

ARTICLE

FULL SP[]ED AHEAD: EXPANDING THE IDEA IDEA TO LET *ALL* STUDENTS RIDE THE SAME BUS

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I. ALL ABOARD

*The Short Bus*¹ is an appropriate metaphor for the place that students with disabilities have occupied, and continue to occupy, in many of the nation's schools. After more than three decades of litigation, legislation, and changes in educational policy and pedagogy, disabled² pupils have moved closer to taking

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1. See, e.g., Wikipedia.org, Short Bus, http://en.wikipedia.org/wiki/Short_bus (last visited May 14, 2007) (describing buses used to transport small numbers of schoolchildren such as those in a special education class or segregated school). “[T]aking the short bus” has become a pejorative term “used to imply that the subject is mentally challenged (or simply stupid).” *Id.*

2. Some colleagues shudder when I use “disability first” language. See Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA: Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 4 n.14 (2004).

seats next to their non-disabled peers—on the bus and in the classroom. Yet, the goal of having all children ride the big or “regular” bus is still elusive.³

Since the inception of civil rights lawsuits for disabled children⁴ and the Individuals with Disabilities Education Act (IDEA),⁵ there have been two recent developments that may affect not simply where those students sit, but how they are viewed by their teachers, administrators and peers in the larger school context.

First, some commentators and policymakers have suggested that the schoolhouse “door to special education services has opened too widely and too indiscriminately”⁶ Professor Wendy Hensel alludes to “The Short Bus” in her article responding to the recent calls to shrink the student eligibility

While advocates “have all but abandoned the antiquated label ‘handicapped’ . . . the verdict is not yet in whether ‘disabled person’ is acceptable in lieu of a ‘people first’ term like ‘person with a disability.’” *Id.* (citations omitted). Curiously, the disability cognoscenti are as likely to refer to *handicapped* parking as women steeped in feminist lexicon insist on using the *ladies’* room. For others, the name game is all about internal intellectualizing. *See, e.g., Why “Voice of the Retarded?” A Statement About Our Name*, http://www.vor.net/name_game.htm (last visited May 5, 2007) (reporting that parental advocacy organization claims “[t]he buzz” about appropriate nomenclature “relates mostly to the debate within disability circles”).

3. One indicator of society’s failure to embrace the student with intellectual disabilities is the list of more vulgar names for the short bus contained in the Wikipedia entry for Short Bus, which includes “retard cart,” “syndrome truck,” “window licker,” “sped sled,” “sped-ex,” and “retard rocket.” Wikipedia.org, Short Bus, http://en.wikipedia.org/wiki/Short_bus (last visited Dec. 17, 2007).

4. *See generally* Pa. Ass’n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (D. Pa. 1971) and Mills v. Bd. of Educ., 348 F. Supp. 866 (D. D.C. 1972) (standing, among the earliest cases, for the principle that children with disabilities have a civil right to receive an education).

5. The original act was adopted in 1975 as the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773, and has been amended and renamed several times since. Congress reauthorized the Act in 2004 after more than two years of debate. Pub. L. No. 108-446, 118 Stat. 2647. The reauthorization was intended to align the Individuals with Disabilities Education Act with across-the-board educational standards and accountability measures for *all* students enunciated in the No Child Left Behind (NCLB) Act. *See* Rosenbaum, *supra* note 2, at 4-5, 26-30; Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 16-22 (2006). In its current iteration, the statute is officially dubbed the Individuals with Disabilities Education Improvement Act (IDEIA), a title deemed “Orwellian” by one veteran commentator. (It may still be properly referred to as the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1400(a) (2006)).

6. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1149 (2007) (citing Wade F. Horn & Douglas Tynan, *Time to Make Education “Special” Again*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 23, 26 (Chester E. Finn, Jr. et al., eds., 2001)) [hereinafter RETHINKING SPECIAL EDUCATION]; Gregory F. Corbett, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Act Violate a General Education Student’s Fundamental Right to Education?*, 40 B.C. L. REV. 633, 634 (1999). For a more extensive discussion of the critique, see Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 768-69 nn.62-65 and accompanying text (2001).

definition under IDEA.⁷ “Many in society have a clear image of the children they believe belong on the bus and those that do not.”⁸ The shrinkage of the class of eligible students of course leads to a reduction in educational expenditures.

Second, the No Child Left Behind Act (NCLB),⁹ which is now firmly implanted in virtually all of the nation’s public schools, is the most significant federal education policy reform in place for students in the so-called general education curriculum. The Act dictates a level of academic progress, and instructional interventions, meant to assist all pupils, including those with disabilities along with other marginalized students.¹⁰

In this Essay, I call for an end to the line-drawing and hoop-jumping. Like Professor Hensel, I believe the public policy focus should not be on the breadth or narrowness of the definition of disability under IDEA.¹¹ I also share her belief that educators and policymakers must continue to grapple with the extent

7. Hensel, *supra* note 6. I first began to think about this question as a respondent to Professor Hensel’s paper, presented at the Hastings College of the Law National Disability Law Symposium (Feb. 3, 2007). I had not previously heard of the “Short Bus.” Rather, the image lodged in my head was of the equally stigmatizing “Little Yellow Bus,” which my son has ridden for most of his 17 years in “special ed” or “sped.” Apparently, I am not alone in associating the Yellow Bus with special education, although this term is more equivocal than the “Short Bus.” See, e.g., Quinton Hatfield, All Aboard The Yellow Bus: Mistah F.A.B., <http://www.hhnlive.com/features/more/173> (last visited Feb. 24, 2008) (describing his hip-hop album *Yellow Bus Rydah* as follows: “[W]hen you see the yellow school bus you think ‘Aw, look at the slow kids cracking jokes having something funny to say.’ If you ever were friends with anybody on that bus you realize they was just slow, you realize they just had a mental problem that keep them from not being as fast as everyone else on a conversational level. If you dug deep into their minds you realize they were highly intelligent. They had great artistic abilities within their differences.”).

8. Hensel, *supra* note 6, at 1151 n.22. A decade earlier, Professors Mark Kelman and Gillian Lester wrote at length about the same phenomenon, in slightly different terms: “[A]s a society, we must make decisions about which students deserve resources beyond those devoted to their classmates.” MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 6 (1997).

9. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, 20 U.S.C. §§ 6301-6339 (2006). Members of Congress and the Administration have put forth proposals for reauthorization of NCLB. See, e.g., No Child Left Behind Reform Act, S. 1194, 110th Cong. (2007), H.R. 2087, 110th Cong. (2007); Sec’y Margaret Spellings, *Building on Results: A Blueprint for Strengthening the No Child Left Behind Act* (U.S. Dept. of Educ., Jessup, MD), Jan. 2007, available at <http://www.ed.gov/policy/elsec/leg/nclb/buildingonresults.html>.

10. Note that the IDEA exempts from the definition of disability those learning problems that are due to “environmental, cultural, or economic disadvantage” or social maladjustment in the absence of emotional disturbance. 34 C.F.R. § 300.8(C)(4)-(10)(ii) (2007).

