-by-state catalogue of state whistleblower protection laws, see generally Kallio & Geisel, *supra* note 236, at 525–27 (noting that some states require the employee to report misconduct within the chain of command, while others do not and concluding that this fact, “coupled with the fact that many public employees will not know what is required or permitted under their state’s whistleblower statutes” compounds the uncertainty).

250. See *supra* text at notes 210–11; see also RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977).

251. See, e.g., *Chiarella v. United States*, 445 U.S. 222, 228 (1980). The Court recited the general rule:

[O]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information “that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.”

Id. (alteration in original) (citation omitted).

252. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977).

[t]he relations of trustee and cestui, executor or administrator and creditors, next of kin or legatees, guardian and ward, principal and agent, attorney and client, corporate director and corporation, and the like are easily thrown into distinct subdivisions of the law. They have distinctive names. The term “fiduciary” might well be reserved for such relations.²⁵³

In addition, as a factual matter, parties might enter into a relationship where one reposes a high degree of trust in the other, and the other accepts the responsibility that accompanies that grant of trust. Under those circumstances, a court might well find the existence of a fiduciary obligation as a factual matter even outside of the traditional fiduciary relationships, though some courts term these to be “confidential relationship[s].”²⁵⁴

1. Fiduciary Relationship Between School District and Child: *Acting in Loco Parentis*

Whether spouses stand in a fiduciary relationship with one another and whether parents are fiduciaries of their minor children are matters of some disagreement.²⁵⁵ Some states have recognized the fiduciary nature of the family relationships,²⁵⁶ while others deny its existence, at least as a matter of law.²⁵⁷ To the extent that teachers may be seen as acting in the

253. Taeger v. Catholic Family & Cmty. Servs., 995 P.2d 721, 726 (Ariz. Ct. App. 1999) (quoting *Condos v. Felder*, 377 P.2d 305, 308 (Ariz. 1962)).

254. *Id.* The court asserted:

[T]here are other cases where there is just as great intimacy, disclosure of secrets, intrusting of power, and superiority of position in the case of the representative, but where the law has no special designation for the position of the parties. It cannot be called trust or executorship, and yet it is so similar in its creation and operation that it should have like results.

Id.

255. See generally John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 743–44 (2013) (noting the split in authority).

256. See *In re Estate of Gelonese*, 111 Cal. Rptr. 833, 839 (Cal. Ct. App. 1974) (“Such a [fiduciary] relation is presumed to exist between parent and child.”); *Boyd v. Boyd*, 545 S.W.2d 520, 524 (Tex. Civ. App. 1976) (“There is a fiduciary relationship existing between Mrs. Boyd and her minor children.”).

257. See, e.g., *In re Estate of Kieras*, 521 N.E.2d 263, 280 (Ill. App. Ct. 1988) (holding that there is no presumption of a fiduciary relationship between parents and children); *Wilson v. Wilson*, 154 P.3d 1136, 1147 (Kan. Ct. App. 2007) (noting that “the mere relationship of parent and child does not raise a presumption of a confidential and fiduciary relationship”); *Latty v. St. Joseph’s Soc’y of the Sacred Heart*, 17 A.3d 155, 161 (Md. Ct. Spec. App. 2011) (citation omitted) (“While some confidential relationships arise if there is a familial relationship, ‘the mere existence of a familial relationship is not indicative of a confidential relationship.’”); *Moody v. Stibling*, 985 P.2d 1210, 1216 (N.M. Ct. App. 1999) (noting that there is “no[] presumption of a fiduciary relationship between a parent and a child”).

place of parents, *in loco parentis*, the existence of a fiduciary relationship between pupil and teacher may turn on whether the particular jurisdiction recognizes an underlying fiduciary relationship between parent and child.²⁵⁸

