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# **Bureaucratic legalism: A proposal for inquisitorial decisionmaking in determining educational benefits and services**

**Stephen A Rosenbaum\*\***

## **Introduction**

The United States has established that individuals entitled to government benefits and services, extending from welfare payments to unemployment compensation to educational rights, are protected through administrative adjudicatory due process. It is a system rooted in adversarial legalism.<sup>1</sup> Common features include a hearing conducted by a neutral officer, a timely written decision and an established burden of proof. The beneficiary has the rights to present documents, to testify and confront witnesses, some form of representation and to an appeal to a court of law.<sup>2</sup>

In the educational context, a hearing may be requested by parents of students facing disciplinary charges<sup>3</sup> or removal from classrooms for behavioral disruptions,<sup>4</sup> or by those dissatisfied with their educational program.<sup>5</sup> Under the nation's fundamental "special" education<sup>6</sup> law, the Individuals with Disabilities Education Act (IDEA),<sup>7</sup> the primary means for enforcing the Act falls on parents of pupils with disabilities.<sup>8</sup> Those who disagree with the determinations of an Individualized Education Program (IEP)<sup>9</sup> team can file a complaint for an impartial due process

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<sup>1</sup> Socio-legal scholar Robert Kagan has defined adversarial legalism as a "legally formal and party-driven method," distinguished from non-legalistic modes of dispute resolution, such as those that rely on expert or political judgment or on negotiation or mediation. Robert A Kagan, "On Surveying the Whole Legal Forest" (2003) 28 *Law & Soc Inquiry* 833, 834-35 ["Whole Legal Forest"].

<sup>2</sup> See e.g., *Goldberg v Kelly*, 397 US 254, 266 (1970)(reaffirming Constitutional importance of "fair hearing" in safeguarding benefits) and *Morrissey v. Brewer*, 408 US 471, 485-86 (1972)(due process requires reasonably prompt informal inquiry conducted by impartial hearing officer).

<sup>3</sup> *Goss v Lopez*, 419 US 565, 576 (1975) (student facing more than de minimis suspension from school entitled to hearing).

<sup>4</sup> *Honig v Doe*, 484 US 305, 326(1988)(school district may not exclude student with behavioral disability on extended basis without hearing).

<sup>5</sup> 20 USC § 1415(f) (2012); 34 CFR § 300.507(a)(1) (2014)(opportunity for impartial due process hearing conducted by state or local educational agency with respect to disabled child's identification, evaluation or placement or provision of appropriate education).

<sup>6</sup> The term "special education," like "special needs," has been criticized for its paternalistic or non-inclusive and non-universal connotations. One might just as simply refer to "education."

<sup>7</sup> 20 USC § 1412 (2012). Originally enacted as the Education for All Handicapped Children Act of 1975, the statute was amended most recently a decade ago and rebranded as the Individuals with Disabilities Education Improvement Act, Pub L No 108-446, 118 Stat 2647. For a summary of the provisions of the IDEA, and the complementary legislation under the Americans with Disabilities Act (ADA) and the Rehabilitation Act, section 504, see Stephen A Rosenbaum, "Schools and Educational Programs" in Scott Skinner-Thompson, ed, *AIDS and the Law*, 5th ed (2015).

<sup>8</sup> By contrast, in the Hungarian education scheme, for example, parents may indicate a preference for the educational institution their child will attend, but the law places diagnostic, therapeutic and placement decision-making in the hands of national and local committees composed of expert teachers and other specialists. European Agency for Special Needs and Inclusive Education, <https://www.european-agency.org/country-information/hungary/national-overview/special-needs-education-within-the-education-system> (May 2016).

<sup>9</sup> The hallmark of special education, the IEP is a written statement of a child's educational levels of academic achievement and functional performance and measurable goals, as well as the instructional methodologies and services. It is developed by a team of educators and parents, often in a series of meetings. See 20 USC § 1401(19)

hearing, if they have been unable to resolve their dispute at a school-based team meeting, mediation or some other informal conference. A parent may initiate a hearing to resolve complaints concerning “any matter relating to the identification, evaluation, or educational placement” of the child.<sup>10</sup> A decision rendered in an impartial hearing is final, absent a timely appeal.<sup>11</sup> The administrative jurist has the power to order a school system to “take any number of actions in order to correct violations of IDEA...including modifying [or] implementing an existing IEP it has failed to carry out, providing a particular placement, [or] providing a particular related service.”<sup>12</sup>

In this paper I lay out a blueprint for radical change, looking for inspiration to the Commonwealth and civil law inquisitorial processes, and to the role of educators as the neutral officers. In brief, my proposal is to replace the adversarial due process hearing with a bureaucratic legalist<sup>13</sup> model in instances where the family and school authorities disagree about the components of a student’s instructional program. This procedure for resolving disputes would be determined by best educational practices, rather than due process of law or the assertion of rights. In addition, the review would not be grounded in an adversarial hearing, but in an “active adjudication” procedure.<sup>14</sup>

Could a quasi-inquisitorial approach be preferable to an “agency trial” in resolving disputes over what constitutes an appropriate education? It may be heresy for a students’ attorney to argue that the voice of the pupil with disabilities<sup>15</sup> and their families should not be on equal footing with that of the educational professional, nor that law should be privileged over pedagogy. However, there would still be a place for informal dispute resolution at the IEP team meeting or at mediation, as well as ardent advocacy (both micro and macro) by parents and students—and a judicial appeal in limited circumstances.

The savings in time, cost and angst could be channeled instead into more applied research, hiring local district experts, parental involvement inside and outside the classroom, and genuine collaboration between families and professional educators. For example, a move away from an adversarial administrative hearing practice and culture could mean more funds and time for collaborative educational planning workshops, alternative dispute resolution, or release time for curricular adaptation and parent-teacher conferences.

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(2012); 34 CFR §§ 300.22, 300.320–300.324 (2014). The resulting document becomes the guide for teachers, paraprofessionals and specialists for the academic year.

<sup>10</sup> 20 USC §§ 1415(b)(6), f (2012).

<sup>11</sup> *Ibid* at § 1415(i).

<sup>12</sup> Eileen L Ordover & Kathleen B Boundy, *Educational Rights of Children with Disabilities: A Primer for Advocates*, by Sharon Schmuck (1991) 59. Other available remedies include retroactive reimbursement for private placement or services and compensatory education. 20 USC § 1412 (a)(10)(C)(ii) (2012) (reimbursement for private schooling available when district failures to provide appropriate placement).

<sup>13</sup> Under Professor Kagan’s definition, bureaucratic legalism emphasizes a “hierarchical recruitment and supervision of legal decision makers [and] uniform implementation of centrally devised rules.” While restricted in their policymaking, judges do have “official responsibility for fact finding, judicial domination of the adjudicative process, and hence a smaller role for lawyers and legal advocacy...” Kagan, “Whole Legal Forest,” *supra* note 1 at 835.

<sup>14</sup> Samantha Green & Lorne Sossin, “Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy” in Laverne Jacobs & Sasha Baglay, eds, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (2013).

<sup>15</sup> “People First” language, e.g., “person with a disability,” is used to accentuate the humanity rather than the impairment or disabling condition. However, for the sake of brevity and variation, I also use “disabled” as an adjective. Some activists and academics actually use “disability first” language out of habit, for emphasis, or to reclaim antiquated or pejorative terms (crippled or cripp) as a statement of pride or insider speak. Stephen A Rosenbaum, “Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All” (2004) 14 *Hastings Women’s LJ* 1, 4.

