

BARGAINING AND DISTRIBUTION IN SPECIAL EDUCATION†

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INTRODUCTION

The problem of unequal access to educational services in the US has received the attention of courts and legislators for several decades. A traditional source of inequality, increasingly addressed by scholars and law-makers, is the discrimination against students with disabilities, who

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were once deprived *tout court* of real educational opportunities.¹ In this field, legislative intervention has been momentous and political forces across ideological lines have converged to provide children with disabilities proper access to public learning. The reform of special education has achieved tangible results in the last thirty years and has provided children with unprecedented opportunities.

Educational inequality, however, shares the nested structure of Russian dolls and lurks at each new layer. Several scholars have pointed out that focusing on children's disabilities may result in decreased attention to students in social or economic trouble.² This essay focuses on another under-explored distributive dimension of special education law that is *internal* to the pool of children with identified disabilities and detectable in the workings of each educational agency. As illustrated in the pages that follow, special education services are currently allocated on the basis of heavy parental participation in the administrative process. Bargaining power and negotiation strategies play a significant role in the ultimate determination of children's entitlements. These mechanisms are worthy of praise in many respects and should be retained. Thanks to such participation opportunities, families devoid of financial means but endowed with advocacy skills may still ensure that their children receive an adequate education.³ Parental involvement also allows for truly individualized educational plans, drafted with full knowledge of each child's strengths and needs. Recent attempts to limit parents' say in the process of defining appropriate educational services are not commendable.⁴ It is nonetheless important to point out that such bargaining mechanisms combine with other traits of the system—such as wide agency discretion, lack of transparency, and budget constraints—to generate unintended outcomes. It was explicit in the design of the Individuals with Disabilities Education Act that the distribution of special education services would counteract existing inequalities.⁵ However, there is evidence that the resultant distribution is uneven.⁶ The current system yields lower

¹ See, e.g., *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1972) (striking down state statutes which barred or delayed the entry of mentally handicapped students into public schools).

² See generally MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997).

³ See *infra* Section V.A.

⁴ See, e.g., PROPOSED MASS. REGS CODE tit. 603, § 28.07 (December 21, 2004), available at <http://www.doe.mass.edu/lawsregs/proposed/p603cmr28.doc>. These proposed amendments follow the recent enactment of the Individuals with Disabilities Education Improvement Act (2004), which will take effect on July 1st, 2005.

⁵ See, e.g., 20 U.S.C. § 1400(c)(1) (2004) (effective July 1, 2005).

⁶ See, e.g., SPECIAL EDUCATION EXPENDITURE PROJECT, *HOW DOES SPENDING ON SPECIAL EDUCATION STUDENTS VARY ACROSS DISTRICTS?* 7-8 (2003) (if classified by median family income, special education expenditures per student are significantly lower in the lowest-income group), available at <http://csef.air.org/publications/seep/national/AdvRpt2.PDF>.

payoffs for needier families, which are on average less endowed with bargaining power and therefore less capable of taking advantage of participation opportunities.⁷

What follows is not an overall critique of special education law.⁸ If compared with prior regimes, the current system has certainly succeeded at improving the average condition of children with disabilities.⁹ The purpose of this article is to examine the law's distributive effects in order to devise strategies of correction while upholding the federal government's commitment to the educational welfare of children with disabilities.

Sections I-IV examine the structure and consequences of bargaining for entitlements envisaged by current special education laws. Section V draws insights from the literature on the distributive effects of compulsory contract terms and other mandates. Section VI links the contractual features of the system to a second potential source of uneven distribution—unguided administrative discretion. Section VII explores certain theoretical dimensions of parental participation in the allocation of special education services. This interesting but flawed model of participatory democracy illustrates with unusual clarity the potential shortcomings of collaborative governance and sheds light on the distributive implications of deliberative democracy theories. Section VIII demonstrates how the specific budget constraints of special education combine with contractual mechanisms and agency discretion to produce undesirable distributive effects. Section IX recommends that distributive considerations be given visibility and substantive weight in the implementation of the Individuals with Disabilities Education Act.

I. SPECIAL EDUCATION AND CONTRACTS

Up until the 1970s, it was common to exclude many children with disabilities from public schools.¹⁰ The long-term achievements of these individuals depended solely on their families' ability to help them financially and emotionally.¹¹ As a reaction to this practice, in 1975 the US Congress passed the Education for All Handicapped Children Act of

⁷ See *id.* at 8-10.

⁸ For a comprehensive criticism of legal backfire claims aimed at repealing or blocking progressive legislation because it allegedly hurts the groups it means to help, see generally Robert Hillman, *The Rhetoric of Legal Backfire*, 43 B.C.L. REV. 819 (2002).

⁹ See KELLMAN AND LESTER, *supra* note 3, at 2.

¹⁰ See generally Pennsylvania Ass'n for Retarded Children, *supra* note 2.

¹¹ 20 U.S.C. § 1400(c)(2)(D) (effective July 1, 2005) ("Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because. . . a lack of adequate resources within the public school system forced families to find services outside the public school system.").

1975.¹² This Act (amended and renamed the Individuals with Disabilities Education Act or IDEA¹³) mandates that all children with disabilities receive a free appropriate public education (FAPE) in the least restrictive environment (LRE),¹⁴ integrating the children as far as possible into mainstream classrooms and keeping them up to speed with the regular curriculum.¹⁵ The Act also ensures procedural due process rights for parents and establishes a particular mode of cooperation between families of children with disabilities and school districts: the *individualized educational program* (IEP).¹⁶

Today, parents of children with special needs quickly become familiar with the IEP acronym. Before the beginning of each school year, parents must approve and sign a rather lengthy document drafted by the relevant school district which specifies what kind of services and accommodations each eligible child will need in order to receive a “free and appropriate public education” according to the law.¹⁷

It is difficult for most parents to understand what an IEP really is.¹⁸ Informational brochures attempt to clarify that parents can have a say in the production of the document, and that they can reject it if they do not agree with it.¹⁹ At first sight, the process seems to follow the familiar pattern of administrative allocation of entitlements. The working assumption in such processes is that the values of public welfare, as opposed to private autonomy, will control the ultimate decisions of public officials and of reviewing agencies or courts.²⁰ However, parents of children with disabilities are repeat players. Sooner or later they learn that traits of contractual autonomy may characterize the IEP process. They learn that their consent to a proposed set of educational services is essential to the school, and that they can withhold it if not satisfied with the proposal.²¹ The affirming language of rights informs the rhetoric of

¹² Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as 20 U.S.C. §§ 1401-1461 (1976)).

¹³ Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1487 (effective July 1, 2005)).

¹⁴ 20 U.S.C. § 1412(a)(1) (effective July 1, 2005).

¹⁵ 20 U.S.C. § 1412(a)(5) (effective July 1, 2005).

¹⁶ 20 U.S.C. § 1414(d) (effective July 1, 2005).

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *See generally* THE MASS. DEP'T OF EDUC. PARENT'S RIGHTS BROCHURE (Jan. 2002), available at <http://www.doe.mass.edu/sped/prb/prights.pdf>.

²⁰ *See* KELLMAN & LESTER, *supra* note 3, at 196-197 (describing the tendency to attempt to distribute resources to the learning disabled as a group).

²¹ 20 U.S.C. § 1415 (effective July 1, 2005) (“Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.”).

special-education advocates. Parents learn that someone, somewhere, has engaged the school district in intense negotiations and obtained either much better services within the same district or free placement of their child in sophisticated, expensive private schools capable of addressing that child's special needs.²² Parents also learn that special education is a matter of federal rights,²³ and that the IEP process is a just battle worth fighting until the very end for the sake of a deserving child—their own.