Although under some circumstances school districts have been found to stand in a fiduciary relationship with their pupils, most of these cases tend to involve the situation where a teacher subjected the child to physical or sexual abuse. *Vicky M. v. Northeastern Educational Intermediate Unit 19*²⁵⁹ is instructive. In that case, an autistic support teacher allegedly submitted an autistic child to systematic physical abuse.²⁶⁰ The teacher's duties, according to the court, included "keeping safe and secure the autistic children in her care, custody, and control, and attending to all of [their]. . . daily classroom needs" ²⁶¹ In the course of performing her duties, or at least under the guise of performing her duties,

Defendant Wzorek continuously and systematically employed the use of aversive techniques, which are deliberate activities designed to establish a negative association with a specific behavior, and which techniques are specifically excluded from the list of positive approaches to behavior management found in Title 22 of the Pennsylvania School Code (PSC), section 14.133(e). Defendant Wzorek used aversive techniques to redirect her autistic students' behavior, including that of Minor-Plaintiff AJM. Specifically, these techniques included, but were not limited to: (a) striking AJM on the legs and arms, causing bruising, (b) screaming in AJM's face, (c) squeezing and crushing AJM's arms, causing bruising; and (d) stomping on AJM's insteps.²⁶²

Not only did the child's parents become aware of problems,²⁶³ but two assistant teachers confronted the abusive teacher and, thereafter,

258. See Rumel, *supra* note 255, at 743–44.

259. *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437 (M.D. Pa. 2007); see also *John G. v. Ne. Educ. Intermediate Unit 19*, 490 F. Supp. 2d 565 (M.D. Pa. 2007); *Joseph M. v. Ne. Educ. Intermediate Unit 19*, 516 F. Supp. 2d 424 (M.D. Pa. 2007).

260. *Vicky M.*, 486 F. Supp. 2d at 446.

261. *Id.*

262. *Id.* at 446–47 (citations omitted).

263. *Id.* at 447. The court recapped from the complaint:

Plaintiffs noted changes in their minor child AJM's behavior, specifically a trend of developmental regression exhibited by, *inter alia*: (1) screaming "Ms. Sue hurts me"; (2) becoming increasingly afraid of Defendant Wzorek; (3) developing bruises on tops of his legs and the backs of his arms; (4) developing a limp in the middle of the 2002–2003 school year; (5) developing severe swelling in his foot; and (6) developing a burning sensation when urinating.

Id. (citation omitted).

reported the abuse to the Intermediate Unit's director of special education.²⁶⁴ The director's responded that it was a matter "'over his head'" and the IU's executive director needed to get involved.²⁶⁵ Although a meeting was scheduled with the child's parents, the teacher, and the executive director, prior to the meeting the executive director was overheard reassuring Wzorek, saying, "'[d]on't worry Sue, they are coming in here to shoot their loads but nothing's going to happen and then we'll be done with it.'"²⁶⁶

Eventually, the IU simply transferred the abusive teacher "to the Scranton School District for the 2003-2004 school year, where she would continue to have contact with special needs students as a learning support teacher at West Scranton High School."²⁶⁷ The whistleblowing assistant teachers, on the other hand, were also transferred based on a report from the Superintendent of the School District that asserted that their "'behavior ha[d] negatively affected the work environment for [the] teaching staff,'" and asked "'that they be removed from [the] building as soon as possible.'"²⁶⁸

The complaint eventually filed by the parents contained numerous counts, predictably including civil rights violations, negligence, assault and battery, and fraud. Significantly, the fourth count alleged breach of fiduciary duty. In this connection, the court noted:

Under Pennsylvania law, "[t]he general test for determining the existence of . . . a [fiduciary] relationship is whether it is clear that the parties did not deal on equal terms." Indeed, a fiduciary relationship "is not confined to any specific association of the parties." Rather, a fiduciary relationship will be found to exist "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible."²⁶⁹

...

Certainly, Defendant Wzorek, as the special education teacher in charge of the instruction of Minor-Plaintiff AJM, a child with autism, was in an overmastering position in this relationship, and was trusted and depended upon by AJM to exercise sound judgment in handling his care and instruction. Consequently, when viewed in the light

264. *Id.* at 448.