11. Hensel, *supra* note 6, at 1152. Before the 2004 amendments were enacted, Professor Terry Jean Seligmann had also concluded the definition should not be narrowed. Seligmann, *supra* note 6, at 767.

of services, if for no other reason than the spiraling cost.¹² However, in moving toward an educational system that is more inclusive in implementing the “least restrictive environment” principle under the IDEA—and the success-for-all mandate of NCLB¹³—I believe we need to refine the laws and policies that end the divide between disabled students and their nondisabled peers who also require intensive academic or other educational supports.

We must therefore evaluate the remedial needs of a broader group of students—those situated outside the traditional and legal disability circle—and craft individualized programs for them as well, whether or not they are deemed IDEA-eligible. Moreover, we should strengthen another important factor that is key to the success of students with disabilities: adequate preparation of teachers and other professional staff to meet the needs of all students. Finally, the monitoring of children’s programs and progress that is now available to parents of disabled youngsters should be extended to parents of other students in need.¹⁴ In making a shift in legal and pedagogical analysis, it is important that we not attach political or ideological labels to a change in conceptualization.¹⁵

12. See also Corbett, *supra* note 6, at 649 (“[I]ncreases in special education costs are effectively siphoned from general education spending because local school districts across the country have fixed budgets.”). Those of us in the disability advocacy community bristle at the term “encroachment,” used by administrators who claim that expenditures for special education students are cutting into the general fund. Audio tape: Symposium on Education as a Civil Right, held by the Stanford Journal of Civil Rights and Civil Liberties (Feb. 2, 2008) (on file with author). While we routinely respond that disabled students are also part of the general student body, we cannot ignore the fact that some needs are indeed costly.

13. There are two known pronunciations of the NCLB acronym: “N-C-L-B” is the standard one. I was unaware of another until Dean Christopher Edley injected the more lyrical “NIK-el-bee” into his Symposium keynote address. Christopher Edley, Dean, Univ. of Berkeley Law Sch., Keynote Address at the Stanford Journal of Civil Rights and Civil Liberties Symposium: Education as a Civil Right (Feb. 2, 2008).

14. My views are informed by my own professional and personal experience. I have practiced for almost a decade as a lawyer with Disability Rights California (formerly, Protection & Advocacy, Inc.), an affiliate of the federal network of non-profit “protection and advocacy” organizations representing people with disabilities to advance their service, legal and human rights, and before that as the Disability Rights Education and Defense Fund’s senior litigation attorney. I am also the father of David Rafael, a young man with significant intellectual and physical disabilities. For an account of my experiences in advocating for my son’s educational, habilitative and service needs, see Stephen A. Rosenbaum, *When It’s Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. DAVIS J. JUV. L. & POL’Y 159 (2001) and Stephen A. Rosenbaum, *Representing David: When Best Practices Aren’t and Natural Supports Really Are*, 11 U.C. DAVIS J. JUV. L. & POL’Y 161 (2007) [hereinafter *Representing David*].

15. I reject what Professors Kelman and Lester characterize as a “left multiculturalist” view in which learning-disabled students are viewed as a “readily identifiable subset of pupils” more worthy of assistance and resources than a broader group of unidentified “poor learners.” KELMAN & LESTER, *supra* note 8, at 197. This political label is as much a distortion as the characterization itself. It would be equally unhelpful to brand the call for the elimination of disability-based determinations as right-wing or reactionary.

II. CHANGING DEFINITION

Professor Hensel reminds us that resource allocation is a topic that is alive and well in the realm of limited education funding. Some commentators fear that relaxed IDEA eligibility guidelines will allow general education to swallow up special education, with the disabled children Congress intended to serve left unserved.¹⁶ Other commentators argue that eligibility must be restricted to prevent special education from draining the resources available to the regular education students. Professor Mark Kelman, for instance, poses an uncomfortable question for special education advocates about costs: are there children who might deserve incremental school resources as much or more than special education students, for example, children with low IQs but ineligible for IDEA, children of color, children with harsh conditions at home?¹⁷ Hensel thoroughly explores the legal and social implications of the rising number of this subclass of “less disabled” special education students. She concludes that the growth is positive and consistent with Congress’ intent “to bring all students, regardless of functioning, into the mainstream of American education.”¹⁸ The debate, she urges, should not be about the severity of these youngsters’ disability, but about the extent of services that should be made available to pupils with disabilities.

The shrinking definition of disability espoused by scholars and policy analysts is also evident in recent IDEA jurisprudence. Just as the courts have whittled away at the Americans with Disabilities Act (ADA), judges are restricting the definition of disability under the IDEA as well as parents’ ability to advocate for their children in administrative and judicial proceedings. A number of decisions have adopted a mitigation analysis, akin to the Supreme Court’s approach in analyzing the ADA in the so-called *Sutton* trilogy of cases.¹⁹ That is, if a child performs adequately with mitigation, such as

16. See Hensel, *supra* note 6, at 1150 n.18 (quoting 2003 congressional findings on the over-identification of children as disabled, depriving the “truly . . . disabled” of “valuable resources”). Other commentators concur. *Id.* (citing backlash against “false identification” of special needs children as well as argument to reclaim special education for “the genuinely disabled” (citations omitted)).

17. Mark Kelman, *The Moral Foundations of Special Education Law*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 8, at 78; see also Seligmann, *supra* note 6, at 761 (criticizing funding “tug of war between ‘regular’ and ‘special education’ kids”); Hensel, *supra* note 6, at 1188 (questioning the “implicit assumption that typical children are presumptively entitled to all educational funding”).

18. Hensel, *supra* note 6, at 1152.

19. See *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002); *Murphy v. United Parcel Serv.* 527 U.S. 516 (1999); *Sutton v. United Airlines*, 527 U.S. 471 (1999). In this series of employment cases, the Court held that all mitigating measures utilized by employee plaintiffs must be taken into account in determining whether a plaintiff actually has a disability within the meaning of the ADA. See Hensel, *supra* note 6, at 1182 n.205. More than one commentator has lamented the gutting of statutory protections as a result of these holdings. *Id.* at 1182 nn.202-03.

classroom “supports and services,” she cannot establish an “adverse effect” on educational performance and is therefore ineligible for special education.²⁰

Other recent setbacks for parents include decisions by the Court placing the burden of proof on parents who petition for due process hearings²¹ and disallowing the recovery of expert witness fees.²² Decisions adverse to students and parents have also come from the federal appellate courts.²³ As disability is redefined and parental advocacy is constrained,²⁴ one may well wonder if our schools will continue their obligation to properly identify children with disabling conditions and undertake appropriate instructional measures.

