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# ARTICLES

## THE SPECIAL EDUCATION BARGAIN

J.S. Hsin

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# ARTICLES

# THE SPECIAL EDUCATION BARGAIN

J.S. Hsin*

## ABSTRACT

*Half a century ago, Congress "revolutionized" the way children with disabilities are educated in this country. Under the Individuals with Disabilities Education Act ("IDEA"), every year the public schools must prepare a "written statement" describing where each such child stands educationally, what educational goals she will work toward, and the special education services she will need to meet them. That document—the Individualized Education Program ("IEP")—is easily the single most recognizable symbol of special education today. Courts have held it "central" to the IDEA's "statutory scheme." Scholars and educators regard it as the "heart and soul" of special education law. And yet, for all that, the IEP has long been a puzzle. What is it, exactly? To many scholars, parents, advocates, and even some schools and educational agencies, the IEP has looked suspiciously like a contract. And yet, courts and agencies rarely recognize it as such. Hence the puzzle: if courts, agencies, even Congress have insisted that IEPs are not contracts, why does the IEP feel so unmistakably contractual? Is that feeling simply a mistake? But if so, what makes that mistake—if that's what it is—so irresistible?*

*This Article urges a new way of looking at the IEP, and with it, much of special education today. We so easily fall into thinking of IEPs as contracts, this Article argues, because that was the way the IEP process was designed to work—like contract—even though the IEP was not meant to be one. On its face this may seem odd, even paradoxical. As this Article shows, however, the Act's history tells us that*

* Assistant Professor, University of Alabama School of Law. For their very helpful insights and suggestions I am grateful to audiences at the University of Alabama School of Law and Boston College Law School, as well as my many former colleagues in the U.S. Department of Education. And special thanks to the thoughtful editors of the *Pittsburgh Law Review*.

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*that is exactly what Congress created when it wrote the IEP process into the IDEA. The Act tempts this contractual talk by design. The trouble is that we lack a vocabulary to pinpoint why it does so, and how. So this Article proposes one: the IEP is a process transplant. What distinguishes a transplant of this kind is what gets borrowed: not a legal rule, concept, or principle—the law's black letter—but the model of a process, assembling legally recognized actors, with specified legal powers, into a definite arrangement. With this account, this Article argues that we can come to see why courts have read and enforced the IDEA in sometimes surprising ways—through a lens that looks decidedly contractual. And we can also come to better appreciate how the IDEA ultimately "revolutionized" special education—by deliberately remaking it in the image of contract—and how we might then start fixing that law's flaws.*

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## INTRODUCTION

One cold January day several years ago, a kindergartener was running across her school's icy playground when she slid and tripped, sending her hard to the ground.[1] The girl, S.H., was badly hurt—her femur, it turned out, had fractured in the fall.[2] And as one might expect, soon the law got involved. Her grandparents, acting as her guardians, sued her Wyoming school district, seeking to recover for her injuries.[3] That day, they alleged, the school had improperly left S.H., despite her multiple disabilities, unattended and unsupervised[4]—a rather typical claim, one might think, of negligence. In the end, though, that was not their claim.[5] They had also alleged breach of contract—the putative contract being the girl's Individualized Education Program ("IEP"), which, they claimed, had called for S.H. to be constantly supervised, to prevent the very kind of accident she had that day.[6]

S.H. and her grandparents went on to lose that case, first before the trial court, and ultimately the Wyoming Supreme Court.[7] And they lost for a simple reason: an IEP, the court held, "is not a contract[.]"[8] The IEP is rather a creature of federal law,[9] specifically the special education law known as the Individuals with Disabilities Education Act ("IDEA" or the "Act").[10] In exchange for funds under the Act, every participating state must guarantee its children with disabilities what, in the lingo of the Act, is known as a free appropriate public education ("FAPE"), in the least restrictive environment.[11] And it must do so by ensuring, every year, that every child with a disability has in place a "written statement" describing where the child stands

[1] SH v. Campbell Cty. Sch. Dist., 409 P.3d 1231, 1232 (Wyo. 2018).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 1232–33.

[5] Indeed, with Wyoming's government immunity statute, the only chance the grandparents had of prevailing was under a contract theory. *See id.* at 1233 (noting this exception to WYO. STAT. ANN. § 1-39-104(a) (2024)).

[6] *Id.* at 1232, 1233–34.

[7] *Id.* at 1233, 1236.

[8] *Id.* at 1233.

[9] *See* Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 820 (9th Cir. 2007) ("[T]he IEP is entirely a federal statutory creation.").

[10] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482.

[11] 20 U.S.C. § 1412(a)(1), (5).

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educationally, what educational goals she will work toward, and the special educational services she will need to meet them.[12]

That document—the IEP—is easily the single most recognizable symbol of special education today. And yet the IEP is also a puzzle, one that has confounded courts and agencies, parents and advocates for half a century. On the one hand, courts have held the IEP "central" to the IDEA's "statutory scheme."[13] Scholars and educators regard it as the "heart and soul" of special education law.[14] For the more than seven and a half million children with disabilities today in the public schools,[15] the IEP is not only the "heart" of their education, but often their only hope for getting one at all.[16] And yet, despite this, the IEP is still dogged by the same question that Wyoming's high court had to confront in *S.H.*[17] What *is* it, exactly?

To many, like S.H.'s grandparents, the IEP has looked suspiciously like a contract.[18] One hardly needs to squint to see the parallels. The IEP, after all, is supposed to come about through a process that, rather unusually for a public

[12] *Id.* §§ 1412(a)(4), 1401(14).

[13] "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." Bd. of Educ. v. Rowley, 458 U.S. 176, 205–06 (1982) (citations omitted); "In requiring that special education and related services be provided in conformity with a child's IEP, the Supreme Court recognized the central role played by the IEP in a statutory scheme like the EAHCA, which has placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents." Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom.* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

[14] Barbara D. Bateman, *Individual Education Programs for Children with Disabilities*, *in* HANDBOOK OF SPECIAL EDUCATION 87, 102 (James M. Kauffman, Daniel F. Hallahn & Paige Cullen Fullen eds., 2d. ed. 2017).

[15] *Students with Disabilities*, NAT'L CTR. EDUC. STATS. (May 2024), https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities [https://perma.cc/MK5P-G3FH] (reporting that as of the 2022–23 school year, 7.5 million children with disabilities were receiving special education and related services under the IDEA, some 15% of all public school students).

[16] *See* Kelli A. Sanderson, *"Be Prepared to Fight Like Hell": Parent Advice for IEP Meetings*, 31 EXCEPTIONALITY 344, 344, 354 (2023).

[17] *See, e.g.*, Doe v. Dennis-Yarmouth Reg'l Sch. Dist., 578 F. Supp. 3d 164, 182 (D. Mass. 2022) (similarly confronting claim that a Massachusetts school district breached a high schooler's IEP terms, ultimately joining most courts in rejecting the argument that IEPs qualify as a contracts).

[18] *See infra* Section I.B.2.

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entitlement, can look and feel an awful lot like a negotiation—bargaining.[19] The parent and even the child sit across the table from the child's teachers and school administrators and other professionals, and hash out in concrete terms what the child's education will look like that year—not just the goals she will work towards, but the services the school will be committing so she can meet them.[20] And though in name it may be just a "written statement," in form and effect it certainly can read like a contract—a binding agreement.[21] Perhaps unsurprisingly, special education advocates and specialists, and even some schools and state officials, actively encourage parents to think of IEPs in just those terms.[22] And yet, as S.H. and her grandparents soon learned, the courts and agencies enforcing them rarely do. Instead, much to the bewilderment of parents and students and advocates alike, hearing officers and courts routinely disavow all such talk of contract.[23] As has the agency responsible for administering the Act, only echoing remarks scattered throughout the Act's legislative history.[24]

And hence the puzzle: if courts, agencies, and arguably even some of the Act's drafters have insisted that IEPs are not contracts, why does the IEP look so unmistakably contractual? Is it merely *like* a contract,[25] as the literature generally

[19] *See infra* Section I.B.2.

[20] To ease exposition, I will typically refer to the party or parties legally responsible for a child's education as her "parents" or "parent," as the IDEA does. And I will also mean by that what the Act does—a child's natural, adoptive, or foster parents, or any other legal guardians or representatives of the child. *See* 20 U.S.C. § 1401(23) (broadly defining "parent" for purposes of the Act); 34 C.F.R. § 300.30 (2025) (same for the regulations implementing the Act).

[21] Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE Under the IDEA: IEP Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409, 420 n.53 (2016); 20 U.S.C. §§ 1412(a)(4), 1401(14).

[22] *See infra* Section I.B.2.

[23] *See infra* Section I.B.1.

[24] *See infra* Section I.B.1.

[25] David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 L. & CONTEMP. PROBS. 63, 65, 67 (1985).

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assumes? Is it an imprecise and dubious "analogy,"[26] or else a "pseudo-"[27] or "quasi-contract"?[28] But if it is, why then do so many still mistake it for something it supposedly isn't—even some who should know better? What makes that mistake, if that's what it is, so irresistible?

In this Article, I want to urge a new way of looking at the IEP, and with it, much of special education today. But this Article isn't simply about IEPs or even special education. It is also about what the IEP represents—how the law can change, in a rather surprising way. Using the IEP as a case study, this Article seeks to identify and characterize this unique type of legal change, apparently for the first time in the literature. And it also explains why that kind of legal change is of such surpassing importance for public education and for the law generally.

As legal change goes, the IEP is a particularly striking—and fascinating—episode. The IDEA, after all, "revolutionized" the way children with disabilities in this country are educated;[29] indeed, for millions of those children the Act effectively opened the doors of the public schools for the first time. And yet, as this Article explains, we cannot fully understand that revolution, nor the puzzling way special education now works—and all too often doesn't—until we first see just how the Act changed special education half a century ago. It did so, I argue, by borrowing. The IEP was not pure legislative invention, but was instead taken from the private law of contracts. The IEP, as comparativists would say, is a legal transplant. But that borrowing didn't take the tidy form now familiar from the literature—the transplantation of a body of rules or principles or doctrines, the law's black letter. Instead, when Congress remade special education it did so by assembling in the Act all the pieces of a contractual *process*. The IDEA remade special education in the

[26] Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 459 (2011) ("There is a compelling analogy to contractual enforcement."); Mitchell L. Yell, Terrye Conroy, Antonis Katsiyannis & Tim Conroy, *Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools*, 41 FORDHAM URB. L.J. 669, 694 (2013) ("An IEP is similar to a contract in that the school district is promising, in writing, to provide specific educational services to a particular student to ensure that the student receives a FAPE.").

[27] Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 176 (2005) ("The IDEA contains elements of a pseudo-contractual nature . . . ."); Eugene Bardach, *Educational Paperwork*, *in* SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 126, 127 (David L. Kirp & Donald N. Jensen eds., 1986) (describing IEPs as "Pseudo Contracts," and adding that the IEP often has the character of a contract, in spirit and in form).

[28] Bonnie Spiro Schinagle, *Considering the Individualized Education Program: A Call for Applying Contract Theory to an Essential Legal Document*, 17 CUNY L. REV. 195, 199, 227 (2013) (arguing that IEPs should be considered "quasi-contractual"); Neal & Kirp, *supra* note 25, at 72 n.39 (saying the term quasi-contractual should be utilized used advisedly in regard to IEPs).

[29] Schinagle, *supra* note 28, at 195.

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image of contract, even as its drafters repudiated contract by name. On its face this may seem odd, even paradoxical. How can a contractual process not produce a contract? My aim here is to put together the pieces of this puzzle and, in doing so, make clear why its solution matters—for the millions of children who rely on an IEP every year for their education as much as for the law itself.

The Article proceeds in three parts. Part I lays out the IEP puzzle, by tracing it to its origins in the first major iteration of the Act, Public Law 94-142. As Part I argues, we so easily fall into thinking of IEPs as contracts because that was, in fact, the way the IEP process was designed to work—like contract—even though the IEP was expressly written not to *be* one. Odd as that may sound, as Part I shows, the Act's history tells us that that is exactly what Congress created when it wrote the IEP process into Public Law 94-142. With distrust in institutions running deep, Congress simply gave up on defining what would make the disabled child's education appropriate, and instead went looking for an accountability device—one that could reliably individualize the disabled child's education, while leaving its details up to parents and the schools, and out of federal hands. The device Congress chose was the IEP. And for decades now, as Part I documents, many have assumed that device must be contractual, even as the courts and agencies enforcing the Act have insisted it isn't.

Yet, as Part II explains, the Act itself tempts this contractual talk, by design. The trouble is we lack a vocabulary to pinpoint why it does, and how. So Part II proposes one: the IEP is what I call a *process transplant*. By "transplant" I mean what comparativists have understood by the same term in their study of borrowing across legal systems, or, as Vanessa Casado-Pérez and Yael Lifshitz have recently shown, the migration of law across subjects even within a single legal system.[30] Two features I suggest distinguish a transplant of this kind from the others on offer in the literature: *what* gets borrowed, and *why*. Unlike the transplant typical of the literature, a process transplant need not involve the borrowing of a legal rule, concept, or principle—the law's black letter. What is instead borrowed is the *model* of a *process*, assembling legally recognized actors, with specified legal powers, into a definite arrangement. And the reason for this borrowing is also unique: policymakers turn to processes because of their nature, what each is thought capable of doing. Drawing on this account, Part II argues that the Act borrowed the IEP process from what has come to be known as the classical model of contract. And that model was chosen precisely because of what it was thought a contractual process like that could do—individualize a child's education, by leaving the details up to

[30] *See generally* Vanessa Casado Pérez & Yael R. Lifshitz, *Natural Transplants*, 97 N.Y.U. L. REV. 933 (2022).

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parents and schools to sort out for and between themselves. For the child with a disability, an appropriate education simply would be the deal struck at the IEP meeting table.

Part III goes on to explain what we gain from understanding the IEP this way. First, on the explanatory side, we can come to see why courts have read and enforced the IDEA in frankly surprising ways—through a lens that looks decidedly contractual. Second, we can also come to better appreciate how the IDEA revolutionized special education—by remaking it in the image of the bargain—and why it so often fails to live up to its promise, and, more normatively, how we might go about fixing that law's flaws. In the end, Part III concludes, whether the IEP is a contract is ultimately not a question *of* law, even if it is one *for* law. But it is only a question at all because the IEP is in the nature of contract.

## I. THE IEP PUZZLE

To understand what makes the IEP so puzzling, we first have to see how the Act came to have it in the first place—the role the IEP has come to play in special education, and why. As Part I.A explains, the story of the IEP is in many ways the story of special education: how we as a country came to grips with the immense responsibility—and challenge—of educating every child, whatever her abilities. That story begins in an era of deep distrust—of the public schools and the educational professionals running them, and of the laws and those enforcing them. With that history in mind, Part I.B turns to the IEP itself, and explores the reasons why the text and history of the Act make it the puzzle that it remains today.

### *A. Distrust and Accountability*

Half a century ago, two million school-aged children in the United States were not receiving an education.[31] Of those were the million or so children whom the law had declared "uneducable"—children, as we now would say, who had disabilities.[32] Many of these children had never attended school, and never would.[33] Millions more

[31] CHILDREN'S DEF. FUND, CHILDREN OUT OF SCHOOL IN AMERICA 1 (1974) [hereinafter CDF REPORT].

[32] A word on terminology: disability in those days was understood and talked about in terms that we would now deplore. I therefore try to avoid that language whenever I can, unless doing so would sacrifice historical or legal accuracy. Even then, I default to inclusive paraphrasing wherever possible. And since I will be focusing specifically on special education, I generally use "child with a disability" in the sense that that term's given in the Individuals with Disabilities Education Act (IDEA), not that of the two other major federal laws protecting students with disabilities in the public schools—Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.

[33] A few years later, a community health worker in Floyd County, Kentucky, could still tell the Children's Defense Fund that "children in their teens ha[d] been found 'who ha[d] never been to school.'" CDF REPORT, *supra* note 31, at 99.

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would show up at their local public school only to be siloed away in special classrooms or programs, even institutions—out of sight, out of mind, and outside public scrutiny.[34] And even "those properly placed were inadequately instructed," if really instructed at all.[35] Many instead sat idly in their segregated classrooms, or passed the hours with the same rote chores day in, day out, year after year, until they finally dropped out.[36] The schools, for their part, offered few excuses. And why should they? Many felt that they had no "responsibility to do anything about special needs children."[37] And as far as the law was concerned, they were usually right.[38]

The first major attack on that regime came not through Congress, but the courts. And, surprisingly to some, the children won. The seminal case—*PARC v. Pennsylvania*[39]—involved a group of thirteen children with intellectual disabilities who sought to challenge what was, in name and effect, their total exclusion from public school.[40] At the time, Pennsylvania, like other states, openly allowed its schools to refuse to admit any child "who ha[d] not attained a mental age of five years" by the time the child would ordinarily have entered first grade.[41] The state ultimately entered into a consent decree under which it finally agreed to provide all children with intellectual disabilities not just a public education, through the age of twenty-one, but one "appropriate to [each child's] learning capacities."[42] A few

[34] CDF REPORT, *supra* note 31, at 93 ("Out of sight, out of mind has allowed programs to escape public scrutiny.").

[35] Joan F. Goodman & Lori Bond, *The Individualized Education Program: A Retrospective Critique*, 26 J. SPECIAL EDUC. 408, 410 (1993).

[36] The schools, for their part, often didn't deny it. Indeed, some openly protested that it simply wasn't their "responsibility to do anything about special needs children." CDF REPORT, *supra* note 31, at 92. They are "different," after all, or "might hurt others," or would cost too much, stretching even thinner the already too-thin "resources and patience of teachers and administrators." *Id.*

[37] CDF REPORT, *supra* note 31, at 92.

[38] Edwin M. Martin, Reed Martin & Donna L Terman, *The Legislative and Litigation History of Special Education*, 6 FUTURE OF CHILD. 25, 27 (1996) ("During the . . . early 1970s, no state served all its children with disabilities. Many states turned children away."); Mitchell L. Yell, David Rogers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 REMEDIAL & SPECIAL EDUC. 219, 220 (1998) ("The state efforts . . . were uneven, with some providing substantial educational rights to students with disabilities and others providing little beyond admittance to public schools.").

[39] 343 F. Supp. 279 (E.D. Pa. 1972).

[40] *Id.* at 281–82.

[41] *Id.* at 308.

[42] *Id.* at 302.

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months later, in *Mills v. Board of Education*,[43] the federal district court in the District of Columbia effectively turned that decree into a constitutional holding, extending it to all "exceptional" children in the District.[44] Neither contrary state law, nor bare state coffers, would excuse the public schools from their basic duty: providing every child, regardless of ability, "an appropriate educational program."[45] The "implication" of both cases was unmistakable: what the child with a disability needed was an "individualized education."[46]

By the mid-1970s, however, little had changed. Even after the dust from the *PARC* and *Mills* litigation had settled, and a wave of so-called "mandatory" laws had swept through the states,[47] more than 1.75 million children with disabilities were still "receiving no educational services at all."[48] And among those who did attend public school, more than half—some 3.5 million children—still needed special education services they were not getting.[49] Much of this was, once again, by design. Some state "mandatory" laws, for example, had "loopholes" granting admission only to those children "who could benefit from education"—obviously of little use to the child already deemed uneducable.[50] In other states, with stronger protections, the laws simply went unenforced.[51] In all, the great majority of children with disabilities across the country were still "either totally excluded from schools or [were] sitting

[43] 348 F. Supp. 866 (D.D.C. 1972).