## Over-legalized and Adversarial Process

Complaints about the so-called technical and cumbersome requirements of the IDEA usually include an attack on students' extensive due process rights or over-reliance on the procedural nature of the school compliance process.<sup>16</sup> Litigation usually begins with the due process hearing before an administrative law judge or other impartial official, with appeals filed directly with a federal district or state trial court. The hearing officer's decision is then subject to judicial review. The court: "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."<sup>17</sup>

Criticism typically centers on the cost<sup>18</sup> or utility of these procedures, but it may also emanate from "a strong resentment by educators of the parental right and power...to challenge the educators' professional judgment."<sup>19</sup> In a major decision interpreting the IDEA, the U.S. Supreme Court declared that parents "will not lack ardor" in making sure their children gain access to all the educational benefits entitled to them under the Act.<sup>20</sup> But, while the Court has reemphasized the central role of parental decisionmaking,<sup>21</sup> it may have overestimated their ability to act on their own. Parents must negotiate the labyrinth of education law at the planning team conference tables, in mediation rooms, or at parent organizing meetings.<sup>22</sup> The high court's estimation of their advocacy capacity notwithstanding, it is a highly democratic and unique participatory role that Congress has assigned to parents in the determination of how their child will learn.

Other reprovals include delay in the adjudication process.<sup>23</sup> One recent report issued by the American Association of School Administrators (AASA) declared that the hearing process "has

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<sup>16</sup> Among these are the right to call team meetings on thirty days' notice; to require the attendance of certain persons at meetings and consideration of certain curricular matters; to request an independent evaluation of a student for a suspected disability; to receive notice of, and challenge to, a placement or level of services; and to compel program and legal compliance. 20 USC §§ 1412-1416 (2012). In fact, the Supreme Court in has referred to the administrative and judicial review under the Act as "often 'ponderous.'" See *Honig v. Doe*, supra note 4 at 322 (internal citation omitted).

<sup>17</sup> 20 USC §§ 1415(i)(2), (i)(2)(c)(2012). Under Hungarian education law, for example, there is no administrative or judicial review of the expert committee's decisions. European Agency for Special Needs and Inclusive Education, supra note 8.

<sup>18</sup> See Elisa Hyman, Dean Hill Rivkin & Stephen A Rosenbaum, "How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering" (2011) 20 Am U J Gender Soc Pol'y & L 107, 109-110. But see, Mark C Weber, "In Defense of IDEA Due Process" (2014) 29 Ohio St J Disp Res 501, 509-13 (cautioning against eliminating due process protections owing to economic disparities in legal system and society at large).

<sup>19</sup> Martin A Kotler, "The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change" (1994) 27 U Mich. JL Ref 331, 366, n 132 (citations omitted).

<sup>20</sup> *Board of Education v Rowley*, 458 US 176, 178, 209 (1982). I have previously argued that "ardor may not be enough" to achieve success in light of some of the jurisprudential and legislative setbacks in the IDEA. Stephen A Rosenbaum, "A Renewed IDEA and the Need for More Ardent Advocacy" (2005) 32:4 Human Rights 3, 3.

<sup>21</sup> *Winkelman v Parma City School District*, 550 US 516, 524 (2007) (noting that the statute lays out "general procedural safeguards that protect the informed involvement of parents in the development of an education for their child").

<sup>22</sup> While the IDEA is one of the best educational initiatives ever hatched by Congress, a catchy acronym and improved and reborn statute (Individuals with Disabilities Education Improvement Act, Pub L No 108-446, 118 Stat 2647 (2004)) are not enough to make up for the longstanding lack of Congressional appropriations. See Wendy F Hensel, "Sharing the Short Bus: Eligibility and Identity under the IDEA" 2007) 58 Hastings LJ 1147, 1155, n 47 (Congress has never fully funded IDEA, falling far short of its goal to cover 40% of costs incurred by states).

<sup>23</sup> S James Rosenfeld, "It's Time for an Alternative Dispute Resolution Procedure" (2012) 32 J Nat'l Ass'n Admin L Judiciary 361, 373-34 (arguing for speedy resolution of disputes, while acknowledging logistical or strategic reasons for delay). As the typical school year lasts 9-1/2 months, the requested relief may have only a negligible or symbolic effect on a student's current program by the time a decision is rendered and implemented.

gone out of control.”<sup>24</sup>

It is easy to dismiss the criticism of hyper-legalized procedural safeguards as rhetoric from harried school administrators, or the rehashed dogma of anti-regulatory conservatives. Nonetheless, it must be acknowledged that the procedures have at times been adhered to in a *pro forma* or even burdensome manner—with no corresponding positive effect on a child’s educational objectives, school services or learning outcomes. Despite the Congressional intent that school officials and parents be jointly and continuously involved in IEP development and review,<sup>25</sup> “it is not at all unusual or unexpected that parents become the adversary of the district, sometimes to the point of ‘irreconcilable differences’ . . . .”<sup>26</sup> In short, due process hearings are not necessarily conducive to preserving long-term relations.<sup>27</sup>

It may be naïve to seek a change in school culture, in which the family and educational authorities engage in dialogue more than argument, and collaboration more than confrontation. It is a vision that actually matches that of the school administration petitioners in *Goss v. Lopez*,<sup>28</sup> the Supreme Court’s landmark case on school suspensions. The administrators in that case conceived of the school as a “community” or “family” of shared interests. As minority rights and education scholar Martha Minow later described, this is a conception whose defenders fear that the “[c]ontinuing relationships among people with shared interests would be frustrated by the formality and distance imposed by legal procedures—that is, by rights.”<sup>29</sup> While this view of schools was not adopted by the Court majority, the dissent embraced it, referring to the student-teacher relationship as one that “is rarely adversary in nature” and “in which the teacher must occupy many roles—educator, adviser, friend and, at times parent-substitute.”<sup>30</sup>

### **Preferring a Non-adversarial Model**

Some commentators have observed that the adversarial process “is habitually seen as the ‘gold standard’” for producing and testing evidence<sup>31</sup> and that “adversarial combat,” especially cross-examination, is favored by many Americans as the best way to seek truth.<sup>32</sup> “The predominance

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<sup>24</sup> Sasha Pudelski, Rethinking Special Education Due Process (AASA), April 2013.

<sup>25</sup> S Rep No 168, 94th Cong, 1st Sess 11 (1975)(intent that local educational agencies “ensure adequate involvement of the parents or guardian” throughout the school year).

<sup>26</sup> Perry A Zirkel, “A Special Education Case of Parental Hostility” (1992) 73 West Ed Law Rep 1, 9.

<sup>27</sup> See, Clyde K and Sheila K v Puyallup School District No 3, 35 F Supp (3d) 1396, n 5 (9th Cir 1994), where the court opined: “[L]itigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must—despite any bad feelings that develop between them—continue to work closely with one another.” See also, Perry A Zirkel, “Over-Due Process Revisions for the Individuals with Disabilities Education Act” (1994) 55 Mont L Rev 403, 405 [“Over-Due Process”].

<sup>28</sup> *Supra* note 3.

<sup>29</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (1990) 289-90.

<sup>30</sup> *Goss v Lopez*, *supra* note 3 at 593-94. The administrators’ concern was not shared by the Court majority. In his dissent, Justice Powell regretted “a recognition of rights as defining and accentuating the distances between people, seeming to pin students in adversarial relationships to teachers and school administrators.” Although the context for the Court’s analysis was the suspension process and schools’ ability to freely discipline, it offers an appealing alternative to the typical special education scenario, i.e., disabled pupils and their parents in opposition to school administrators. The lower court in *Goss* asserted that “[t]he primacy of the educator in the school has been unquestioned by the Courts.” *Lopez v Williams*, 372 F Supp 1279, 1300 (SD Ohio 1973).