Unlike the ADA, the Individuals with Disabilities Education Act is not, strictly speaking, a civil rights statute.²⁵ It does not primarily address discrimination, but rather, educational deficits.²⁶ The IDEA is defined by remediation, intervention, support, services, and specialized instruction—what

20. See, e.g., *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 946 (9th Cir. 2007); *Ashli C. ex rel. Sidney C. v. Hawaii*, No. 05-00429, 2007 WL 247761, at *9 (D. Haw. Jan. 23, 2007); Hensel, *supra* note 6, at 1170-73.

21. *Schaffer v. Weast*, 546 U.S. 49 (2005).

22. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006). Legislation has been introduced in the House of Representatives to reverse the holding of *Murphy*. See IDEA Fairness Restoration Act, H.R. 4188, 110th Cong. (1st Sess. 2007).

23. See e.g., *Van Duyn v. Baker Sch. Dist.* 5J, 481 F.3d 770 (9th Cir. 2007) (holding that only “material” failure to implement IEP [individualized education program] may result in district’s denying a free appropriate public education); *A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004) (finding that lower court incorrectly substituted own views for determinations of local education officials who offered student an IEP “reasonably calculated to provide him *some* educational benefit, thus . . . satisfying IDEA’s modest requirements”) (emphasis added); *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002) (holding that educators’ decision in placement trumps parents’).

24. Not all the recent decisions from the high court have been hostile to parents. See, e.g., *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (holding that non-lawyer parent’s representation of child in court appeal permitted under IDEA and does not constitute unauthorized practice of law); *Bd. of Educ. v. Tom F.*, 128 S. Ct. 1 (2007) (affirming judgment that parents are entitled to reimbursement of private school tuition where school district failed to offer appropriate education, without first enrolling child in district program).

25. For a summary of the provisions of the IDEA and ADA school requirements, see Linda Headley & Stephen A. Rosenbaum, *Schools and Educational Programs, in AIDS AND THE LAW* §5 (David W. Webber ed., 4th ed. 2007).

26. Notwithstanding this legal distinction, one national disability advocacy organization called the IDEA “the most important [U.S.] civil rights law ever passed for children with disabilities.” Press Release, Disability Rights Education & Defense Fund, S. 1248: Individuals with Disabilities Education Improvement Act of 2003: Many Improvements but Ongoing Concerns (June 24, 2003), available at http://www.dredf.org/press_releases/Senate_Markup.html For comparisons of how disabled students are treated under the IDEA, ADA and Section 504 of the Rehabilitation Act of 1973, see Perry Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 WEST’S EDUC. LAW REP. 629 (2004); Christopher J. Walker, *Adequate Access or Equal Treatment: Looking Beyond IDEA and Section 504 in a Post-Schaffer Public School*, 58 STAN. L. REV. 1563, 1579-98 (2006); see also *infra* notes 28 and 48.

might facetiously be referred to as “unreasonable accommodations.”²⁷ A school district may not assert the undue burden or fiscal hardship defense that is allowed in certain instances under Section 504 of the Rehabilitation Act²⁸ or the ADA.²⁹ Yet, a district’s resistance to remediating or otherwise redressing an IDEA student’s disability is often all about money and resources.³⁰ While the IDEA is one of the best educational initiatives ever hatched by Congress, a catchy acronym and an improved and reborn statute³¹ are not enough to make up for the longstanding lack of congressional appropriations.³²

Professor Hensel posits that “bestowing unfunded mandates” on local school authorities in the name of IDEA is less problematic than imposing obligations on private entities and the more rigorous examination of what constitutes “disability” under the ADA. But, she notes that “[a]s special education enrollment rises and schools are required to comply with NCLB without adequate funding, . . . the competition for scarce education dollars will increase, and with it, scrutiny of the class receiving services under the IDEA.”³³ I believe that that scenario is already in place.

27. The better expression would be accommodations or resources that “exceed reasonable cost.” See Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1224 (2007). The authors argue that paying these additional costs could perhaps even “enable above-average function.” *Id.* (emphasis added). But see Nirmala Erevelles et al., *How Does It Feel to Be a Problem? Race, Disability, and Exclusion in Educational Policy*, in WHO BENEFITS FROM SPECIAL EDUCATION? 89-90 (Ellen A. Brantlinger ed., 2006) (criticizing deficit model of disability whereby student is perceived as “having some inadequacy, shortcoming, failure or disease”) (citation omitted).

28. See, e.g., 34 C.F.R. § 104.12 (2008) (exempting employer from making reasonable accommodation where “undue hardship” is present under Section 504 employment regulation). For non-employment purposes, Section 504 exemptions or “defenses” are slightly different. For example, a school receiving federal funds shall place a disabled student in the regular school setting “unless it is demonstrated . . . that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. §104.34(a) (2008).

29. See, e.g., 42 U.S.C. §§ 12111(10), 12182(b)(2)(A) (2008) (including in statutory defenses “undue hardship” or “fundamental alteration”).

30. Rosenbaum, *When It’s Not Apparent*, *supra* note 14, at 174 n.55 (noting that program cost factor is like a big dollar sign hanging over a “tiny formica IEP table”).

31. Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

32. See Hensel, *supra* note 6, at 1155 n.47 (noting that Congress has never fully funded IDEA, falling far short of its goal to cover 40% of costs incurred by states); see also H.R. REP. NO. 108-77, at 125 (2003). For an explanation and history of the federal funding formula, see MARY KONYA WEISHAAR ET AL., INCLUSIVE EDUCATIONAL ADMINISTRATION 129-32 (2d ed. 2007).

33. Hensel, *supra* note 6, at 1185. I believe Professor Hensel’s assertion is equally inaccurate that the IDEA, like the ADA, requires parties “to actively engage in an interactive process to determine how the [students] can best function in an environment tailored to meet [their] needs” Hensel, *supra* note 6, at 1185. In point of fact, the active engagement is often lacking, and school districts are the first to insist that “best” is not the standard they need to meet under the federal special education statute.

III. WHAT'S IN A NAME?

Are there more children claiming a disability who don't warrant the eligibility label?³⁴ The media image is of white middle class parents urgently seeking college admission for their sons and daughters who discover new diagnoses as they face entrance exams.³⁵ But, there is another story. Stigmatizing or not, today's parents of at-risk or low-achieving students (including students of color) may actually *want* to get their youngsters qualified for special education services, because it is perceived as the pathway to getting resources and attention in overburdened, underfunded schools.³⁶ As Hensel puts it, "perverse incentives" lead parents to emphasize the severity of a child's impairment as "eligibility is all or nothing . . ." ³⁷ This does not mean, however, that parents necessarily want their child placed in a special day class or other segregated setting.³⁸

34. See, e.g., Horn & Tynan, *supra* note 6, at 30; Corbett, *supra* note 6, at 646-48; and KELMAN & LESTER, *supra* note 8, at 80-85.

35. Hensel, *supra* note 6, at 1193 (describing "instances of alleged abuse by wealthy parents noted in the popular press"); *id.* at 1166 (attributing IDEA's initial success to "confluence of interests and advocacy between civil rights proponents and a group of largely middle class white parents who desired to secure assistance for their children's academic difficulties," but arguing that the learning disability label "quickly came under attack as a 'bogus' disability") (citations omitted).