Along with other sources, some states reinforce the rights discourse with contractual jargon. The Massachusetts Department of Education, for instance, explains that “[t]he IEP is a contract between you and the school. As with any contract, you should make sure you fully understand the terms to which you are agreeing and make certain that everything that was agreed to verbally is written in the contract.”²⁴

This language is often echoed in communications, both formal and informal, between families and special education professionals.²⁵ The use of contractual jargon makes and is designed to make a powerful impression upon both parents and school district personnel.²⁶ There are no contracts in matters of welfare benefits.²⁷ By contrast, IEPs are referred to as contracts and therefore, parents are led to believe, must be differ-

²² See, e.g., DANIEL MCGROARTY, PROGRESSIVE POLICY INSTITUTE, *THE LITTLE KNOWN CASE OF AMERICA'S SCHOOL CHOICE PROGRAM* 290 (2001).

²³ See generally Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1487 (effective July 1, 2005)).

²⁴ FED’N FOR CHILDREN WITH SPECIAL NEEDS & THE MASS. DEP’T OF EDUC., *A PARENT’S GUIDE TO SPECIAL EDUCATION*, at <http://www.fcsn.org/parentguide/pgtext.txt> (last visited Nov. 4, 2004). The IEP is also referred to as a contract in THE MASS. DEP’T OF EDUC., *IEP PROCESS GUIDE* 15 (June 2001), available at <http://www.doe.mass.edu/sped/iep/proguide.pdf>: “The IEP is a contract between the school district and the parent. The IEP should reflect the decisions made at the Team meeting and should serve as a contract between the school system and parent(s). For that reason, the document must clearly communicate to parents the needs of their child, the steps the school district will take to address these needs and the progress their child is expected to make during the set IEP period. The IEP must also be written in generally understandable language and free of educational jargon. The IEP does not serve as a guarantee of progress. However, school districts must be aware that IDEA-97 clearly states that a school district must make a good faith effort to assist the student in making progress towards the IEP goals.”

²⁵ See, e.g., SALLY OZONOFF, GERALDINE DAWSON & JAMES MCPARTLAND, *A PARENTS’ GUIDE TO ASPERGER SYNDROME & HIGH-FUNCTIONING AUTISM*, 165 (2002) (“The IEP is best thought of as a contract between parents and schools that outlines what the team agrees is an appropriate education for the child.”).

²⁶ See FED’N FOR CHILDREN WITH SPECIAL NEEDS & THE MASS. DEP’T OF EDUC., *supra* note 25 (“As with any contract you should make sure you fully understand the terms to which you are agreeing and make certain that everything that was agreed to verbally is written in the contract.”).

²⁷ See Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1245-46 (1964-65) (describing the common theory that welfare is a gratuity from the state, subject to whatever conditions the state chooses to apply).

ent.²⁸ Administrators also share the sense that a contract is a higher, more immediate and accountable form of commitment toward children with disabilities than their generic duty to implement state and federal laws.²⁹

Contradicting these guidelines, the federal IDEA does not contain any reference to contracts.³⁰ The Massachusetts Department of Education's lexical choice, as it turns out, is technically inaccurate. An IEP is not a contract in a formal sense. It is simply a statement produced by an educational agency at the end of a formalized collaborative process, defining the appropriate set of special education services for a given child.³¹ Services are technically not a matter of contractual rights, but are educational entitlements conferred by law to each eligible child on the basis of stated criteria and with due process guarantees.³² The IDEA contains elements of a pseudo-contractual nature, such as parents' participation in the IEP drafting process³³ and parental consent as a condition precedent to the implementation of any IEP provisions.³⁴ But such features are increasingly common in the relationship between citizens and administrative agencies and are signs of collaborative governance rather than traits of contractual dealings in a technical sense.³⁵ Special education lawyers, when faced with questions on the legal nature of IEPs, usually downplay the contract analogy and explain to parents that an IEP is not as forceful as a contract when it comes to judicial enforcement.³⁶

²⁸ See FED'N FOR CHILDREN WITH SPECIAL NEEDS & THE MASS. DEP'T OF EDUC, *supra* note 25, at 15.

²⁹ *Id.* at 15 (describing the vital role educators play in devising an IEP and modifying the curriculum so that the student succeeds in the special education program).

³⁰ As defined by Congress, an individualized education program is simply "a written statement for each child with a disability [that includes] a statement of the special education and related services. . . that will be provided. . . ." 20 U.S.C. § 1414(d)(1)(A)(iv) (2005).

³¹ *Id.*

³² See 20 U.S.C. §§ 1414-1415 (effective July 1, 2005).

³³ 20 USC § 1414(d)(1)(B)(i) (effective July 1, 2005).

³⁴ 20 USC § 1414(a)(1)(D)(ii)(II) (effective July 1, 2005) (guaranteeing parental consent before the provision of services).

³⁵ See generally Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (discussing collaborative governance and why current collaborative models fall short of the collaborative ideal). See also Negotiated Rulemaking Act, 5 U.S.C.S. § 571 (2004).

³⁶ The following quotes are indicative of this attitude:

"[The IEP is not] a contract that a parent could sue a teacher under, in a contract case, because the teacher did not produce the outcomes expected on the IEP. But the school has to carry out what is on the IEP." Reed Martin, J.D. At our IEP meeting, the school personnel told me "The IEP was not a contract," Special Education Law & Advocacy Strategies, at <http://www.reedmartin.com/iepmorethancontract.htm> (last visited Nov. 4, 2004).

"Is the IEP a contract? No, not in the true sense of contract law. The IEP is a document written by specified school personnel together with the parents. The IEP does obligate the school district to provide the services identified in the IEP." Nessa G. Siegel Co., LPA, Frequently Asked Questions, at <http://www.nessasiegel.com/faq1.html> (last visited Nov. 4, 2004).

The main difference lies in the fact that, in case of disputes over the correct implementation of the IEP, the stipulated clauses are not interpreted by courts as contracts would be, but rather are read with substantial deference to agency discretion.³⁷

The fact remains, however, that IEPs are as close to contracts as it gets in the realm of public services governed by federal law. The IEP drafting process includes strong elements of bargaining and is open to the influence of market forces, just as private party contractual dealings usually are.³⁸ Because resources are limited, families end up competing for special education services, just as different groups may compete for affirmative-action entitlements.³⁹ IEPs are the product of veritable negotiations between a child's family and the educational team.⁴⁰ According to the IDEA, the team is composed of teachers and specialists—usually employed by the relevant school district, but occasionally hired as ad-hoc consultants.⁴¹ After an indefinite number of optional informal contacts, parents and team sit together to define an IEP draft. The contract metaphor is most forceful at this stage. The two parties, while apparently pursuing the common target of an appropriate education for the child, work on the basis of conflicting subtexts. Even if school personnel are truly committed to the well-being and educational progress of the child—an often true assumption among dedicated administrators—the school district must work within budgetary and political constraints, while parents tend to equate “appropriate education” as mandated by law to “absolutely the best education” for their children.⁴² Parents' ability to take part in an agency's decision-making process at its very beginning gives them much more leverage than they might have in traditional administrative procedures. The outcome of this negotiation, as typical in the contractual context, is the product of such variables as the parties' advocacy power and access to experts.⁴³

Contractual analogies of this intensity are rather unique in administrative law. Private contracts have long inhabited the universe of service

³⁷ See *infra* Section VI.

³⁸ See generally Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1908-09).

³⁹ See Deborah Ramirez, *Multicultural Employment: It's Not Just Black and White Any-more*, 47 STAN. L. REV. 957, 969-74 (1995).

⁴⁰ See U.S.C. § 1414(d)(3) (detailing the factors that the IEP team should consider) (effective July 1, 2005).

⁴¹ See U.S.C. § 1414(d)(1)(B)(IV) (effective July 1, 2005).

⁴² The difference (and frequent confusion) between the two standards is highlighted by OZONOFF ET AL., *supra* note 25, at 166: “Know your legal rights. For example, you do not need to sign the IEP until you agree that it provides what the law promises you Equally important, however, is understanding that the law says your child is entitled to an *appropriate* education, not the *best* education. Just as with regular education, parents may choose to “purchase” what they perceive to be the *best* education for their child through a private school.”