<sup>31</sup> Robert Thomas, “From ‘Adversarial v Inquisitorial’ to ‘Active, Enabling, and Investigative’: Developments in UK Administrative Tribunals,” in Jacobs & Baglay, *supra* note 14 at 61.

<sup>32</sup> Michael Asimow, “Inquisitorial Adjudication and Mass Justice in American Administrative Law,” in Jacobs & Baglay, *supra* note 14, 93 at 110. However, to succeed, Professor Asimow asserts that there must be “a rough equality” between contenders in lawyering skills and resources, which is often not the case. *Ibid*.

of courts, emphasis on individualism...and the enshrinement of rights” are other factors that fuel adversarial legalism.<sup>33</sup> But, “contrary to the widespread assumption today, inquisitorial modes of adjudication are not entirely alien to our legal culture.”<sup>34</sup>

The term inquisitorial is “nebulous and can carry a range of possible meanings.”<sup>35</sup> The taxonomy may range from “soft” inquisitorial, in which judges ask a few questions or investigate issues with assistance of counsel, to “fully” inquisitorial, in which they take charge.<sup>36</sup> Public Law Professor Robert Thomas asserts that the descriptors adversarial and inquisitorial do not really capture the nature of the *administrative* process, which ranges from passive or reactive to proactive or intrusive, or the evolving “enabling approach.”<sup>37</sup>

In the United Kingdom, a hybrid “enabling approach,” recommended particularly for unrepresented parties appealing against regular respondent government agencies, is gaining particular popularity where there are cutbacks in publicly funded counsel.<sup>38</sup> “Active adjudication” is another description of the hybrid model.<sup>39</sup> Characterized in part by tribunal-led focus of the issues and facilitating the production of evidence (including early disclosure), active adjudication is said to enhance the efficiency, fairness and effectiveness of tribunals in ways that are neither purely adversarial nor inquisitorial.<sup>40</sup> The labels “adversarial” and “non-adversarial” have also been employed to contrast the two standard procedural models, with most Commonwealth adjudicative tribunals using a mixture of the two.<sup>41</sup> Rather than viewing their mandate as “truth seeking,” active adjudicators see it as “problem-solving.”<sup>42</sup>

Thomas cautions against generalizations and sets out a number of factors that should guide the selection of an appropriate administrative adjudicatory approach. For special education matters, he cites decisional law favoring an inquisitorial over an adversarial model because the tribunal is likely to have greater expertise than parental parties, and must not rely only on the evidence put forth by the parties.<sup>43</sup> Kagan has enumerated the traits that distinguish *bureaucratic* legalism from *adversarial* legalism, some of which are relevant here.

The former is characterized not only by a built-up caché of government expertise, but official responsibility for fact finding, judicial domination and a restricted role for judicial policymaking of the adjudicative process. In contrast, adversarial legalism is marked by a greater role for lawyers, through litigant and lawyer activism, fragmented authority, and greater

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<sup>33</sup> Kagan, “Whole Legal Forest,” supra note 1 at 840 (citing W. A. Bogart, *Consequences: The Impact of Law and Its Complexity* 114 (2002)). Public Law Professor Bogart adds that, “In quantity and quality the United States is an outlier regarding the role of law.” *Ibid.*

<sup>34</sup> Amalia Kessler, “Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial” (2005) 90 *Cornell L Rev* 1181, 1210-11. See also, Judith Resnik, “Managerial Judges” (1982) 96 *Harv L Rev* 374, 382, 438-39 (American experience with non-adversarial models of judging in different forums). While he has been pointed in his critique of American reliance on the “engines of adversarial legalism,” Kagan too notes that it is “by no means ubiquitous or the first option” in the United States. “Whole Legal Forest,” supra note 1 at 838-39.

<sup>35</sup> Thomas, supra note 31 at 51-52.

<sup>36</sup> *Ibid.* at 52.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* Thomas goes on to suggest that the adversarial-inquisitorial dichotomy is no longer “insightful” and that an “active, investigative, or intrusive adjudication” model is what is required. *Ibid.* at 61.

<sup>39</sup> Green & Sossin, supra note 14 at 71.

<sup>40</sup> *Ibid.* at 72.

<sup>41</sup> *Ibid.* In the Introduction to their comprehensive tome on global administrative perspectives, Professors Jacobs and Baglay have commented upon the rarity of “pure adversarial or pure inquisitorial decision-making systems” and the worldwide trend toward mergers, Jacobs & Baglay, “Introduction,” in Jacob and Baglay, supra note 14, 1 at 6, cross-fertilization of legal traditions and hybridized hearing processes. *Ibid.* at 9, 25.

<sup>42</sup> Green & Sossin, supra note 14 at 75.

<sup>43</sup> Thomas, supra note 31 at 55 (citing *W v Gloucestershire County Council*, (2001) EWHC Admin 901, 15).

responsiveness to legal and political advocacy at all levels of decisionmaking.<sup>44</sup> Other factors to be considered, aside from court decisions, are emphasis on burden of proof, applicability of evidentiary rules, whether the parties are represented, judges' preferences, timelines for issuing decisions and tribunal culture.<sup>45</sup>

### **Privileging Professional Judgment**

When parties cannot otherwise agree, the final word on pupil placement and services for the current or upcoming school term should come from an education expert, not a judge. The former is better suited to thoughtfully design an educational plan and designate outcomes and should not be mistrusted, unless there is a reasonable suspicion of incompetence, negative attitude, inattentiveness, or inappropriate behavior.<sup>46</sup>

In most transactions with service providers, we give deference to the opinions of professionals—be it health care, construction, design, accounting, exercise, real estate, nutrition, tutoring, insurance or legal advice. We want to have quality treatment or service from individuals with expertise and experience. We want communication in a language we can understand and candor. As with all professional relationships, we do expect to be adequately informed, before giving consent to particular educational interventions, and to be respected and heard on matters in which our observations or opinions may be relevant. To confirm advice, increase options or change a service provider, we may also seek a second opinion or an independent evaluation.<sup>47</sup> Favoring professional judgment is somewhat akin to reliance on *expert* judgment in systems that abide by bureaucratic legalism.<sup>48</sup>

In its landmark *Romeo v. Youngberg* decision, the U.S. Supreme Court held that “courts must show deference to the judgment exercised by a qualified professional”<sup>49</sup> in determining the training or treatment due an individual with disabilities.<sup>50</sup> Moreover, “the decision, if made by a professional, is presumptively valid...”<sup>51</sup> It is important to distinguish the two Constitutional claims that the Court examined in *Youngberg*: The institutionalized individual’s right to freedom from state interference, which all persons enjoy and which survives institutionalization, and the right to “treatment,” an affirmative right to adequate services from

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<sup>44</sup> Kagan, “Whole Legal Forest,” supra note 1 at 834.

<sup>45</sup> Thomas, supra note 31 at 55. In an overarching analysis, legal historian Philip Hamburger actually criticized the administrative decision-making process for its “evasion of the Bill of Rights.” Philip Hamburger, “The History and Danger of Administrative Law” (2014) 43:9 *Imprimis* 1. 5. Hamburger traces the origin of today’s rules and regulations to the proclamations and decrees issued under the prerogative power of English kings, outside the presence of juries and “real judges.” *Ibid.*

<sup>46</sup> See e.g. Anne P Dupré, “Disability, Deference, and the Integrity of the Enterprise” (1998) 32 *Ga L Rev* 393, 445-46, n 294 (IEP forum is overtaken by protracted legal battles in which parents challenge academic judgment of other team members). There is no reason to think that a parent or judge knows more than a teacher or specialist about formally educating a child—particularly a child with a disability—unless he or she has equivalent or superior knowledge and experience.