265. *Vicky M.*, 486 F. Supp. 2d at 448.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 458 (alterations in original).

most favorable to the Plaintiffs, Defendant Wzorek's motion to dismiss this Court must be denied.²⁷⁰

While the correctness of the court's legal conclusion may seem self-evident, other courts have displayed considerable reluctance to follow its lead,²⁷¹ often asserting with little analysis that no fiduciary duty is owed.²⁷²

Importantly, however, the physical or sexual abuse cases are not directly relevant to the argument here. Those cases primarily deal with the relationship between the student and teacher, rather than the relationship between the child's parent and the educational agency itself, acting through its teachers and school administrators.

2. Fiduciary Relationship Between School Districts and Parents: Obligation Owed Directly to Parents

Inasmuch as disclosure obligations may be largely dependent on the relationships between the parties, it is necessary to attempt to determine what relationships are created under the Act and between whom. If the right to a FAPE belonged only to the child, the parent or guardian would be limited to seeking enforcement of the child's rights. That is, the school district might be able to claim the existence of an arm's length transaction with the parents. While there still might be an actionable non-disclosure under those circumstances,²⁷³ parents would be unable to claim that the school districts' disclosure obligations to them arise out of a confidential or fiduciary relationship that is contemplated by and created by the Act itself.

The Act, however, does not contemplate a bipartite relationship. Instead, it locks the parents and school districts into a cooperative venture entered into for the benefit of the disabled child. Not only do the parent and the school district owe distinct obligations to the disabled child, who is provided with independent rights under the Act, but the Act also creates certain obligations owed by the school districts to the parent that are independent from the obligations owed to the disabled child.

270. *Vicky M.*, 486 F. Supp. 2d at 458–59.

271. *See, e.g., Thomas v. Bd. of Educ.*, 759 F. Supp. 2d 477, 503–04 (D. Del. 2010) (holding that there was no fiduciary relationship between a student and a public school board); *accord C.A. v. William S. Hart Union High Sch. Dist.*, 117 Cal. Rptr. 3d 283, 291 (Cal. Ct. App. 2010).

272. *See, e.g., Key v. Coryell*, 185 S.W.3d 98, 106 (Ark. Ct. App. 2004) (“[T]he supreme court held that a defendant priest did not owe a fiduciary duty to a parishioner. We cannot say that appellees owed appellant [special needs student] . . . any greater duty than a priest owes a parishioner.”).

273. *See supra* notes 201–206 and accompanying text.

In *Winkelman ex rel. Winkelman v. Parma City School District*,²⁷⁴ the U.S. Supreme Court faced the question of whether a parent could appear pro se.²⁷⁵ The district court granted the school district's motion for judgment on the pleadings on the basis that a FAPE had been provided.²⁷⁶ On appeal, the Sixth Circuit "entered an order dismissing the appeal unless [the parents] obtained counsel" to represent the child.²⁷⁷ In so holding, the Sixth Circuit relied on *Cavanaugh v. Cardinal Local School Dist.*,²⁷⁸ which held that the right to a free appropriate public education "belongs to the child alone."²⁷⁹ If that were the case, non-lawyer parents could not represent their child in the federal courts.²⁸⁰

After analyzing the provision of the Act, the Supreme Court reversed, holding that the IDEA "includes provisions conveying rights to parents as well as children."²⁸¹ Although the school district argued that the "IDEA accords parents nothing more than 'collateral tools related to the child's underlying substantive rights—not freestanding or independently enforceable rights,'"²⁸² the Court rejected this interpretation of the Act, insisting that the

IDEA defines one of its purposes as seeking "to ensure that the rights of children with disabilities and parents of such children are protected." The word "rights" in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense.²⁸³

In the course of decision, the Court stressed the importance of parental participation in the development of the child's educational program.

IDEA requires school districts to develop an IEP for each child with a disability, with parents playing "a significant role" in this process, Parents serve as members of the team that develops the IEP. § 1414(d)(1)(B). The "concerns" parents have "for enhancing the education of their child" must be considered by the team. IDEA accords parents additional protections that apply throughout the IEP process. *See, e.g.*, § 1414(d)(4)(A) (requiring the IEP Team to revise

274. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

275. *Id.* at 520.