[44] *Id.* at 875 ("[D]enying [exceptional children] not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.").

[45] *Id.* at 876, 878–79.

[46] H. Rutherford Turnbull, III, *Accountability: An Overview of the Impact of Litigation on Professionals*, 41 EXCEPTIONAL CHILD. 427, 431 (1975).

[47] Under these laws, the states required local school districts to educate at least some of their children with disabilities, with the (partial) support of state funds. By 1973, forty-five states had enacted some such "mandatory" law. *See* Martin et al., *supra* note 38, at 27–28.

[48] S. REP. NO. 94-168, at 8 (1975) (reporting statistics for the 1974–75 school year from the Bureau of Education for the Handicapped).

[49] Martin et al., *supra* note 38, at 29.

[50] *Id.* at 28.

[51] *Id.*

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idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[52] Unsurprisingly, distrust of schools and educational professionals ran deep.[53]

So too did distrust in the law. By 1973, Congress at last was resolved to act. Across a range of bills in both the House and Senate, *PARC* and *Mills* soon crystallized into two substantive rights: what we now know as the right to a FAPE, and the right to that education in the least restrictive environment. As those rights became clearer, though, so did the problems they created. Two in particular stood out.

The first and most obvious problem was one of substance. For any given child, what exactly *was* an "appropriate" education, what did an "individualized education" look like? The other problem was practical: how would Congress make sure that the child actually got it? As testimony and debate unfolded through 1973, it became clear that these were really two sides of a more fundamental difficulty: the need for accountability.[54]

Minimally, most agreed that accountability meant that parents had to be able to scrutinize and challenge decisions made about their children—to hold educational professionals to account.[55] And for that, both *PARC* and *Mills* had already handed Congress an institutional solution: the impartial hearing, known more simply as "due process."[56] In some ways due process was an ideal antidote to the ill besetting special

[52] H.R. REP. NO. 94-332, at 2 (1975) [hereinafter HOUSE REPORT].

[53] "The public distrust of schools and school systems has reached an unprecedented high level. Change is wanted and expected. Although equal educational opportunity has been affirmed as the political, legal, and moral right of all individuals, our schools for the most part are characterized by lack of equality of educational opportunity." Maynard C. Reynolds, *Introduction*, *in* PROCEEDINGS OF THE CONFERENCE ON PSYCHOLOGY AND THE PROCESS OF SCHOOLING IN THE NEXT DECADE: ALTERNATIVE CONCEPTIONS, xv, xvi (Maynard C. Reynolds ed., 1971); "These bureaucratic excesses appear to reflect a hostile vision of the [field of special education]. It involves a dangerous degree of distrust: by legislators, who distrust bureaucrats and virtually all professionals; by central office bureaucrats, who distrust local bureaucrats and professionals; by legalists, who take their court-won victories as a mandate for excessive regulation-writing; by local bureaucrats and professionals, who distrust national leaders who may write unnecessary restrictions in programs; and by parents who distrust all professionals and the schools." Maynard C. Reynolds, *More Process Than Is Due*, 14 THEORY INTO PRAC. 61, 68 (1975).

[54] *See generally* Turnbull, *supra* note 46 (discussing the growing concerns about professional accountability in the wake of litigation involving people with disabilities).

[55] *Id.* at 428.

[56] Or at least it did to the House. The Senate, on the other hand, early on had toyed with the "monstrously impractical" idea of having every child's IEP forwarded to Washington, for the then-Department of Health, Education, and Welfare to review, one by one. Neal & Kirp, *supra* note 25, at 73. The Senate wisely dropped that proposal, only to take up another, only somewhat less eye-popping, proposal for

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education—the plague of distrust. Through due process, parents could put education professionals' decision-making to the test, in an adversarial proceeding, before an independent official. And the theory behind it was simple. By flushing that decision-making out in the open, and forcing administrators to defend it, schools would have that much more incentive to make those decisions responsibly—answerable at once to professional standards and the child's needs. And parents would likewise have a way of holding professionals to their word, whether in evaluating or placing a child with a disability, or providing the child whatever services she needed.[57] Due process could dispel distrust, in short, by putting schools to their proof.

And, no doubt, due process did—and still does—offer *some* accountability. But it did not fully solve the accountability *problem*. Accountability by hearing was still only accountability after the fact, and so, as a practical matter, accountability too late. Due process did not directly address accountability on the front end: *before* the crucial educational decisions had been made, and time lost. And as Congress had heard in the hearings leading up to the law we now know as the IDEA—Public Law 94-142, as it was known then—this continued to be a major problem across the states, even after *PARC* and *Mills*. As a representative from PARC recounted before the Senate subcommittee working on an early version of the bill, even after the consent decree, "educators [were] trying to narrow the scope of the word 'appropriate' . . . by saying that if your local district has a program that meets minimum state standards for trainable [intellectually disabled] children, it is the appropriate program, whether the child fits into it or not."[58] One source of that problem is familiar to any legislative drafter. As scholars later summed up the problem, since "the needs of individuals var[y] so greatly," it was simply not clear how the "general terms" of a right like FAPE could be reduced to useful specifics, a line or two or even ten of legislative text.[59] The problem was more than merely a matter of legislative detail, though—that the crucial term ("appropriate") resisted easy definition.[60] As PARC's representative stressed, the real problem was institutional: few at the time seemed

"central oversight," this time lodging the responsibility for reviewing individual plans in each state with a state agency that the Senate bill referred to as "the entity." *Id.* In the end, the House prevailed, giving us the due process system we have today.

[57] Nor was this new to Pub. L. 94-142. Congress had in fact already required states to provide parents due process rights the year prior, as part of several changes it made to the EHA in the Education Amendments of 1974. Education Amendments of 1974, Pub. L. No. 93-380, sec. 614, § 613(a)(13), 88 Stat. 484, 582.

[58] *Education for All Handicapped Children: Hearing on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 36 (1973) (statement of Stuart Brown, PARC).

[59] Neal & Kirp, *supra* note 25, at 71.

[60] As Neal and Kirp later put it, "[t]he courts had declared the right" to an appropriate education, but "[b]eyond that," had left "the substance of the right . . . unspecified." *Id.*

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willing to trust in *any* definition—that any substantive right would prod the educational professional into answering to the disabled child or addressing *her* unique needs.[61]

What's more, any solution also risked courting larger controversies. By specifying any right in detail, Congress would have to step near, possibly over a line that many felt the Constitution had already drawn around public education. Educational policy, after all, had long been a matter largely of "local responsibility," a job fundamentally up to states and school boards to do, not Congress or the federal bureaucracy.[62] "[E]ven in th[at] interventionist era," as David Neal and David Kirp would later remark, "federal substantive mandates seemed excessive."[63] And, besides, the bill had grown long enough as it was; a far cry from the single sentence Congress had written a year or so before into the Rehabilitation Act, prohibiting disability discrimination in entities receiving federal funds.[64] Requiring more than what the bill already did could well have made it that much harder to pass, or to get signed into law—especially by 1975, with President Ford already looking warily down Pennsylvania Avenue.[65]

So, by 1975, it was clear *what* any bill had to do. Fundamentally, it had to guarantee every child with a disability what *PARC* and *Mills* said they had a right to: an appropriate public education. What Congress still lacked, though, was the *means*

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[61] *See, e.g.*, Reynolds, *supra* note 53 ("All over the country community representatives are expressing their growing distrust of school counselors, psychologists, and measurements specialists, among others, and a growing estrangement is evident between teachers and the psychologists who make decisions about children."); Jack Tweedie, *The Politics of Legalization in Special Education*, *in* SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION, AND FINANCE 48, 51 (Jay G. Chambers & William T. Hartman eds., 1983) ("[Advocates for the disabled] did not trust school officials, whom they regarded as uncomfortable with handicapped children and hostile to the children's presence in schools").

[62] Neal & Kirp, *supra* note 25, at 71.

[63] *Id.*

[64] 29 U.S.C. § 794(a).

[65] A wariness President Ford never quite shook, even as he grudgingly signed P.L. 94-142 into law. His signing statement signaled real reservations about the bill, especially its cost. Congress, he felt, was "promis[ing] more than the Federal Government c[ould] deliver," not least by "claiming authorization levels which are excessive and unrealistic." Gerald R. Ford, *Statement on Signing the Education for All Handicapped Children Act of 1975*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/statement-signing-the-education-for-all-handicapped-children-act-1975 (last visited Aug. 24, 2025) [https://perma.cc/HJ4K-SUPS]. But those reservations also ran to the root of the whole effort. He had serious misgivings about the role federal law was poised to assume over special education, through the bill's "vast array of detailed, complex, and costly administrative requirements which would unnecessarily assert Federal control over traditional State and local government functions." *Id.*

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of delivering it—of "individualiz[ing] education," in a politically palatable way.[66] And so what the bill's drafters went looking for was an "accountability device" besides due process.[67] As members heard throughout the hearings in 1973, that device had to be capable of doing two things. First, it had to deliver what a growing chorus of courts had either ordered or held, and that the vast majority of states had at least nominally mandated by statute: that children with disabilities had a right not just to an education, but to an education that was appropriate, the product of an *individualized* decision tailored to the child's unique needs. And, second, that device had to provide accountability *before* those decisions were made, and leave them where it was assumed they belonged—in local hands.[68]

### *B. Written Statement or Contract?*

The device Congress ultimately chose was the IEP. On the page, the IEP may not seem like much. It is described simply as a "written statement,"[69] memorializing where the child stands educationally,[70] the educational goals she should work toward,[71] and the services the school would make available so she can get there, in

[66] Turnbull, *supra* note 46, at 431; Neal & Kirp, *supra* note 25, at 71 ("[E]ven if a categorical definition could have been produced, it would have been politically difficult.").

[67] *See* Pa. Ass'n for Retarded Child. v. Commonwealth, 343 F. Supp. 279, 303 (E.D. Pa. 1972) (requiring as part of the consent decree that prior to any change in educational status, the child with the intellectual disability first had to be given notice and the opportunity for a due process hearing); Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (requiring a constitutionally adequate prior hearing before making changes in any disabled child's placement).

[68] *See, e.g.*, Tweedie, *supra* note 61, at 56 ("Respect for local school autonomy, necessitated by the schools' political clout, strictly limited the extent and means of federal intervention. This respect precluded a significant federal presence at the local level.").

[69] 20 U.S.C. § 1414(d)(1)(A)(i); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 4(a)(19), 89 Stat. 733, 776.

[70] *See* § 1414(d)(1)(A)(i)(I) (requiring a written statement noting the child's current levels of academic achievement and functional performance); Education for All Handicapped Children Act of 1975 § 4(a)(19) (defining the IEP to include "a statement of the present levels of educational performance of such child").

[71] *See* § 1414(d)(1)(A)(i)(II) ("a statement of measurable annual goals, including academic and functional goals"); Education for All Handicapped Children Act of 1975 § 4(a)(19) ("[The written statement] shall include . . . a statement of annual goals, including short-term instructional objectives . . . .").

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an appropriate setting,[72] and ensure that she does.[73] The Act has never purported to make more of this "written statement." It was certainly not meant to be an educational or pedagogical tool, dictating day-to-day instruction.[74] Nor, though, was it to consist merely of "guidelines" or, worse, vague aspirations from which educators could then go on to decide what to do for the child.[75] It was instead to be what its name said: a *program*, stating "what will actually be provided to the child."[76] And, despite some changes over the years, it has retained the same basic character.[77]

What character that is, though, has never been totally clear. Whatever it may be, everybody agrees on its basic legal effect: the IEP is binding on the school district that prepares it.[78] And all agree about how it has to be prepared: with the parent and, whenever appropriate, the child, at a meeting between them and the school district personnel essential to ensuring the child receives an appropriate education—a regular and special education teacher, a representative of the district, and any other professionals needed to interpret whatever data that team will use to decide what services the child needs (together known as the IEP team).[79] That much is black letter. Just beyond it, though, lies a puzzle at least as old as the Act itself. Given how the IEP has to be made, and what it is supposed to do, what is it, exactly?

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[72] *See* § 1414(d)(1)(A)(i)(IV); Education for All Handicapped Children Act of 1975 § 4(a)(19) (requiring also "a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs," including when they would begin and how long they would last).

[73] *See* § 1414(d)(1)(A)(i)(III); Education for All Handicapped Children Act of 1975) § 4(a)(19) ("[The written statement] shall include . . . appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.").

[74] *See* Goodman & Bond, *supra* note 35, at 413 ("[T]he framers of P.L. 94-142 did not intend the IEP to prescribe curriculum . . . .").

[75] Joseph Ballard & Jeffrey Zettel, *Public Law 94-142 and Section 504: What They Say about Rights and Protections*, 4 EXCEPTIONAL CHILD. 177, 181 (1977).

[76] *Id.*

[77] In 1997, Congress established several new criteria that IEPs had to meet, such as requiring that IEPs include annual, measurable goals for the child, as well as statements of the "services and accommodations the child needs to participate in the general education curriculum." 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, 441 (2012).

[78] *Id.* at 442.

[79] *See* 34 C.F.R. § 300.321(a) (2024).

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### 1. The Written Statement View

To some, the answer has seemed obvious: the IEP is just what the Act says it is—a written statement. Start, as always, with the text.[80] The Act itself has never referred to the IEP as anything more—like, say, a "contract."[81] Nor do words anywhere in that semantic vicinity—"bargain" or "agreement"—appear in the relevant sections of the Act.[82] And if that's what Congress had in mind—to make the IEP something more formal, like contract—it surely knew how to write it. One need only think of Section 8 of the National Labor Relations Act, and its mandate to both employers and employees' representatives to bargain collectively on certain topics, in good faith.[83] The IDEA, by contrast, says nothing like that. Nor can we easily chalk the absence of such language up to oversight—sloppy drafting. By all accounts, in fact, it was deliberate. Probably the clearest evidence of this comes not from the text but from its history, especially the Senate Report that accompanied the bill that eventually became P.L. 94-142. There the Committee took up the question directly, and didn't mince words: it was *not* its "intention," it insisted, "that the written statement developed at the individual planning conferences be construed as creating a contractual relationship."[84] "Rather," it went on to clarify, "the Committee intend[ed] to ensure adequate involvement of the parents or guardian of the handicapped child, and the child (when appropriate) in both the statement and its subsequent review and revision."[85] And the bill's principal Senate sponsor had made the same point from the floor.[86] This also clearly weighed on others' minds at the time. The National School Boards Association strongly urged the House committee considering the bill not to imply the IEP was a contract, mostly to avoid courts

[80] *See, e.g.*, Twitter, Inc. v. Taamneh, 598 U.S. 471, 484 (2023) ("As always, we start with the text . . . .").

[81] *See generally* Education for all Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 733.

[82] *Id.*

[83] *See* 29 U.S.C. § 158(d). Jon Romberg has drawn this same analogy to make the opposite point: that the "commitments in the IEP function much like the enforceable terms reached in a collective bargaining agreement" under the NLRA. *See* Romberg, *supra* note 26, at 459–60. About that, he is clearly right. But he does not draw what I take here to be the straightforward negative implication: if that is what Congress really want, surely it knew how to write that. So why did it not?

[84] S. REP. NO. 94-168, at 11 (1975).

[85] *Id.*

[86] *See* 121 CONG. REC. 19492 (1975) (statement of Sen. Harrison Williams) (explaining that the Senate bill proposed the individualized planning conference, later to become the IEP team meeting, to involve parents and children—when appropriate—in the educational process to enable them to fully participate in the decision making regarding their child's education, yet adding that the conference is a cooperative effort, not a contractual relationship).

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ordering their specific performance.[87] And even the Council for Exceptional Children (CEC), a major force behind the school litigation in those years, had nodded along.[88]

What this history tells us, and the text doesn't, is apparently only reinforced by standard contract doctrine. If the IEP were a contract, after all, it would presumably have to be backed by consideration.[89] What consideration, though, lies on either side of an IEP? Arguably none, as S.H. and her grandparents found out. Under the Act, as the *S.H.* court noted, the district *already* has a duty to do what any properly developed IEP promises: provide the child a FAPE, in the least restrictive environment.[90] So anything the district agrees to do in the IEP, it already has to honor as a matter of federal law—a preexisting duty. And "[i]t is well recognized that the performance of a duty imposed by law," the *S.H.* court observed, "is insufficient consideration to support a contract."[91] Valid consideration, then, does not seem to be on the table.

So the text, history, and doctrine all seem to line up in the case of the IEP, and they point away from contract. And yet, despite this, uncertainty still dogged the IEP in the early years of the Act. This was in fact among the earliest questions the agency administering the Act had to address. In June 1979, in response to an inquiry asking what "responsibilities [a] school system [would] have in providing the services listed in a child's IEP," since it "was not a binding contract," the Bureau of Education for the Handicapped simply ducked.[92] That question, its reply ran, was just "not directly addressed in either the statute or the Part B regulations."[93] A few months later, though, this time answering a letter puzzling over the "legal implications" of IEPs, the Bureau had another, stronger take. The IEP, it explained, "is *neither* a legal

[87] *See Extension of Education of the Handicapped Act: Hearings on Education and Training of the Handicapped and H.R. 7217, Education for All Handicapped Children Act of 1975 Before the Subcomm. on Select Educ. of the H. Comm. on Educ. & Lab.*, 94th Cong. 74 (1975) (statement of The National School Boards Association).

[88] The CEC instead suggested "that these plans be considered as an informal mechanism, as a way of looking at children, rather than as a formal contract." *Id.* at 34.

[89] As well, of course, as offer and acceptance. *See supra* note 1, at 1233 ("The elements of a contract are offer, acceptance, and consideration.").

[90] *See generally supra* note 1, at 1233.

[91] *Supra* note 1, at 1235; *see also*, *e.g.*, JOSEPH M. PERILLO, CONTRACTS 157 (7th ed. 2014) ("[T]he common law usually requires that promises be made for consideration if they are to be binding.").

[92] Letter to Pheil, 211 IDELR 117 (BEH June 19, 1979).

[93] *Id.*

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document *nor* a legal contract."[94] It was instead just what the Act says it is—"a written statement of the specific special education and related services to be provided to a child."[95] Just a few weeks later, though, the Bureau seemed to scatter the pieces it had started assembling in that prior letter. Answering a similar question, the Bureau again explained that the IEP is "seen as neither a legal document nor a legal contract"—though by whom, exactly, wasn't clear. (The agency itself? Congress? School boards and their lawyers?) Still, the Bureau went on, the IEP "does represent a commitment of resources necessary to enable a handicapped child to receive needed special education and related services."[96] And thus, "[i]n effect, the IEP is an agreement (with [the local educational agency] and parental approval) for services to be provided."[97] What kind of commitment would the IEP represent, though, if not a *legal* one? And if the IEP merely sets forth whatever the district commits itself to do for the child—in neither a contractual nor even a legal sense—what were the parents really approving? Why call it an "agreement" at all?

These early letters thus reflect a basic confusion about the IEP—what it was, and what its legal effect was or could be. And yet the letters also testify to the growing doubts, even then, that IEPs could really be contracts. On the one hand, the administering agency, later renamed the Office of Special Education Programs, seems to have backed off its early view that the IEP isn't a *legal* document. On the other hand, it has never given up its view that, whatever they might be, they could not be contracts. Indeed, for many years the regulations implementing the Act expressly distinguished IEPs from "performance contracts."[98] And the federal courts have largely followed suit. As just one example, the Ninth Circuit has brushed aside the argument that any ambiguity in an IEP should be read in favor of the parent and child, and against the district that drafted it, consistent with the rule of *contra proferentem*.[99] The IEP, it instead held, was "entirely a federal statutory creation," "not a contract," and therefore was not to be read like one.[100] Other courts, some

[94] Letter to Browne, 211 IDELR 125A (BEH Oct. 17, 1979) (emphasis added).