<sup>47</sup> This option may be constrained, of course, by public sector personal finances, referral policies and/or availability of other professional providers.

<sup>48</sup> Robert A Kagan, “Adversarial Legalism: Tamed or Still Wild?” (1998-99) 2 *NYUJ Legis & Pub Pol’y* 217, 219-20.

<sup>49</sup> *Romeo v Youngberg*, 457 US 307, 322 (1982).

<sup>50</sup> The Supreme Court’s deference—an adoption of the circuit court’s standard—should be seen in the context of a state institution for persons with developmental disabilities, where deprivation of liberty and “minimally adequate treatment” were the predominant factors. Nevertheless, there is an appeal to a standard that relies on qualified professional assessment in other settings devoted to instruction or training.

<sup>51</sup> *Youngberg*, supra note 49 at 322-23.



the state that arises out of institutionalization.<sup>52</sup> It is the latter right, and what constitutes adequate (or appropriate) educational services, that is at the heart of challenges made against local school authorities.<sup>53</sup>

In addition to their expertise and experience, the deference due professionals is predicated upon two assumptions: The first is that to act professionally is to act neutrally, objectively, and non-ideologically, with the primary motivation of furthering the patient's best interests. Second, the Court assumes that professionalism transcends the gulf between the public and private spheres for both the professional and the patient, so that no difference exists between the actions and standards of public professionals treating public patients and those of private professionals treating private patients.

However, it is not simply enough that an opinion be rendered by a professional. The *Youngberg* majority "envisioned the possibility of decisions by professionals that were unqualified or suspect insofar as they departed from 'professional judgment, practice or standards.'"<sup>54</sup> Commentator Susan Stefan writes persuasively about how personal freedoms can be squelched under the guise of professional treatment or how the professionalism may be otherwise tainted by budgetary, safety and security conflicts of interest.<sup>55</sup> Healthy skepticism should also be applied to the opinions of those who practice in institutionalized settings (such as hospitals or prisons), in circumstances when their expertise infringes on the personal autonomy of disabled individuals, to the point of inflicting physical or psychological injury (e.g. forced medication or use of restraints or seclusion).<sup>56</sup>

However, it is overreaching to equate an educator's decision about what constitutes appropriate curriculum for an individual student during the academic year as necessarily a matter of liberty interest. Whereas professionals employed by public sector institutions may be subject to subtle fiscal pressures or programmatic bias, this predisposition would hopefully be mitigated on the part of a special master conducting a review under the scheme proposed in this paper.<sup>57</sup>

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<sup>52</sup> Susan Stefan, "Leaving Civil Rights to the 'Experts': From Deference to Abdication under the Professional Judgment Standard" (1992) 102 Yale LJ 639, 641 ["Leaving Civil Rights"].

<sup>53</sup> See, *Saint Louis Developmental Disabilities Treatment Centre Parents Association v Mallory*, 591 F Supp 1416, 1476 (WD Mo 1984) ("due deference should be given to the decisions made by the professionals working in the institution..."), *aff'd*, 767 F (2d) 518 (8th Cir 1985); *Wynne v Tufts University School of Medicine*, 932 F (2d) 19, 25 (acknowledging need "to accord some measure of judicial deference to program administrators, but reject[ing] 'broad judicial deference resembling that associated with the 'rational basis' test [which] would substantially undermine Congress' intent ... that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs.'")(internal citation and footnote omitted), 26 ("substantial departure from accepted academic norms' is not necessarily a helpful test in assessing whether professional judgment has been exercised") (1st Cir 1991) (en banc).

<sup>54</sup> Susan Stefan, "What Constitutes Departure from Professional Judgment" (1993) 17 *Mental & Physical & Disability L Rptr* 207, 209 ["Professional Judgment"].

<sup>55</sup> "[E]ven the best-intentioned are subject to enormous pressure to adjust or dilute their professional standards to conform to inadequate resources and substandard supplies and facilities. The patient's treatment may not represent the result of a decision or judgment at all, but simply a default in the absence of alternatives." Stefan, "Leaving Civil Rights," *supra* note 52 at 691 (footnotes omitted).

<sup>56</sup> Stefan acknowledges that because individuals (in a facility) are legally entitled to treatment of some kind does not mean they will receive a particular treatment. That is a determination that "appropriately involves professional judgment..." *Ibid* at 690.

<sup>57</sup> A more radical critique is that professional judgment is per se objectionable, given the authority and oversight historically exercised by medical personnel, therapists, social workers, educators and all manner of administrators. In Stefan's words, the disabled person's "voice is so completely silenced" vis-à-vis the professional's. *Ibid* at 680. Professor Weber also cautions against reliance on the "trust us" approach" in the educational context, where school district decision-making about an appropriate educational program may be subject to budgetary and other pressures and is not in accordance with the law. Weber, *supra* note 18 at 516. I am not suggesting that professional voices should always be heard above those of people with disabilities. I merely propose that in the discrete matter of developing and implementing a child's IEP, where there is no agreement between the (parents of a) disabled



In the blueprint below, disagreements would be reviewed by a “special master” whose expertise is in education or disability rather than law. She could hold a conference, conduct a hearing or brief investigation, receive more documents, consult with experts or correspond in some other mode with the parties to quickly resolve the dispute over appropriate placement, benefits or services. The master’s determination would be subject to judicial review in limited circumstances.

### **Elements of a New Process of Administrative Review**

This reform proposal is based on two key principles: First, a belief in professional judgment as the overriding factor in any kind of educational planning and execution. Where there is no school-family consensus, the dominant voice should be that of a knowledgeable and experienced educator. The perceptions, objections and learning objectives offered by the parent or other caregiver—and by the student herself, if able—are, of course, important inputs in the team planning process as well, particularly when they are stripped of rhetoric or jargon and are based on personal observation, insight, cultural perspective, knowledge and/or aspiration.<sup>58</sup>

Second, if there is no agreement amongst members of the planning team, the review, oversight or appeal should be cloaked less in due process than in quality assurance, as administered by a corps of education specialists, rather than jurists. The process that I propose would not necessarily involve a hearing, but should contain the following seven elements:

1. A review conducted by a “special master” who is an experienced special educator or disability specialist (not affiliated with any school district)<sup>59</sup> or a special education academic.<sup>60</sup> In some jurisdictions that use this model for benefits determination, the inquisitorial decision-maker is a jurist *assisted* by a specialist in areas such as education, mental health, social security, employment or immigration.<sup>61</sup> My preference is for a single reviewer, and one whose expertise is in education rather than law. Of course, they are free to consult with other educational experts or legal colleagues who form part of a state or national corps of special masters or reviewers. The most qualified person for this position is someone who has experience both in training special education teachers and in the classroom, or in some other instructional or therapeutic capacity in a school district. Affiliations with universities are desirable. The special master might even be selected from a national or state registry, if that were to insure the availability

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student and school administration—and absent allegations of abuse or constraints on liberty—an experienced and knowledgeable educator is best positioned to make a decision.

<sup>58</sup> Fellow parent Carrie Griffin Basas has written: “Parents provide unique insights into the experiences of their children and may have different cultural perceptions of the importance—or lack thereof—of language or disability assimilation, for example, that extend beyond seeing their children as having deficits.” “Advocacy Fatigue: Self-Care, Protest, and Educational Equity” (2016) 32(2) Windsor YB Access Just 37, 47.