⁴³ See SPECIAL EDUCATION EXPENDITURE PROJECT, *supra* note 6, at 10.

provisions, but such contracts are usually stipulated by public agencies on one hand, and service providers on the other.⁴⁴ In the IEP process, by contrast, the educational agency negotiates directly with service recipients.⁴⁵ Contractual mechanisms also pervade the field of rule-making and standard-setting, where some federal agencies such as the Environmental Protection Agency seek the preliminary consensus of stakeholders rather than relying on the traditional practice of notice and comment.⁴⁶ Rulemaking, however, has built-in characteristics of transparency and publicity that are simply inconceivable in the context of private and confidential IEP negotiations. The investigation of contractual hybrids, increasingly popular in current administrative law literature,⁴⁷ has not yet entered the field of special education, where collaborative governance takes on particularly conspicuous contractual features.

II. CONTRACTUAL MECHANISMS AND DISTRIBUTIVE CONSEQUENCES

Interestingly, IEPs' similarity to contracts tends to increase in direct proportion to families' advocacy power and access to resources. Consider the following illustration:

Family A and Family B have children with identical disabilities, but different bargaining power. In fact, A and B could be snapshots of the same family taken at different points in time, far apart in the steep learning curve prompted by the realization of their child's disability.

In Family A the parents have no bargaining power, because they are either not educated, or because they are too emotionally or financially drained to conduct any meaningful negotiation. Their child has just been identified as eligible for special education services. This family will sign an IEP, as proposed by the school district, without questions or demands. For this family, the IEP is not a contract, but merely a statement of what the educational agency feels legally obliged to do for their child. Because the school district is acting on the basis of a federal mandate, the legal duty rule nullifies any pretense of consideration on the school's part.⁴⁸ The parents are consenting recipients of federally mandated services, and

⁴⁴ See Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-To-Work Services*, 28 FORDHAM URB. L.J. 1559, 1556 (2001).

⁴⁵ See 20 U.S.C. 1414(d)(1)(B) (explaining who is present in an IEP meeting) (effective July 1, 2005).

⁴⁶ See David Dana, *Innovations in Environmental Policy: The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 45 (2000).

⁴⁷ See generally *id.*; see also Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

⁴⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 75 CMT. C, ILLUS. 1 (1979).

their contribution to the district through taxes hardly qualifies as consideration. If anything, being a tax-paying resident is a condition for the school's performance, but again, the contract analogy here is poor. With no pressure from the family, the definition of entitlements is likely to be determined not only by the relevant administrators' understanding of the FAPE standard, but also by budget and resource considerations. The district will therefore offer the family a set of educational services that can be provided with little financial strain. The resulting IEP will be enforceable, but the school system runs no real risk of ever breaching its clauses and facing "contractual" liability.⁴⁹

By contrast, Family B is endowed with financial and educational resources. The parents have firm opinions about what qualifies as "appropriate" education for their child, and have no intention to settle for anything less than the best educational setting available, whether that be in the public education system or in a private school. They are equipped with legal counsel, specialists' reports, and private evaluations of their children, all recommending a complex and expensive set of services. For Family B, the contract analogy is most appropriate. Their IEP is indeed a bilateral exchange of promises. After several meetings and rounds of discussion, the school district offers Family B more educational benefits than the family would have received without "fighting," which is, by Family A's standards, more than the law requires.⁵⁰ What is not caught by the existing legal duty rule is fresh and valid consideration. Moreover, this IEP is likely to be better written, to contain more clearly measurable goals, and to be more easily enforceable against non-compliant districts.⁵¹

What does the family offer in exchange? As is common in settlement agreements, Family B promises not to sue for the next 12 months insofar as the district complies with its IEP obligations. This promise is of real value to the school district—in fact, it has been the parents' implicit and credible threat of litigation that has led the school district to

⁴⁹ See Nessa Siegel, *supra* note 36.

⁵⁰ This follows from the assumption that the services received by Family A already meet the legal standard of FAPE. On the many possible meanings of FAPE, see generally Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613 (1999) (provides overview of judicial interpretation of FAPE and evaluates the post-amendment procedural requirements relating to each child's special education program); Charlene K. Quade, *A Crystal Clear Idea: The Court Confounds the Clarity of Rowley and Contorts Congressional Intent*, 23 HAMLINE J. PUB. L. & POL'Y 37 (2001) (examines and critiques the judicial decisions challenging FAPE in the Eighth Circuit).

⁵¹ Poorly written IEPs are notoriously plagued by indefiniteness problems. See, e.g., Jared L. Graves, *Meeting The Texas Education Agency's Demands for Special Education Students: Is Your Texas School District Performing Adequate ARDs?* 5 TEX. TECH J. TEX. ADMIN. L. 153, at 167 (2004) (explaining that IEPs often contain vague statements, instead of focusing on concrete measurable objectives).

give in to some of the family's perhaps eccentric requests. The DOE's use of contractual terms may not be technically precise and yet it captures, at least in part, the reality of bargaining for special education.

III. PARTICIPATION PROMISES

In at least two ways, the idea of empowering parents in the design of an individualized educational plan for their children is appealing from a distributive viewpoint. First, it guarantees formal equality of opportunities to all families. Second, it allows individual involvement to generate positive externalities for all. Let us examine in turn these two promises of the IDEA, and then explain why they are both so difficult to keep.

A. EQUAL ACCESS TO NEGOTIATION OPPORTUNITIES

If school districts' decisions in matters of services and placement could be challenged only *ex post*, by means of costly hearings or judicial proceedings, families with scarce financial resources would simply have no chance of participation. By contrast, parental involvement in IEP drafting is in principle status-blind. There is sufficient anecdotal evidence of families devoid of financial means, but armed with a profound understanding of their children's needs, with a serious commitment to their education, and with much determination.⁵² Their norm-centered advocacy is independent of social status or wealth.⁵³ Their children may gain full access to IDEA opportunities and obtain no less from an educational agency than children from wealthier families. Since the IDEA ensures that all families will be involved in the definition of an individualized program and formally guarantees equal opportunities to all children with disabilities, its results are certainly preferable to the pre-IDEA regime.

The problem, however, is that the injection of negotiation elements into the picture raises the specter of substantive bargaining inequality and sweeps away the prospects of truly equal opportunities for all children with disabilities. Negotiations take place in the shadow of a very uncertain law. The legal standard of FAPE is unavoidably vague, and it is impossible to know *ex ante* to what services any given child will be deemed entitled if the dispute is litigated.⁵⁴ Since the law is phrased in

⁵² See generally Mothers From Hell 2 (advocates of disability rights), at <http://www.mothersfromhell2.org> (last visited Nov. 4, 2004); see also Susan Sheehan, *The Autism Fight*, THE NEW YORKER, Dec. 1, 2003, at 76.

⁵³ See Mothers From Hell 2, *supra* note 53 (describing themselves as "fighting chipped tooth and broken press-on nail for the appropriate education, community acceptance, desperately needed services, rights of and entitlements for individuals with disabilities").

⁵⁴ See Charlene K. Quade, *supra* note 50, at 49-55.

terms of highly flexible standards, strategic bargaining is encouraged rather than discouraged,⁵⁵ and families will have incentives to engage not only in norm-centered argumentations (invoking rules, citing precedents, and producing reasoned elaborations) but also in strategic behavior involving “the exercise of power, horse trading, threat, and bluff.”⁵⁶ This is where having power and plenty of horses to trade makes all the difference, because the threat of litigation is more credible when it comes from well-off families. Therefore, the chance for such families to win a better bargain is much higher.