[95] *Id.*

[96] Letter to Beck, 211 IDELR 145 (BEH Nov. 6, 1979).

[97] *Id.*

[98] This was once part of a series of questions the U.S. Department of Education answered in the IDEA regulations. *See* 34 C.F.R. 300.350 (1994). In 1997, it decided to remove all the Q&As from the regulations, including this one.

[99] *See* Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 820 (9th Cir. 2007).

[100] *Id.* The court nevertheless went on to say, in some telling dictum, that *contra proferentem* wouldn't have helped the student-plaintiff in any case, because "[h]is parents played a central role in the drafting

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looking to that case, have similarly refused to read IEPs through a contract lens.[101] As a legal matter, then, one might think the question is now fairly well settled: whatever IEPs are, they are *not* contracts.

### 2. The Contract View

Things are rarely so simple, though. Just consider again the Act's text. Granted, it does not say the IEP *is* a contract.[102] Yet it also does not say an IEP *isn't* one either.[103] The text simply does not characterize the relationship substantively at all. On this point, then, one might think the statute is at best ambiguous. And so to make sense of the IEP, as a matter of standard statutory construction, we would presumably have to resort to other, more structural considerations—the IEP's role, for example, "in the overall statutory scheme."[104] How should we read the IEP, that is, so that it will "operate" as "Congress intended"?[105]

The text offers only two clues in that direction: *what* IEPs are supposed to do, and *how* they are to be made. On the "what" side, the IEP clearly has to deliver on the basic guarantee of the Act—to provide each child with a disability a FAPE.[106] And, on the "how" side, we know that the IEP generally must come about through the meeting mandated by the Act—essentially, a back-and-forth between the school district and the parent and (whenever possible) the child.[107] FAPE, though, is hardly

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of the IEP," so that it was "unclear who the IEP's 'author' is for contract law purposes." *Id.* The court may well have been right about this. But it didn't pause to reflect on what it then had been implying about the IEP, or why it was so obviously not contractual. *Cf.*, *e.g.*, E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1114 (Del. 1985) (explaining that it would not apply the rule of *contra proferentem* where terms of an agreement result from a series of negotiations between experienced drafters, so that all contract parties are knowledgeable about its terms).

[101] *See, e.g.*, L.J. *ex rel.* N.N.J. v. Sch. Bd., 927 F.3d 1203, 1212 (11th Cir. 2019) (citing the Act's definition of the IEP as a written statement and saying that an "IEP is a plan, not a contract").

[102] *See* 20 U.S.C. § 1414.

[103] *Id.*

[104] King v. Burwell, 576 U.S. 473, 492 (2015) (quoting Utility Air Regulatory Group v. EPA, 573 U.S. 302, 320 (2014)).

[105] *Id.* at 494 (quoting National Federation of Independent Business v. Sebelius, 567 U.S. 519, 702 (2012) (Scalia, J., dissenting)).

[106] *Cf. id.* at 493 (basing its interpretation of an ambiguous provision in the Affordable Care Act on the "three major reforms" the Act was supposed to deliver, and how the provision would accordingly "operate" to give them effect).

[107] Only generally, because the Act does allow for the meeting to proceed without the parent, but only after considerable efforts to accommodate the parent, and to convince them to participate. *See* 34 C.F.R. § 300.322(d) (2006) (detailing the efforts required).

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self-explanatory. Indeed, as many noted at the time, the Act itself does not specify what it amounts to substantively. It instead defines the term schematically, by reference to whatever the IEP requires—"a 'definition' in name only."[108] So, going by the text only twists us around in a circle. To decide what the IEP has to include, an IEP team has to determine what services the child needs for a FAPE. But a FAPE just *is* the package of services included in the IEP—right back where we started.

As we saw in the last section, this was also no accident.[109] On the page, the IEP is quite literally all there was to FAPE, but also all it was *meant* to be—something that both scholars and the courts soon picked up on.[110] As Joseph Ballard and Jeffrey Zettel explained shortly after P.L. 94-142 became law, "'Appropriate' is not defined as such" by the Act, "but rather receives its definition for each child through the mechanism of the written" IEP.[111] And thus "what is agreed to by all parties becomes in fact the 'appropriate' educational program for the particular child."[112] How, though, would *that* work? The only "mechanism" the Act calls for, recall, is a mandatory meeting culminating in a "written statement"—a statement the district has the "ultimate responsibility for crafting."[113] But why would simply drafting a "written statement," after a possibly fraught and inconclusive meeting with a parent,[114] *individualize* the child's education? How would that prevent the IEP team from doing exactly what PARC's representative complained Pennsylvania's schools had done under the *PARC* consent decree—offer whatever placement worked best

[108] *See* Chopp, *supra* note 77, at 429; *see also* 20 U.S.C. § 1401(9) (defining FAPE to mean "special education and related services that" are "provided at public expense, under public supervision and direction, and without charge," "meet the standards of the State educational agency," "include an appropriate preschool, elementary school, or secondary school education in the State involved" and, crucially, are "provided in conformity with" the child's IEP).

[109] *See supra* Section I.B.1.

[110] *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) ("We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.").

[111] Ballard & Zettel, *supra* note 75, at 180.

[112] *Id.*

[113] Letter to Simon, 211 IDELR 436 (OSEP Feb. 6, 1987).

[114] As may have happened in the case OSEP was considering in its *Letter to Simon*. *See id.* ("[T]he desired consensus among equal participants is not always possible. Where an open discussion does not lead to agreement on the contents of the IEP, the local educational agency has the ultimate responsibility for crafting the IEP. An IEP with which a parent disagrees then forms the basis for a due process hearing . . . .").

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for the district, whether it suited the child's needs or not, and simply call it "appropriate"? How is *that* accountability?

The text alone yields few answers. One, though, might be substantive. Perhaps the Act, almost despite itself, *does* specify a standard by which teams (and, later, hearing officers and courts) can judge the appropriateness of an IEP: whether it really offers a child FAPE. That's a possibility of course, and it's also what a good deal of the litigation under the Act has been about over the past forty years.[115] And it's also the premise of both *Rowley* and *Endrew F*. As an answer to the accountability problem, though, it fits rather awkwardly with the text, which invests heavily in process, and very little in substance.[116] It also assumes what at least some at the time thought unlikely: that the Act *could* specify a standard in a way that would be useful, or politically palatable.

Worse, it doesn't seem to be what the Act's drafters had in mind. As Neal and Kirp later reported, having interviewed the "principal congressional staff people and lobbyists" who worked on P.L. 94-142, the drafters instead viewed the IEP process *itself* as the answer.[117] Because, in their view, the IEP was designed "to be a meaningful contract."[118] So one of Neal and Kirp's interviewees explained, with the IEP,

> We intended to strengthen the hands of parents . . . . It was a way of individualizing and contractualizing the relationships and involving parents in the process . . . . It's a way of enforcing what should be delivered to kids. While it's said not to be a contract, it is a contract for service.[119]

A decade later, another scholar confirmed what Neal and Kirp's interviewees had told them. Speaking with "a number of professionals knowledgeable about, and critical to, the passage of P.L. 94-142," Joan Goodman and Lori Bond learned that among the "particularly formative influence[s]" on the drafters was the so-called

[115] *See infra* Section III.A.

[116] As the Court acknowledged in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). For further discussion, *see infra* Section III.A.1.

[117] Neal & Kirp, *supra* note 25, at 63 n.*.

[118] *Id.* at 72.

[119] *Id.* at 72 n.39.

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"special education contract."[120] First floated by James Gallagher in 1972,[121] and separately by Alan Abeson and several colleagues in 1975,[122] the contract was, in effect, an accountability device. As Abeson and his colleagues explained it:

> Very simply, the educational-services contract involves a commitment among child, parent, and school to the educational goals and programs that appear to be in the best interests, both present and future, of the child . . . . The educational-services contract, like any other contract, is an exchange of promises: the school promises to devote certain resources (personnel hours, special teaching aids, and so on) toward achieving education and/or behavioral objectives which the three parties—child, parent, and school—have determined to be most desirable for the child. The parents promise to aid the school in its endeavors in whatever ways will be most helpful in achieving the desired goals.[123]

In Abeson's and his colleagues' eyes, the contract would "guarantee program options" and "provide family participation in decision making."[124] Gallagher, for his part, also thought it would give parents two critical points of leverage. First, by laying out "measurable objectives" for the child to work toward, the contract handed parents something "around which they could mold their own program"—the terms of an agreement.[125] And, second, as the child's education became the subject of negotiation, parents would also gain "a bargaining point within the educational system for more resources of personnel or equipment, if the existing ones were inadequate to carry out reasonable objectives."[126] The IEP, in short, would supply a "corrective for special education's failure to ensure procedural safeguards."[127] It would build accountability into the front end—not through a hearing, but by dickering.

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[120] Goodman & Bond, *supra* note 35, at 410–11.

[121] *See generally* James J. Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 7 EXCEPTIONAL CHILD. 527 (1972).

[122] *See generally* Alan Abeson, Robert L. Burgorf, Jr., Patrick J. Casey, Joseph W. Kunz & Wanda McNeil, *Access to Opportunity*, *in* 2 ISSUES IN THE CLASSIFICATION OF CHILD. 270 (Nicholas Hobbs ed., 1975).

[123] *See id.* at 279.

[124] Goodman & Bond, *supra* note 35, at 411.

[125] Gallagher, *supra* note 121, at 532.

[126] *Id.*

[127] Goodman & Bond, *supra* note 35, at 411.

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Whatever their merits, these proposals left a definite impression on the Act's drafters. Abeson and his colleagues' piece, for example, largely "foreshadow[ed]" what soon became "our current IEP requirements."[128] Those proposals would also explain why the bill's sponsors in Congress, as well as interested parties outside it, both labored to distinguish the IEP in the end from contract.[129] And not only in the legislative record. In its version of the bill, the Senate had deliberately dropped one provision—requiring the IEP "to state and evaluate instructional outcomes objectively"—"out of concern that the IEP might create a contractual relationship."[130] Only after the House insisted on having that provision during conference did the Senate finally relent.[131] With the air thick with contract talk, one can certainly see why some in the Senate balked as they did. And one can also begin to see why others, like S.H.'s grandparents, could so easily slip into assuming the IEP is what the process makes it look like—a contract.

Indeed, over the past half century, many have struggled to put aside the thought. As we saw, within only a few years, the Bureau was also straining in its letters to distinguish the IEP from contract. And scholars like Neal and Kirp and, later, Goodman have similarly picked up on the IEP's contractual quality, joined by many others since.[132] Neither was this simply an early confusion, since cleared up by Congress or the Department of Education, nor just so much scholarly talk, confined to pages like these. For better than twenty years now, the Massachusetts Department of Education has advised parents in its publicly available "IEP Process Guide" that the "IEP is a contract between the school district and the parent," and encouraged both parties to treat it as such.[133] Advocates and other specialists also regularly

[128] *Id.* at 412.

[129] *See id.* at 413.

[130] *Id.*

[131] *Id.*

[132] *See, e.g.*, Caruso, *supra* note 27, at 177 ("The fact remains . . . that IEPs are as close to contracts as it gets in the realm of public services governed by federal law."); Schinagle, *supra* note 28, at 227 ("IEPs have significant contract-like qualities."); Romberg, *supra* note 26, at 459 ("There is a compelling analogy to contractual enforcement . . . ."); Neal & Kirp, *supra* note 25, at 72 n.39 ("The term quasi-contractual is used advisedly [to describe IEPs]."); Chopp, *supra* note 77, at 429 ("The IEP operates like a contract between the school district and the student . . . .").

[133] MASS. DEP'T OF EDUC., IEP PROCESS GUIDE, at 13 (2001), https://www.keystonecollaborative.org/wp-content/uploads/2020/07/IEP-Process.pdf [https://perma.cc/8V5B-8XJ7] ("The IEP should reflect the decisions made at the Team meeting and should serve as a contract between the school system and parent(s).").

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encourage parents to think of IEPs and the IEP process the same way,[134] as do some public schools.[135] And, as the court had to acknowledge in *S.H.*, even a few courts have had trouble seeing the difference.[136] Little wonder, then, that parents and

[134] *See* Matthew Saleh, *Public Policy, Parol Evidence and Contractual Equity Principles in Individualized Education Programs: Marking the Four Corners of the IEP to Mitigate Unequal Bargaining Power Between Parent-Guardians and School Districts*, 43 J.L. & EDUC. 367, 370 (2014) (urging courts to adopt contractual equity principles to supplement the use of contract doctrines to construe IEPs); *see also*, *e.g.*, *Learn the Law: IDEA*, NAT'L CNTR. FOR LEARNING DISABILITIES, https://web.archive.org/web/20230816064839/https://www.ncld.org/get-involved/learn-the-law/idea [https://perma.cc/P5NQ-R68C] (last visited Sept. 17, 2025) ("The IEP is a formal a contract [sic] outlining the services and support the school will provide in order for the child to benefit from the educational program."); *What is an IEP and what purpose does it serve?*, EXCEPTIONAL LIVES, https://exceptionallives.org/guides/what-is-iep-what-purpose-does-it-serve/ [https://perma.cc/EH7C-HGXJ] (last visited Oct. 2, 2025) ("An IEP is an Individualized Education Program. It is a legal contract between you and the school."); *IEP Development*, TEX. PROJECT FIRST, https://texasprojectfirst.org/en/iep-development/ [https://perma.cc/226G-8B7J] (last visited Sept. 17, 2025) ("Think of the IEP as a contract between you and the school. It is your role as a [sic] parent participate in the development of your child's IEP and always understand what you are agreeing to."); *Individual Education Program: IEP*, THE THRIVE CTR., https://web.archive.org/web/20240221003511/https://www.thrivectr.org/theeip [https://perma.cc/3SZF-AVUR] (last visited Sept. 17, 2025) ("An IEP is the legal contract between the parent and school district that documents what special education services will be provided for a child with a disability."); Kristin Stanberry, *5 Common Misconceptions about IEPs*, UNDERSTOOD FOR ALL, https://www.understood.org/en/articles/5-common-misconceptions-about-ieps [https://perma.cc/4HCG-EWWS] (last visited Sept. 17, 2025) ("Myth #2: If something is in the IEP, the school will make it happen . . . . Fact: The IEP is a legal contract. The school is required to provide the services and supports it promises for your child."); Jim Schneider, *Make the Most of Your Child's IEP*, COLO. PARENT (Oct. 28, 2021), https://coloradoparent.com/make-the-most-of-your-childs-iep/ [https://perma.cc/UV7R-GSJ2] ("The IEP is a legal contract between the school and family of every service and support the child will receive, who will provide the service, and how much of it will be provided. . . . In many ways, the IEP process, and the meetings related to it, are like a contract negotiation.").

[135] *See, e.g.*, *IEP Program in Michigan*, DETROIT PUB. SCHS. COMM. DIST., https://www.detroitk12.org/Page/16906 [https://perma.cc/EBC3-6WQW] (last visited Sept. 17, 2025) (noting, among things for parents to remember, the IEP is a contract between the school and parent); *IEP Amendments*, COLO. CHARTER SCH. INST., chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://resources.csi.state.co.us/wp-content/uploads/2021/06/IEP-Amendments-for-Staff-Orientation.pdf [https://perma.cc/52YA-VPTF] (last visited Sept. 17, 2025) ("The IEP is a legal contract that the IEP team develops with the family to ensure that a student has a free, appropriate public education in the least restrictive environment."). This has practically become boilerplate in some of New York City's public schools. *See, e.g.*, *The Individualized Education Program (IEP)*, P.75Q ROBERT E. PEARY SCHOOL, https://p75q.org/iep.html [https://perma.cc/423T-REG2] (last visited Sept. 17, 2025) ("An IEP is a contract between parents and the local Department of Education which says what services the Department commits to provide to your child to address his/her particular needs to ensure success in school."); *Individual Education Plans (IEP)*, P371K, https://p371k.org/iep.html [https://perma.cc/ST7R-XNTM] (last visited Sept. 17, 2025) (same).

[136] *See* S.H. v. Campbell Cty. Sch. Dist., 409 P.3d 1231, 1235 (Wyo. 2018) (noting another court found an IEP was a contract but was in the minority); *see also* Combs by Rockingham v. Sch. Bd. of Rockingham Cty., No. 90–0162–H, 1992 WL 245671, at *1 n.1 (W.D. Va. Sept. 11, 1992) ("An IEP is a contract

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advocates continue to press courts to read IEPs not only *like* contracts, but *as* contracts.

### *C. The Puzzle*

And so we end where we began: what, exactly, is the IEP? As we've seen, the Act itself doesn't say one way or another. And the Act's history, such as it is, seems to point in diametrically opposite directions. On the one hand we have the word of a Senate report and the Act's principal sponsor saying, plainly enough, that whatever the IEP process is, it was *not* intended to be contractual. But we also know that the Senate didn't fully get its way on this either. It also would not have included objective measures in the IEP, recall, lest it be viewed as a performance contract. Yet, on that point, the House prevailed, and the Senate lost. Though, of course, those responsible for enforcing the Act and IEPs still largely wave off the contract talk as just that—a lot of loose talk. On the other hand, we also have the evidence speaking to how the Act came about, and how it was supposed to work—as an accountability device. If we take the word of those who actually wrote or lobbied the IEP into P.L. 94-142, the IEP simply couldn't work were it *not* in some sense contractual. After all, the whole point of the IEP process, as Abeson and other scholars later said, was to contractualize special education. And, unsurprisingly, many today still think of IEPs exactly that way—as contractual—as many parents, like S.H.'s, do. So we are left in the end with a puzzle: is the IEP a contract, or merely *like* one? What's the difference, and what difference would—or should—that make?

## II. THE PROCESS TRANSPLANT

Whatever the answers may be to these questions, one thing seems clear: they won't be found directly in the IDEA, or even its history. We will have to look elsewhere instead. But where? In this Part, I want to suggest we look beyond the IDEA itself—beyond the text or its history—at what those who drafted the Act *accomplished* by ratifying it. Seen that way, the puzzle about the IEP ceases to be about just the IDEA, or even special education. It really becomes a puzzle about how

between the parents or guardians of a handicapped child and the school district that indicates the services the school will provide to educate that child."); Lopez v. City of Bridgeport, No. CV56051932S, 2016 WL 4071711, at *4 (Conn. Super. Ct. June 27, 2016) ("[T]he IEP is a form of contract made between the local board of education and the parents.") (quoting Nisinzweig v. Kurien, No. X05CV960150688S, 2001 WL 1075761, at *29 (Conn. Super. Ct. Aug. 21, 2001)); Prunty v. Johnson & Johnson, Inc., No. 2:15–cv–105–FtM-29DNF, 2015 WL 2019411, at *2 (M.D. Fla. May 1, 2015) (citation omitted) ("The federal program at issue is the [IDEA], and the contracts at issue are IEPs created pursuant to it."); Braley v. Midland Cty. Educ. Servs. Agency, No. 06-11990-BC, 2007 WL 3332859, at *2 (E.D. Mich. Nov. 8, 2007) (explaining that agency offered the student educational services according to an Individualized Educational Program (IEP) contract); M.C. *ex rel.* M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1197 (9th Cir. 2017) ("An IEP, like a contract, may not be changed unilaterally.").