<sup>59</sup> For example, three of the seven Members of the Special Education Tribunal in Ontario, Canada have an educator’s background, Government of Ontario, Agency member biographies, Public Appointment Secretariat [www.pas.gov.on.ca/scripts/en/bios.asp?minID=36&boardID=751&persID=122955#1](http://www.pas.gov.on.ca/scripts/en/bios.asp?minID=36&boardID=751&persID=122955#1).

<sup>60</sup> This differs from the AASA’s consultancy proposal insofar as parties would not select the decision-maker and that person need not have a background in the disability of the student in question. While perhaps desirable, these added conditions could cause delay in selecting the third party reviewer and could lead to a subsidiary dispute regarding qualification or mere selection of a mutually acceptable reviewer. The special master might be selected from a registry of reviewers. There would not necessarily be a face-to-face with the parties, which is why mediation should still be heavily encouraged. Moreover, under the model here, the master has an authority that the consultant does not, in terms of being able to order additional services or instruction, placement change, or compliance with the status quo.

<sup>61</sup> See e.g. Thomas, *supra* note 31 at 53. In Ontario, Canada, a majority of the Special Education Tribunal Members are in fact current or former educators; only a handful of Members are lawyers. The Tribunal sits in panels of three, but it is not obvious whether each panel must have at least one Member with a legal background. See *supra* note 59.

and high caliber of reviewers. However, it is important that there be no current employment or contractor relationship with any district.

2. A review based on the “record” below (e.g., IEP, evaluations and meeting notes), with the possibility of augmenting the record. Standard appellate practice is to allow in information not available to the parties before the review was requested, but a more liberal rule could be adopted by the special master at his discretion, or by the administrative review office as a matter of policy. That is, the parties could be allowed to submit new documents or even testimony to be examined by the special master.

3. Early disclosure to the special master (including additional areas to be covered or witnesses to be called) should be encouraged. This allows for the review to be more efficient and focused and is a recognition that instruction or services that were earlier considered or disputed may evolve or shift with the passage of time between the initiation of the IEP process and the special master’s decision.

4. A special master will adapt to the needs of the parties to ensure meaningful access. This means the master will have broad powers over the process, including how hearings are conducted.

5. A special master would determine the focus of issues for review. In many instances, they would rely on the information supplied by the parties and their own expertise. They should actively manage<sup>62</sup> the case, have broad powers over any hearing, including limiting the examination of witnesses and claimants, and questioning parties before the counsel ask any questions. The special master would be able to engage in independent fact-finding and request additional information on his own motion. In order to give the master flexibility in resolving disputes there should be less emphasis on a single determinative hearing. Expedient decisionmaking and instituting a less litigious process are also important objectives. These can be facilitated through written submissions in lieu of oral proceedings and a limitation on oral argument, new “testimony” and “cross-examination.”<sup>63</sup>

6. An advisor might accompany a party to a hearing or meeting with the special master.<sup>64</sup> While lawyers should not necessarily be prohibited from appearing in the process, they should be subject to the master’s decision as to how the hearing will be conducted, including the manner of examination and order of questioning, the introduction of new documents or witnesses, and the need for opening statement or argument.<sup>65</sup> Again, discretion must be left to the special master to decide the terms of engagement, keeping the focus on the child’s program and parental input.

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<sup>62</sup> Active management will depend in large part on whether there are resources at the disposal of the administrative case reviewer. Thomas, *supra* note 31 at 6. Tribunal members’ preferences, the parties’ relevant knowledge and experience; and complexity of case are also factors that dictate the degree of management. Green & Sossin, *supra* note 14 at 74.

<sup>63</sup> The record below is not a verbatim transcript and there is no examination of witnesses *per se*. However, IEP meeting notes, teachers’ assessments and reports submitted by specialists are the functional equivalent.

<sup>64</sup> This is actually the current practice of the Ontario Special Education Tribunal, which distinguishes between a legal “representative” and a non-legal “support person.” The former may be a lawyer, licensed paralegal or legislatively sanctioned legal services advisor who communicates with the Tribunal and presents her client’s case, at the client’s direction. The latter is a family member, friend or NGO volunteer who “attends the hearing to provide moral support and assistance to the parents.” Ontario Special Education Tribunal, *Starting An Appeal 11-12*, Social Justice Tribunals Ontario, <http://www.sjto.gov.on.ca/oset>.

<sup>65</sup> This would be an atypical “back seat” role for American attorneys in administrative forums. The objective is neither to muzzle them, nor to encourage their involvement as quasi-trial lawyers, as that would only heighten the litigious and adversarial nature of the review.

7. Decisionmaking timelines should be short and delays minimized. This is commonsensical and uncontroversial, given that any curricular adjustments will take time. The school year, on which the whole IEP dispute is based, is not really an adequate period for making changes in placement, instructional interventions or compensatory relief. Despite general agreement about the need for expedited decisions, the problem lies in genuine implementation of this principle. Under the current due process scheme, even without extensions, the relief can be meaningless or anti-climactic, and the focus of the dispute can shift from the pupil's needs to the underlying conflict between adults.<sup>66</sup>

### **Limited Judicial Review**

An appeal from the special master's decision is arguably problematic under the schema just described and raises a number of questions. First, what is the educational interest to be protected against wrongful deprivation? Second, what standard of review should be applied by the court? Third, what constitutes the record to be reviewed?

Most IDEA disputes are about what constitutes "Free Appropriate Public Education" or "Least Restrictive Environment," the pupil's placement or related services.<sup>67</sup> This is distinct from a challenge to suspension, expulsion or aversive behavioral interventions, or from claims regarding the habilitation or programming (or lack thereof) provided persons in state hospitals, correctional centers or other custodial settings. Lastly, allegations of disability-based discrimination, including unwarranted segregation or warehousing at school sites, can be challenged under Section 504 of the Rehabilitation Act of 1973 or, in some instances, under Title II of the Americans with Disabilities Act (ADA).<sup>68</sup>

In most cases there is no liberty or property interest worthy of Constitutional protection. As noted above, the student who is excluded from school through suspension or expulsion, and deprived of his right to an education, is entitled to ample procedural safeguards under federal and state law, independent of the IDEA due process hearing. Should this student contest a finding by the school district that his conduct was *not* a manifestation of his disability,<sup>69</sup> the

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<sup>66</sup> Rosenfeld, who has trained hundreds of hearing officers and administrative law judges, observes that "[f]or many, if not most, a final decision will come well past the time it can be of any benefit to the most important party: the student. A frequent consequence is that, over time, the dispute tends to become more focused on the needs, desires, and frustrations of the parties..." Rosenfeld, *supra* note 23 at 367-68. The AASA analyst describes the process as "argu[ments] over whether the school district erred in designing or administering the original IEP or whether the parents' demands for services and placements are unreasonable... [or] whether the district abided by the hundreds of paper-based compliance metrics under state and federal law." Pudelski, *supra* note 24 at 21.

<sup>67</sup> Even in cases that squarely challenge a violation of IDEA or ADA integration mandates, the question for review is not about a student's wholesale exclusion from school or denial of the right to an education, but whether the child is being offered an appropriate education in the "least restrictive environment." The well-settled case law rests on such factors as meaningful educational and non-academic benefit, effect of student on teacher and other children and meaningful participation in the IEP process. See *Rowley*, *supra* note 20 and progeny; *Daniel RR v State Board of Education*, 874 F (2d) 1036 (5th Cir 1989); *Oberti v Board of Education*, 995 F (2d) 1204 (3d Cir. 1993); *Sacramento City Unified School District v Holland*, 14 F (3d) 1398 (9th Cir 1994); and *Beth B v Van Clay*, 282 F (3d) 493 (7th Cir 2002). While fact-specific and maddeningly ambiguous, these criteria are best reviewed by an education professional, such as the special master proposed in the scheme above.