276. *Id.* at 521.

277. *Id.*

278. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005).

279. *Id.* at 757.

280. 28 U.S.C. § 1654 (2012) (stating that parties can prosecute their own claims pro se).

281. *Winkelman*, 550 U.S. at 529.

282. *Id.* at 527–28 (quoting Brief for Respondent at 25, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983)).

283. *Id.* at 528 (quoting 20 U.S.C. § 1400(d)(1)(B) (2012)).

the IEP when appropriate to address certain information provided by the parents); § 1414(e) (requiring States to “ensure that the parents of [a child with a disability] are members of any group that makes decisions on the educational placement of their child”). The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child. See, e.g., § 1415(a) (requiring States to “establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education”); § 1415(b)(1) (mandating that States provide an opportunity for parents to examine all relevant records).²⁸⁴

In the event that parents seek a review of the IEP process on procedural grounds,

the [hearing] officer may find a child “did not receive a free appropriate public education” only if the violation “(I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.”²⁸⁵

The Court concluded that “Congress has found that ‘the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility 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.’”²⁸⁶

Given the importance of informed and meaningful parental participation in the process by which the IEP is formulated, taken together with the Court’s repeated acknowledgement over the years that educators have greater technical knowledge of educational programming (though not, of course, greater knowledge of the particular child’s strengths and weaknesses), the school’s obligation to fully and honestly disclose all relevant information to the parent so as to permit meaningful participation necessarily follows. Allowing the school to keep its cards face down on the table, so to speak, would be antithetical to the entire notion of parental rights so explicitly established.²⁸⁷

284. *Id.* at 524 (some citations omitted).

285. *Id.* at 525–26 (emphasis added) (citations omitted).

286. *Winkelman*, 550 U.S. at 535 (citing 20 U.S.C. § 1400 (c)(5)).

287. See also 20 U.S.C. § 1415(c) which provides, in part, as follows:
The notice required by the subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

More important for immediate purposes is the nature and extent of the obligations owed by school districts directly to the parent. While probably not “fiduciary” in the sense that it must necessarily exist as a matter of law, it is almost certainly possible for the relationship to be “fiduciary” or “confidential” as a matter of fact.²⁸⁸

Discussing the analogous situation of adoption and the relationship between the adoption agency and prospective adopting parents, the court in *Taeger v. Catholic Family and Community Services*,²⁸⁹ succinctly summed up the situation:

An adoption is not an arms-length sale of widgets. Although the primary purpose of adoption is to promote the well-being of children, adoptive parents are also in a special relationship with an adoption intermediary. Professional guidelines for adoption agencies recognize that “child welfare agencies have a responsibility to provide preparation, counseling and support on an ongoing basis for all the parties involved in an adoption,” and that the services provided by an adoption agency should include protection of the interests of adoptive parents, including their interest in making “a free and informed decision to adopt.” The counseling services an adoption agency provides to adoptive parents further illustrate the fiduciary nature of the relationship. As an outcome of this counseling relationship, it is natural that adoptive parents would place special trust in agency social workers with whom they have worked closely and discussed intimate details of their lives.²⁹⁰

This is not to say that all parent-school district encounters will be marked by the level of trust and reliance as is necessary to impose a disclosure requirement and to deem non-disclosure to be

(B) An explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; . . .

(E) a description of other options considered by the IEP Team and the reason why those options were rejected, and

(F) a description of the factors that are relevant to the agency’s proposal or refusal.

In substance, the disclosure requirements are repeated in 20 U.S.C. § 1415(c)(2)(B)(i)(I)(aa)–(dd) (stating similar requirements applicable for the LEA response if no prior written notice given).

288. See *supra* notes 253–54 and accompanying text.

289. *Taeger v. Catholic Family & Cmty. Servs.*, 995 P.2d 721 (Ariz. Ct. App. 1999).