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the law changes, and why. After all, when P.L. 94-142 took effect, it also effectively swept aside a great deal of law.[137] And in doing so, it fundamentally remade special education in its own image.[138] And at the heart of that image was the IEP. So, to the extent that one thinks of the IEP as a contract, and the IEP process as contractual, one might also be tempted to think of the change that the IEP brought about as an instance of mass borrowing—a legal transplant, as comparativists would say. But if so, it would also be a transplant of a highly unusual kind. Indeed, as this Part explains, it does not fit the usual transplantation mold at all. To make sense of it, we need another mold entirely—what I will call a *process transplant*.

### *A. Black Letter Transplants*

How *does* the law change? One way, as comparativists have taught, is by borrowing.[139] Borrowing can occur on a grand scale, as with the spread of the Roman *ius commune* to France or Germany, or of the English common law to the United States and other Commonwealth countries.[140] Or it can occur on far smaller scales,

[137] And not just those state laws that had excluded children with disabilities from school. The IEP also displaced other institutional strategies the states were experimenting with at the time. Wisconsin, for example, had provided for the appointment of a "multidisciplinary team," consisting of two or more professionals "skilled in assessing exceptional educational needs" and "in programming for children with exceptional educational needs," whose job it would be to develop and recommend to the school board "an educational program fitted to the individual child's needs." WISC. STAT. 115.80(3)(a), (e) (1973). The law required, however, only that the team "*consult* with the child's parent prior to recommending a child for a special program[;]" it did not give the parent the right to participate in framing the program's terms. *Id.* at § 115.80(3)(c) (emphasis added). Illinois had provided for much the same by regulation. *See* Jeffrey J. Zettel & Alan Abeson, *The Right to a Free Appropriate Public Education*, *in* THE COURTS AND EDUCATION 214 (Clifford P. Hooker ed., 1978) (describing a similar "multidisciplinary staff conference" required by Illinois' regulations at the time). These approaches might approximate the "professionalized" model that other countries, like the United Kingdom, have used to address the educational needs of their children with disabilities. *See generally* David L. Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, 34 WORLD POL. 137 (1982) (distinguishing the British "professionalization" of special education from the "legalism" pioneered in the United States). And all of that effectively came to an end once the states signed up for funds under P.L. 94-142.

[138] Or at least it did so for those that signed up for funds the Act made available. Only one state—New Mexico—didn't do so immediately. Soon after, though, a group representing children with intellectual disabilities successfully challenged that state's special education policies under the other federal law protecting students with disabilities—Section 504 of the Rehabilitation Act of 1973. After that loss, the state finally gave in and took the money. *See* Yell et al., *supra* note 38, at 225 (recounting this history).

[139] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 7 (Univ. Ga. Press 2d ed. 1993) (1974) ("[I]n the Western world borrowing (with adaptation) has been the usual way of legal development.").

[140] *See* Silvia Ferreri & Larry A. DiMatteo, *Terminology Matters: Dangers of Superficial Transplantation*, 37 B.U. INT'L L.J. 35, 54–55 (2019).

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such as the adoption of the jury trial in Argentina,[141] or even at the level of a single rule, like a rule in the ancient Near East about oxen goring each other to death.[142] Fifty years ago, Alan Watson famously gave us a name for this migration of law from "one country to another, or from one people to another"—the legal transplant.[143] And the law is seemingly littered with them, not only ours, now, but indeed, the law of many other peoples and countries, from the "earliest recorded history."[144] But transplants do not just cross borders. As Vanessa Casado Pérez and Yael Lifshitz have recently shown, they can also hop subjects *within* a single legal system—from water to space law, or consumer contracts to residential leases—as lawmakers borrow from one area of law to fill out or reform another.[145] Whether or not "the most fruitful source of legal change,"[146] transplants certainly do seem to have played *some* role in the way the law changes.

That role, though, can also be fairly superficial—only rule-deep.[147] At least in Watson's early writings, he all but assumed that the only transplants, or perhaps the only ones of interest, were those involving the migration of rules.[148] As the name

[141] *See* Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 L. & SOC'Y REV. 471, 473 (2017).

[142] *See* WATSON, *supra* note 139, at 23–24.

[143] *Id.* at 21. As Mathias Reimann has pointed out, though Watson's book is often credited with their discovery, discussion of legal transplants "actually predates that little volume by at least several decades." Mathias W. Reimann, *A Bottom-up View of Legal Transplants*, 68 AM. J. COMP. L. 689, 689 (2020) (reviewing JENS DROLSHAMMER & ROLF WEBER, WIE DAS RECHT AUF REISEN GEHT (2019)). For the details, see John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637, 686–96 (2013). Many, though, still credit Watson, among others like Otto Kahn-Freund, with making transplants a major subject in comparative law. *See generally* Toby S. Goldbach, *Why Legal Transplants?*, 15 ANN. REV. L. SOC. SCI. 583, 584–85 (2019).

[144] *See* WATSON, *supra* note 139, at 21; *see also*, *e.g.*, John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 367 (1981) ("Legal transplantation has a long history."); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 841 (2003) ("Academic scholarship has identified transplants in virtually every area of law . . . .").

[145] *See generally* Casado, Pérez & Lifshitz, *supra* note 30.

[146] Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996).

[147] As Watson's critics have pointed out. *See, e.g.*, Pierre Legrand, *The Impossibility of 'Legal Transplants,'* 4 MAASTRICHT J. EUR. & COMP. L. 111, 113 (1997) (criticizing Watson's views for their "particularly crude apprehension of what law is and what a rule is").

[148] *See* WATSON, *supra* note 139, at 96–97 (apparently dismissing principles or habits of thought in the comparative study of legal systems, instead focusing on differences in rules); *see also* Legrand, *supra* note 147, at 113 (noting the same in Watson's early writings); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 489–510 (1995) (offering a rough restatement of Watson's theory as holding that legal development is primarily driven by the transplantation of legal rules, and illustrating this with examples drawn from his various writings).

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suggests, these are distinguished by *what* we take to be borrowed—their "object," as William Twinning has put it.[149] In the "paradigm case,"[150] transplants are what Pierre Legrand, criticizing Watson, describes as "bare propositional statements."[151] Of course, no rule is simply a statement, a linguistic entity. Otherwise, a great many apparent transplants from one country to another could never qualify as such, simply because they required translation from the donor country's language to the borrower's (from, say, modern English to Mandarin Chinese).[152] Consider one of Watson's earliest examples, a provision in the Laws of Eshnunna about a goring ox:

> If an ox (was) a gorer and the ward (authorities) have had it made known to its owner, but *he did not guard* his ox and it gored a man and caused him to die, the owner of the ox shall weigh out 2/3 of a mina of silver. If it gored a slave and caused him to die, he shall weigh out 14 shekels of silver.[153]

This rule, Watson explains, dates at least as far back as the eighteenth century B.C.E. Another, addressing a very similar situation, surfaces a century or so later in Hammurabi's Code, and yet another still later in Exodus.[154] Each, though, was formulated somewhat differently—in the case of Exodus, also in a different language. Still, they all show such "similarities both of substance and of formulation" that he thought "some connection, though distant, must exist between them."[155] By "substance," I take him to mean the rule he thought all three articulated—the normative proposition variously formulated across all three of these ancient contexts.[156] The rule accordingly links specific entities and actions (owners of oxen,

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[149] William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC'Y 203, 206 (2005).

[150] *Id.* at 205.

[151] Legrand, *supra* note 147, at 113.

[152] *See generally*, *e.g.*, Wang Jingen & Larry A. DiMatteo, *Chinese Reception and Transplantation of Western Contract Law*, 34 BERKELEY J. INT'L L. 44 (2016). By saying this, I in no way mean to diminish the "[i]nevitable problems in adopting foreign law" that "may arise from . . . translating foreign legal concepts, principles, and rules from one language to another." *Id.* at 47. I mean only to point out that they are problems because of the kinds of transplants they involve—concepts, principles, rules—what usually, if loosely, is filed under the label "black letter."

[153] WATSON, *supra* note 139, at 22–23.

[154] *Id.* at 23.

[155] *Id.*

[156] More precisely, I take him to mean by a "rule" any "guide to thought or conduct" that is "prescriptive", and that "has a logical structure, the most abstract form of which is reflected in the standard conditional

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whose goring causes a person's death) to certain triggering conditions (an owner being officially notified of the ox's propensity to gore, and the ox subsequently goring somebody to death) with specific consequences (having to pay out silver in prescribed amounts).[157] In one form or another, these elements appear in each of the three sources.[158] And together, they share such "similarities of style and substance" that, to Watson's eyes, "parallel legal development" was simply impossible.[159] The only explanation, he concluded, was borrowing.[160]

Serious doubts have been raised about this aspect of Watson's theory, even its intelligibility.[161] In his later years, reacting to that criticism, Watson seemed to recognize the need somewhat to liberalize his way of talking about legal transplants and what he thought legal systems borrowed from one another. Perhaps they were not *merely* rules, he seemed to concede, but instead the "rules[,] institutions, legal concepts, and structures" adopted by a state's legal system.[162] By this, though, he made clear that he still had in mind something tangible, or, really, legible—law in the sense of something that "can easily be reduced to writing," and that would therefore be "accessible."[163] A transplant may not in every case be a rule, understood as a normative proposition. But it still had to be something set down somewhere (usually a statute), and that could be carried, often literally, from one country or jurisdiction to another. Even as liberalized, then, Watson still couldn't quite shake the belief that legal transplants had to be somewhere in the law's black letter—either as a normative proposition, or else one of its constituents (a concept) or the entities

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proposition." Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 965 n.132 (1996). In this sense, rules include standards and even principles. *See id.* at 972 & nn.153–54 (explaining as much). As I note below, rules can also implicitly define institutional concepts. *See infra* note 164.

[157] WATSON, *supra* note 139, at 23.

[158] *Id.* at 24.

[159] *Id.*

[160] *Id.* at 25.

[161] Some have doubted even the "transplant" metaphor. *See* Goldbach, *supra* note 143, at 592 (briefly recounting this debate).

[162] Alan Watson, *Legal Transplants and European Private Law*, 4.4 ELEC. J. COMPAR. L. at 2–3 (2000) (explaining also that law, as he understood it, is an element of the state, and that the state is responsible for the law's coming into being, its application, and its efficacy).

[163] *Id.* at 3.

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that rules apparently create and elaborate (such as institutions).[164] And that is still true of the rich literature that has since mushroomed around Watson's metaphor. So even in the study of institutions like plea bargaining,[165] or concepts like "good faith" in contracts,[166] comparativists still go looking for borrowed black letter—whether in shape of a statutory code or regulation, or in the holding of courts or agencies. For simplicity, we could call this form of legal borrowing the *black letter transplant*. And in the literature today, transplanting black letter still seems by far the "standard case."[167]

Turn back now to the IEP. Was it a transplant? Not, it seems, if we are to judge it by the way the legal transplant has traditionally been understood, even in a more liberalized sense. As we saw in the last Part, the IDEA says nothing about contract,[168] at least understood as the formal legal institution—the concept or the rules constituting it. And, as we also saw, this was deliberate. In the Senate, the bill's sponsors worked hard to keep out anything that looked or sounded too "contractual"—no mention of offer or acceptance, certainly not bargaining or

[164] This would also only make sense, since in the standard accounts institutions just are complexes of rules. *See, e.g.*, JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 28 (1995) (discussing the constitutive rules he takes to define institutional concepts like *money* or *the President of the United States*); Neil MacCormick, *Norms, Institutions, and Institutional Facts*, 17 L. & PHIL. 301, 301 (1998) (offering an alternative account based on institutive, consequential, and terminative rules); Frank Hindriks, *But Where Is the University?*, 66 DIALECTICA 93, 93 (2012) (offering yet another account centered on so-called status rules); Joshua Rust, *On the Relation between Institutional Statuses and Technical Artifacts: A Proposed Taxonomy of Social Kinds*, 25 INT'L J. PHIL. STUD. 704, 704 (2017) (comparing these different approaches). Whether any are right to reduce institutions to rules is another question entirely.

[165] Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 355, 360 (2010) (tracing the migration of U.S. style plea bargaining to the Republic of Georgia and Bosnia and Herzegovina through their adoption of provisions in their statutory law).

[166] *See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998) (analyzing and tracing the role of "good faith" across both U.S. and European jurisdictions in the form of rules, principles, and doctrines).

[167] Twining, *supra* note 149, at 206 (listing "Legal rules and concepts" as well as "Institutions" as the "Standard case" of the "Objects" of legal borrowing). Twining also points to "variants" from this "standard" or "paradigm" case, essentially covering "[a]ny legal phenomena or ideas, including ideology, theories, personnel, 'mentality', methods, structures, practices (official, private practitioners', educational, and so on), literary genres, documentary forms, symbols, rituals, etc." *Id.* This Article seeks to add another to that list—processes—while also giving a clearer sense what it might mean to transplant that and perhaps others of these variants.

[168] *See generally* Individuals with Disabilities Education Act, Pub. L. 108-446, 118 Stat. 2647 (2004).

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*consideration*.[169] The oft-cited Senate report even repudiates contract by name.[170] Nor is it clear what Congress *could* have coherently transferred. As *S.H.* helps us see, the IEP arguably lacks an ingredient indispensable to any contract—consideration.[171] And it seems to lack that ingredient, moreover, by design. After all, the Act itself creates the duty—to provide the child a FAPE—that would seem to take valuable consideration off the table, at least on the district's part.[172] So even if we were to try to squeeze the IEP into contract's black letter, it simply wouldn't fit.

### *B. The IEP as Bargain*

Perhaps, though, we are looking for the wrong thing. Rather than focusing on rules, perhaps we should instead be looking to what those subject to a law like the IDEA are expected to *do* under it and the *process* it creates. Recall that the IEP is itself the culmination of just such a process—the parent and (whenever possible) the child sit down across from a school district's team of educators and professionals, and together hash out an education for the child.[173] As a matter of black letter, as we saw, that's substantially all there is to the IEP process: a meeting and, afterward, the "written statement."[174] Consider, on the other hand, how the process can work in practice. As Daniela Caruso has described it:

> 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. Because resources are limited, families end up competing for special education services, just as different groups may compete for affirmative-action entitlements. IEPs are the product of veritable negotiations between a child's family and the educational team. 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. 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

[169] *Id.*

[170] S. REP. NO. 94-168, at 11 (1975) ("It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship.").

[171] S.H. v. Campbell Cnty. Sch. Dist., 409 P.3d 1231, 1234 (Wyo. 2018).

[172] *See* 20 U.S.C. § 1412(a)(1).

[173] *A Guide to the Individualized Education Program*, OFF. OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC. (July 2000), https://www.ed.gov/sites/ed/files/parents/needs/speced/iepguide/ iepguide .pdf [https://perma.cc/KGB6-BML2].

[174] *Id.*

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> 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. 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.[175]

The IDEA plainly does not *say* anything about contracting or bargaining.[176] And yet, as Caruso and others have seen, it plainly *creates* a "bargaining structure,"[177] in which "negotiations" can, and regularly do, take place.[178] As we saw in the last Part, it also seems to do that by design. But how? By, I want to claim, interleaving a *model* of that process into the law's black letter.

What is a model? Todd Rakoff gives us a helpful start: models "describe type-situations and the relationships among type-characters."[179] Unpacking that a little, we could say that models assemble (1) specific types of actors and entities, (2) endowed with specified legal powers, (3) into a definite social arrangement.[180] In the case of the IDEA, the law singles out a group of individuals that it makes responsible for developing a child's IEP: the parents and (whenever appropriate) the child; the child's regular and special education teachers; an administrator

[175] Caruso, *supra* note 27, at 177 (footnotes omitted).

[176] *See generally* Individuals with Disabilities Education Act, Pub. L. 108-446, 118 Stat. 2647 (2004).

[177] M. Hannah Koseki, *Meeting the Needs of All Students: Amending the IDEA to Support Special Education Students from Low-Income Households*, 44 FORDHAM URB. L.J. 793, 811 (2017).

[178] Bonnie Spiro Schinagle & Marilyn J. Bartlett, *The Strained Dynamic of the Least Restrictive Environment Concept in the IDEA*, 35 CHILD. LEGAL RTS. 229, 229 (2015) ("In the Authors' experience, placement negotiations between parents and school districts are more a matter of jockeying for position in which school districts put their financial interests at the forefront.").

[179] Todd D. Rakoff, *The Implied Terms of Contracts: Of* 'Default Rules' *and* 'Situation-Sense,' *in* GOOD FAITH AND FAULT IN CONTRACT LAW 191, 216 (Oxford Univ. Press 1995).

[180] In this case, I am taking only one kind of model in Rakoff's sense—a model of a social mechanism. For an example of his own, see Todd D. Rakoff, *Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1238–39 (2006) (describing the mismatch between the "postulated underlying dynamics" of much of contract's doctrine, and the realities of boilerplate); *see also* STUART GLENNAN, THE NEW MECHANICAL PHILOSOPHY 17, 39 (2017) (similarly characterizing a "minimal mechanism," and giving committees as an example of socially defined entities that are also system mechanisms); *cf.* William Bechtel & Adele Abrahamsen, *Explanation: A Mechanist Alternative*, 36 STUD. HIST. PHIL. BIOLOGICAL & BIOMEDICAL SCI. 421, 425 (2005) (similarly characterizing models of mechanisms).

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representing the "local educational agency" (often, but not always, a school district); and any professionals needed to interpret evaluation data.[181] As assembled by the Act, these actors also form a further entity, known as the "IEP team."[182] Besides simply naming them, the Act also gives these actors and, collectively, that entity a distinct set of powers. Parents not only have the right to participate in making placement decisions,[183] but may also ask for relevant educational records,[184] insist on having the child independently evaluated,[185] refuse or withdraw consent for services,[186] and, ultimately, resolve disagreements about the IEP through mediation[187] or else demand a hearing should they disagree with the team's decision.[188] Only a group that includes the parent has the power to make that decision.[189] And that decision must come about through a specific arrangement: not just the IEP meeting, itself structured by the Act and its implementing regulations,[190] but the whole sequence of steps leading to and from it.

Altogether, we could think of this as the equivalent of a verbal sketch, a blueprint in words. Of what? A *mechanism*,[191] in this case for delivering each child with a disability a FAPE, in the least restrictive environment. And how do we grasp that mechanism? Not, I suggest, by holding a lot of black letter in our head all at once, if that were even possible, linearly checking provisions off, one by one. Instead, we draw something much closer to a picture—a model. For a handy example

[181] 20 U.S.C. § 1414(d)(1)(B)(i)–(vii).

[182] *Id.*

[183] 34 C.F.R. § 300.501(b)–(c) (2025); 20 U.S.C. § 1414(d)(1)(B)(i).

[184] 34 C.F.R. § 300.501(a) (2025); 20 U.S.C. § 1415(b)(1).

[185] Subject, in this case, to the district's right to contest that demand at a due process hearing. 34 C.F.R. § 300.502(b) (2025); 20 U.S.C § 1415(b)(1).

[186] 34 C.F.R. § 300.300 (2025); 20 U.S.C. § 1414(a)(1)(D).

[187] 34 C.F.R. § 300.506 (2025); 20 U.S.C. § 1415(e).

[188] 34 C.F.R. § 300.511 (2025); 20 U.S.C. § 1415(f)(1)(A).

[189] 34 C.F.R. § 300.327 (2025); 20 U.S.C. § 1414(e).

[190] 34 C.F.R. § 300.501(c)(1)–(2) (2025); 20 U.S.C. §§ 1414(e), 1415(b)(1).