Another reason why equal access to the IEP process is an empty shell is the fact that the neediest families may intentionally renounce the very opportunity of negotiating and even resist the identification of their child’s disabilities.⁵⁷ Often, self-exclusion begins at the early stages of identification.⁵⁸ Accepting the fact that one’s child is unquestionably disabled is not easy. The stigma that accompanies a disability diagnosis causes some parents to keep their children out of the pool of special education recipients.⁵⁹ This happened regularly in the past, when children with special needs were systematically labeled as mentally retarded—a label that is intuitively unappealing.⁶⁰

Today, by contrast, the IDEA fosters the laudable philosophy of inclusion and builds upon the values of learning diversity. As a result of growing public awareness, improved disability culture, and embellished jargon, there is increasingly less emotional resistance to special education labels.⁶¹ Paradoxically, it is in this laudable form of cultural evolution that one finds the first kernel of inequality in the practice of special education. Disability is more likely to remain a stigma in less well-off neighborhoods, which are more remote from professional support and less well-served with informational services.⁶² When information is inadequate, families may have a tendency to reject the suggestion that their child might need an evaluation and eventually an IEP.⁶³ A family’s like-

⁵⁵ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969 (1979), for a clear illustration of this phenomenon in the context of divorce settlements.

⁵⁶ *Id.* at 973 (quoting Melvin Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976)).

⁵⁷ See KELLMAN AND LESTER, *supra* note 3, at 86.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ To this day, the Massachusetts Department of Mental Retardation (DMR) provides handicapped residents with grants and other services on the basis of very little screening; however, the ugliness of the DMR acronym is a very effective gate-keeper. See STEPHEN R. SCHROEDER ET. AL., RESOURCE NETWORK INT’L, USAGE OF THE TERM “MENTAL RETARDATION:” LANGUAGE, IMAGE, AND PUBLIC EDUCATION 16 (2002).

⁶¹ *Id.* at 92.

⁶² See KELLMAN AND LESTER *supra* note 2, at 86.

⁶³ *Id.*

likelihood of applying for IDEA services is often proportional to their access to professional networks. For example, recent immigrants in urban areas are likely to be hostile to the idea of special education, which they often deem stigmatizing and potentially discriminatory.⁶⁴ The equalizing effect of opportunities stemming from parental involvement may therefore be completely nullified in practice.

B. POSITIVE EXTERNALITIES

Other equalizing forces are also at work in the IDEA design. When families with strong bargaining power manage to negotiate a very high standard of FAPE for themselves, less well-off children may ultimately benefit from such efforts. Conscientious administrators will not allow for great discrepancy between forcefully negotiated educational plans and the service regimes designed in the absence of parental advocacy. As a result, outspoken parents may serve the interests of all children in the school district and, by informational spillover, of the nation. In this light, the distribution of resources among children with disabilities may not be a zero-sum game. It may also be the case that the injection of further special education resources into a classroom benefits typical students as well. The advocacy work of some parents may pay dividends for everyone; it raises the standards of appropriate special education and augments the rights of all children. The injection of contractual mechanisms in the allocation of entitlements may enhance the know-how and quality of all services, serving the interests of all children with disabilities in line with the normative spirit of the IDEA. The outcome may not be absolutely fair, but it may at least be Pareto-optimal.

However, the problem with such uplifting prospects is that the supply of special education services is not sufficiently elastic. The hard negotiating work of Family B is likely not to generate any positive externalities for Family A whenever the educational agency has less than infinite human and financial resources.⁶⁵ Administrators operate under serious financial constraints, and not every family will be allowed to win generous applications of the flexible FAPE standard. Therefore it is inevitable that resources will be diverted away from children of less forceful parents.⁶⁶ This mostly unintended diversion is at least in part a by-product of the IEP's contractual features. Once again, the empowerment of families in the process, while laying the basis for a laudable form of participatory democracy, reveals much inequitable potential.

⁶⁴ *Id.*

⁶⁵ See discussion on funding *infra* Section VIII.

⁶⁶ See KELLMAN AND LESTER *supra* note 2, at 89 ("[T]he most aggressive parents... frequently were able to have their children tested immediately, both by making personal contacts with relevant administrators and by *being* aware of their legal rights to diagnosis.").

IV. PARENTAL INVOLVEMENT AND LIMITED SCHOOL CHOICE

The current economic understanding of general education markets is based on the assumption that public schools can coexist and compete with private schools in terms of both quality and quantity of educational services.⁶⁷ In this context, the most obvious form of parental involvement is the choice of an appropriate school for their children; a choice on which the current presidential administration places enormous emphasis.⁶⁸ By voting with their feet, parents express their judgment on the relative worth of public versus private schools and on the relative value of different public school options. Parents tend to have strong opinions about both these issues.⁶⁹

In the context of special education, parents' involvement takes on a different meaning altogether. Public schools offer something that most private special-education schools do not: the pedagogical model of inclusion (part-time or full-time), which allows students with disabilities to be surrounded by typically developing peers.⁷⁰ In fact, inclusion is mandated by law whenever possible.⁷¹ This inclusion model is most appealing to parents of children with relatively minor disabilities who are more likely to be mainstreamed into regular education programs.⁷² Private schools, on the other hand, may offer a high degree of specialization for certain disabilities, and when they do, they are intuitively not appealing to the families of typically developing children. Inclusion models exist but are infrequent in the private sector.⁷³ It is only by ignoring this major point that researchers may see the privatization of special education as the cure for parents' dissatisfaction.⁷⁴

Parents who would have otherwise chosen a private school which offered the model of inclusion are often stuck in a public school setting and can only voice their hopes and discontent within the IEP team.⁷⁵

⁶⁷ See DANIEL MCGROARTY, *supra* note 22, at 292.

⁶⁸ *Bush Calls Ruling About Vouchers a Historic Move*, N.Y. TIMES, July 2, 2002 at A1.

⁶⁹ See DANIEL MCGROARTY, *supra* note 22, at 294-95.

⁷⁰ See KELLMAN AND LESTER *supra* note 2, at 94-102.

⁷¹ See 34 C.F.R. § 300.550(b)(1) (2004) (requiring that to the maximum extent appropriate, children with disabilities must be educated with children who are not disabled).

⁷² See Therese Craparo, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, at 496-500 (2003) (describing several instances of parents' battle for inclusion against school district recommendations).

⁷³ See OZONOFF ET AL., *supra* note 26, at 169 (explaining that private schools are not obliged to accommodate children with special needs so that they can be included in regular programs).

⁷⁴ See Jay P. Greene & Greg Forster, *A New Model for Special Ed: Voucher Plan Could Ease Mass. Woes*, BOSTON HERALD, June 15, 2003, at A48 (describing Florida's school choice programs as a response to this dilemma).

⁷⁵ *Id.*

Collaboration with an agency becomes the only outlet for manifesting their views and preferences in matters of educational strategies. The package that the agency provides may be the only one containing the desirable feature of inclusion, and will therefore be accepted, even though it may lack many valuable accessories that the parents would have willingly paid for if inclusion were available in private schools.

IEP negotiations are the tools by which parents put pressure upon the education provider to add such accessories to the package. It is to be expected that the force of such negotiations, measured in terms of lawyers' or specialists' fees, will be directly proportional to each family's willingness and financial ability to privately purchase the package of their choice. Such factors should have no impact on the ultimate quality of an IEP; however, they are certainly not irrelevant in practice, as discussed above.

V. CONTRACT LAW AND DISTRIBUTIVE ANALYSIS

Given that the regressive distribution of educational resources is, to a considerable extent, a by-product of the system's reliance on contractual mechanisms, it is worthwhile to look for analogous distributive phenomena in the proper realm of contract law. This search yields some false positives, but also some interesting insights.

Contractual discrimination paradigms find no immediate parallel in the IEP context.⁷⁶ In the car sales example famously analyzed by Ian Ayres, the negotiation strategies pursued by all buyers were identical, and the fact that certain categories of buyers were systematically penalized had an obvious flavor of discrimination.⁷⁷ Here, the reality of differentiated deals can be readily explained without suspecting any discriminatory animus in agency conduct. First, there are obvious differences between the active negotiation strategy of Family B and the passive role of Family A. Second, the agency may know enough about the families' status to take Family B's threat of litigation more seriously than Family A's and be subliminally affected by such knowledge. The word "discrimination" can be used in this context as well,⁷⁸ but in a much

⁷⁶ See 42 U.S.C. §§ 1981-1982 (2000) (guaranteeing the same right to contract and buy property to every citizen). As there is no intentional racial discrimination in the IEP system, or a denial of the right to participate in the contractual process, there would be no violation of the civil rights law.