290. *Id.* at 728 (quoting D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability For Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 908 (1992)).

misrepresentation.²⁹¹ In many cases, particularly where there has been an ongoing course of acrimonious conflict and it has become clear that the parties are dealing with one another at arms-length, or where the parents are themselves professionals having familiarity with the relevant information, there will be no justifiable reliance or expectation that the school district is acting in their or their child's best interest. Ultimately, it is a question of fact.²⁹²

However, both the letter and spirit of the Act rather explicitly envision a cooperative relationship between parents and school districts working for the good of the child, though the Act also recognizes or even anticipates the potential for an adversarial relationship between school and parents. Nevertheless, to overly stress the potential conflict arising out of the school's attempt to satisfy its responsibility of meeting the child's entitlement to an appropriate education (however defined) discounts the importance of the fundamentally non-adversarial position of parents and educators. The relationship between parties is critical in determining both the obligation to disclose and the extent of that obligation. In these cases, all of the hallmarks of a fiduciary relationship—inequality of knowledge, inequality in bargaining power, disproportionate expertise by the school districts, and justified expectation (at least initially) that the school districts will act to protect the child's interests—may well exist.

C. Remedies for Non-Disclosure

1. Remedies Within the Act

Assume, for the sake of argument, that the educational agency was under a duty to disclose the existence of better programming than that which is being offered, and the agency failed or refused to inform the parent. If this non-disclosure "impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child," it would constitute a procedural violation of the type that would allow the hearing officer to find that the child was denied a FAPE.²⁹³ That finding would

291. RESTATEMENT (SECOND) OF TORTS § 551(1) (1977) provides:

One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

292. See *supra* note 257.

293. *Winkleman ex rel. Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 525–26 (2007).

(or at least could) provide the basis for ordering that the school district provide compensatory educational services.²⁹⁴

In addition, if the parents and school district have entered into a settlement agreement, it might be possible for the parents to rescind the agreement that was induced by fraud,²⁹⁵ though the availability of rescission may depend on the point at which the fraud took place. Since a settlement agreement between the parents and school district is a contract, at the very least it is subject to all of the normal contract rules regarding validity.²⁹⁶ Moreover, if it involves the waiver of a federally guaranteed civil right, perhaps a higher standard is to be applied.²⁹⁷

In any case, the established rules regarding the rescission undoubtedly also apply. There are, however, at least two glitches, one written into the law and the second inherent in the dynamics of parent-school district interaction. The 1997 Amendments to the Act added a provision making “[d]iscussions that occur during the mediation process . . . confidential and . . . [precluding their use] as evidence in any subsequent due process hearing or civil proceeding.”²⁹⁸ While this provision was, undoubtedly, included to encourage candor from all parties,²⁹⁹ the effect is that misrepresentations or failures to disclose information that might be relevant to the formation of the contract and its voidability, at least those made during the course of mediation, are made inadmissible.³⁰⁰ This is not to say, however, that the evidentiary restriction would apply to a nondisclosure that can be traced back to

294. See generally Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 288–89 (2013) (noting a denial of parental participation is a procedural violation for which compensatory education might be available). But see *Somoza v. N.Y.C. Dep’t of Educ.*, 538 F.3d 106, 109 n.2 (2d Cir. 2008) (noting that compensatory education is available only for gross violations of the IDEA).

295. See, e.g., *Mr. J. v. Bd. of Educ.*, 98 F. Supp. 2d 226, 239 (D. Conn. 2000) (recognizing the agreement was voidable on the basis of fraud or mutual mistake but finding the hearing officer’s refusal to set aside a settlement agreement on those bases was supported by the record).

296. See generally Weber, *supra* note 132, at 651–52.

297. See *supra* notes 149–150 and accompanying text.

298. 20 U.S.C. § 1415(e)(2)(G) (2012).