[191] Here, I am following Nancy Cartwright's account of models and mechanisms. *See generally* NANCY CARTWRIGHT, THE DAPPLED WORLD: A STUDY OF THE BOUNDARIES OF SCIENCE 49–74 (1999).

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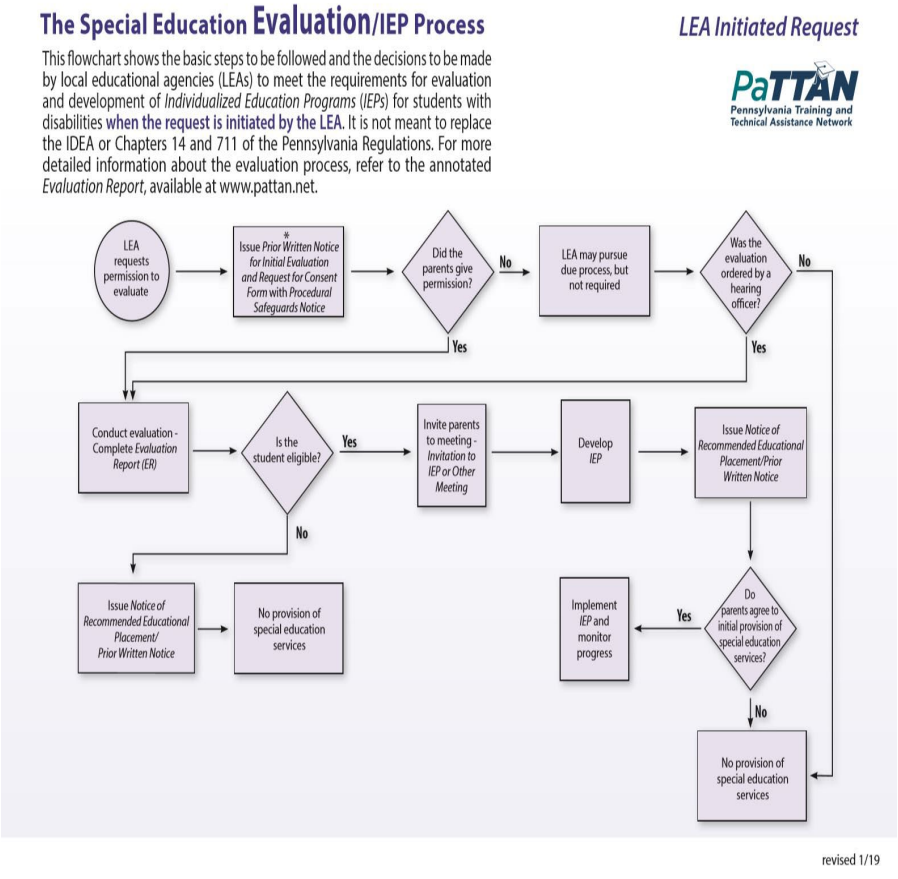
of what I have in mind, just consider the flowchart below, from Pennsylvania's technical assistance network for special education (PaTTAN).[192]

As PaTTAN says, its flowchart essentially depicts the IEP process in a sequence of "basic steps," a mechanism that either parent or Local Educational Agencies (LEA) can set in motion.[193] Where do those steps come from? Obviously, the IDEA and the regulations implementing it—the rules.[194] As PaTTAN's disclaimer warns, though, the flowchart does not "replace" those rules.[195] Nor does it try to. Yet the sequence of "basic steps" is there in the black letter, waiting to be assembled into a flowchart like PaTTAN's.

Models in this sense are obviously "neither doctrines nor cases," nor anything else for that matter naturally described as the law's black letter.[196] Indeed, they may not consist of "linear propositions" at all, as PaTTAN's doesn't—they are more subway map than statute book.[197] As such, they do not "aspire to the universality present in abstract rules."[198] And what rules they do use are awash in social content, and framed against a large backdrop of social context.[199] Just consider how much one already has to know about the public schools to even make sense of PaTTAN's

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model, or the rules it embodies: how schools and districts are set up and funded; the usual role parents play in their children's education; the roles of teachers and aides, school psychologists and counselors, principals and superintendents, school boards and state educational agencies and the work they all do; and the authorities that shape and warp that "educational order" in their complex, often subtle, sometimes clashing ways.[200] As is clear from just that laundry list, the "glue" holding together these parts and processes is not merely "logic." And so knowing how a model works will considerably outstrip what a preserving lawyer could deduce simply from a patient study of the Federal Register. What else would she need to know about? A good many social forces and processes—individual and group habits and beliefs, as well as the norms and expectations of professions and institutions. In short, "social processes"—what flesh-and-blood people are supposed to *do* and how and when they are supposed do it.[201] And very often this is only implicit in the models lawyers use and make. A parent can't participate in a meeting to which the district has yet to invite her, and she can't be invited to a meeting that has yet to be scheduled. That sequence is both practically necessary and clearly supposed by the way the IDEA sets up the IEP process. The IDEA, however, never *says* anything like that.[202] Yet anybody conversant in the IEP process can and does immediately grasp these implicit dynamics, without needing to spell any of that out, literally, in so many words. We can instead make do, and often do better, by using diagrams, flowcharts, or even gifs.[203]

My claim here is not that the IDEA itself is literally a model like PaTTAN's (it is probably for the best that Congress is not in picture-drawing business). I instead want to claim only that the highly reticulated body of rules that the IDEA *does* contain can be read—and indeed has been read, by PaTTAN and many others—as

[200] *See, e.g.*, John W. Meyer, *Organizational Factors Affecting Legalization in Education*, *in* SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 261–65 (David L. Kirp & Donald N. Jensen eds., 1986) (describing these elements and these "structural conditions" and their interplay in the early years of the Act).

[201] *Id.* at 260–61; *cf.* Bechtel & Abrahamsen, *supra* note 180, at 430 ("[T]he traditional glue that relates laws and statements of the phenomena to be explained in [deductive-nomological] models will not capture the reasoning in understanding involved in understanding.").

[202] *See generally* Individuals with Disabilities Education Act, Pub. L. 108-446, 118 Stat. 2647 (2004).

[203] *Cf.* Bechtel & Abrahamsen, *supra* note 180, at 426–30 (explaining why the diagrams commonly used in the natural sciences to depict models are not represented (or easily represented) in linguistic representations). One might note the same of nutshells still popular among law students, and arguably, to that extent, their importance to legal change. *See* Alan Watson, *The Importance of "Nutshells,"* 42 AM. J. COMP L. 1, 1 (1994) (remarking the importance of nutshells to the most notable events in western legal history).

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framing a *model* of a *process*. And it was that process, through that model, that the IDEA ultimately transplanted into special education.

But why? Why that process? As we saw in Part I, the answer boils down to how Congress sought to solve the problem plaguing special education: accountability. How do you ensure the child with a disability gets a truly "individualized education"? And how does *Congress* do that without upsetting the delicate political balance between state and federal authority in education? We know that the process Congress ultimately chose was not arbitrary, nor just a shot in the dark. As Neal and Kirp and Goodman later learned from the staff who had their hands in drafting it, P.L. 94-142 had *intended* to solve that problem by, in some sense, *contractualizing* the decision-making.[204] But what sense is that?

By effectively recreating the features that we know as the classical *model* of contract, contract's "paradigm case."[205] To help see how, consider this illustration, again from Caruso, of one hypothetical family embarking on the IEP process. That family

> 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 . . . . After several meetings and rounds of discussion, the school district offers [this family] more educational benefits than the family would have received without "fighting," which is, by [another, less forceful family's] standards, more than the law requires . . . . 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.[206]

As far as I have ever seen, this illustration is clearly apt. And here, Caruso adds, "the contract analogy is most appropriate."[207] One might instead say that the hypothetical lives up to the IDEA's design. As Caruso rightly sees, that design is contractual because of the process it creates, a process replaying the same dynamics

[204] *See* Neal & Kirp, *supra* note 25, at 65; *see also* Goodman & Bond, *supra* note 35, at 413.

[205] MARGARET JANE RADIN, BOILERPLATE 3 (2012).

[206] Caruso, *supra* note 27, at 179 (footnotes omitted).

[207] *Id.*

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assumed by much of contract law—contract's classical model.[208] Over the years that model has gone by many descriptions.[209] At its core, though, is the bargain, in which "each party is expected to define his or her own interests."[210] And as Caruso invites us to see, that kind of bargaining is also built into the IEP process, and shares its basic features:

*Friendly strangers*. As in the classical model, the parties to an IEP are hardly intimates.[211] At least at the point of initial services, the parent may know only one person on the other side of the table—her child's classroom teacher—and nobody else. They may feel effectively like strangers.[212] Still, they may feel like equals at the table, especially when joined by counsel—a feeling that districts reportedly work hard to encourage and cultivate.[213]

*Arm's length negotiation*. Also, as in the classical model, though, the parties are negotiating "at arm's length," each pursuing their own interests.[214] As we saw Caruso say, even though the parties may be "pursuing the common target of an appropriate education for the child," they are still "work[ing] on the basis of

[208] RADIN, *supra* note 205, at 3.

[209] To list just a few, see Aditi Bagchi, *Parallel Contract*, 75 U. PITT. L. REV. 139, 145 (2013) (describing the classical contract model as involving parties who negotiate their agreements, which imposes a specified set of performance obligations on the parties, and the obligations of each are thoughtfully designed such that the bargain could not be improved to their mutual satisfaction); RADIN, *supra* note 205, at 3 ("Contract, at least in this paradigm case, is typified by a process of negotiation that results in a bargain satisfactory to both parties."); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 402–03 (1979) (offering a classical model of contract consisting of six features).

[210] J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325, 337 (1996).

[211] *Id.* at 339 ("What characterizes bargains is not that they occur between strangers, but that they can occur between strangers.") (emphasis omitted).

[212] Chun Zhang & Tess Bennett, *Facilitating the Meaningful Participation of Culturally and Linguistically Diverse Families in the IFSP and IEP Process*, 18 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 51, 53 (2003) (observing that, at this point, feelings may run especially high for families as their reaction to the child's disability is exposed to a stranger); Kate MacLeod, Julie N. Causton, Mary Radel & Patrick Radel, *Rethinking the Individualized Education Plan Process: Voices from the Other Side of the Table*, 32 DISABILITY & SOC'Y 1, 9 (2017) (reporting the feeling among parents that, through the process, they are trusting their beloved child to the care of strangers—albeit trained, caring strangers—but still strangers).

[213] *See, e.g.*, Wade W. Fish, *The IEP Meeting: Perceptions of Parents of Students Who Receive Special Education Services*, 53 PREVENTING SCH. FAILURE: ALT. EDUC. FOR CHILD. AND YOUTH 8, 11–12 (2010) (reporting that in a survey of fifty-one parents who had gone through IEPs, the great majority felt the experience was positive, and many attributed it to feeling that educators often treated them as equal partners, consistent with prior studies).

[214] ATIYAH, *supra* note 209, at 402.

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conflicting subtexts."[215] The parent typically will be pushing not just for any education, but the best the child can get; they are, by design, the child's "advocates."[216] The district, on the other hand, has to be mindful of the resources it has and what committing to a service today will mean for what it can afford tomorrow. So, Bonnie Spiro Schinagle and Marilyn J. Bartlett recount, "placement negotiations between parents and school districts" frequently devolve into "jockeying for [a] position in which school districts put their financial interests at the forefront."[217] Parents say the same. As one summed up her advice to other parents: "Don't trust that the school is going to do what is best for your child. They will do what is best for them."[218] Or as another bluntly warned: "Be prepared to fight like hell."[219] Unsurprisingly, "many parents" find the IEP process "difficult,"[220] even "humiliating."[221] So even though in theory the parties are pursuing the same abstract end (a FAPE), in reality their interests, and aims, quite often diverge.[222] And, unsurprisingly, the parties will be pursuing their own ends, as they each understand them.

*Informational risk*. Parties to the IEP generally have to rely on their own information and must form their own judgments about it, at their own risk.[223] Here that risk falls heaviest, of course, on parents. As Matthew Saleh notes, "[s]chool districts, for better or worse, are typically the 'repeat players' in IEP meetings . . . , whereas parent-guardians are the 'one-shotters,' or at least are comparatively drastically less experienced than the other party to the agreement."[224] While districts do have to turn over some information to parents, as well as any records the parent may request, they are under no obligation to help the parent understand the often

[215] Caruso, *supra* note 27, at 177.

[216] Tweedie, *supra* note 61, at 61.

[217] Schinagle & Bartlett, *supra* note 178, at 229.

[218] Sanderson, *supra* note 16, at 355.

[219] *Id.*

[220] *Id.*

[221] Jan Weatherly Valle & Elsie Aponte, *IDEA and Collaboration: A Bakhtinian Perspective on Parent and Professional Discourse*, 35 J. LEARNING DISABILITIES 471, 474 (2002) (quoting David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 L. & SOC'Y REV. 785, 819–20 (1993)).

[222] *See, e.g.*, MacLeod et al., *supra* note 212, at 2–3 ("[T]he IEP process can be difficult and complicated because school staff and families do not always share the same goals and perspectives about disability and education.").

[223] *See* ATIYAH, *supra* note 209, at 403.

[224] Saleh, *supra* note 134, at 382.

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complex, jargon-laden evaluation and other materials typical of placement decisions.[225] Consequently, many parents struggle to piece together what a proposed service will do for their child, or whether a child really needs it or something else.[226] As Caruso notes, though, this also means that a family, like in her hypothetical, will have a comparative advantage over other parents at the IEP meeting table.[227] The parent armed with more and better information, and backed by advocates who know how to use and exploit it, can better turn the bargaining table to their advantage—just as contract assumes of any sophisticated party.[228]

*Free and voluntary agreement*. The IEP, like any contract, also has to be agreed to freely and voluntarily by both district and parent.[229] Even though under an obligation to provide FAPE, the district can of course choose to offer only what it believes necessary for it—and does not, for example, have to provide a parent a service or accommodation simply because the parent prefers it. And a parent, too, can always decline a district's offer of FAPE. Although not originally in the Act, Congress has since made this explicit through the law's consent provisions, allowing parents to walk away at any time.[230] And the Act gives parents a potentially powerful kind of exit. As S.H.'s grandparents argued, a parent not only has the right to homeschool the child, but to place their child in a private school.[231] To which they might have added that the district could be stuck paying the bill for that private

[225] *See* Colonial Sch. Dist. v. G.K. *ex rel.* A.K., 763 F. App'x 192, 197–98 (3d Cir. 2019) (parents had no claim that the district had restricted them from participating in the decision-making process, even though they did not completely understand the goals of the IEP because the Act does not require the District to ensure perfect comprehension by parents of a student's IEP). A district *does* have a duty to translate, though, in cases when a parent has only limited proficiency in English or would encounter other communication barriers, like deafness. *See* 34 C.F.R. § 300.503(c) (2025).

[226] *See, e.g.*, Virginia M. Zeitlin & Svjetlana Curic, *Parental Voices on Individualized Education Programs: 'Oh, IEP meeting tomorrow,? Rum tonight!*, 29 DISABILITY & SOC'Y 373, 381–83 (2014) (reporting that the parents in its study generally found their children's IEPs "hard to read," and their length "daunting and unnecessary"; one physician parent considered his child's IEP "meaningless," another saw in it only "mumbo jumbo," still another said she was "lost" trying to make sense of it).

[227] *See, e.g.*, Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 495 (2010) ("Sophisticated parties are expected to negotiate ably and order contract risks sensibly.").

[228] *Id.*

[229] ATIYAH, *supra* note 209, at 403.

[230] *See* 34 C.F.R. § 300.9 (2025).

[231] *See* Brief for Appellant at 18, S.H. v. Campbell Cty. Sch. Dist., 409 P.3d 1231 (Wyo. 2018) (No. S-17-0164), 2017 WL 4273884, at *18 (arguing that, in agreeing to S.H.'s IEP, her grandparents gave up their right to place S.H. in another facility).

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placement, if it's otherwise appropriate, and the district's own "offer of FAPE" was improper.[232]

*Free dealing as the fair deal*. Finally, the IEP process equally shares with the classical model of contract a vital assumption: as P.S. Atiyah puts it, that the parties "are the best judges of their own needs and circumstances, that they will calculate the risk and future contingencies that are relevant, and that all these enter into the bargain."[233] And thus "free dealing was fair dealing."[234] Or in the Act's idiom, an IEP done right just *is* an IEP that delivers FAPE. Indeed, this was and still is key to the whole theory of the IDEA. The IEP process individualizes education the same way that free dealing is thought to make deals fair: by making special education the stuff of dickering. As long as you put the parent in the kind of arrangement the IDEA designs, and empower that parent the way the Act does, whatever educational deal is struck just *is* appropriate. As Ballard and Zettel saw early on, the IEP "mechanism" is *itself* substance; "what is agreed to by all parties becomes in fact the 'appropriate' educational program for the particular child."[235] An appropriate education just is the deal struck at the IEP meeting table.

All this explains why, as we saw, those who actually had a hand in drafting P.L. 94-142 could insist that the law had contractualized special education. The IEP had been crafted on the model of the bargain—the classical model of contract. And, as the Court soon recognized, this is also why the Act invests virtually everything in that process—"procedures"—and why it still "impose[s] no explicit substantive standard."[236] The Act simply didn't need one.[237]

Nor, as we saw, was there much appetite for one anyway. By 1975, after the uneven experience with the *PARC* consent decree, and with states still skirting or openly flouting their own "mandatory" laws, how could Congress have put faith in *any* substantive standard? Would anybody really have believed that a few lines of legislation would discipline professionals' judgments, or truly individualize their

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[232] 20 U.S.C. § 1412(a)(10)(C)(ii).

[233] ATIYAH, *supra* note 209, at 403.

[234] *Id.*

[235] Ballard & Zettel, *supra* note 75, at 180.

[236] Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 398 (2017). As far as substance was concerned, the Act itself had only "admonitions" that were at best "general and somewhat imprecise." Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982).

[237] *Rowley*, 458 U.S. at 205 ([C]ongressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.").

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decisions for each child? How can a definition undo a lifetime of distrust? And even if some in Congress believed it could, how could any standard with teeth have made it out of the political gauntlet that is federal education policy? The problem wasn't merely technical,[238] in short, and so the solution couldn't be simply definitional. The problem was instead institutional, as its solution would have to be, too. And thus Congress went looking for—and found—an "accountability device" that could do what many at the time thought no substantive standard could: compel professionals to squarely confront the needs of the disabled child, as an individual, and address them on that basis, all while leaving the educational details—the terms—to the parents and schools to settle for themselves. That "ingenious device," Congress named the IEP.[239] But it could just as well have been called the "special education bargain." For, at bottom, that was all it was—the bargain still so much at the center of contract law, smuggled in the public schools under a heavy cloak of procedure.[240]

### *C. A Process Transplant*

How, then, did the IDEA change the law of special education? Based on all the evidence we have, the answer seems to be—by borrowing. Yet, as we have seen, the Act *says* nothing about contract, bargain, agreement, or the like.[241] So if we think of transplants as the literature long has, the IEP hardly seems to fit the bill. The reason why not should now be clear. With the IEP, Congress didn't borrow any of contract's black letter—its rules, concepts, or doctrines. Congress instead sought to exploit the contractual *process*—the special education bargain. And to do that, it had to write a model of that process into the heart of P.L. 94-142, the same model still at the heart of contract theory today.