⁷⁷ See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819-20 (1991).

⁷⁸ The following passage illustrates in broad terms this kind of "rational" discrimination, identified by Ayres (*Id.* at 842-3) as profit-maximizing strategy rather than social bias: "[C]ontracting involves discrimination. . . . [W]here I choose to contract with a particular party, I may set different terms of trade than I would if I were entering into a similar transaction with somebody else—for example, because the party with whom I am contracting presents more risks to me or imposes a greater cost on me than alternative contracting parties."

looser sense. Contractual discrimination due to lack of money, initiative, or simply grit, is notoriously non-actionable.⁷⁹

The concept of regressive distribution, borrowed from fiscal jargon and used throughout this article, seems descriptively more appropriate. In so far as entitlements are withheld from needier families and correspondingly allocated to those that are better-off, distribution of public resources is indeed regressive. But what if regressive distribution is the unintended by-product of legislative intervention, specifically designed to correct economic inequalities, or at least to operate above market forces? The literature exploring the distributive consequences of compulsory contract terms has much to say on this point.

Beginning in 1971 with the work of Bruce Ackerman on housing codes, the analysis of compulsory contract terms has focused on the disparate impact of mandatory product warranties on different types of buyers, and has highlighted patterns of redistribution from marginal to infra-marginal consumers.⁸⁰ Reduced to its bare bones, the core intuition of that literature is as follows: whenever there are marginal consumers ready to give up a product altogether if its price rises significantly, the price of that product will not be seriously affected by the imposition of mandatory warranties.⁸¹ Sellers will hesitate to pass the whole cost of the warranty onto the consumers for fear of losing the marginal ones,⁸² and thus may only raise the price of their product by a small amount.⁸³ Marginal consumers who place zero value on the warranty will continue to buy the product because the price increase is modest and no immediate substitutes are available.⁸⁴ They will thus pay more than they did before, in exchange for something of no value to them.⁸⁵ By contrast, infra-marginal consumers who place a high value on the warranty will obtain it at a relatively low cost.⁸⁶ Marginal consumers, often the worst-off to begin with, will subsidize infra-marginal ones.⁸⁷ The pro-consumer

MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 188 (Harvard University Press 1993).

⁷⁹ See, e.g., Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1306 (1993) ("[The US Supreme] Court periodically warns that any judicial intrusion into allocative decisions, expressive as they are of majoritarian preference, would harm the foundations of democracy itself.").

⁸⁰ See generally Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

⁸¹ See Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 374 (1991).

⁸² *Id.* at 384-85.

⁸³ *Id.* at 385.

⁸⁴ *Id.* at 385.

⁸⁵ *Id.*

⁸⁶ See Bruce Ackerman, *supra* note 80, at 1105.

⁸⁷ See Richard Craswell, *supra* note 81, at 373.

logic of the mandatory term can still be satisfied in so far as buyers as a whole obtain a distributive advantage over sellers.⁸⁸ However, within the pool of consumers, redistribution may run against the progressive logic of the mandate and yield, in fact, a regressive result.⁸⁹

This analysis applies, with due adjustments, to the context of special education. The participation rights conferred upon parents in the formulation of IEPs bear strong analogies with mandatory contract terms.⁹⁰ The pool of service recipients is a highly heterogeneous group of consumers, only some of whom are capable of exploiting the IEP process to the fullest. As discussed above, Family B gains much from its bargaining opportunity exactly because Family A derives zero value from it. While children with disabilities are better off as a group, regressive subsidization occurs between the two sub-groups of benefit recipients.

This kind of subsidization begs for correction when it is the unintended by-product of progressive mandates. The regressive distribution allowed for by the IEP process is, indeed, incompatible with the spirit of the IDEA. Children's disabilities manifest themselves across the social spectrum. Sometimes they strike like lightning in an otherwise perfectly blue sky. Some other times they land on a pile of emotional and economic misery. The IDEA does not aim at corrective justice on this front, but neither should it allow for less aid in the latter case than in the former.

The point is not to jettison the very idea of compulsory contract terms or federal mandates, but rather to study the conditions which allow for certain redistributive aberrations.⁹¹ For our purposes, this prompts the investigation of other traits of the system. As we shall see, the use of pseudo-contractual mechanisms in the determination of entitlements might not lead *per se* to the described undesirable results. The problem is that, in the field of special education, private bargaining combines with endemically unaccountable administrative standards and funding constraints. It is this "perfect storm"⁹² that ends up penalizing the neediest families.

⁸⁸ See Bruce Ackerman, *supra* note 80, at 1105.

⁸⁹ *Id.*

⁹⁰ For a forceful parallel between compulsory contract terms and the judicial definition of due-process rights in matters of welfare entitlements, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MARYLAND L. REV. 563, 595 n.12 (1982) (discussing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

⁹¹ See generally Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

⁹² SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA*. A "perfect storm" is a combination of meteorological conditions creating a high-powered weather system. Here, socioeconomic and government factors combine with the bargaining elements of the IEP process to generate inequitable distribution of educational services.

VI. ACCOUNTABILITY PROBLEMS

Since family involvement in the IEP process is useful and even necessary in so many ways, it would be desirable to capitalize on its values while deterring all potential distortions by means of appropriate mechanisms of accountability. On this front too, however, the system is less than perfect, because the IEP process is inherently opaque and special education is refractory to objective measurement. Let us examine, in turn, these two issues.

A. TRANSPARENCY VERSUS PRIVACY

Wherever models of collaborative governance are successfully applied, the regulatory outcome of business-agency negotiations is always made known, either to the public at large or to a considerable number of stakeholders.⁹³ The possibility for cross-references and comparisons is built into the regulatory processes.

Things are different, however, in the case of IEPs. Families are entitled to absolute confidentiality, and the outcome of their negotiations with the competent regulatory agencies is kept secret.⁹⁴ In any given classroom, only the school personnel are entitled to full disclosure of the special needs of all their students.⁹⁵ Parents are not allowed to make comparisons between IEPs, since comparison would involve disclosure of other families' issues, and disclosure is against the law. For privacy reasons, parents have no way to know which services other families are receiving and, therefore, no way to identify distributive inequalities. Correction is the exclusive prerogative of agencies, and, therefore, it is impossible to remedy cases of agency failure or capture.

B. FLEXIBLE STANDARDS AND THE PARADOX OF DISCRETION

Even if comparisons were allowed, there would be no *tertium comparationis*. Because children are unique, and the standards of appropriate education are intrinsically *ad hoc*, there are no shared features or common platforms of reference on the basis of which a comparison between two IEPs could be made.⁹⁶ Flexibility is a blessing of the system and a tribute to the sophistication of its designers, but it is also a curse when it comes to monitoring. A major break-through brought about by the IDEA was the legislative acknowledgement that disabilities come in a wide variety with varying degrees of intensity, and that no child is like any other. The IEP process was expressly designed to produce a unique assessment

⁹³ See David Dana, *supra* note 46, at 37.

⁹⁴ See generally Peter A. Walker & Sara Jane Steinberg, *Confidentiality of Educational Records: Serious Risks for Parents and School Districts*, 26 J.L. & EDUC. 11 (1997).

⁹⁵ 34 C.F.R. § 300, 560-.76 (2003).

⁹⁶ See Therese Craparo, *supra* note 72, at 522.

of each child's special needs, with agency discretion and parental involvement intended to allow for truly customized services. The drawback is that, in this context, because all children are different, unequal treatment is, by definition, justified.