299. See, e.g., *J.D. v. Kanawha Cnty. Bd. of Educ.*, 571 F.3d 381, 386 (4th Cir. 2009) (“[This] provision[] . . . ensure[s] that mediation discussions will not be chilled by the threat of disclosure at some later date. Enforcing the confidentiality provision is therefore critical to ensuring that parties trust the integrity of the mediation process and remain willing to engage in it.”).

300. Possibly, there is one exception. In an unpublished decision returned in 2012, a federal district court declined to strike a school district allegation that a disabled child’s father made the statement that he was using the mediation process to run up the school district’s expenses and thus force them to accede to his demands. See *Bethlehem Area Sch. Dist. v. Zhou*, No. 09-03493, 2010 WL 2928005, at *2–3 (E.D. Pa. July 23, 2010).

interactions independent of the mediation process, at the resolution conference stage or at IEP team meetings, for example.

Moreover, if the agreement is reached as a result of the resolution session process,³⁰¹ the Act declares that the agreement is voidable for three days.³⁰² In all probability, this condition was intended to deal with buyer's remorse or, because attorneys typically are not present at the resolution session,³⁰³ the three-day provision provides parents an opportunity to consult with counsel before the agreement becomes binding.³⁰⁴ It seems highly unlikely that the provision was intended to limit rescission to three days in cases of fraud, particularly since 20 U.S.C. § 1415(f)(3)(D)(i) and (ii) indicate that the two-year statute of limitations is tolled by fraud or nondisclosure.

If parents, upon learning of the district's misrepresentation or nondisclosure, privately place their child and then seek reimbursement for tuition and cost of the private placement, whether they are found to be entitled to reimbursement depends, in part, on the equities of the situation.³⁰⁵ While there do not appear to be any cases directly on point, private placement after discovery of nondisclosure of a better program's existence likely constitutes the type of circumstances that would make a compelling case for reimbursement on the equities.³⁰⁶

2. Remedies Outside of the Act

The remedies which might be available for a failure to disclose in a case in which a duty to disclose has been found depend, in large part, on whether and to what extent those remedial provisions of the Act are found to be exclusive. As noted, this is an issue upon which there

301. See 20 U.S.C. § 1415 (f)(1)(B) (2012).

302. *Id.* § 1415 (f)(1)(B)(iv).

303. *Id.* § 1415 (i)(3)(D)(iii)(I)–(II); see also *supra* notes 107–110 and accompanying text.

304. See generally *Mr. S. v. Rochester Cmty. Sch.*, No. 5:06-CV-53, 2006 WL 2830042, at *8 (W.D. Mich. Oct. 2, 2006) (discussing the limitations on attorney's participation at resolution sessions).

305. See *supra* notes 94, 177–79 and accompanying text.

306. See generally *Wolfe v. Taconic Hills Cent. Sch. Dist.*, 167 F. Supp. 2d 530, 535 (N.D.N.Y. 2001) (considering the school's failure to present options to parents in finding that equities favored reimbursement); *W.M. v. Lakeland Cent. Sch. Dist.*, 783 F. Supp. 2d 497, 506 (S.D.N.Y. 2011). The court reasoned:

By contrast, the School District initially denied that it was even responsible for conducting an evaluation of O.M. and it maintained this incorrect position until at least October 11, 2007. Thus, at a minimum, the equities favor reimbursing the plaintiffs for tuition expenses from the period of March 28, 2008 through the end of the 2007–2008 school year.

Id.

remains considerable debate.³⁰⁷ While it is agreed that both claims under the IDEA and § 504 of the Rehabilitation Act can be brought simultaneously, the question of whether one can bring a federal civil rights act claim under § 1983 based on a violation of the IDEA has resulted in a split among the circuits.³⁰⁸ In the Second and Seventh Circuits, however, which have continued to recognize the possibility that an IDEA violation may be actionable under § 1983, nondisclosure may give rise to an action for damages. Furthermore, subject to the federal exhaustion limitations,³⁰⁹ other federal or constitutional claims or state law claims might also be based on fraudulent nondisclosure and breach of fiduciary duty.