In a sense, everything said so far should already be familiar. For years now, scholars, educators, schools, even a few courts have felt the tug of contract in the IEP. Some, usually lawyers, try to smother that feeling as simply false, mere illusion:

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[238] As is sometimes said in the literature. *See, e.g.*, Mitchell L. Yell et al., *Free Appropriate Public Education*, *in* HANDBOOK OF SPECIAL EDUCATION 72 (James M. Kauffman, Daniel P. Hallahan & Paige Cullen Pullen eds., 2d ed. 2017) ("Congressional writers of the IDEA understood that it would be impossible to define a FAPE in such a way that the actual substantive educational requirements for every student were listed, so instead they defined a FAPE primarily in accordance with the procedures necessary to ensure that parents and school personnel would collaborate to develop a program of special education and related services that would meet the unique educational needs of individual students.").

[239] Neal & Kirp, *supra* note 25, at 72.

[240] Here I am adopting what Stuart Glennan calls the "models-first" approach to distinguishing among kinds of processes (or mechanisms), according to which two processes (or mechanisms) are of the same kind just in case the same model applies. *See* GLENNAN, *supra* note 180, at 92–95.

[241] *See generally* Individuals with Disabilities Education Act, Pub. L. 108-446, 118 Stat. 2647 (2004).

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the IEP must be *quasi*- or *pseudo*-contractual, merely "analogy" or "metaphor." Others, typically educators and parents, struggle to see why an IEP should be any less a contract than, say, clickwrap.[242] Nobody, though, has yet to put a finger on that feeling's source, on what about the IEP lures us into seeing it as contractual. The reason why not is simple: given the literature's focus "primarily on doctrine-infused transfers of law," we have been looking for the wrong thing.[243] Or, rather, given that focus, it hasn't been clear *what else* we could be looking for, besides borrowed rules, the law's black letter. The phenomenon is there, but we have simply lacked the vocabulary to describe it.[244]

For want of a better term, we could call this kind of borrowing a *process transplant*. And as I see it, at least three features distinguish it from the transplants "privileged" in the literature: *what* is borrowed, *how* that borrowing occurs, and *why*.

*The What*. As one can see in PaTTAN's flowchart, we generally get a grip on a process like the IEP by assembling a model.[245] Just as clearly, though, models cannot be equated with what I have been calling black letter. They are neither cases nor doctrines, neither rules nor concepts. Visualized, they are much closer to pictures, diagrams, even animations. And so the way a process is transplanted often will look very different from the borrowing of black letter, like in the perhaps extreme case of Mustafa Ataturk's Turkey, which, in 1927, wholesale imported the Swiss Civil Code and Code of Obligations.[246] This is not to say, though, that a process could not be transplanted by borrowing black letter, even plain copying-and-pasting. The IDEA, after all, might have required bargaining in so many words, much like the National Labor Relations Act ("NLRA"). Or as we will see below, the IDEA might have adopted contract doctrine directly as a statutory standard, like for interpretation of IEP or remedies. The IDEA clearly didn't do any of that, though, and—as matters here—it need not have. Indeed, perhaps the most interesting cases may be those hybrids of both approaches: when one legal system or actor seeks to

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[242] *IEPs and Common IEP Issues*, EDUCATIONLAWYERS.COM, https://www.educationlawyers.com/what-is-an-iep [https://perma.cc/F2ZU-JSLU] (last visited Sept. 23, 2025).

[243] Natasha Affolder, *Contagious Environmental Lawmaking*, 31 J. ENVT'L L. 187, 198 (2019) (observing that studies of "transplants" often emphasize large-scale legal transfers—like the adoption of entire civil or commercial codes—as well as other transfers involving doctrines, institutions, or legal ideas).

[244] *Cf. id.* at 199 (explaining, given the literature's focus, that she, too, was seeking "a name, even as a place-holder, to describe what [she] see[s] as a significant aspect of environmental law practice that [her] own legal education has not prepared [her] to adequately describe").

[245] *See supra* Section II.B.

[246] *See* Ferreri & DiMatteo, *supra* note 140, at 55 (giving this standard example). A closer analogy would be what software engineers code the simulation of a natural system in a language like C++. For a particularly lucid exposition, see GLENNAN, *supra* note 180, at 99–105.

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transplant a model, or part of one, *by* transplanting black letter.[247] One might well wonder whether the checkered history of legal transplantation—some flourishing, while others wither—reflects some confusion about what it takes for each kind of transplant to succeed, black letter and process, and to what extent the one supposes the other.[248]

*The Why*. Process transplants are also unique in another way: *why* they are used in the first place. Thanks to the comparativists' study of legal change, we now know that legal systems and actors generally resort to borrowing for any number of reasons. Among those, as Casado-Pérez and Lifshitz have explained, are reasons of efficiency: borrowing can help legal actors "save time and money by not developing their own solution to a problem," or else "ensure uniformity and interoperability across jurisdictions."[249] In some cases borrowing may enhance legitimacy, by drawing on "the prestige of the originating system or rule."[250] Sometimes, as in the case of the "natural transplants" Casado-Pérez and Lifshitz identify, borrowing happens out of sheer habit—because "what is familiar" is also what "seems intuitive or instinctual."[251] Reasons like these plausibly explain much of the black letter borrowing documented in literature, and they could just as easily apply to processes. Missing from that list, though, is a reason that uniquely motivates a transplant like the IEP: a process may be borrowed because of its *nature*.

By "nature" I mean something very specific: a "nature" not in the sense of a process's "essence,"[252] but rather the *capacities* that process has, what it *can do*, by virtue of being a process of that kind.[253] And, indeed, in the case of the IEP, we saw

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[247] For one possible example, see generally Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 230 (2000) (discussing Italy's apparent attempt to incorporate elements of the common law's adversarial model into its traditionally inquisitorial legal system).

[248] A useful example might be the "revolution in landlord-tenant law" that both Casado Pérez and Lifshitz and Rakoff discuss. *Compare* Casado Pérez & Lifshitz, *supra* note 30, at 977–78 (discussing Javins v. First Nat'l Realty Corp, 429 F.3d 1071 (D.C. Cir. 1970)), *with* Rakoff, *supra* note 179, at 217 n.57 (analyzing the same briefly).

[249] Casado-Pérez & Lifshitz, *supra* note 30, at 945–46. Of course, transplantation might also occur because one country or actor imposes it on another, or because "a group of people, often experts, push[] for the adoption." *Id.* at 945.

[250] *Id.* at 945.

[251] *Id.* at 977.

[252] As, for example, one arguably sees in the New Private Law. *See, e.g.*, Katrina M. Wyman, *The New Essentialism in Property*, 8 J. LEGAL ANALYSIS 183 (2017) (reviewing critically and analyzing the "new essentialism" in property law).

[253] The same sense, in other words, that Nancy Cartwright uses that term. *See* CARTWRIGHT, *supra* note 191, at 81.

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that those who had a hand in drafting P.L. 94-142 sought to contractualize special education for exactly that reason: what they thought that process would do *because* it was contractual.[254] As Jon Romberg has explained, the IEP process was designed precisely to achieve two effects: (1) "to enhance the fairness and wisdom of the resulting substantive decisions," and (2) to ensure the "meaningful participation of the family in the decisionmaking process concerning their child."[255] The former reason Romberg regards as "instrumental," and the latter "a normative good, in and of itself."[256] But why would the IDEA's drafters have believed that the IEP process would or even could do either? Because those are exactly the effects we expect of "bargaining and mutual assent" itself—any process in the nature of contract.[257] As Rakoff has put it,

> Enforcing [a contract's] terms presumptively enhances welfare because parties generally know what is good for them. When they trade quid pro quo, each party choosing what he is to get over what he is to give, each party comes out better off, and the same set of resources produces greater satisfaction overall. And enforcing the terms of contracts also presumptively enlarges freedom because each party chose to enter the arrangement. Taking someone's voluntary commitments seriously both dignifies his freedom and also enhances his opportunities for expressing that freedom.[258]

The drafters expected the IEP to produce fair and wise decisions the same way that free dealing makes the resulting deal fair. Why? Because they assumed, quite simply, that that was what contract does—what arrangements in the nature of contract do. Likewise, the drafters believed that the IEP process would enhance the parent's autonomy—a good in itself, whether for IEPs or for contacts generally.[259] And again, they assumed as much because they believed that to be in the nature of the process they had designed—a design in the nature of contract. Whether either assumption actually obtains in fact—like when figuring out what a child with a disability needs to make progress toward appropriate educational goals—obviously

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[254] *See* Tiina Itkonen, *PL 94-142: Policy, Evolution, and Landscape Shift*, 16 ISSUES IN TCHR. EDUC. 7, 10 (2007).

[255] Romberg, *supra* note 26, at 447.

[256] *Id.*

[257] Rakoff, *supra* note 179, at 1237.

[258] *Id.*

[259] *Special Education Public Policy*, PROJECT IDEAL, https://www.projectidealonline.org/v/special-education-public-policy/ [https://perma.cc/S3XV-KEQ4] (last visited Sept. 23, 2025).

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cannot be stipulated, nor guaranteed a priority. But the point is that that assumption was made at all, and that it clearly can and does motivate a transplant like the IEP—a transplanted process, that is, rather than a rule. To that extent, processes are borrowed for a unique reason—what it is in their nature to do. And, as the next Part explains, this borrowing also shapes a distinctive kind of strategy.

## III. THE SPECIAL EDUCATION BARGAIN REVISITED

The IEP was a legal transplant, as the last Part argued, but a distinctive kind, and one largely unknown to the literature. So much so that we had to propose a new name for it—the *process transplant*. That kind of transplant, I claimed, gives us a way of describing a kind of legal change that we might otherwise miss—the kind of change on display when Congress remade special education half a century ago. With it, though, we gain more than just a new way of cataloging legal change. We also gain a new explanatory foothold that we otherwise lack at the level of black letter. In the case of the IEP, as this Part shows, we gain a new way of understanding how the doctrine has developed the way it has under the IDEA, and why.

### *A. Interpreting IEPs*

Consider, first, what may seem like a straightforward question. How should IEPs be read? Or more precisely, what can a court consider when deciding what a child's IEP requires, and whether it provided a child a FAPE? Perhaps surprisingly, federal courts appear to be split on this point. On the one hand, as Matthew Saleh suggested, three circuits so far appear to have "explicitly condoned judicial reliance on extrinsic evidence in determining whether an IEP provides FAPE."[260] Another three circuits, on the other hand, have held that when reading IEPs, "courts should not look beyond the four corners of the document."[261] Between these, in Saleh's view, sits the Second Circuit, which has explicitly declined to adopt a rule limiting an IEP to its "four corners," yet also cabined "testimony regarding state-offered services . . . only [to] explain or justify what is listed in the written IEP," and never to "support a modification that is materially different from the IEP."[262]

As Saleh rightly sees, this debate revolves entirely around contract. In his view, though, the sides in that debate also line up neatly along either side of another distinction: those that treat the IEP like a contract, and those that don't. Those that do, he says, adopt the "four corners" rule he favors (as modified by "contractual equity principles," like unconscionability); those that don't are instead willing to rely

[260] Saleh, *supra* note 134, at 369 & n.12 (collecting cases from the First, Sixth, and Seventh Circuits).

[261] *Id.* at 370 & n.13 (rounding up cases from the Fourth, Ninth, and Tenth Circuits).

[262] R.E. *ex rel.* J.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 185 (2d Cir. 2012).

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on extrinsic evidence—something he quite reasonably disfavors, also for reasons rooted in contract.[263] I have no quarrel with his recommendation or the reasons he gives for it. And he is clearly right that "[a]ny rule of interpretation" that "strengthens the autonomy of the IEP," distinguishing it from due process, is "closer to the legislative intention of the IDEA's IEP provisions."[264] I differ only with the way he characterizes this supposed split, or how much of a split it really is, and what this case law tells us about how the courts approach and understand IEPs. Unsurprisingly, the split as I see it is a split *within* the law of contracts, playing out across the law of special education.

To see this, just consider the split itself. As Saleh sees it, the split parts courts that read IEPs more like contracts from those that don't.[265] In fact, though, this split seems to track a different distinction: between courts that seek the meaning of an instrument within its "four corners," "without resort to extrinsic evidence of any kind,"[266] and those contextualist courts that are willing to resort to some form of non-textual, extrinsic evidence when interpreting contracts.[267] Saleh is certainly right that a plain-meaning approach still dominates the common law of contract.[268] But that approach has long had its contextualist rivals, among them the Uniform Commercial Code and the Restatement (Second) of Contracts.[269] So even if Saleh is right to describe the split the way he does, that hardly implies that one side reads IEPs like contracts, and the other not. It instead parts plain meaning courts from contextualists. And that only reinforces just how easily even the courts slip into thinking of IEPs along contractual lines—just as one would expect if the IEP were a transplant.

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[263] Although Saleh calls this a "four corners" rule, he seems to mean by this not the "four corners" rule as it has been traditionally understood—as a rule about contract *integration*—but a rule about how to *interpret* contracts that are fully integrated. *See, e.g.*, PERILLO, *supra* note 91, at 136–37 ("The Plain Meaning Rule states that if a writing, or a term is plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind.").

[264] Saleh, *supra* note 134, at 392.

[265] *Id.* at 369.

[266] PERILLO, *supra* note 91, at 136–37.

[267] *Id.*

[268] *See id.* at 137 (noting the UCC and the Second Restatement among the contextualists); *see also* Jeffrey W. Stempel, *What Is the Meaning of "Plain Meaning"?*, 56 TORT TRIAL & INSUR. PRAC. L.J. 551, 567 & n.43 (characterizing the Second Restatement, and collecting relevant provisions); RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 3 (AM. L. INST. 2018) (noting the same about the Restatement (Second) of Contracts, and rejecting that view in favor of the plain meaning approach given its predominance in the insurance case law).

[269] PERILLO, *supra* note 91, at 137 nn.221–22 (citing U.C.C. § 2-202 cmt. 2 and RESTATEMENT (SECOND) OF CONTS. §§ 200–204 (AM. L. INST. 1981)).

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Indeed, this thinking surfaces directly in the way courts have justified a four corners rule for IEPs. As the seminal Ninth Circuit case explained, keeping within the four corners of an IEP "has an important purpose that is not merely technical."[270] It ensures that a "formal, specific *offer*" is presented to the parents so that they can "consider seriously whether" that offer is "an appropriate placement under the IDEA."[271] As Saleh persuasively argues, a plain meaning rule like this doesn't only, or even primarily, create a clear record for the parties to take to due process.[272] It also supports the IEP process itself—a process that the Ninth Circuit all but called bargaining.[273]

All that said, it is not entirely clear how much of a split there really is on this point. In fact, looked at more closely, one finds all but one of the circuits reading IEPs the same way—in each case, using the same plain meaning approach from contract law. Of the three courts that Saleh believed had expressly embraced extrinsic evidence, one—the Sixth Circuit—has in fact made clear that it generally also applies a plain meaning rule, for the same reasons the Ninth Circuit gave.[274] And another—the Seventh Circuit—has also admonished that "under usual circumstances," a "court should find it unnecessary to go beyond the four corners of the document."[275] When there is some "vagueness in the instrument" on that point, though, the court acknowledged that it would have to "turn to extrinsic evidence to determine the intent of those who formulated the plan."[276] But this is just to say that when the IEP is neither plain nor unambiguous, a court obviously cannot limit itself to the words on the page, as would be true under any plain meaning approach. Meanwhile, in the case Saleh cites from the First Circuit, the panel indeed suggested the court would consider extrinsic evidence to read IEPs—not, though, because it rejected a plain

[270] *See* Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994) (emphasis added); *see also* Knable *ex rel.* Knable v. Bexley City Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001) (relying on *Union*'s rationale to adopt the plain meaning approach); A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 682 (2007) (relying similarly on *Knable*'s discussion of the rationale in *Union*).

[271] *Union*, 15 F.3d at 1526.

[272] *See* Saleh, *supra* note 134, at 382.

[273] *Id.*

[274] *See Knable*, 238 F.3d at 768 ("[The court] must limit [its] evaluation of [the district's] proposed IEP to the terms of the document itself, as presented in writing to [the parents].").

[275] John M. *ex rel.* Christine M. v. Bd. of Educ., 502 F.3d 708, 715 (7th Cir. 2007).

[276] *Id.*

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meaning, "four corners," rule.[277] That question the court expressly reserved.[278] Instead, the court concluded that, even had it adopted a "four corners" rule, that rule would simply have had no bearing in that case.[279] The problem, the court pointed out, was that there was "no last, best offer."[280] The parents in that case "had disrupted the IEP process midstream," leaving the only IEP on record "incomplete."[281] The agreement, in other words, was not fully integrated.[282] And it therefore made "very little sense to consider only the latest version of the IEP"[283]—as it would to even a hard-nosed literalist like Samuel Williston.[284] So even if these courts do condone the use of extrinsic evidence, they do so in ways also condoned by a plain meaning approach. And to that extent, the courts are also reading IEPs the way their sister circuits do—like contracts.

That leaves only the Second Circuit, which Saleh sees as straddling the circuits on this point.[285] About that, he's clearly right: the court made clear that it was rejecting "a rigid 'four corners' rule prohibiting testimony that goes beyond the face of the IEP."[286] In reality, though, the court was adopting one "four corners" rule only to reject another. The rule that the court *did* adopt is what has traditionally gone by the name of the "four corners" rule, and it concerns *integration*, not *interpretation*.[287] Under that rule, when an "instrument appears complete on its face . . . the instrument

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[277] C.G. *ex rel.* A.S. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 285 (1st Cir. 2008).

[278] *Id.* ("The circuit has yet to decide whether or not to adopt the four corners rule and . . . we have no occasion to consider the advisability of that course today.").

[279] *Id.* at 287.

[280] *Id.* at 286.

[281] *Id.*

[282] *See, e.g.*, Segal Wholesale, Inc. v. United Drug Serv., 933 A.2d 780, 784 (D.C. Cir. 2007) ("A completely integrated agreement is one adopted by the parties as a complete and exclusive statement of the terms of the agreement.").

[283] C.G. *ex rel.* A.S. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 286 (1st Cir. 2008).

[284] *See* Stempel, *supra* note 268, at 562 ("The more nuanced reality is that Williston did not take a plain meaning/anti-extrinsic evidence attitude toward contract text unless the contract was fully integrated . . . .") (citing RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 31:1–13 (4th ed. 2001 & Supp. 2021)).

[285] *See* Saleh, *supra* note 134, at 371–72.

[286] R.E. *ex rel.* J.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012).

[287] PERILLO, *supra* note 91, at 132; RESTATEMENT (SECOND) OF CONTS. § 209(2) (AM. L. INST. 1981) ("Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation . . . .").

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is conclusively presumed to be a total integration."[288] That determination, moreover, must be "made by the trial judge by looking solely at the writing," not by resorting to extrinsic evidence.[289] And that is effectively the rule the Second Circuit adopted in *R.E.* for IEPs: under that rule, retrospective "testimony that materially alters the written plan is not permitted."[290] So, for example, a district "may not introduce testimony" by a teacher or administrator "that a different teaching method, not mentioned in the IEP, would have been used."[291] After all, when used for that purpose, testimony like that could effectively nullify the terms of the IEP itself, defeating the IEP's role "as the centerpiece of the [special education] system" created by the IDEA.[292] But the court did not shut the door entirely to extrinsic evidence, like "retrospective testimony" about services a child would have gotten under the IEP.[293] That testimony could come in, the court held, but only if used to "explain[] or justif[y] the services listed in the IEP."[294] Thus, "if an IEP states that a specific teaching method will be used to instruct a student, the school district may introduce testimony at the subsequent hearing to describe that teaching method and explain why it was appropriate for the student."[295] That would depart from a "rigid 'four corners' rule," but in a different sense: extrinsic evidence could come in to *clarify* the terms of an IEP, but not to *vary* them.[296] And to that extent, the court also *rejected* a "four corners" rule—but only as a rule of interpretation, not integration.[297]

What's remarkable about this case law is not so much where the courts land, but how they get there. They are not disagreeing about whether to construe IEPs like contracts—whether those rules make sense at all. They are instead weighing *which*

[288] PERILLO, *supra* note 91, at 132.