<sup>68</sup> Disability anti-discrimination and anti-harassment complaints may be addressed to the regional Office for Civil Rights, US Department of Education. See, *Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance*, 34 CFR §104.1 et seq (2014). Title II of the ADA is the congressional prohibition on benefits denial and exclusion from participation faced by individuals with disabilities in state and local entities. 42 USC §§ 12132-12134.

<sup>69</sup> 20 USC §1415(k)(3) (2012).

special master would be competent to review that finding, once again relying on professional judgment, not judicial temperament. The only liberty interest arguably at stake is that of the student who is subjected to aversive behavioral interventions, including restraints or seclusion. Like the suspended or expelled student, she too may seek relief that bypasses the special master review.

Thus, the administrative review need not necessarily contain the procedural safeguards of a fair hearing as set out in agency adjudication jurisprudence, and embodied in the due process hearing currently provided under IDEA. As noted above, there are a number of procedural protections already afforded the pupil and his parents before a matter would even come up for review by a special master. These range from the right to have one's child assessed for suspected disability, to call an IEP meeting with 30 days' notice, to receive independent evaluations of disability and appropriate services, to file complaints of non-compliance, and to attend a mediation conference. In the vast majority of cases, the parties do not pursue channels beyond those afforded by the school district.<sup>70</sup> Moreover, federal and state law strongly encourage alternative means of resolving disputes, principally through the services of trained mediators, at no cost to the parties.<sup>71</sup> Thus, it is preferable to leave the review process in the hands of an education or disability professional rather than a jurist.

Professor Stefan is right to worry about the opaqueness that envelops professional decisionmaking from the vantage point of the judiciary, and the collapse of procedural and substantive due process inquiries.<sup>72</sup> But, the concern about courts "rais[ing] a white flag in the face of subjective, interpretive decisions"<sup>73</sup> is far greater in cases where the opinions of treating professionals are contested by incarcerated or institutionalized persons. In such instances, the quality or invasiveness of the treatment, program or interventions is not easily separated from the involuntary confinement, and the alleged constitutional violations do indeed warrant judicial scrutiny. By contrast, the typical IDEA dispute is about the appropriate instruction and related services offered in a school setting.

Still, it is difficult to conceive of Congress foreclosing a judicial avenue to challenge an educational program decision opposed by a student or her parents, particularly under a radically amended IDEA that dispenses with the standard due process hearing.<sup>74</sup> For the model of administrative review set out above to succeed, with few incentives to routinely appeal, there must be confidence in the procedures at the administrative level—and limits on the review conducted by the courts.

The next critical question is what standard of judicial review should be applied? One can look to both U.S. and Canadian law for an array of standards on administrative appeals. Currently, IDEA requires that the court base its decision to uphold or reverse an administrative law judge's ruling on the preponderance of the evidence<sup>75</sup> and the U.S. Supreme Court has held that courts must give "due weight" to judgments of education policy when reviewing state hearings under IDEA.<sup>76</sup> The Ninth Circuit has since ruled that "courts should not substitute their own notions of sound educational policy...."<sup>77</sup>

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<sup>70</sup> See Reece Erlichman, Michael Gregory & Alisia St Florian, "The Settlement Conference as a Dispute Resolution Option in Special Education" (2014) 29 Ohio St J Disp Resol 407, 408-09 & n 11.

<sup>71</sup> 20 USC §1415(e)(2012).

<sup>72</sup> Stefan, "Civil Rights," supra note 52 at 679-80.

<sup>73</sup> Ibid at 680.

<sup>74</sup> "American voters [will] resist significant restrictions on... the use of courts as an alternative mode of political action," Kagan, "Whole Legal Forest," supra note 1 at 844, and "parties more often challenge the administrative decisions in court." Ibid at 839 & n 7 (citing comparative studies).

<sup>75</sup> 20 USC §1415(i)(2)(C)(iii) (2012).

<sup>76</sup> Rowley, supra note 20 at 206.

<sup>77</sup> Gregory K v Longview School District, 811 F (2d) 1307, 1311 (9th Cir 1987) (citation omitted). Troubled by

The First Circuit has adopted a more nuanced position: The trial court must recognize the administrative agency's expertise, "consider the [agency's] findings carefully," and "endeavor to respond to the hearing officer's resolution of each material issue..." However, the court "is free to accept or reject the findings in part or in whole."<sup>78</sup> Whether or not this (*obiter dicta*) is the prevailing view in other circuits, it underscores the difficulty of prescribing a standard of review—by statute or case law—and having confidence that judges will follow it.<sup>79</sup>

The Canadian Supreme Court's candid acknowledgment of the need to "develop a principled framework that is more coherent and workable"<sup>80</sup> for judicial review of agency decision-makers has resulted in a reduction and, arguably, a clarification of standards of review. In a 2008 decision, the Court announced just two standards: correctness of the decision or the more deferential reasonableness standard.<sup>81</sup> The high court's rationale for applying the reasonableness standard seems à propos for the kind of decisions to be rendered in an IDEA administrative review, viz. respect, in a constitutional system for legislative choices to leave some matters in the hands of expert and experienced administrative decision makers, and for differentiation in the role of courts.<sup>82</sup>

The Court stated further that the reasonableness standard should be employed where an administrative body "is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity..."<sup>83</sup> In sum, whether guided by U.S. or Canadian law, deference to administrative expertise and a desire for practical application by the judiciary should be the principles upon which any standard of review is founded.

The final question on appeal from the special master would be: What constitutes the record and will it be adequate for judicial review under a deferential standard? As set out in the IDEA currently, the court is to receive the record of the administrative proceedings and hear additional evidence at the request of a party.<sup>84</sup> If, however, there is a need for the special master to more fully document and record his decision, it is possible that "implanting an adversarial judicial review process" on top of an inquisitorial process may lead to delays and backlogs in the overall review.<sup>85</sup> This is because lengthier administrative decisions may be required to develop a fuller record for judicial review.<sup>86</sup>

In other words, the necessity of a fuller record could undercut the value of the informal, special master-directed approach. One mitigating measure might be to require written findings, with citation to evidence and reasoning adequate for review, only in instances where a party actually files a notice of appeal with the court. This would allow most cases to be decided expeditiously by the special master, preserving the informality and waiver of hearing, and still permit would-be appellants to go forward with a record on appeal if dissatisfied with the decision.

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the district court's lack of factual or legal basis for overturning the hearing officer, the appellate court went on to say that the "due weight" standard "should prompt courts in the future to provide a more thorough explanation when reversing an agency's ruling on the appropriateness of a special education placement." Ibid at 1314.

<sup>78</sup> *Town of Burlington v Department of Education*, 736 F (2d) 773, 792 (1st Cir 1984), aff'd 471 US 359 (1985).

<sup>79</sup> The First Circuit prefaces its instruction by stating: "The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply." Ibid at 773 (emphasis added).

<sup>80</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 32 (per Bastarache and LeBel JJ for the majority of the Supreme Court of Canada).

<sup>81</sup> Ibid.

<sup>82</sup> Ibid at para 49.

<sup>83</sup> Ibid at para 54 (citations omitted).

<sup>84</sup> 20 USC §1415(i)(2)(C)(i)-(ii) (2012).

<sup>85</sup> Asimow, supra note 32 at 108.

<sup>86</sup> In some US judicial circuits, the court's insistence on every issue being exhausted before a special education appeal will be heard in federal court has added to delay in the due process proceedings. See, Weber, supra note 18 at 519.