CONCLUSION

Over the past century or so, American political culture has repeatedly swung back and forth between welfare state progressivism, with its emphasis on government's role in providing basic services to advance societal goals, and various forms and degrees of laissez faire capitalism, with its emphasis on individualism, the sanctity of contract and minimized collective responsibility.³¹⁰ The enactment of the Education for All Handicapped Children Act in 1975 reflected, perhaps embodied, the progressivism of its day. It is no coincidence that, on a state level, pro-plaintiff tort law peaked at the same time.³¹¹

The four decades that followed, however, have, for the most part, witnessed the steady erosion of the accident victims' right to claim compensation.³¹² And, as I argued elsewhere, one of the primary strategies of the tort reform movement was to recast the victim from one fairly seeking just compensation for harm inflicted upon him or her to that of greedy opportunist.³¹³ One can observe the same strategy being employed in the realm of social welfare programs. President Reagan, for

307. See *supra* notes 140–148 and accompanying text.

308. See *supra* notes 147–148.

309. See *supra* notes 151–67 and accompanying text.

310. To be somewhat more accurate, the political culture of individualism can be traced back to the American colonial period. See generally Stanley Feldman & John Zaller, *The Political Culture of Ambivalence: Ideological Responses to the Welfare State*, 36 AM. J. POL. SCI. 268, 271 (1992).

311. Regarding the expansion and subsequent contraction of tort law, see Kotler, *supra* note 19 *passim*. See also Martin A. Kotler, *Tort Reform and Implied Conflict Preemption*, 44 J. MARSHALL L. REV. 827, 832–60 (2011) (discussing products liability doctrine during this period of time).

312. See, e.g., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 647–53 (1992); see also Kotler, *supra* note 19; Kotler, *Implied Conflict Preemption*, *supra* note 311.

313. Kotler, *supra* note 19, at 795–96.

example, recast welfare recipients as “welfare queens”³¹⁴ and coined the memorable phrase of “the truly needy” as a means of limiting the class of eligible recipients.³¹⁵

It is odd, though not really surprising, that parents seeking public education for their disabled children were tarred with the same brush. This was true notwithstanding the undeniable fact that the tacit accusation of greed is completely incoherent in that context, as, arguably, no personal gain is even being sought. Moreover, the underlying goal of universal public education with the resultant creation of an educated, productive citizenry is commonly championed by both the political right and left.

In any event, both the legislative response of repeated amendments to the Act serving to inhibit legal representation and the judicial interpretation of the Act serving to elevate the sanctity of private contract, even when the contracts prove to undercut the fundamental goal of the Act,³¹⁶ largely has made the enforcement provisions of the law illusory to all but the wealthiest. Ironically, it is the wealthiest who have the least need for the substantive promises and procedural protections of the law—at least if they are wealthy enough to afford to privately educate their children.

But, what if the relationship between parents and school districts is recognized to be fiduciary in nature? If so, the existence of a fiduciary or similar relation of trust and confidence would profoundly affect the extent to which disclosure is required and the enforceability of contracts between parties in such a relationship. Thus, for example, the Restatement of Contracts declares that “[t]here is no privilege of non-disclosure, by a party who . . . occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for”³¹⁷ Comment *c* explains:

A fiduciary position within the meaning of the Section includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business advisor, and indeed any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.³¹⁸

314. ‘Welfare Queen’ Becomes Issue in Reagan Campaign, N.Y. TIMES, Feb. 15, 1976, at 51.

315. See AMOS KIEWE & DAVIS W. HOUCK, A SHINING CITY ON A HILL: RONALD REAGAN’S ECONOMIC RHETORIC, 1951–1989, at 79 (1991) (citing and analyzing Mr. Reagan’s 1971 speech to the American Association of University Women).

316. See *supra* notes 123–128 and accompanying text.

317. RESTATEMENT (FIRST) OF CONTRACTS § 472 (1932).

318. *Id.* § 472 cmt. c.