36. A special education placement may be seen as the only alternative to school failure. According to one study, some professionals have suggested "[n]o LD [Learning Disability], no services." BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? 14 (2006). See also Anna B. Duff, *How Special Education Policy Affects Districts*, in RETHINKING SPECIAL EDUCATION, *supra* note 6, at 135, 139 (observing that there is less stigma now in applying for special education eligibility and "this is the way you get help"). Not all parents are eager to have their children wear the special education label. See, e.g., Theresa Glennon, *Race, Education and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1327 (1995) (noting that black parents are "far less likely than school officials to identify children as having 'mild' disabilities") (citation omitted); see also 20 U.S.C. §§ 1400(c)(12), 1412(a)(24), 1418(d) (2008) (finding that minority youths, particularly African Americans, have been disproportionately identified as special education students, and that states must take steps to prevent "this historic trend"). For a disability studies and critical race theory critique of minority over-representation, see Erevelles et al., *supra* note 27, at 77. The authors assert that school policies continue to be guided by the notion that "Whiteness is equated with competence/ableism and Blackness with incompetence/disability." *Id.* at 88. See also Lyndsay R. Carothers, Note, *Here's an IDEA: Providing Intervention Services for at-Risk Youth Under the Individuals with Disabilities Education Act*, 42 VAL. U. L. REV. 543 (2007) (arguing for race-neutral evaluation criteria and early interventions for at-risk children to reduce over-identification of minority pupils).

37. Hensel, *supra* note 6, at 1187. She also notes that the per pupil cost is 91% higher for special education than regular education. *Id.* at 1149 n.15.

38. Professors Kelman and Lester remind us that the early special education litigation was motivated in part by a "desire to fight the exclusion of children of color from the schools." KELMAN & LESTER, *supra* note 8, at 4. In the wake of *Brown v. Board of Education*, civil rights activists were concerned about the disproportionate number of nonwhite children labeled as mentally retarded and placed in segregated classrooms, or in separate schools. *Id.* All of the student plaintiffs in *Mills v. Board of Education*, 348 F. Supp.

IV. AMBIGUOUSLY APPROPRIATE

What exactly *is* special education? Hensel notes that the definition “is relatively ambiguous and a subject of debate.”³⁹ The statute and regulations provide an equally unsatisfying definition: “[S]pecially designed instruction . . . to meet the unique needs of a child with a disability”⁴⁰ The regulations in turn define specially designed instruction as “adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction” to address the child’s needs and to ensure access to the general curriculum.⁴¹ In keeping with the tautological nature of the definition, before the term was defined in regulations, the Office of Special Education Programs explained that “specially designed instruction” means “education planned for a particular individual or ‘individualized instruction.’”⁴²

It is like saying the definition of special education is “special education”—or more precisely “specialized education.” If this definition is *relatively* ambiguous, then what is *ambiguous*? On the other hand, the statute’s wisdom and beauty lay in its flexibility, subject to the particularities invested in it by members of the individualized educational program (IEP) team.

A related quandary is presented by the definition of “appropriate,” as in the child’s entitlement to a Free *Appropriate* Public Education or FAPE. FAPE is defined as specialized instruction and “related services”⁴³ that are offered at an appropriate school, at public expense, and meet state educational agency standards. This education must also be provided in conformity with an IEP and all the procedural requirements concerning IEP content, team membership and parent participation, as set out in the regulations.⁴⁴ The case law interpreting “appropriate” is varied and voluminous. The landmark case of *Board of Education v. Rowley*⁴⁵ set a very low bar, in which the test for “appropriate” is in two parts: First, has the State complied with the procedural requirements set

866 (D. D.C. 1972), were African-American. Professors Harry and Klingner catalogue the downside of the special education track for these students: large classes, teacher shortages, undifferentiated instruction, poor teacher quality and stigma. HARRY & KLINGNER, *supra* note 34, at 160.

39. Hensel, *supra* note 6, at 1174; *see also id.* at 1174-76 (discussing the definition of special education).

40. 20 U.S.C. § 1401(29) (2006); 34 C.F.R. § 300.39(a)(1) (2006).

41. 34 C.F.R. § 300.39(b)(3) (2006).

42. Letter to Smith, 19 IDELR 494, 495 (OSEP [Office of Special Education Programs] 1992).

43. Related services include a wide array of “supportive services” required to assist a child “to benefit from special education,” such as speech-language pathology, physical and occupational therapy, counseling or social work services, medical diagnostic and school nurse services, interpreting, recreation, orientation and mobility services, and parent counseling and training. 34 C.F.R. §300.34(a) (2008).

44. 34 C.F.R. §300.320 *et seq.* (2008); *see also* 20 U.S.C. §1401(9) (2006); 34 C.F.R. §300.17 (2008).

45. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

forth in the IDEA? Second, “is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits?”⁴⁶ Since its issuance just over a quarter-century ago, *Rowley* has spawned a number of appellate and trial court decisions. Still, as one commentator recently wrote: “As long as the Supreme Court does not overrule *Rowley* or refine its interpretation in a subsequent decision, the meaning of the term appropriate remains unclear, undefined, inconsistently applied, and a source of frustration in educational implementation.”⁴⁷

Moreover, as Hensel notes, the courts are not in agreement on what services are included under the special education umbrella and there is little guidance from the U.S. Department of Education.⁴⁸

46. *Id.* at 206-07. The high court has not revisited this definition since. See also Judith DeBerry, *When Parents and Special Educators Clash: Are Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 523-26 (2003) (analyzing the *Rowley* standard and post-*Rowley* case law holding school districts accountable for a low level of “educational benefit” in satisfying their obligation to deliver FAPE). For more recent case law and an argument in favor of a clearer federal definition of “appropriate,” particularly in light of NCLB, see Andrea Blau, *The IDEA And The Right To An "Appropriate" Education*, 2007 BYU EDUC. & L.J. 1 (2007). The author is dubious that the Court will take up the definition anew and also notes Congress' refusal to clarify the concept, as illustrated by its recent enactment of the “improved” IDEA in 2004. See *infra* note 79 (describing recent commentary and cases challenging *Rowley* standard). Of course, in real life, what every parent wants is not what is “appropriate,” but what is “best.” At least one state comes close to meeting that. Michigan requires districts to design an IEP to “develop the maximum potential” of disabled students as a way “to enhance IDEA’s requirements.” *Renner v. Bd. of Educ. of Public Sch. of City of Ann Arbor*, 185 F.3d 635, 645 (6th Cir. 1999). However, the one appellate court to review the statute has determined that the term is undefined and the standard “may be more precatory than mandatory; it does not necessarily require the best education possible.” *Id.*

47. Blau, *supra* note 46, at 14. Writing after the 1997 IDEA amendments were enacted, two prominent school district attorneys described the *Rowley* standard as “cryptic and intangible.” Joyce O. Eckrem & Eliza J. McArthur, *Is the Rowley Standard Dead? From Access to Results*, 5 U.C. DAVIS J. JUV. L. & POL'Y 199, 217 (2001); see also *infra* note 79.