The court would still be free to make its own findings of fact and conclusions of law, if it found the record was not sufficient enough to determine any preponderance of the evidence, much less accord it “due weight.” In lieu of conducting a full-blown evidentiary hearing, the court might require the parties before it to prepare and file excerpts of record or a joint record (supplemented by information not available below) and written arguments. The judge could then decide the matter upon submission or entertain limited testimony and/or oral argument *sua sponte* or upon a party’s request. This would allow aggrieved parties a more robust adjudication and not be overly burdensome to the judiciary.

### **Objections to Bureaucratic Legalist New Model**

There are perhaps three basic objections to this departure from the status quo, all of which have been alluded to above. The first is that articulated by adherents of adversarial legalism: Without an adversarial adjudicatory hearing, and the current procedural safeguards under the IDEA, there is no way to really assure that a student’s right to an education will be secured. The second objection is that there will be no incentive to end disputes at this level of review; parties will simply take their disagreements to the courts. The third objection is that professional judgment should not trump the judgment of other parties to the dispute, namely pupils with disabilities or, more often, their parents.

As for the first objection, adversarial legalists may be unconvinced of the merits of this approach. For those who view the right to an appropriate education in the least restrictive environment through a civil rights lens, the review scheme laid out above will not meet their expectations. From their perspective, this right is best protected and defended through a fair hearing before a jurist, by marshaling expert testimony and documentary evidence, and perhaps by winning some procedural arguments.<sup>87</sup> Sometimes adversarial system adherents question whether decision makers can be fair and impartial in the collection of evidence in the inquisitorial model. The rebuttal offered is that the inquisitorial approach is not about favoring one party over the other, but collecting relevant and significant evidence.<sup>88</sup> Professor Weber advances a passionate argument for the adversarial legal approach,<sup>89</sup> and concludes that “[l]egal remedies are always an equalizer, and are essential to maintaining a just public order.”<sup>90</sup>

The lawyer’s objective is to obtain an order for a prospective instructional program, placement or set of services for the near term and/or compensatory education. That is much like the outcome one would expect from a special master review. The difference is in the trust invested in a judge weighing evidence with counsel’s assistance and relying on expert witness opinions, as opposed to an educator who looks over a proposed educational plan and assessments, and perhaps consults expert colleagues and asks pertinent questions of teachers, parents or even students. There are many benefits to multi-party advocacy through litigation, regulatory

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<sup>87</sup> Kagan suggests that the lack of “political support in the United States for the federal government to take primary responsibility for funding of ‘special education’ or for expanding government subsidies for employers of disabled persons...help[s] explain why American advocates for people with disabilities emphasized a rights-and-litigation based strategy...” Kagan, “Whole Legal Forest,” *supra* note 1 at 864.

In contrast, “European advocates have generally emphasized governmentally funded benefit programs, in which litigation is quite rare.” *Ibid*.

<sup>88</sup> Jacobs & Baglay, *supra* note 14 at 9-10 (citing Leroy Certoma, “The Non-Adversarial Administrative Process and the Immigration Review Tribunal” (1993) 4 *Pub L Rev* 4, 7).

<sup>89</sup> Weber, *supra* note 18 at 520-24.

<sup>90</sup> *Ibid* at 524. But, Weber overstates both the interest at stake and the capability of a judge to best determine the interest that must be protected. I have already noted that no school administration in the country is today contesting the right of youngsters with disabilities to attend school at public expense. As it has been for years, the debate is over the “A” word, i.e. what is an “appropriate” education? This is a serious question and one that demands attention unfettered by cost, perfunctory compliance, bureaucratic inertia or cronyism. That said, I believe the contours of what makes an education appropriate is best defined by an educator, not a lawyer or judge.

oversight and other forms of legal intervention. Indeed, for across-the board reform of school systems, public interest litigation is a useful tool. However, in the myriad of individual cases of parents or students who are challenging the quality or quantity of educational interventions and services, the adversarial legalist approach seems a poor substitute for a thoughtful review and consideration of best educational practices.

There may also be some self-interest at play on the part of lawyers who view this administrative procedure as inadequate or unfair. Specialty bars representing either school districts or parents and students have had their ranks swell since the enactment of the IDEA. Their desire to maintain the status quo is not necessarily about protectionism or attorneys' fees. It may be equally driven by a professionally instilled bias that zealous advocacy based on statutory or case law is the best way to secure a government benefit—even if that benefit is not explicitly perceived as a fundamental interest or an anti-discrimination remedy.

Second, is the concern that there will be no incentive to have cases resolved at the administrative level; they will instead simply get “kicked upstairs” to the courts of law. Of course, that same criticism could be applied to any agency adjudicatory procedure that is viewed as *pro forma*, biased, incompetent or a rubber stamp for the decision-makers below—including offices of special education hearing officers and administrative law judges. The objection takes on a heightened meaning when the target is a review procedure that has none of the usual trappings of due process, i.e., the decision-maker is not a jurist, the model is largely inquisitorial and there may not be documentary or testimonial evidence proffered, much less a hearing.

There are, however, a few factors that can enhance the attraction of the administrative review and/or offset a race to the courthouse. First, it will be important to recruit and retain high quality reviewers.<sup>91</sup> They must be viewed as knowledgeable, experienced, practical, efficient and completely independent of school districts, boards of education and parent and student advocacy NGOs. Once that reputation is established, there will be little cause for advocates or parties to dismiss this level of review as perfunctory or a waste of time.<sup>92</sup> Second, if the grounds for judicial review are narrow, there will not be much incentive to hold out for a more favorable decision from a court of law than one made by a school district administrator or special master.<sup>93</sup> Finally, a renewed effort to develop informed and collaborative relationships at the IEP tables, and in facilitated or mediator-led conferences, will also limit the incentive to pursue appeals at the administrative or judicial levels.<sup>94</sup>

With regard to the third objection, rejecting preference for professional judgment, it is important to remember that the special master's professional or expert opinion that prevails at this level of administrative review is preceded by any number of interventions made by educators and

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<sup>91</sup> Jacobs & Baglay, *supra* note 14 at 22.

<sup>92</sup> In contrast to the US immigration appellate process, the Canadian refugee status determination regime is characterized by “the vertical accountability and legal informality of the professional judgment model of decision-making.” Rebecca Hamlin, “International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia” (2012) 37:4 *Law & Soc Inquiry* 933, 946-47 (citing Robert A Kagan, *Adversarial Legalism: The American Way of Law* 10). Canadian bureaucrats who conduct these reviews “have high levels of discretion to make decisions without legislative tinkering or judicial oversight and the low level of court involvement is uncontroversial.” *Ibid* at 947.

<sup>93</sup> However, as noted above, this cannot be a sham review by the special master. There must be an adequate record for the court to consider, with findings of fact and conclusions of law —whether prepared after the fact and/or by the parties who file for an appeal. In those instances where the plaintiff asserts a liberty or property interest or another constitutional claim, the court should have more latitude to conduct a *de novo* review of the facts and the law.