Even if aware of actual discrimination, parents bear daunting burdens of proof. When Family A is denied services that Family B is instead enjoying, it is presumed by law that this choice depends exclusively on objective differences between the needs and learning aptitudes of their children.⁹⁷ Family A has no way to rebut that presumption by means of factual comparisons and must fight its battle focusing exclusively on what is "appropriate" for their child. The catch is that appropriateness is once more a matter of agency discretion. The standard of judicial review is by no means intrusive, at least when the agency has determined that, in one way or another, a child's educational needs can be accommodated in a particular educational setting.⁹⁸

The Federal No Child Left Behind Act of 2001 makes standardized testing (with minimal adaptations) mandatory for most children on IEPs.⁹⁹ Tests might work as objective measures of performance and as benchmarks of accountability, and unusually poor scores in given districts could indeed signal an aggregate deficit of appropriate special education. However, no single family would benefit from such information. Individual test failure may be due to many other factors besides inadequate service delivery.¹⁰⁰ Conversely, relatively good scores do not demonstrate that a relatively successful child has been given the chance to actualize her full potential. Families may have been treated more or less equally in any given district, but they just have no way to know it, either *ex ante* or *ex post*.

⁹⁷ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982).

⁹⁸ The Individuals with Disabilities Act, 20 U.S.C. § 1416(e)(8) (effective July 1, 2005), provides for a "substantial evidence" standard, which the Supreme Court has interpreted in a rather deferential fashion. See *Rowley*, 458 U.S. at 207 (1981) ("[C]ourts must be careful to avoid imposing their view of preferable educational methods upon the States."). For a discussion of the problematic scrutiny of unequal treatment in areas of high agency discretion, see RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMAN, *ADMINISTRATIVE LAW, CASES AND MATERIALS* 736-7 (4th ed. 2002). Judicial review is much stricter when parents appeal the agency's choice of a separate placement; the mandate of inclusion in the "least restrictive environment" is very forceful and deviations are often scrutinized *de novo*. See Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 658-9 (1995).

⁹⁹ See No Child Left Behind Act, 20 U.S.C. § 6311(b)(3) (2001) (requiring that the states test all students' performance). See, e.g., Massachusetts Department of Education, Requirements for the Participation of Students with Disabilities in MCAS, (2004) at <http://www.doe.mass.edu/mcas/alt/spedreq.pdf>.

¹⁰⁰ See Cory L. Shindel, *One Standard Fits All? Defining Achievement Standards for Students with Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J.L. & POL'Y 1025 (2004).

VII. LIMITS OF COLLABORATIVE GOVERNANCE

In spite of its pseudo-contractual features, the IEP process remains a matter of administrative entitlements implemented by governmental agencies. Its distinguishing trait is the unusually intense participation of service recipients in the process of service design and delivery. In many ways, this trait characterizes various forms of agency work that are commonly identified as instances of collaborative governance.¹⁰¹

Legal scholars have recently taken much interest in collaborative governance, based on the involvement of all interested parties in the work of administrative agencies, as a plausible cure for many regulatory inefficiencies.¹⁰² This lawyerly insight goes hand-in-hand with the development by contemporary political theorists of the model of deliberative democracy, which adopts extensive grass-roots participation in decision-making as a formula for optimizing the substance and legitimacy of regulatory outcomes.¹⁰³ Examples of the convergence between deliberative democracy theories and faith in collaborative governance exist in the field of education law. Scholars have celebrated the current U.S. educational system, with its emphasis on parental choice, decentralized teaching practices, and multiplicity of models, as an excellent laboratory for polyarchic experimentation.¹⁰⁴ The concept of accountability through testing, recently espoused by the No Child Left Behind Act, has also been hailed as the gateway to the development of best practices by way of data exchange and methodological comparisons.¹⁰⁵ Within this logic, the IEP drafting process, involving families as active participants with significant due process rights, might seem on its face to be the substantiation of deliberative democracy ideals. At least with respect to the field of special education, the crusade during the 1990s for parental involvement has been thoroughly successful.¹⁰⁶ The IDEA allows parents to be a major force in the design of individualized programs for their children. Outcomes are therefore custom-tailored (with no redundant services) and aimed at addressing the specific needs of each child.

The problem with this picture, however, is its tendency to "see a world in a grain of sand and heaven in a wild flower."¹⁰⁷ The foregoing

¹⁰¹ See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

¹⁰² *Id.* at 547.

¹⁰³ See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

¹⁰⁴ See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

¹⁰⁵ *Id.* at 283.

¹⁰⁶ Mary Sue Johns, *The New Crusade: Parent Involvement*, 94 SCH. ARTS 16 (1994).

¹⁰⁷ Mark Tushnet, *A New Constitutionalism for Liberals?* 28 N.Y.U. REV. L. & SOC. CHANGE, 357, 358 (2003). Tushnet borrows this poetic metaphor from William Blake to de-

pages have told a cautionary tale of participatory democracy. The field of special education can be mired by instances of both agency capture and agency failure in the gathering and processing of parental input. Preliminary evidence depicts a landscape of disturbing inequalities, which are systemically hard to pin-point and resistant to correction.¹⁰⁸

The promising traits of participation can be easily offset in the reality of special education. Formal access to negotiation opportunities may become an empty shell, and positive externalities may prove simply impossible to attain given the low elasticity of supply of educational services for children with disabilities.¹⁰⁹ Accountability is endemically scarce, and therefore it is virtually impossible to detect and cure the many instances of substantive inequalities, leading the neediest families to get the least amount of educational benefits from the system.¹¹⁰ The elaboration of best practices by way of comparison—a crucial element of polyarchic democracy—is rendered impossible by the natural opacity of the system. Rather than being a triumph of collaborative governance, the IEP process provides a useful check-list of drawbacks, doomed to defy the rosy predictions of collaborative governance scholars.

VIII. FLEXIBLE FUNDING AND BUDGET CONSTRAINTS

The broad issue of inequality across states or districts in the funding of public education is beyond the scope of this essay.¹¹¹ With the specific goal of shedding light on the inequalities that may occur within each district, one must rather focus on the budgetary constraints faced by any given educational agency in the determination of special education entitlements.

The IDEA provides for federal funding of special education. The amount of federal grants is, in principle, directly correlated to the number and the seriousness of identified disabilities in each state or district, and should therefore increase proportionally when more children necessitate the provision of expensive services.¹¹² In practice, much of the funding

scribe the overly enthusiastic endorsement of the No Child Left Behind Act by Liebman & Sabel, *supra* note 104.

¹⁰⁸ See *supra* notes 6 and 7.

¹⁰⁹ See *supra*, Sections II-III.

¹¹⁰ See *supra*, note 6.

¹¹¹ The U.S. Supreme Court famously decided not to intervene in matters of school finance. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Since then, State courts and legislators have struggled to strike the proper balance between equity concerns on one hand and the politics of tax-based local control on the other.

¹¹² See 20 U.S.C. § 1411(a)(2) (effective July 1, 2005). The maximum federal grant amount is obtained by multiplying the number of eligible children by 40% of the average cost of per student expenditure in public schools. In reality, this maximum funding limit is never reached. The proposed 2006 budget, while cutting Department of Education spending by 1%, requests 4.8% more money for special education. Proposed Budget of the United States Gov-

of special education is local, and bears on the limited finances of school districts.¹¹³ Local educational agencies are obliged to serve all special education children as identified along IDEA guidelines, and to fund all the services recommended by their IEPs in order to meet the FAPE standard.¹¹⁴ The problem is that, in spite of the intended flexibility of this design, the supply of special education resources is relatively inelastic.¹¹⁵ Because funding is limited, zero-sum dynamics in the distribution of finite resources are unavoidable.