48. Hensel, *supra* note 6, at 1174-75. In comparison, the regulatory definition of “appropriate” for students with disabilities who qualify for Section 504 plans is “regular or special education and related aids and services” that are “designed to meet [the] individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met” and are presumptively provided in an integrated setting. 34 C.F.R. § 104.33(b) (2008). Youngsters schooled in accordance with a “504 plan” do not meet the IDEA categorical disabilities criteria, but nonetheless have a substantially limiting physical or mental impairment within the meaning of Section 504 of the Rehabilitation Act of 1973. In my experience, this residual definition of disability is often met by a residual or diluted interpretation of educational interventions and standards on the part of school authorities. This also means residual—or no—funding or procedural safeguards. Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (1998).

V. INCLUSIVE EDUCATION

The IDEA also establishes a presumption that children with disabilities are to be included in the regular classroom environment,⁴⁹ although the term “inclusive” —popularized by educators,⁵⁰ parents, and advocates⁵¹—is never used in the statute or IDEA case law.⁵² The reality of creating an inclusive classroom is much harder than the theory. Too often, we see the practice of “dump and pray.” That is, dump the child in the regular classroom—without

49. 20 U.S.C. §§ 1400(c)(5)(A) & (D), 1412(a)(5)(B) (2008); 34 C.F.R. § 300.114(a)(2) (2008). This presumption underscores the principle that special education is about services and not classroom location. See RUTH COLKER, *THE LAW OF DISABILITY DISCRIMINATION* 305-13 (6th ed. 2007) (brief historical overview of special education statutory and case law); Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 548-65 (1996) (noting that a “least restrictive environment” or LRE owes its place as a key IDEA component in reaction to a history of “the stigmatizing effect of differential special placements,” the aftermath of *Brown v. Board of Education*, educational theories stressing integration, and LRE’s consistency with individualizing a child’s placement); Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL’Y 147 (2001) (reviewing the tensions between FAPE and LRE).

50. I thank Professor Pam Hunt, San Francisco State University, College of Education, for introducing me to the more nuanced term “inclusive education,” which appears to be a recognition that “full inclusion” is not necessarily the least restrictive or ideal setting for every disabled student. The “full inclusion” movement, which originated as the Regular Education Initiative (REI), was intended to “break[] down barriers between the two educational systems and integrat[e] students with disabilities more fully into the general education classroom.” JIM YSELDYKE & BOB ALGOZZINE, *PUBLIC POLICY, SCHOOL REFORM, AND SPECIAL EDUCATION* 21 (2006). Professors Yseldyke and Algozzine suggest that the early debate about REI was amongst special educators and parents. The former were concerned about job loss or whether they possessed the necessary consultation skills to share responsibility for disabled students with regular teachers. Parents worried whether their children would be educated appropriately in an inclusive setting. *Id.*

51. On the well meaning, but unintended usage of “inclusion,” see Rosenbaum, *When It’s Not Apparent*, *supra* note 14, at 182 n.74 (“‘[I]ncluded’ simply becomes a euphemism for ‘retarded’ or ‘special ed.’ . . . If one is truly ‘included,’ the word itself should fade away as a modifier.”). See also Rosenbaum, *Representing David*, *supra* note 14, at 178 (describing how, after being enrolled in regular classrooms since kindergarten with large doses of genuine inclusiveness, David hit a brick wall in high school when it came to programmatic and social integration).

52. *But see* Convention on the Rights of Persons with Disabilities, art. 24, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc. A/RES/61/106 (Dec. 13, 2006), available at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm> (“States Parties shall ensure an inclusive education system at all levels and life long learning [and] that . . . [p]ersons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live”) (emphasis added). The treaty entered into force on May 3, 2008. The United States has neither signed nor ratified the Convention. For a discussion of the need for a “holistic” disability rights agenda that adopts social, cultural, and economic rights—such as the right to inclusive education—along with the “first generation” disability civil and political rights, see generally Stein & Stein, *supra* note 27.

adequate advance training or support for teachers—and pray that it works. Or, pray that it does *not* work so that when the parents come back to the IEP table, they will be too disillusioned or dispirited to insist on placing their child in a more integrated, yet pedagogically challenging, environment.⁵³

Up until now, there has not been much overt backlash to placing children with disabilities in regular classrooms, in part because it would be viewed as anti-egalitarian and mean-spirited. Nonetheless, there has been whispering and grumbling by parents in some quarters, which is likely to grow louder.⁵⁴

We can choose to be indignant or dismissive about this *sub rosa* sentiment, or we can try to address the concerns and educate fellow parents. Both strategically and pragmatically, it is worth seeking allies within the school and forging relationships with parents of other students who feel they are not being well served in the system.⁵⁵

VI. A NEW PARADIGM

While, as Professor Hensel suggests, we need not further limit who is eligible for the special education label,⁵⁶ it is not sufficient to merely maintain the current eligibility definition and decrease the level of services for these students. Rather, we should peel off the labels so that we do not have competition for resources and services between the youth who are at risk and those who meet the definition of disabled—whether the gap is between pupils with IEPs and those with section 504 plans or between “regular ed” and “special ed” youngsters. We must look at each child individually.⁵⁷ The research⁵⁸ and the current public policy⁵⁹ appear to support this approach.

53. One writer acknowledges the popular and succinct concept of inclusion that “[s]pecial ed should be a service, not a place,” Duff, *supra* note 36, at 143 as well as the challenges of having a student in general education who “can’t keep up with the rest of the class.” *Id.* at 144.

54. Last year, one California school district offered evidence in a due process proceeding consisting of letters written to a school principal complaining about a special education pupil’s disruption of the class. One parent wrote: “Our children remained in class with this student the entire fourth grade. She continues to yell out in class, other students still get headaches, and are still distracted and disrupted. For most of us this has not been the first year our children have been forced to try to make the best with this bad situation. We want it to be the last year.” *San Ramon Valley Unified Sch. Dist. v. [Student]*, Off. of Admin. Hearings, No. N2007020638 (letter on file with author).

55. See, e.g., Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 311-15 nn.207-17 (2005) (discussing models for group advocacy, coalition-building and community organizing in a special education context).

56. See Hensel, *supra* note 6.

57. See Rosenbaum, *Aligning or Maligning?*, *supra* note 2, at 26-28 (noting NCLB mandate to boost achievement levels of *all* students through tailored instruction, regardless of classification); Weber, *Reflections*, *supra* note 5, at 22-23 (noting that early intervening services to students needing additional academic or behavioral support may be less stigmatizing); see also G. Reid Lyon et al., *Rethinking Learning Disabilities*, in RETHINKING

There is no reason why the entitlement to a free appropriate public education should be limited to students in need of specialized instruction. For all its ambiguity, the concept of FAPE is at least more recognized and studied as a national educational benchmark than anything applied to students not labeled “disabled.” Doesn’t every child deserve an individualized learning plan that charts a course for obtaining an appropriate education and measuring her progress?⁶⁰ Shouldn’t that plan be subjected to the same parental participation and vigilance that are key to the success of every special needs student? Congress has affirmed this⁶¹ and our intuition tells us that as well.⁶² The

SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 6, at 259 (describing how early identification and prevention programs for at-risk children can reduce number of students who later require intensive, long-term special education programs).