Similarly, the Restatement of Restitution, while denying a general disclosure obligation, unequivocally asserts that “a person who stands in a fiduciary or confidential relationship to the other party has a duty to reveal all relevant facts.”³¹⁹

The proposal here for mandated disclosure at best would only be a partial solution. By itself, its adoption would not change the substantive programming requirements to which the school districts must adhere. It would not eliminate the disparity in power between the schools and the parents—a growing disparity that increasingly distorts the bargaining process.³²⁰ What it would do, however, is introduce a level of transparency and honesty into the process and minimize the game playing that presently characterizes so much of the parent-school district interaction.

Although the legal and equitable remedies for nondisclosure were briefly noted above,³²¹ the real importance of recognizing the disclosure obligation lies not in remedies flowing from a failure to fulfill the duty, but the advantages that flow from compliance with the obligation. After all, the goal is to create an impetus toward making the Act function as intended, not just remedy its violation.

In addition to shifting political attitudes, the failure of the Act lies in the disintegration of trust between parents and educational agencies and, since trust was and is at the core of the cooperative venture envisioned by the Act, the goals of the Act cannot be achieved without it. Although part of the problem lies in the underlying issue of resource allocation, that is not the full story. The limitation of resources necessary to achieve the educational goals is an undeniable reality in this political climate, but it need not pit the parties against one another. The acrimony is a product of the inevitable failure of the school’s attempt to hide the problem of inadequate programming by dealing dishonestly with parents, not a product of the realization that there exists an underlying shortage of available resources in the first place.

In any case, there is no question that distrust has been engendered and has served to undermine the foundations of the IDEA, and disclosure is the only way to restore that trust. The funding shortages will not disappear and there will inevitably be disagreements on whether parental expectations are realistic or not, but disclosure may allow at least the funding shortage to reclaim its rightful place as a political problem of resource allocation (with all of its associated moral and ethical overtones), rather the source of accusations of greed and evil.

319. RESTATEMENT (FIRST) OF RESTITUTION § 8 (1937).

320. See *supra* note 130.

321. See *supra* notes 294–309 and accompanying text.

Differing expectations between the parents of disabled children and the educational establishment regarding the child's needs and the school's capacity and willingness to meet those needs need not turn the parties into adversaries dealing with one another from a position of distrust.³²² In fact, the Act envisioned disagreement and provided a means by which resolution might be achieved. The dispute resolution process, however, depends on each of the parties believing that the other is acting in good faith. That becomes impossible once there arises the perception that information is being withheld. It is the mutual suspicion that distorts the cooperative enterprise model envisioned by the drafters of the Act.

Power imbalances between parents and school districts cannot be eliminated, but the mandatory provision of information will go a long way to level the playing field and restore some level of trust.³²³ While parents will invariably strive to maximize their children's potential and school districts will do what they can given the limitations inherent in public education, a disclosure obligation will at least put everyone on the same page. Parents that have the resources to give their children more will spend those resources, not wasting valuable time under the mistaken belief that the best is already being provided. Parents without the resources to provide private education will be forced to lobby the schools and elected officials to equalize public and private education. They may be successful, or may not be, but in either case, the hypocrisy and deception that presently characterizes so much of the parent-school interaction will be minimized. If educators are made sufficiently uncomfortable by being required to confront and acknowledge the inequality between public and private programming, they will be forced to either improve public education or join with parents to form a new coalition much like that which was responsible for the law's enactment.³²⁴

322. See Lake & Billingsley, *supra* note 14, at 244 (noting that “[d]iscrepant views of a child or a child’s needs was identified as a category of factors that initiate or escalate conflict in 90% of participant interviews”).

323. *Id.* at 248 (identifying the “perception of withholding information . . . as a factor that escalated conflicts”).

324. See generally Marvin Lazerson, *The Origins of Special Education*, in SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION AND FINANCE 41–42 (Jay G. Chambers & William T. Hartman eds., 1983) (describing the parent-educator coalition that was instrumental in the enactment of the Education for All Handicapped Children Act of 1975).