[289] *Id.*

[290] *R.E. ex rel. J.E.*, 694 F.3d at 186.

[291] *Id.* at 186–87.

[292] *Id.* at 188.

[293] *Id.* at 186.

[294] *Id.*

[295] *Id.*

[296] *R.E. ex rel. J.E.*, 694 F.3d at 186.

[297] Nor is this an unheard-of pairing, of a "strict 'four corners' approach to issues of integration" with a contextualist approach "in regard to the issue of ambiguity." Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1010 n.9 (3d Cir. 1980) (noting the same pairing in Pennsylvania's common law of contracts).

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of those rules to apply.[298] The courts are *all* handling IEPs much as they would any contract, indeed often in the very same terms.

But why? If the IEP is "entirely a federal statutory creation,"[299] why would its reading depend at all on a logic of offer and acceptance, or be put in service of a dynamic that certainly sounds like a negotiation? Why treat the IEP like a bargain? To those who see IEPs as just a "written statement," this should seem at least unmotivated, likely misguided. When viewed as a process transplant, though, this only makes sense. Why read an IEP like a contract? Because that is exactly the kind of process the Act creates: a process in the nature of contract. And, unsurprisingly, we find the courts reacting to that process with the same legal instincts, deploying the same techniques and arguments that the law of contracts has put at their disposal.

### *B. Designing IEPs*

Even if courts may read IEPs like contracts, one might think IEPs still must differ fundamentally from contracts in at least one respect: the nature of the *entitlements* they involve. As Caruso puts it, the services required by an IEP "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."[300] What criteria are those, though? Not the Act's itself, as the Court has acknowledged.[301] Still, the Court has found *some* criteria to apply in the name of FAPE, a substantive "standard implicit in the Act."[302] And more recently, in *Endrew F.*, the Court made clear that not just any IEP would suffice.[303] An IEP must be designed to offer the child not merely *some* educational benefit, as some lower courts had held under *Rowley*.[304] To provide a child a FAPE, her IEP must instead be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[305] But how,

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[298] Others have noted this, too. *See, e.g.*, Schinagle, *supra* note 28, at 225 (remarking the Seventh Circuit's use of "contract law terminology" in *John M.*).

[299] Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 820 (9th Cir. 2007).

[300] Caruso, *supra* note 27, at 176.

[301] *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982) ("Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded" children with disabilities.).

[302] *Id.* at 193 n.15.

[303] *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017) ("To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

[304] *Id.* at 397.

[305] *Id.* at 399.

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then, could an IEP really be in the nature of a contract? Wouldn't the IDEA itself decide the services an IEP has to offer? And would that not then imply that those services are really statutory entitlements, and that IEPs must be, as Caruso says, only "pseudo-contractual [in] nature"?[306]

How one answers that question will depend on how one has answered another: what kind of standard FAPE really amounts to. And what's striking is how much that standard mimics another found not in the IDEA or even disability law, but in the law of contracts—the doctrine of substantive unconscionability. Those similarities surface in two ways: how *Endrew F.* has played out in practice, and how *Endrew F.* actually articulates the standard "implicit in the Act."

### 1. FAPE After *Endrew F.*

Take, first, the empirical side of the question: how has that standard worked in practice? Or to ask the same another way, what *effect* has *Endrew F.* had? Early on, some had hailed that decision as "transformative," a "game changer" for children with disabilities and their families.[307] Others, especially school districts, largely shrugged it off, as simply confirming the status quo.[308] Half a decade later, the evidence suggests the districts had it right. As Perry Zirkel has documented, even after *Endrew F.*, districts still hugely prevail in challenges alleging that an IEP has failed to offer a child FAPE, just as they had under *Rowley*—now by a margin of almost nine to one in federal court.[309] Other studies report similarly lopsided margins, and little, if any effect since *Endrew F.*[310] And this has been true even in those circuits whose standard the Court *rejected* in *Endrew F.* for not being demanding enough.[311] Even more eye-opening, though, is why this seems to be happening: as Zirkel found, the federal courts have paid "relatively scant attention" to "indicators of progress."[312] Indeed, only thirteen percent of decisions in his study

[306] Caruso, *supra* note 27, at 176.

[307] Julie Waterstone, *Endrew F.: Symbolism v. Reality*, 46 J.L. & EDUC. 527, 527 (2017).

[308] *Id.* at 528.

[309] *See* Perry A. Zirkel, *Which Progress Indicators Do Courts Use in Applying the* Endrew F. *Substantive Standard for FAPE under the IDEA?*, 399 EDUC. L. REP. 1, 2 (2023) (reporting that in his study of the fifty-eight FAPE rulings since *Endrew F.*, in fifty-one cases, or 88%, the district prevailed, while only 12% favored the parent).

[310] *See* John P. Connolly & Lewis M. Wasserman, *Has* Endrew F. *Improved the Chances of Proving a FAPE Violation under the Individuals with Disabilities Education Act?*, 18 J. OF ARTICLES IN SUPPORT OF THE NULL HYPOTHESIS 51, 51 (2021) ("An explanation for our own null finding remains elusive.").

[311] *Id.* at 57.

[312] Zirkel, *supra* note 309, at 5.

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even *cited* a progress indicator, like grades or test scores or progress reports, when weighing whether a child's IEP offered her FAPE.[313] And in the few cases that did discuss those indicators, their inclusion has been "marginal" or their treatment "cursory."[314] If a child's entitlement to FAPE really is subject to "stated criteria," those criteria seem to be strangely irrelevant to courts.

Why might this be? There are, of course, structural reasons. As Zirkel notes, federal courts are reviewing IDEA cases only after a fairly heavy "filtering process"—first through the due process hearing, then in some states a second state-level review, and, at least for the courts of appeals, yet another decision from the federal district court.[315] So, by the time a federal court hears an IDEA case, a great many "factual specifics [will] have been filtered out with overall deference to the hearing officer's findings."[316] Still, in Zirkel's view, that likely is only "part" of the story.[317] Filtering certainly can skew the kinds of facts the courts may have before them, and how they may read those facts.[318] Skewing, however, does not straightforwardly explain why progress indicators receive such little attention at all in the courts. And that only raises more questions about why parents still lose at such eye-popping rates.

### 2. Progress in Light of *Endrew F.*

What else, then, might explain all this? A natural place to start is with the standard that the courts are tasked with applying in these cases. What exactly does *Endrew F.* require, in other words, for FAPE? All told, surprisingly little. As the Court broke down its "progress" standard, FAPE calls for three things. First, the district has to make a "prospective judgment" about what the child needs, given the "expertise" of its own personnel on one side, and the "input of the child's parents or guardians" on the other.[319] Second, "[t]he IEP must aim to enable the child to make progress."[320] On paper, this may read like a standard with real bite, certainly as

[313] *Id.*

[314] *Id.*

[315] *Id.* at 5–6.

[316] *Id.*

[317] *Id.*

[318] *See* Zirkel, *supra* note 309, at 6 (pointing out that filtration results in skewed selection and interpretation of progress indicators). One might also wonder whether even this filtering process, centered on the administrative hearing, makes sense only *because* the IEP is contractual.

[319] *Endrew F. ex rel. Joseph F.*, 580 U.S. at 399.

[320] *Id.*

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compared with the "merely more than *de minimis*" standard the Court was asked to reject there.[321] In reality, as the Court went on to explain, this call for "progress" amounts merely to the "promise" that the child will have "access to an 'education'"—progress, it turns out, in the rather minimal sense of making progress through the education system.[322] For the child in the general education curriculum, that usually means "achiev[ing] passing marks and advanc[ing] from grade to grade."[323] For other children with more significant disabilities, it may make little, if any, sense to expect progress even in that modest sense. And so, third, the goals a child's IEP aims for must be focused "on the particular child," and adjusted to the child's specific needs—in that sense, "appropriate in light of the child's circumstances."[324]

Distilled down, what does this standard amount to? That the IEP has to be reasonable at the time the parties make it;[325] that it has to ensure a child is not merely enrolled in school but actually being educated;[326] and that that education has to be "tailored to the [child's] unique needs."[327] In short, the IEP has to be a reasonable effort at individualizing the child's education given her unique needs. If this sounds familiar, it should. It simply restates the problem that Congress set out to solve half a century ago: how to "individualize education" for a child with a disability.[328] In the end, one would be forgiven for thinking that *Endrew F.* has not so much solved that problem as simply restyled it, swapping out talk of "educational benefit" for the argot of "progress."

One might think this reads *Endrew F.* too cynically. But it also takes *Endrew F.* at its word. And that word also happens to make sense. As we saw, the Act itself

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[321] *Id.* at 402.

[322] *Id.* at 400–01

[323] *Id.* at 400 (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 203–04).

[324] *Id.* at 399–400.

[325] *See* Perry A. Zirkel & Mitchell L. Yell, *Indicators of Progress in the Wake of* Endrew F.*: The Distinction Between Professional Recommendations and Judicial Rulings*, 90 EXCEPTIONAL CHILD. 110, 120 (2024) (distinguishing the perspective taken by courts from that of the special education profession, noting that courts still assess what is reasonable rather than what is optimal—even after *Endrew F.* clarified the FAPE standard).

[326] The Court rejected the "merely more than de minimis" standard in exactly these terms. *See* Endrew F. *ex rel.* Joseph F., 580 U.S. 386, 402–03 (2017) ("When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all.").

[327] *Id.* at 401 (quoting *Rowley*, 458 U.S. at 181).

[328] *Id.* at 390–91 (discussing the requirement of an individualized education program under the IDEA).

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specifies no substantive standard, for good reason: as designed, it didn't need one. The IEP process *was* the Act's substance. Seen in that light, this reading begins to look less cynical and rather more candid. The Court was simply reading the Act for all its substantive worth. That just happens not to be very much. Not much, of course, is still something. More surprising is what that something has looked like in practice—a standard very close to contractual unconscionability.

### 3. FAPE and the Rotten Deal

As every law student learns, courts will occasionally "void or rewrite a contract on grounds of unconscionability."[329] Just how occasionally is the subject of some debate. Few, though, would quarrel with the complaint that has been raised "time and again" against that doctrine: that it is "hopelessly vague."[330] Simply stating it is enough to see why. Unconscionability is usually halved into two inquiries: one procedural, the other substantive.[331] The procedural side focuses on the "bargaining process"—whether there was "unfair surprise" or a lack of "meaningful choice."[332] The substantive side focuses on the terms of the bargain itself: whether they were "fundamentally unfair or unreasonably one-sided."[333] Even as standards go, these are far from self-explanatory. Still, as Jacob Hale Russell has shown, unconscionability is still alive and well.[334] And while it may be vague, it is not hopeless. As he goes on to argue, this is because the doctrine has increasingly taken on an approach that he calls *tailoring*.[335] Under that approach, when a court decides "whether the consumer lacked meaningful choice or entered into a fundamentally unfair bargain," it will look not to what a "typical" or "reasonable consumer would experience in striking the same hypothetical bargain," but to what "the specific, subjective individual" actually did when the deal in question was struck.[336] As Russell explains, this kind of tailoring doesn't just add detail to an obscure doctrine; it helps give that doctrine structure.[337]

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[329] Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 967 (2019).

[330] *Id.* at 976.

[331] *Id.* at 988.

[332] *Id.*

[333] *Id.* (quoting RESTATEMENT OF CONSUMER CONTS. § 5 cmts. 1, 3, 8 (AM. L. INST. 2024)).

[334] Russell, *supra* note 329, at 965.

[335] *Id.*

[336] *Id.* at 989.

[337] *Id.* at 987–88.

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Take the case Russell gives of tailoring: *James v. National Financial LLC*.[338] There, the plaintiff, a housekeeper at a Wilmington hotel, took out a "Flex Pay Loan" from a "Loan Till Payment" storefront to pay for food and rent.[339] Under the terms of the agreement, the APR for the loan came to an eye-popping 838.45%, for a total interest payment of $1,620.[340] She soon defaulted and later sued the lender, arguing the terms were unconscionable.[341] Among the substantive "indications of unfairness" the court considered was price: whether the "disparity between price and value" was so extreme as to suggest "defects in the bargaining process."[342] The court held it was in no small part because the lender could not explain what "rational" use somebody like James, as opposed to a hypothetical borrower, could possibly have had for a loan of such a shockingly high cost.[343] The problem, as Russell explains, was not that the loan couldn't satisfy an objective test of rationality; arguably it could have, under the right circumstances.[344] The problem lay instead with the circumstances in James's case. Even if there was "hypothetically rational use of some high-cost credit products," the court did not think that hypothetical could "legitimize" the "facially disturbing price" James had to pay, given her circumstances.[345] There was just no rationalizing terms so obviously one-sided—no sense in which the loan's terms were at all suitable.[346]

Now consider, by comparison, a recent substantive challenge to an IEP. That case involved a thirteen-year-old girl, A.D., attending a D.C. charter school, who began receiving special education in second grade for a specific learning disability in written expression.[347] According to the evaluations at the time, A.D. had only "limited mastery of foundational math," and had a "significantly underdeveloped"

[338] *See generally* James v. Nat'l Fin., 132 A.3d 799 (Del. Ch. 2016).

[339] *Id.* at 805.

[340] *Id.* at 807.

[341] *Id.* at 803.

[342] *Id.* at 816 (quoting RESTATEMENT (SECOND) OF CONS. § 208, cmt. c. (AM. L. INST. 1981)).

[343] *James*, 132 A.3d at 821.

[344] Russell, *supra* note 329, at 990.

[345] *James*, 132 A.3d at 821.

[346] *Id.* at 816 ("In this case, there are obvious indications of unfairness. The Loan Agreement called for finance charges of $1,620 for a $200 loan, resulting in a disclosed APR of 838.45%. That level of pricing shocks the conscience.").

[347] A.D. v. Creative Minds Int'l Pub. Charter Sch., No. 18-cv-2430, 2020 WL 6373329, at *1 (D.D.C. Sept. 28, 2020).

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working memory, hindering her "performance in a variety of academic areas."[348] Two years later, she had yet to achieve any of her IEP goals.[349] Her IEP team met to reconsider the services she was receiving and ordered a new evaluation.[350] That evaluation revealed that A.D. still had the same specific learning disability, with many of the same academic difficulties, including "low average" scores in broad mathematics and "low" fluency in math facts.[351] And yet, a month later, when her IEP team reconvened, it produced a new IEP that "contained no math goals and reduced A.D.'s specialized instruction in written expression by thirty minutes a week."[352] At that, A.D.'s parents notified the school she would not be returning the next year and later sought reimbursement for her placement at a private school instead.[353]

The parents eventually prevailed on that claim, first in due process, and again in federal court.[354] In both venues, the parents pressed the same point: A.D.'s last IEP simply did not provide her FAPE.[355] And both the hearing officer and court accepted it, for a simple reason: as the court put it, "[a]n IEP is not a form document."[356] It must instead be "reasonably calculated to enable [the child's] success in light of her unique needs"[357]—in a word, "tailored."[358] A.D.'s clearly was not. Why? Because it was not even plausibly suited to her needs.[359] A fresh evaluation had found A.D. continuing to struggle in math, as she had for several years, and with it came the recommendation of one specialist that she likely would

[348] *Id.* at *2.

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Id.*

[353] *A.D.*, 2020 WL 6373329, at *2.

[354] *Id.* at *3.

[355] *Id.*

[356] *Id.* at *5.

[357] *Id.*

[358] Endrew F. *ex rel.* Joseph F., 580 U.S. at 391 ("The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child.") (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 181); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 234 n.1 (2009) ("An IEP is an education plan tailored to a child's unique needs . . . .").

[359] *See* Russell, *supra* note 329, at 1004 ("Tailoring turns the substantive unconscionability prong into something loosely akin to a 'suitability' standard.").

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benefit from specialized instruction in the subject.[360] And yet the IEP dropped her math goals altogether.[361] Meanwhile, A.D. was still not achieving her writing goals, as she hadn't in any of the three years prior—goals that were directly related to the disability that made her eligible for an IEP in the first place.[362] But the IEP pared back her specialized instruction in that subject, too.[363]

The court understandably found this "puzzling."[364] It might instead have called it simply unfair—substantively unconscionable. At bottom, the problems that the *A.D.* court was pointing to in A.D.'s IEP were the same that the *James* court had with the terms of James's loan.[365] In neither case could the party offering the terms—the school in *A.D.* nor the lender in *James*—say what "rational" value they gave to the other party, or legitimize the "facially disturbing" lack of fit between what the other party needed and what she got under the agreement's terms.[366] No parent, the court seems to say, could have rationally signed up for that IEP believing it would offer A.D. *any* educational benefit, let alone meaningful benefit, no matter what other progress she may have been making at the time. If anything, under the IEP she instead *lost* ground, having regressed in math and writing—all while the school stood to gain, in both the time and resources it could redirect from A.D. elsewhere.[367] Worse, as the court puzzled, those terms had apparently nothing to do with A.D. or her needs.[368] Like the lender in James's case, the school simply could not explain how the services proposed in the IEP were suited to A.D.'s needs, or, really, to anything about her or her circumstances.[369] A.D.'s IEP was not just poorly tailored; it had apparently not been tailored at all. There's a word for a deal like that—rotten.

[360] *A.D.*, 2020 WL 6373329, at *2.

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *Id.* at *5.

[365] *See James*, 132 A.3d at 816 (noting obvious indications of unfairness in the loan agreement).

[366] *Id.* at 821.

[367] *Id.* at *2.

[368] *Id.* at *5.

[369] *Id.*

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*A.D.* is of course only one case, but it is hardly unique.[370] It simply illustrates in particulars what Zirkel and others have shown in the aggregate: that FAPE is still rather light on substance, even after *Endrew F.* To be sure, the court talked the talk of *Endrew F.* It dutifully recited the Court's "progress" standard, and pointed to relevant indicators (progress reports, test scores, and expert testimony). In the end, though, its analysis was not especially "particularistic and rigorous."[371] But then, neither was *Endrew F.*[372] That is not to say, of course, that FAPE means *nothing*. As *A.D.* makes clear, it does have *some* content, some statable criteria. What's perhaps surprising is how closely those criteria track a doctrine like unconscionability—the black letter of contract. And that is the real point here. If a child's entitlements under an IEP are merely statutory, why are they analyzed and enforced in such curious symmetry with substantive unconscionability, especially tailoring? Why are courts not instead closely sifting through "progress indicators" under a bespoke statutory lens? Why treat an IEP like a payday loan?