58. Researchers, for example, have suggested that there is an overlap in needs between those labeled “disabled” and those deemed “at risk.” It is difficult to distinguish pupils with high-incidence learning disabilities from those who are “low achieving” or “educationally disadvantaged.” Margaret J. McLaughlin & Kelly Henderson, *Defining U.S. Special Education into the Twenty-First Century*, in SPECIAL EDUCATION IN THE 21ST CENTURY 43, 58 (Margret A. Winzer & Kas Mazurek eds., 2000). In one study of minority children, researchers observed that students who are failing, but not eligible for special education, “fall between the cracks.” HARRY & KLINGNER, *supra* note 36, at 14.

59. See, e.g., 20 U.S.C. § 1400(c)(5)(F) (2008) (noting congressional finding that “early intervening” services, such as scientifically based early reading programs and positive behavioral interventions can “reduce the need to label children as disabled”). One commentator suggests even further IDEA amendments to address early on the needs of low-performing students—with explicit consideration of their socio-economic status, English language proficiency, and family support—to prevent their eventual need for special education services. Carothers, *supra* note 36, at 570-84.

60. Rosenbaum, *When It’s Not Apparent*, *supra* note 14, at 161 n.12 (observing that universal IEP “is a mandate waiting to happen”). As a step in that direction, a California legislator introduced a bill in 2001 to require parents, teachers and “low achieving” students to jointly develop a “personal learning agreement.” The bill, Assemb. B. 1238, 2001-02 Reg. Sess. (Cal. 2001), died in committee. See Complete Bill History, A.B. 1238, http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1201-1250/ab_1238_bill_20020207_history.html (last visited March 16, 2008). In *Abbott v. Burke*, 575 A.2d 359, 366 n.30 (N.J. 1990) (*Abbott II*), the New Jersey Supreme Court acknowledged that “recent scholarly discussion has focused heavily on the need for individualized instruction tailored to children’s different needs and development patterns, experimental learning . . .” (emphasis added, citations omitted). Although the Court’s chief concern was with financial inequity between school districts and the marginalization of minority students from a school system perceived as “‘white’ and alien,” its acknowledgement is no less important. *Abbott II*, 575 A.2d at 366 n.30. See also KELMAN & LESTER, *supra* note 8 at 157; Hensel, *supra* note 6, at 1197 n.268 (citing scholarly support for individualized plans for demonstrated low achievers).

61. 20 U.S.C. § 1400(c)(5)(A)-(B) (2008) (noting that research and experience demonstrate effectiveness of having high expectations for youngsters and in strengthening parental participation); see also GEORGE R. TAYLOR, PARENTING SKILLS AND COLLABORATIVE SERVICES FOR STUDENTS WITH DISABILITIES 88 (2004) (noting importance of involving parents in curriculum development and construction).

62. See Rosenbaum, *Aligning or Maligning?*, *supra* note 2, at 31-33 (describing importance of parental role in school governance and quality control through official and outside channels). Parental governance is not unique to special education. It was envisioned

parental monitoring cannot be limited only to those who have the sophistication, affluence, and educational background. Professor Hensel put it bluntly: “In the absence of due process guarantees, a school district may ignore the parents of children with disabilities with impunity because they have no enforceable rights to the contrary.”⁶³ It is a role that also belongs to parents of poorer, limited English, and other marginalized youth, not yet identified as eligible for special education.⁶⁴ The remedy, as Professor Terry Jean Seligmann recognized before the federal statute was last amended—and which I advocate here—is that “the principles that shape the IDEA should be preserved and expanded. A focus on the individual child’s needs, parental involvement, enforceable rights, and a range of services should be part of every school child’s life, not only those designated as ‘special.’”⁶⁵

To the extent that there has been a campaign to define a universal standard for all students, it is uneven. For example, the adequacy-of-funding movement has spawned litigation in some states that attempt to define a “thorough” or “adequate” education.⁶⁶ Although much of the jurisprudence addresses per

in NCLB in the form of local councils and consultation on school improvement plans. 20 U.S.C. § 6316(b)(5) (2000); 34 C.F.R. § 200.41(a)(2) (2003). Yet most of the parental participation provisions have not been implemented. Amanda Broun et al., *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. C.R. & C.L. 217 (2008).

63. Hensel, *supra* note 6, at 1189.

64. Hensel, *supra* note 6, at 1150 n.17; *see also* TAYLOR, *supra* note 61, at 103 (noting that minority group parents in particular find school to be “an intimidating place”); Massey & Rosenbaum, *supra* note 55, at 281-83 (noting barriers to IDEA enforcement by parents hampered by socio-economic class, educational background, English language proficiency, and/or lack of legal services); Stephen A. Rosenbaum, *The Juris Doctor is In: Making Room at Law School for Paraprofessional Partners*, 75 TENN. L. REV. 315, 323-29 (2008) (observing that lay advocates can effectively assist parents in this role). For instance, the Georgia Advocacy Office, a part of the federal protection and advocacy system, conducts a Parent Leadership Support Project. This four-month lay advocacy program in grassroots parent leadership, trains parents and other “concerned citizens” to “master the information and skills necessary to secure educational opportunities” for children with disabilities. Georgia Advocacy Office, <http://thegao.org/training.htm> (last visited March 28, 2008). The training is not limited to parents and family members of disabled pupils, but reaches out to a broad segment of the lay community, who in turn embrace and advocate for these youngsters in ways that go beyond intoning the legal intricacies of the IDEA. Audio CD: Leslie Lipson, Project Manager, Conference on Special Education Advocacy, held by Council of Parent Attorneys and Advocates (COPAA) (Mar. 8, 2008) (on file with author).

65. Seligmann, *supra* note 6, at 761; *see also* Rosenbaum, *Aligning or Maligning?* *supra* note 2, at 21-22 (noting congressional approval for funding intervention services for children who “narrowly miss an eligibility label”).