<sup>94</sup> My primary concern would be to boost the credibility of the special master review—and, of course, earlier efforts at dispute resolution—in order to eliminate incentives for more costly, time-consuming (and not necessarily better informed) judicial review. A secondary benefit would be to reduce the federal court administrative appeals docket.



other specialists, along with parents or guardians, able students<sup>95</sup> and advocates. The master is also free to review evaluations or recommendations from other experts and consult with colleagues in the masters' offices. It is a mischaracterization to argue that too much control over the pupil's education or the disabled pupil himself is entrusted to a professional. The control amounts to a decision made by a knowledgeable and experienced individual (who is not affiliated with the local school district) about the educational program for that student for a fixed period of time, i.e., an academic year. After all, we allow a vast number of state and on-site educators to make decisions about appropriate curriculum, co-curricular activities and learning objectives for non-disabled students in thousands of elementary and secondary schools throughout the United States, with no direct input from students or parents.<sup>96</sup>

As noted above, professional judgment to affirm a school district's educational program might be consciously or unconsciously influenced by limited resources, a concern for preserving collegial or contractual relationships, institutional loyalty or other conflicts. It is also susceptible to inherent distrust of bureaucrats by anti-government activists or by patient, parent and other grassroots advocates who are skeptical of any opinion proffered by a credentialed health or educational specialist. The influences must be mitigated in the process of selecting special masters, and monitored by stakeholders who will track administrative decisions and, more importantly, the educational outcomes. If the distrust, however, stems from a philosophical or political sentiment, it may never be assuaged.

### **Funds Redirected To Evidence-Based Research or School District Specialists**

A move away from an adversarial administrative hearing practice and culture could mean more public school funds would be devoted to compensation for instructional and specialist personnel, workshops on collaborative educational planning, alternative dispute resolution, or release time for curricular adaptation and parent-teacher conferences. The cost savings to schools could also transfer to the preparation and mentoring of teachers who can become adept at individualized instruction, whether their students are deemed gifted or talented, at-risk or special needs. This change in administrative review does not necessarily mean that dollar for dollar there will be a transfer of funds from due process litigation and liability insurance budget to classroom or school-based teaching and services or other forms of school-based advocacy and collaboration.<sup>97</sup> But, the potential for redirecting expenditures would be enhanced. Presumably, parents would also realize savings insofar as they would avoid lawyers' fees and perhaps utilize those savings to pay educational specialists for supplementary services or assessments.

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<sup>95</sup> While it is rhetorically appealing to champion the primacy of the voice of the disabled student, the reality is that parents speak for all minors in matters of schooling, and almost anything of consequence in a young person's life. Of course, if they are interested and able, students themselves should be encouraged to meaningfully participate in the planning and execution of their educational programs.

<sup>96</sup> This is not to suggest that disabled students lack a need for additional support or that the lowest common denominator should be the governing principle in the nation's schools. On the contrary, I have long advocated that all students deserve an individualized learning plan. See e.g. Stephen A Rosenbaum, Full Sp[Ed Ahead: Expanding The IDEA Idea To Let All Students Ride The Same Bus" (2008) 4 Stanford J Civ Rts Civ Lib 373, 385 (plan that "charts a course for obtaining an appropriate education" and measuring student progress), n 60 (subjected to the same parental participation and vigilance that are key to the success of every special education student) ["Full Sp[Ed Ahead"].

<sup>97</sup> The school superintendents' association estimates that US school districts spend over \$90 million each year in conflict resolution. Pudelski, supra note 24 at 23 (citation omitted). "[B]y creating a lawyer-free system for special education disputes, costs for districts will be significantly reduced" ibid at 22. But see, Debra Chopp, "School Districts and Families Under the IDEA: Collaborative in Theory Adversarial in Fact" (2012) 32 J Nat'l Ass'n Admin L Judiciary 423, 456 (discussing how coverage of liability insurance for special education defense allows districts "to avoid internalizing all of the costs" of IDEA litigation).

The reality is that most teachers enrolled in teacher training programs are offered an infinitesimal amount of course work related to special education methodology.<sup>98</sup> Every prospective teacher—and administrator—entering the university ought to have courses in special education, instead of choosing at the outset of their credential program between a general educational curriculum and a special education emphasis.

The true success stories in special education are not about voluminous and well-crafted educational plans, but are derived from the interventions and support provided by qualified, creative and compassionate teachers, other professionals and paraprofessionals—who are often overworked and underpaid. This is an intangible characteristic, not subject to testing or in-service training. Civil rights attorney and former state education secretary Thomas Gilhool has called on advocates to engage in a direct action to “support and nourish” special education teachers to demand that they learn to be “effective” teachers to put to use what are known to be effective interventions and strategies.<sup>99</sup> Genuine collaboration between educators and parents, in classrooms and conference rooms, can likely lead to successful learning outcomes more readily than adherence to the requirements contained in statute books, best practice manuals, and hyper-technical compliance logs.

## Conclusion

This paper has set out a seven-point blueprint, along with much explanation, rationale and commentary. If it is provocative for a lawyer and disability rights advocate to advance a proposal that chips away at an institution built on years of lobbying and jurisprudence, I assume that risk.

My intent is not to undo the IDEA, but to recommend a better informed and less disputatious means of resolving education disputes—by relying on forums that are more conducive to consultation and deliberation than evidentiary hearings. My hope is as much for better learning outcomes for disabled students as for channeling of resources into improved means of school-based collaboration and instructional interventions.

The path to this new model has been illuminated by reviewing experiences in Canada, other Commonwealth nations, the European Union, and even the U.S., with the inquisitorial approach to decisionmaking and by endorsing a primary role for professionals at the decisionmaking table or in the conference room. The changes proposed here can only be adopted through an amendment to the IDEA,<sup>100</sup> but would greatly upset the contemporary cultural arrangements of the national special education and legal infrastructure.<sup>101</sup>

A Congressional initiative to introduce this kind of change in the administrative review process could begin with public hearings and stakeholder meetings. Perhaps some pilot projects could be initiated on a voluntary basis even before a legislative campaign is under way. The proposal also requires a dedicated effort to build up a corps of highly qualified and high integrity special masters, mainly from the ranks of educators, whose talents are already in great need in

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<sup>98</sup> “[G]eneral education teachers [are encouraged] to expect special education teachers to assume primary responsibility for students with IEPs. Special education departments at colleges and universities reinforce this notion by training special education teachers in self-contained classrooms and by having little overlap with general education departments...” Wayne Sailor & Blair Roger, “Rethinking Inclusion: Schoolwide Applications” (2005) 86:7 Phi Delta Kappan 503, 506 (citation omitted).

<sup>99</sup> Rosenbaum, “Full Sp[ed] Ahead,” *supra* note 96 at 387, n 69.

<sup>100</sup> 20 USC §1415(f) (2012).

<sup>101</sup> A pessimistic Professor Kagan has written that “adversarial legalism surely will remain a prominent feature of the American way of law, and the United States, while perhaps growing somewhat less ‘exceptional,’ is likely to remain in a league of its own in that regard. (footnotes omitted).” Kagan, “Whole Legal Forest,” *supra* note 1 at 844-45.

classrooms, administrators' offices and teachers' colleges. They are the lynchpin of this model. If they gain the genuine trust of parents and administrators, not only will they be sought for their assistance in breaking logjams that materialize on school campuses. There will also be less need to go above them to seek more favorable outcomes from judges who are much more removed from the educational arena by virtue of their position and disposition.

An essential part of my proposal is that facilitated IEP meetings, resolution conferences, mediation, non-compliance complaints and other forms of alternative dispute resolution be earnestly pursued by all parties. This must not become a perfunctory exercise, as it is far more efficient and effective when disputes are solved "on the ground." Lastly, there is the thorny issue of the availability of judicial review, the standard to be applied, and the uncertain reliance on a slim record produced by the special master. Adversarial legalists and other skeptics may maintain that a preponderance of the evidence, reasonableness or any other deferential standard can only be applied where a record is fully developed, with findings and conclusions made by an administrative judge.

Ultimately, the schemes for both administrative review and judicial review must allow enough information to be put on record to make a determination about a disabled youth's educational programming in the near-term, and to assure fairness to all parties.

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