In the specific context of special education, the lack of funding elasticity is aggravated by a number of circumstances. Like that of most government programs, IDEA funding is under strenuous competitive pressure in political arenas at the local, state, and Federal level. Special education is a resource in insufficient supply and high demand. The IEP family receives something others will not. Their child gets truly individualized attention in a public school, at no cost. Neighbors, same-state tax payers, and, to a lesser extent, the nation at large, subsidize that child's education. Not everyone can aspire to an IEP.¹¹⁶ The law makes it clear that social, racial or educational disadvantages are not disabilities for IEP purposes.¹¹⁷ Children whose impaired performance at school is mostly due to "social maladjustment," poor knowledge of the English language

ernment: FY 2006, available at <http://a255.g.akamaitech.net/7/255/2422/07feb20051415/www.gpoaccess.gov/usbudget/fy06/pdf/budget/energy.pdf> (last updated February 11, 2005). However, even with this increase, special education would still be funded at roughly half of the authorized 40% level. President Bush's Proposed FY 2006 Federal Budget for Education, National School Board Association, available at <http://www.nsba.org/site/print.asp?TRACKID=&VID=2&ACTION=PRINT&CID=892&DID=35292> (last accessed Feb. 15, 2005).

¹¹³ Only part of the costs of special education mandates come from federal grants. On federal and state funding of local educational agencies for the implementation of special education mandates, see Assistance to States for the Education of Children with Disabilities, Subpart G-Allocation of Funds; Reports, 34 C.F.R. § 300 (2004).

¹¹⁴ In reaction to the chronic failure of the IDEA funding provisions and to state and local struggles to keep up with rising special education costs, the House Committee on Education and the Workforce considered a proposal "to amend the Individuals with Disabilities Education Act to provide full funding for assistance for education of all children with disabilities" ("Full Funding for IDEA Now," H.R. 823 (2003)). Another version of this bill was proposed as an amendment to the IDEA reauthorization bill (H.R. 1350 (2003)). This amendment would massively increase special education funding to the 40% level promised 30 years ago at first passage of the IDEA. However, the amendment was eventually voted down by a narrow margin.

¹¹⁵ See also Gregory F. Corbett, *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, 646-47 (1999).

¹¹⁶ In order to be on an IEP, a student must have one among a close list of possible diagnoses. Each state drafts its own list of requirements. The requirements are more stringent than those triggering Section 504 of the Rehabilitation Act of 1973, as amended. 29 U.S.C. § 794 (2000).

¹¹⁷ 20 U.S.C. § 1401(30)(C) (effective July 1, 2005).

or lack of discipline are expressly left out.¹¹⁸ In 1997, Mark Kelman and Gillian Lester pointed out that this trait of the system leads to regressive distribution of educational resources, penalizing low-income families.¹¹⁹ According to their analysis, individuals with non-diagnosable socio-economic disadvantages systematically subsidize special education recipients in ways not always warranted by reasons of substantive justice. Kelman and Lester abstained from prescriptive conclusions. In reaction to their findings, however, other legal scholars have opposed the heavy funding of special education as unwarranted by policy reasons¹²⁰ or as plainly discriminatory.¹²¹

In this scenario, it is obvious that funding cannot be proportional to the actual number of entitled recipients and to the cost of all necessary services, but will ultimately reflect the inelastic value placed on hope, learning diversity, and inclusion by the relevant constituency.¹²² At any point in time and at any level of governance, a relatively fixed portion of public funds will be set aside for the education of children with disabilities. The funding of special education can expand or contract depending on political will, but from the viewpoint of an agency engaged in the definition of specific entitlements in a specific school year, funding is never unlimited.

Additional constraints arise from the lack of precise economic justifications for special education expenditures. Disabilities are particularly costly matters.¹²³ The IDEA obliges schools to engage in the expensive business of educating atypically developing children. Analogously, the Americans with Disabilities Act (ADA) expects employers to allow adults with disabilities into their workforce even if this involves providing for expensive accommodations.¹²⁴ However, one difference particularly defies the usefulness of such analogies and begs the development of

¹¹⁸ See, e.g., 603 CMR 28.00: SPECIAL EDUCATION, at 603 CMR 28.02 (f) (2005).

¹¹⁹ See KELMAN & LESTER, *supra* note 2, at 197.

¹²⁰ See Tamara J. Weinstein, *Note: Equal Education Opportunities for Learning Deficient Students*, 68 GEO. WASH. L. REV. 500 (2000) (proposing that diagnostic criteria be extended to encompass all sorts of "learning deficiencies," including those due to students' socio-economic disadvantages). Weinstein's proposal is appealing as fundamentally egalitarian, but if not backed up by *ad hoc* funding, it does imply a significant dilution of resources and arguably defies the very meaning of special education.

¹²¹ See generally Gregory F. Corbett, *supra* note 115.

¹²² The IDEA's goal to render children with disabilities "prepared to lead productive and independent adult lives, to the maximum extent possible" is clearly inspirational. 20 U.S.C. § 1400 (c)(5)(A)(ii) (effective July 1, 2005).

¹²³ The per-pupil cost of special education is notoriously much higher than that of general education. One calculation puts the expenditure per special education student at \$12,480 per year, while the per pupil cost of a regular education student is \$6,573. See SPECIAL EDUCATION EXPENDITURE PROJECT, *supra* note 6, at 16.

¹²⁴ The distributive consequences of ADA mandates have now become the subject of insightful research. See generally Christine Jolls, *Accommodation Mandates*, *supra* note 91.

ad hoc distributive inquiries in the IDEA context. ADA mandates pertain to individuals with disabilities who have already come of age and whose value to the workforce is readily ascertainable.¹²⁵ Costs can be and are often justified by careful cost/benefit analyses, comparing the financial burden of providing accommodations with the advantage of re-absorbing adults into the workforce. It is feasible to compute not only the cost of all accommodations required, but also the social benefit of keeping a known number of people with disabilities off welfare.¹²⁶

By contrast, in matters of children's special education, expenditure justifications cannot rely on exact numbers.¹²⁷ Each time we offer a child special education, we certainly buy hope and comfort for that child's family and espouse a model of society that values inclusion and diversity. But, we cannot know for sure how profitable this investment will prove in terms of sheer economic efficiency. There is no precise promise of welfare cost savings or of net societal gains. We do not know how happily productive a child with a disability will become as a result of early intervention or appropriate schooling. Funding special education involves a leap of faith, and such leaps are especially vulnerable to political pressure. When costs rise beyond politically acceptable levels, administrators are bound to redefine both identification and service standards to make means meet ends. In this context, zero-sum dynamics are unavoidable. It is for this reason that controlling the fairness of the game is a necessary, non-deferrable step.

IX. THE WAY AHEAD

The regressive distribution of educational resources within the pool of children with disabilities is the result of three concurrent traits of the IDEA design: private bargaining, the lack of transparent, accountable standards, and the insufficient elasticity of service supply resulting from budget constraints. For the reasons discussed in the preceding section, budget constraints are unavoidable. The search for systemic improvements must therefore focus on mechanisms of bargaining and accounta-

¹²⁵ *Id.* at 231-233.

¹²⁶ Who should bear such accommodation costs is a different question. *See generally* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

¹²⁷ Many other differences can obviously be drawn between IDEA and ADA funding issues. The analysis of accommodation mandates involves complexities that are unknown in the field of special education. Private schools are under no duty to serve children with disabilities; the problem of subsidizing with private money the social cost of disabilities—a problem at the heart of these economic models—simply does not arise in the context of special education. Subsidization of special education costs with taxpayers' money does indeed occur, but in a much less direct and much more diffuse way than is contemplated in the ADA's design.

bility. Let us now examine such mechanisms with the goal of sketching plausible corrections or at least preventing further structural errors.

A. CONTRACT LESSONS

Because the negotiation process leading to the formulation of an IEP is so crucial, proper distribution may arguably be achieved by improving the equities of the bargaining process. This means making the process uniformly accessible and reaching out to all families so as to equip them with real “bargaining” tools. The IDEA itself contemplates mechanisms for the participatory empowerment of all parents.¹²⁸ The limitation of this strategy, already implemented in many ways, is that it reproduces the Ackerman paradigm.¹²⁹ Information, subsidized access to representation, and enhanced opportunities for involvement are still likely to be quite effective for medium-income families, but less so for those with little money and even less time.