66. Professor Paul Tractenberg dissects the constitutional phrase “thorough and efficient education” as used in New Jersey and several other states. Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411 (2008). In the longstanding *Abbott* school finance litigation, the New Jersey Supreme Court held that the “constitutional requirement of a thorough and efficient education encompasses more than instruction in the basic communications and computational skills, but also requires that students be given at least a

pupil funding equity at a district or aggregate level, the courts have eked out language that could be used to burnish the IDEA's "appropriate" standard,⁶⁷ ranging from "a chance to excel"⁶⁸ to "equip[ping] a child for his role as a citizen and as a competitor in the labor market"⁶⁹ to "prepar[ing] [students] for useful and happy occupations, recreation and citizenship . . ."⁷⁰ Obviously, the standards-based reform movement culminating in the NCLB Act is also an attempt to define academic content standards, set state-by-state and measured through periodic testing, but with no mandate for individualized planning, accountability or dispute resolution.⁷¹

One of the objectives of No Child Left Behind—the Act and the slogan—is that schools must address the needs of all children. This means children with disabilities, as well as English language learners, poor youngsters, immigrants, homeless and foster care youth, and members of ethnic, racial, or sexual minorities. There is a whole host of children who are marginalized or otherwise at risk of failure and who are not classified as disabled students.⁷²

Yet, to date, it is hard to conclude that NCLB has been little more than a slogan. With regard to disabled students, faculty and staff respondents to one

modicum of variety and a chance to excel." *Abbott v. Burke*, 575 A.2d 359, 365-66 (N.J. 1990) (*Abbott II*).

67. As Tractenberg notes, the court's concept of "thorough and efficient" education is an evolving one. Tractenberg, *supra* note 66.

68. *Abbott II*, 575 A.2d at 365-66.

69. *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (citing *Landis v. Ashworth*, 31 A. 1017 (N.J. 1895)). The emphasis on vocational skills and preparation for adult living dovetails very nicely with the component of postsecondary "transition" planning and services under the IDEA. See 20 U.S.C. § 1400(c)(1) (stating that the ultimate goal of the Act is to provide "equality of opportunity, full participation, independent living, and economic self-sufficiency"); see also *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033, at *4 (W.D. Wash. Dec. 8, 2006) ("The IDEA is not simply about 'access;' it is focused on 'transition services, . . . an *outcome-oriented* process, which promotes movement from school to post-school activities . . . taking into account the student's preferences and interests." (citing amended statute and regulations with emphasis added)). Education for "learning and life and citizenship" is the phrase used by the plaintiffs' counsel in the *PARC* case when he summed up the objective of IDEA in the nearly four decades following the landmark district court litigation. Thomas Gilhool, Keynote Address at the Tenth Anniversary Conference, Council on Parent Attorneys & Advocates (COPAA), Anaheim, Calif. (Mar. 7, 2008) (on file with author).

70. *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979). West Virginia's Supreme Court was one of the first state courts to address the requisite qualitative level of educational services under a state constitution, *viz.* one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." *Id.*

71. In expressing concern that disabled students, although accommodated, may remain unidentified in the general education classroom, Professor Hensel notes that NCLB has no requirement "to consult with parents in devising adequate educational plans and bestows no enforceable individual rights when disagreements arise." Hensel, *supra* note 6, at 1176-77. It is precisely these latter features that could be appended to students sitting outside the special education arena.

72. See Rosenbaum, *Aligning or Maligning?*, *supra* note 2, at 21.

recent survey believed that the Act's requirements would "inflict harm" on students with disabilities.⁷³ The survey's author writes: "Indeed with its one-size-fits-all approach to school reform, NCLB fails to recognize that equity in education with equal opportunities for students to reach fullest potential must not be confused with equality or sameness of result, or even identical experience."⁷⁴ The criticism of NCLB because of its impact on disabled students is not much different from overall criticism of the Act: meaningful curriculum has been "elbowed out to make room for test-oriented instruction."⁷⁵

I can visualize a placard around my neck emblazoned with the word "heretic." I am not so naïve as to deny the fear from the special needs advocacy community that if we drop protective status for youths with disability, and take away the disability label, or the separate assessment process, we will dilute services and spread resources too thinly.⁷⁶ Professor Hensel herself warns that a "collapse [in] any meaningful distinction between children with impairments and low performers generally . . . threatens the ability of children with cognitive impairments to secure the due process and individualized education promised by IDEA eligibility."⁷⁷ Nor do I wish to fall into the trap laid by those who protest that the child in special education is educated at the expense of general education pupils.⁷⁸

VII. IT'S THE TEACHING

While opening the services door wider to other students, I would retain the multiple assessments, planning process, determination of goals and objectives, and appropriate program—whatever *appropriate* means⁷⁹—for

73. Sally Harvey-Koelpin, *The Impact of Reform on Students With Disabilities, in WHO BENEFITS FROM SPECIAL EDUCATION?*, *supra* note 27, at 141 (study of school placed on school improvement plan).

74. *Id.* at 141-42 (citation omitted).

75. *Id.* at 142 (citation omitted); *see also* Broun, *supra* note 62, (noting that despite agreement with NCLB goals, parental skepticism of, and resistance to, Act's implementation remains high).

76. Professor Mark Weber argues, for example, that when the federal special education allocations have "too few eligibility strings attached, general education absorbs it and the federal goal of helping children with disabilities is frustrated." Weber, *supra* note 5, at 22.

77. Hensel, *supra* note 6, at 1167. Hensel does acknowledge, however, that a broader classification scheme could help reduce stigma. *Id.* at 1194. Her point is laudable insofar as it makes a commitment to all struggling students, wherever they are on the learning spectrum.

78. *Id.* at 1149 n.12; *see also supra* note 38.

79. Since the IDEA was amended in 1997 and again in 2004, some judges and commentators have suggested that the low bar established in *Board of Education v. Rowley*, 458 U.S. 176 (1982), has been raised. *See, e.g.,* Eckrem & McArthur, *supra* note 47, at 200-213 (noting that 1997 amendments moved focus of statute—and *Rowley* Court—from access to schools to results); Andrea Valentino, Note, *The Individuals With Disabilities Education*

students with disabilities. We must continue to prepare and mentor teachers who are adept at individualized instruction, whether their students are deemed gifted or talented, at-risk or special needs.⁸⁰ It takes a gifted and talented teacher to get it right.

The true success stories in special education are not about voluminous and well-crafted Cadillac educational plans,⁸¹ but about the interventions and support provided by qualified, creative, and compassionate teachers, other professionals, and paraprofessionals—who are often overworked and underpaid. “Qualified” means more than saying the teacher must meet the “highly qualified” certification and licensure standards required under the 2004 IDEA reauthorization and NCLB.⁸² When there is collaboration between

Improvement Act: Changing What Constitutes An “Appropriate” Education, 20 J.L. & HEALTH 139, 155-66 (2006/2007) (noting that by modifying certain IEP requirements and instituting “highly qualified” educator and peer-reviewed research concepts, 2004 amendments call for shift from procedural compliance to a “substantive standard”). In *J.L. v. Mercer Island School Dist.*, No. C06-494P (W.D. Wash. Dec. 8, 2006) the court held explicitly that the standards for FAPE set forth by *Rowley* were no longer relevant because of significant changes in the IDEA amendments and “that any citation to pre-1997 case law on special education is suspect.” *Id.* at *4. Arguably, there is now a higher standard: whether a program “guide[s] the student toward post-education independence and self-sufficiency.” *Id.* at *8. The case is currently on appeal. See also Philip T.K. Daniel & Jill Meinhardt, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of Free Appropriate Public Education?*, 222 EDUC. L. REP. 515, 529-35 (2007) (arguing that the *Rowley* FAPE standard is outdated in light of the NCLB reform movement’s emphasis on state educational content standards and proficiency testing).