Once again, we have had such a hard time seeing what is really going on here, I suspect because of what we are accustomed to looking for. Thinking of the IEP as merely the product of legislative fiat, and so the IEP process as "pseudo-contractual," we are misled into thinking that there must be some secret key in the IDEA—what FAPE *really* means—that each case will unlock what a child's IEP must look like. In fact, the Act says what Congress wanted it to say: that the educational deals that districts strike with parents under the Act should be fundamentally fair. An

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[370] *Compare*, *e.g.*, Osseo Area Schs., Indep. Sch. Dist. No. 279 v. A.J.T. *ex rel.* A.T., 96 F.4th 1062 (8th Cir. 2024) (upholding the district court's finding that a school district denied a student FAPE when it refused to discuss services beyond "the regular hours of the school day," and consequently gave her an IEP from which she barely benefited), *with* Alex W. *ex rel.* Marlene W. v. Poudre Sch. Dist. R-1, 94 F.4th 1176, 1188–89 (10th Cir. 2024) (determining that a student with ongoing behavioral challenges was not denied FAPE, since his IEP initially included goals, supports, and accommodations targeting those needs, and was later revised to reflect and address his continued behavioral difficulties). Above I have focused on decisions from the federal district courts, rather than the courts of appeals, for reasons that *Osseo* and *Poudre* make clear: (1) because in FAPE cases the district courts have to review the ALJ's decision independently, even while giving that decision "due weight," those courts also typically resolve these challenges in far more granular detail than the courts of appeals, and (2) the courts of appeals consequently play a "quite narrow" role reviewing FAPE challenges, limited as they are to reviewing factual findings below for clear error. *Osseo*, 96 F.4th at 1065–66.

[371] Zirkel & Yell, *supra* note 325, at 114. The court, for example, seemed to have put a great deal of weight on A.D.'s "significant deficiencies in writing and math," and at least for math, pointed to her scores on the Woodcock Johnson Tests of Achievement. But as Zirkel and Yell caution, that kind of norm-referenced measure of achievement comes with "notable caveats," caveats that can make them "questionable progress indicators for determining FAPE." *Id.* at 116. The court didn't pause to consider whether those caveats might have mattered in A.D.'s case.

[372] *Id.* at 119 (noting that even after *Endrew F.* the substantive standard is still "limited in scope and unspecific in rigor").

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appropriate education just *is* that fair deal. But then there is nothing especially "pseudo" about the IEP or the Act's process for fashioning one. Like any bargain, its terms cannot be so one-sided, so untailored, that we would hesitate to call it a bargain at all. So even if the Act may demand that bargain, it dictates no particular term, only tailoring. Whatever entitlements the IEP creates are just the product of the bargain itself.

### *C. The IEP and the Contract Strategy*

Suppose you believe the argument so far: that the IEP is a transplant, just not of a rule but a process. What, then, is the IEP? One might think the question should answer itself. Even though the IDEA did not borrow any of contract's black letter, that doesn't mean the Act owes nothing to contract. Indeed, it does. What the Act took from contract was a process—a process answering to the classical model of contract. That's why those who helped draft P.L. 94-142 thought that with the IEP they would be contractualizing special education: the IEP transplanted into the heart of the Act a contractual process. And because the IEP was modeled on that process—the bargain—its dynamics unsurprisingly look and feel like dickering, a negotiation. This would also explain why so many in special education still think of that process as contractual, and why even courts can't resist reading and judging IEPs with contract's black letter. So we might think that S.H.'s grandparents must have had it right, then, and Wyoming's high court had it wrong: the IEP must be a contract.

This, though, I believe would also be a mistake. Instead, the argument this Article develops, I think, offers a somewhat more nuanced solution to our puzzle. That solution comes in the form of two answers to two distinct but related questions: (1) what kind of strategy does the IEP represent, and (2) what, legally speaking, is the IEP? Take each in turn.

#### 1. Special Education and the Contract Strategy

First, when Congress wrote the IEP into the heart of P.L. 94-142, as I have argued, it was trying to introduce a distinct *kind* of process into special education—a process in the nature of contract. But why—why a process like that? It did so, as I have also claimed, as part of an institutional *strategy*, a way of solving the specific institutional problem Congress had before it half a century ago.[373] That problem, as we saw in Part I, was how federal law could "individualize education" for children with such exceptional needs, at a time when practically nobody on the receiving end of that education trusted the schools and the professionals to deliver it. The answer,

[373] I borrow this term from Thomas Merrill's insightful analysis of property. *See* Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2062 (2012).

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as we saw, was to borrow a process that could, if not dispel that distrust, at least work around it. Contract, it was thought, was just the workaround Congress needed.

Half a century later, it is all too easy to forget that Congress might well have chosen some other process to solve that problem—a form of "bureaucratic governance,"[374] for example, or stronger professionalization rooted in a fiduciary rather than a contractual model.[375] Indeed, some have since lamented that the choice Congress made with the IDEA has only deepened the "legalization" of education itself, the intrusion of alien legal forms into the "educational order."[376] Whatever one makes of claims like those, we should be clear on at least this much: that the IEP, as a kind of legal borrowing, was a deliberate choice, a strategy.

Viewing the decision to transplant a process as a piece of strategy, we can more clearly see what's at stake in a decision like that. Even a seemingly trivial puzzle—is the IEP a contract or not?—can reveal a great deal of hidden architecture, indeed the architecture of special education itself. And that design choice has had quite real consequences. It has not just left its imprint on the way courts, agencies, schools, and—of course—lawyers think about educating children with disabilities. It also has had a profound effect on the way those children are in fact educated—and, all too often, are not. And as others have seen before, for children with disabilities and their families, many of these consequences follow directly from the contractual strategy itself.

To see why, just consider another hypothetical family Caruso imagines, similarly embarking on the IEP process for the first time. In this family,

> 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 . . . . The parents are consenting recipients of federally mandated services . . . . 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

[374] *Id.* I owe this way of formulating the point to Merrill, but add a detail that he leaves implicit there: that in formulating a strategy like this, we draw on what this Article has called a model. *See id.* at 2070 ("[T]he property strategy is an institution for organizing the use of resources in society that has the following features: designated persons called owners are given residual management authority and residual accessionary rights over discrete resources.").

[375] *See generally* David L. Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, 34 WORLD POL. 137 (1982).

[376] *See* Meyer, *supra* note 200, at 256–77.

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> 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 . . . .[377]

Again, as far as I have ever seen, this description is certainly apt, and hardly hypothetical. For Caruso, though, it also means that the "contract analogy," so powerful in her prior hypothetical, here becomes quite "poor."[378] For this family, the "analogy" of IEP to contract simply breaks down. I would say instead here that the model supposed by the IEP fails to fit the facts, or fits them rather awkwardly. And because it does, the IEP mechanism simply does not work as designed—the strategy fails to deliver. This is hardly news. Even Gallagher understood when he first proposed the "special education contract" half a century ago that that strategy could not be made to work without a good deal more "social infrastructure" to prop it up.[379] At the very least, Gallagher thought that it had to include "a lawyer or child advocate" who would join the parents at the negotiating table, to "defend the interest of their child."[380] To that, one could now add any of the other much-needed reforms that have been proposed since—all designed, knowingly or not, to compensate for the many ways a contract strategy like the IDEA's can and too often does fail.

With this Article, we can also begin to see, I hope with more precision, just what it would take to make the IEP process work the way Congress said it should—so that "all children with disabilities have available to them a free appropriate public education," a fair educational deal.[381] To do that, though, we first have to understand what makes the Act work at all—the contract strategy and the model it supposes. The shortcomings of that model are legion, but also well known. Many of the model's core assumptions, about parties and the dynamics of deals and dealmaking, we now know to be highly idealized—the technical way of saying false—even of the commercial contexts where it first arose.[382] And they are no less false of special

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[377] Caruso, *supra* note 27, at 178–79.

[378] *Id.*

[379] Nancy Cartwright and Jeremy Hardie have called these "support factors." *See* NANCY CARTWRIGHT & JEREMY HARDIE, EVIDENCE-BASED POLICY: A PRACTICAL GUIDE TO DOING IT BETTER 61–75 (2012).

[380] Gallagher, *supra* note 121, at 532.

[381] 20 U.S.C. § 1400(d)(1)(A).

[382] *See, e.g.*, Bagchi, *supra* note 209, at 147 ("No one takes the classical model of contract formation to be 'true' in the sense of descriptively accurate . . . ."); Melvin A. Eisenberg, *Why There Is No Law of*

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education. Hardly a "sophisticated" party and rarely versed in the finer points of educational practice, parents too often feel they are not really parties at all. They may "have only a limited understanding of special education law," or "not [be] conversant in the jargon that is so often tossed around at team meetings," or may worry "about jeopardizing their relationship with a school district they must rely on in the long-term for the education of their child."[383] Add to that "the dynamics of socio-economic status and language proficiency," and "parents may be all but silenced" by the process.[384] Even though parents will be experts in at least one respect—in their children—in just about every other, they will very often be outmatched, outgunned, and outmaneuvered. In that process, a parent can't help but feel less like a friendly stranger than simply estranged. And, of course, none of this is new: it has been known long before the Act was rebaptized as the IDEA.

If this argument is right, *those* are the issues Congress should be grappling with when it next reauthorizes the Act. What would it take to reinforce the IEP and the contract strategy it embodies? What would it take to make that contract strategy work, not just for the well off and well represented (the "sophisticated" party), but for all children with disabilities and their families?[385] And why was special education contractualized in the first place? Does that strategy—the classical model of contract—really fit this context? Instead, because the contractual aspects of the IEP have, for so long, been waved off as just that—merely aspects, analogies, even illusions—these questions rarely, if ever, get so much as a hearing. But we can hardly expect to make much headway on any of these problems if we haven't even seen them for what they are. And, as this Article has argued, we cannot hope to do that without first appreciating the IEP for the transplant that it is.

### 2. The IEP as Contract

So is the IEP a contract, then, or not? Here, my answer may disappoint. For the account I offer in this Article does not quite answer that question, at least not directly. What it does offer, though, is a way of answering it. It does so by making two things clear: (1) the IEP process was designed to be in the nature of contract, an instance in this case of the "contract strategy"; and (2) insofar as it is, the IEP *could* be *a*

*Relational Contracts*, 94 NW. U. L. REV. 805, 808 (1999) (footnote omitted) ("Mary McCarthy once said of Lillian Hellman that every word Hellman wrote was dishonest, including 'and' and 'the.' Something similar could be said of classical contract law. Every aspect of that school of law was incorrect.").

[383] Chopp, *supra* note 77, at 438.

[384] *Id.*

[385] For an illuminating discussion of the indispensable role that "support factors" play in good policymaking, see CARTWRIGHT & HARDIE, *supra* note 379, at 61–75.

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contract. The first point has already been canvassed at length above. The second, though, warrants a word more of explanation.

Recall that *the* reason why so many have thought an IEP could not be a contract is because, as the court put it in *S.H.*, "the element of consideration is lacking."[386] But that conclusion hinges on another assumption, only rarely stated: that FAPE itself requires a *particular* service or services in the child's IEP. That assumption would make good doctrinal sense: the preexisting duty rule would rule out consideration only if one also assumes that the Act dictates the IEP's relevant terms. If so, the school district would already have a duty to provide each of the services set out in the child's IEP, and hence none could provide good consideration. As explained above, though, that assumption is at least open to serious doubt, for two reasons.

First, as Caruso rightly says, anything in an IEP "not caught by the existing legal duty rule is fresh and valid consideration."[387] But that assumes that there *is* a duty in the Act that would catch at least *some* of the services in *every* child's IEP—that the Act has some "stated criteria" that will decide what each IEP *has* to provide, given the child's circumstances.[388] As this Article has argued, though, there is good reason to doubt that. Indeed, reading it for all its worth, the Act dictates no *particular* service at all. What services a child needs are instead entirely up to the parties to decide, subject only to tailoring—just as one would expect if the IEP process were in the nature of contract. And so, on that account, *any* service the IEP offers could be considered "fresh and valid consideration."[389]

Second, even if the preexisting duty under the Act were loosened just to the bare obligation to provide the child an IEP,[390] that need would not deprive the IEP of consideration. In an arguably parallel line of cases, after all, courts have held that merely because an offeror had a duty to draft an agreement's terms does not preclude consideration, as long as the deal benefits both parties.[391] And both parties to an IEP

[386] S.H. v. Campbell Cty. Sch. Dist., 409 P.3d 1231, 1235 (Wyo. 2018).

[387] Caruso, *supra* note 27, at 179.

[388] *Id.* at 176.

[389] *Id.* at 179.

[390] *See S.H.*, 409 P.3d at 1235 (holding that that preexisting duty rule precluded consideration, since the school bears the obligation to implement the IEP and must do so at no expense to the parents).

[391] *See, e.g.*, Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1184–85 (E.D. Cal. 1998) (discussing the prevailing view that "hospital bylaws [may] constitute an enforceable, binding contract between the hospital and its medical staff," even though the hospital has a statutory duty to write those bylaws, because

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surely do benefit: the parents, in the education the IEP guarantees their child, but also the district, by having the child enrolled at all.[392] So it's unclear why an IEP would necessarily lack consideration, and why that doctrine need debar the IEP as a contract. Here again, I suspect lawyers and courts have struggled to see this because they simply overlook the possibility that an IEP, even if "a federal statutory creation," can still be *in the nature* of contract.[393]

To be sure, this speaks only to whether an IEP *could* be a contract. From that, though, it hardly follows that the law must or should recognize it as such. As Thomas Merrill has cautioned in the case of property, there is no direct road from here to *that* question, from strategy to doctrine.[394] That I instead see as an entirely different question—one not merely of doctrine, but involving many other considerations, not least the unique costs that reducing that strategy to black letter law may impose in a context like special education.

Take, for instance, the costs that S.H.'s grandparents pressed before that court. Where else, they asked, could they have turned for the relief they sought? The IDEA

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when "a hospital offers to extend a particular physician the privilege to practice medicine in that hospital . . . the physician receives the benefit of being able to treat his patients in the hospital and the hospital receives the benefit of providing care to the physician's patients"; thus, "each confers a benefit on the other and these benefits constitute sufficient and legal consideration for the performance of the agreement.") (quoting Virmani v. Presbyterian Health Services Corp., 488 S.E.2d 284, 288 (N.C. Ct. App. 1997)); *see also* Williams v. Univ. Med. Ctr. of Southern Nev., 688 F. Supp. 2d 1134, 1141–42 (D. Nev. 2010) (collecting similar cases).

[392] The *S.H.* court, for its part, poured cold water on the grandparents' claim that the district itself benefited from having a child like S.H. in school. In saying that, though, the court seems to have conflated two different questions: whether the district benefited by providing S.H. an education, and whether that benefit was really enough for consideration. Yet districts undoubtedly do stand to gain *something* when a student enrolls, given the way states apportion funding among districts. What the *S.H.* court doubted was, instead, whether the district there would have "profited" from those funds. *S.H.*, 409 P.3d at 1235 n.2. But that doubt runs to the *adequacy* of consideration—whether the benefit the district received was enough to support the bargain. "As a general rule," though, "courts do not review the adequacy of the consideration." PERILLO, *supra* note 91, at 154; Brodie v. Gen. Chem. Corp., 934 P.2d 1263, 1268 (Wyo. 1997) ("The question of what type of consideration is sufficient cannot be answered with specificity because we have long held that absent fraud or unconscionability, we will not look into the adequacy of consideration."). And this of course weighs benefits only in the crudest, and frankly cruelest, terms. The district apparently never considered that it might have benefited by having a child like *S.H.* in its classrooms *because* of who she was—the benefit we all gain simply by growing up with those who aren't like us.

[393] *S.H.*, 409 P.3d at 1235 (quoting Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 820 (9th Cir. 2007)).

[394] Merrill, *supra* note 373, at 2081 ("Our collective assessment of where to strike the balance between these strengths and weaknesses determines the extent to which we use the property strategy in organizing resources.").

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itself does not support compensatory damages,[395] and many courts have held that parties also cannot recover for the same under 42 U.S.C. § 1983.[396] Nor could they have recovered those costs under a tort theory, given the usual governmental immunity that schools enjoy. S.H.'s grandparents might have tried to recover those damages under other federal laws, like, perhaps, Section 504, which also requires federally funded public schools provide their students a FAPE.[397] But the standards for FAPE under Section 504 do not neatly overlap with the IDEA's,[398] and a claim for damages is extremely difficult to establish in any case.[399] So without a contract remedy, a child and her parents may never be made whole for the injuries she suffers, even when those injuries could be easily avoided if the school had simply kept the IEP's word. On the other side of the ledger, though, are the costs that quite fairly worried the district. Had the court recognized the IEP as a contract, the district warned, "the flood gates would [have] open[ed] for special education students."[400] Possibly "thousands" of such children "whose parents would jump at the chance to start suing school districts for breach of contract."[401] Districts could well face unprecedented liability—and losses—of a kind and scope that Congress had apparently not contemplated, nor itself provided. And all of that, one might fear, could risk injecting yet another "adverse" strain of legalism—lawyers—into a process that the Act has already heavily legalized.[402]

This Article can scarcely tackle issues like these, let alone resolve them. It should at least be clearer now, though, why *these* are the issues that need resolving. As we have seen, whether the IEP is *a* contract is not a question simply of doctrine.

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[395] *See* Perez v. Sturgis Pub. Schs., 598 U.S. 142, 147 (2023) (noting everybody before the Court in that case agreed that compensatory damages is a remedy that IDEA cannot supply); *see also* Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. CIV. LIB. & CIV. RIGHTS 1, 3 (2010) ("The general consensus is that the cause of action provided in IDEA does not allow claims for compensatory or punitive damages . . . .").

[396] *See, e.g.*, K.A. *ex rel.* F.A. v. Fulton Cty. Sch. Dist., 741 F.3d 1195, 1210 & n.52 (11th Cir. 2013) ("We join the First, Third, Fourth, Ninth, and Tenth Circuits, and hold that section 1983 actions for denial of rights conferred by the IDEA are barred . . . .").

[397] 34 C.F.R. § 104.32 (2025).

[398] *See, e.g.*, Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008) (distinguishing FAPE under the IDEA from that under Section 504).

[399] *See* Weber, *supra* note 395, at 3 ("[S]ection 504 and Title II special education cases in which viable compensatory damages claims exist are rare.").

[400] Brief for Appellee at *25–26, S.H. v. Campbell Cty. Sch. Dist., 409 P.3d 1231 (Wyo. 2018) (No. S-17-0164), 2017 WL 4273885.

[401] *Id.*

[402] *Id.* at *26.

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At bottom it is not a question *of* law at all, even if it is one *for* law. Yet it has only been a question at all because, as this Article has argued, the IEP was designed in the image—and nature—of contract.

## CONCLUSION

The law changes in many ways. One way, as we have seen, is by borrowing—and not just black letter. Nowhere is this clearer than in the law of special education. The IDEA revolutionized the way children with disabilities are educated in this country. It did so, as this Article has argued, by remaking their education in the image of contract. That was a deliberate choice, a strategy, with implications that have been at once profound and confounding. For some children and their families, that choice has been a boon and a blessing, the difference between a real education and none at all. For others—too many others—it still bitterly disappoints. Whether it will continue on that way—helping some, while dashing so many others' hopes—will call for far more than just the kind of analysis on offer here. But we cannot hope to do more, or better, until we first understand what has gone wrong, and why.

To understand any of that, though, we have to see the IDEA for more than just the words on its many dense pages. We have to see what those words assemble—the nature of the process that Congress placed at the heart of special education. The Act may call for that process, but the process itself was certainly not that law's creation. We have had such trouble seeing this, as this Article has tried to show, only because we have been looking for the wrong thing. That process is not itself black letter law, yet shapes the law at nearly every turn. Just seeing as much can help us understand what it would take to reshape the current educational order for the better. Yet seeing this should also raise fresh questions about the law, and recast more than a few old ones, perhaps none more pressing than what this account may have to say about law itself. After all, if a model living between the lines of the enacted text can bring about such revolutionary legal change, are we really so sure that "[o]nly the written word is the law"?[403]

[403] Bostock v. Clayton Cty., 590 U.S. 644, 653 (2020).

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