Contract analogies may suggest other strategies as well, such as increased judicial scrutiny of agency determination. The judicial review of IEPs is currently characterized by a high degree of substantive deference to administrative discretion.¹³⁰ By contrast, the presence of bold contractual elements in the IEP process might warrant a more stringent standard of review.¹³¹ Like trial judges in contract disputes, reviewing courts might be given access to hard distributive data and might be empowered

¹²⁸ See Parent Training and Information Centers, 20 U.S.C. § 1471 (2003). This law makes grants available to parent organizations to support parent training in bargaining, understanding special needs children, appreciating procedural safeguards, reading the IDEA, and participating in school activities. The grants are designed to cater “particularly [to] underserved parents and parents of children who may be inappropriately identified.”

¹²⁹ See *supra*, Section V.

¹³⁰ See *supra*, Section VI.

¹³¹ The US Supreme Court in *Board of Education v. Rowley* famously addressed this issue. See *supra* note 37, at 198. The dialogue between Justice Rehnquist (for the majority) and Justice White (dissenting) is a powerful rendition of the unresolved tension between administrative discretion and contractual autonomy within the IEP logic. In *Rowley*, the U.S. Supreme court was called for the first time to interpret the 1975 Education for All Handicapped Children Act and to clarify the concept of “appropriate education.” Lower courts had begun to read into the Act a broad imperative of non-discrimination, requiring that all children receive the same opportunity to reach their maximum potential. By this potential-maximizing logic, States and their educational agencies would be bound to strict substantive standards, fully reviewable *de novo* in court. *Id.* at 217. In a passionate dissent, Justice White endorsed entirely the lower courts’ approach. *Id.* at 212-214. The Court’s majority adopted instead a minimal substantive standard of “appropriateness.” In Rehnquist’s words, “the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.* at 192. The post-*Rowley* legislative developments, as interpreted by the courts, have imposed more stringent constraints upon agency discretion, specifying that children with disabilities are entitled not only to minimal accommodations in public schools, but also to real educational opportunities. The *Rowley* decision, however, still sets the standard of deference. See *Fort Zumwalt School District v. Clynes*, 119 F.3d 607 (8th Cir. 1997).

to second-guess agencies on this basis. IEPs could be interpreted with the same range of judicial discretion and gap-filling power enjoyed by common-law courts in contract cases. This strategy, however, raises questions of institutional competence. By law and in practice, agencies are better suited than courts to the task of gathering statistical information and comparing massive amounts of IEP findings.¹³² Moreover, judicial review happens quite late in the process, and depends upon litigant initiative and relies on resources that may be, to reiterate, unavailable to families of the "A" type. It is therefore preferable to inject distributive considerations into the IEP process at a point in time prior to judicial review, coinciding with the earliest possible stages of IEP formulation or, at the very latest, with the intervention of hearing officers.

B. ADMINISTRATIVE DISCRETION AND DISTRIBUTION

As observed, the flexible standard of "appropriate education" fails to constrain agency discretion and leads to unintended inequalities. IEP processes are proper instances of what Matthew Diller has termed "the new entrepreneurial model of benefit administration," characterized by de-legalized discretion and providing no assurance of equal treatment.¹³³ The system is certainly in need of firmer guidelines. However, reverting to the legal-bureaucratic model developed in the 1960s would be a radically anti-climatic move.¹³⁴ Because the individualization of educational plans has proven essential to the success of special education, administration by hard rules is simply implausible at this stage.

The above discussion suggests that distributive analysis may inject firmer guidelines in this process without unduly rigidifying the interaction between recipients and agencies. Numbers may not provide answers, but they certainly raise good questions and point at instances of

¹³² See Susan Rose-Ackerman, *Progressive Law and Economics and the New Administrative Law*, 98 YALE L. J. 341, 347 (1988) (criticizing the fact that U.S. administrative law is excessively focused on judicial review). "So long as courts remain at the center, the majority of legal commentators can ignore issues related to economic efficiency and political choice." *Id.* See also Therese Craparo, *supra* note 72, at 470 and *passim* (arguing for judicial restraint in matters of special education).

¹³³ See generally Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126-28 (2000). "The new [entrepreneurial model of benefit administration tends] to give much greater power to ground-level employees. These employees are accorded broad discretion to make judgments in individual cases. They are encouraged to influence recipients through persuasion and advice and have broader powers to sanction recipients viewed as uncooperative. A system that was principally legal in nature is becoming delegatized. . . . [I]n the absence of rules, the new administrative regime provides no assurance of equal treatment. Indeed, the only existing study of the issue found startling disparities between the treatment of African-American and white recipients." (emphasis added)

¹³⁴ The legal-bureaucratic model emphasized uniformity and predictability rather than individualization and relied on fixed rules rather than professional judgment. See *id.* at 1129.

unintended redistribution within the pool of special education students. Placing children with very severe needs in private residential facilities is notoriously a much more expensive option than assigning them to separate special education classrooms in public schools. For instance, in Massachusetts during the school year 2002-2003, about 27% of all the special needs students were of a race or ethnicity other than white. With respect to this baseline, these children were largely over-represented in separate classrooms, but significantly under-represented in private residential facilities.¹³⁵ The numbers are striking enough to deserve further investigation. If the rate of severe disabilities among these children is not significantly lower, what justifies the low incidence of costly residential placement? Many different factors, including cultural aversion to empty nests, might explain these results. But, part of the answer might be that certain families receive on average less support from public agencies when pursuing the most costly educational options. This pattern is most probably unrelated to discriminatory animus, but likely motivated by different levels of investment in the IEP process and other measurable data.¹³⁶ An agency informed with such data is more likely to apply uniform standards to substantively similar cases and will be less prone to be swayed in one direction or another depending by the peculiarities of any particular family's style. Statistical evidence may also be enriched by anecdotal narrative. Confidentiality prevents disclosure of names, but not of anonymous facts. It is possible to conceive of Rawlsian (in addition to adversarial or self-interested) models of parental participation and to use family involvement as a source of information on the relative outcomes of different strategies.¹³⁷ Such changes would bring about increased accountability and better opportunities for polyarchic experimentation. In adjudicating individual cases, agencies and hearing officers would be required to rely on rich databases and to compare the quality and quantity of services devoted to specific types of disabilities.

A detailed elaboration of these corrective mechanisms exceeds the scope of these pages, but it is an unavoidable and urgent step. Any reform of special education law that ignores the redistributive impact of

¹³⁵ Only 16.5% of the students in private residential placement were of a race or ethnicity other than white (a relative drop of almost 40% with respect to the baseline of 27%), but almost 46% of the students in separate special education classes fall into this category (a 70% increase). MASSACHUSETTS DEPARTMENT OF EDUCATION, SPECIAL EDUCATION PLANNING AND POLICY DEVELOPMENT, Disability Data Focus Groups, Discussion Guide, Part I, 7 (2003), available at http://www.doe.mass.edu/sped/focus_groups/discussion_guide.pdf.

¹³⁶ The American Institutes for Research recommend further "[multivariate analysis] to disentangle the factors that might explain these patterns of variation in the levels of spending on special education students. . . ." SPECIAL EDUCATION EXPENDITURE PROJECT, *supra* note 6, at 11.

¹³⁷ For an example of parents' advisory participation in the interest of all children with disabilities, see, e.g., 603 CMR 28.07(4) (2005).

participatory processes is bound to endorse and even reinforce existing social disparities. The challenge is, once more, “to devise modes of governance that summon public commitment and action in pursuit of ideals of equality. . .without producing practices that fail or undermine precisely these ideals.”¹³⁸

¹³⁸ Martha Minow, *School Reform Outside Laboratory Conditions*, 28 N.Y.U. REV. L. & SOC. CHANGE 333, 335 (2003).