80. Even while the 2004 amendments were being debated, educators—motivated in part by concern for over-identification of minority children as special education students—called “for a transformation of all classrooms into places where individualized teaching is the norm . . . [and] the merger of special and regular education through inclusion of all children within the regular classroom as the way to accomplish this.” Seligmann, *supra* note 6, at 766 & nn.50-51.

81. In keeping with the vehicle motif for special ed students, one appellate court declared in an oft-quoted passage that under IDEA “the Board [of Education] is not required to provide a Cadillac” to a disabled pupil, but the “educational equivalent of a serviceable Chevrolet.” *Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 459-60 (6th Cir. 1993).

82. 34 C.F.R. §§ 200.56, 300.18 (2007). This is an intangible characteristic, not subject to testing or in-service training. Even the laudable proposal to require *effective* highly qualified teachers in an amended NCLB is unlikely to produce the necessary corps of teaching staff. See, e.g., THE ASPEN INST. COMM. ON NO CHILD LEFT BEHIND, TEACHER AND PRINCIPAL RECOMMENDATIONS: EFFECTIVE TEACHERS FOR ALL STUDENTS, EFFECTIVE PRINCIPALS FOR ALL COMMUNITIES (2007), available at <http://www.aspeninstitute.org/site/c.huLWJeMRKpH/b.938015> [hereinafter *Aspen Institute Commission Report*]. The Commission report recommends that a Highly Qualified Effective Teacher (HQET) demonstration-based standard replace the current HQT credential mandate under NCLB, whereby teachers would be required to produce “learning gains as measured by growth models,” to receive positive peer reviews from teachers or their principal and would be guaranteed “high-quality” professional development. *Id.* at 185. More recently, veteran attorney Gilhool 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. Gilhool, *supra* note 69.

educators and parents, this stands up mightily against the statute books, the best practices manuals, and the hyper-technical compliance logs.

The reality is that most teachers enrolled in teacher training programs are offered an infinitesimal amount of course work related to special education methodology. This is how a prominent educator and his associate describe the status quo:

Most teacher training programs today continue to encourage general education teachers 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, such as departments of curriculum and instruction.⁸³

Every prospective teacher—and administrator—entering the university ought to have courses in special education. Why do teachers choose at the outset of their credential program between a general educational curriculum and a special education emphasis?⁸⁴ Teachers ought to be qualified to teach in a number of different environments.⁸⁵ Although Hensel concedes the wisdom of “widespread individualization of instruction,” she, among other scholars, is dubious that this can be accomplished without some kind of labeling process and adequate funding.⁸⁶ While it is true that there is a dearth of “unified” programs for teacher and school administrator training and preparation, there are indeed supporters and innovators.⁸⁷

83. Wayne Sailor & Blair Roger, *Rethinking Inclusion: Schoolwide Applications in PHI DELTA KAPPAN* 506 (March 2005) (citing CLAUDE GOLDENBERG, *SUCCESSFUL SCHOOL CHANGE* 138-62 (2004)).

84. On the subject of collaboration between general and special educators, see, for example, Christine C. Givner & Diane Haager, *Strategies for Effective Collaboration, in INCLUSIVE AND HETEROGENEOUS SCHOOLING* 41-57 (Mary A. Falvey ed., 1995); Diane Browder et al., *Aligning Instruction With Academic Content Standards: Finding the Link*, 31 *RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES* 309, 312-13 (2006).

85. Certainly, law and other professional school faculty embrace the notion that there is a core curriculum to which all students should be exposed, with time to specialize through practice, and postgraduate professional development and in-service training.

86. Hensel, *supra* note 6, at 1197 & nn.267-68. While Hensel and some of the experts she cites are dismissive of this “optimistic and idealistic” approach, their pessimism appears to stem from a concern that teachers will be ill-prepared. *Id.*

87. See, e.g., Marleen C. Pugach, *Unifying the Preparation of Prospective Teachers, in CONTROVERSIAL ISSUES CONFRONTING SPECIAL EDUCATION* 239, 241 (William Steinback & Susan Steinback eds., 2d ed. 1996) (“Structuring schools to meet individual needs is essentially the same challenge for special and general education.”); see also JAMES J. GALLAGHER, *DRIVING CHANGE IN SPECIAL EDUCATION* 91 (2006) (describing “blended” programs in early childhood and special education early childhood preparation, programs for general educators and in-service); WEISHAAR et al. *supra* note 32, at 38 (noting that with “dual system” of training teachers and administrators, there is little chance for “true educational reform”). For a more sobering—and international—perspective, see Julie Allan, *Failing to Make Progress? The Aporias of Responsible Inclusion, in WHO BENEFITS FROM SPECIAL EDUCATION?*, *supra* note 27, at 27.

Part of the change comes from the way we perceive inclusion or “inclusive education.” If we focus only on the student, the school environment and culture will never change. Some scholars and activists promote the notion of “inclusive schools”⁸⁸ which rely on a “complex and oftentimes difficult concept” of school governance. Its aim is to assist educators to work effectively with all students “without the complicated system of singling out and/or labeling certain children . . . and isolating them to provide special education services.”⁸⁹ To build these schools will require more than legislating the presence of a Highly Effective Principal (HEP), or proscribing any other all-purpose snake oil to be rubbed all over America’s schools.⁹⁰

VIII. THE BUS STOPS HERE

To make IDEA truly effective, we needn’t change the definition of who is able to “get on the bus.” We simply must get the pupils off the short bus and on board a bigger one. Professor Hensel writes that it is not enough for a regular ed student to board the short bus without hesitation.⁹¹ I would prefer to dispense with that short bus altogether. In the end, the youngsters with disabilities, those not proficient in English, the homeless, migrant and poor kids, the queer,⁹² and young people caught up in the juvenile justice system

88. See, e.g., Jean B. Crockett, *Special Education’s Role in Preparing Responsive Leaders for Inclusive Schools*, 23 REMEDIAL & SPECIAL EDUC. 157 (May/June 2002) (stating the importance of preparing administrators to become informed leaders committed to inclusive educational environments).

89. WEISHAAR ET AL., *supra* note 32, at 17-18.

90. See ASPEN INSTITUTE COMMISSION REPORT, *supra* note 82 at 197 (recommending a HEP mandate to complement the call for a Highly Qualified Effective Teacher (HQET)). It is telling that neither HEP nor HQET addresses the need for educators to strive for inclusive schools, to account for learning differences amongst students, or embrace any of the principles that would unify the segregated special and general education approaches to learning. Instead, we are asked to endorse legislation introducing two new acronyms founded on well-meaning, but vague, formulaic criteria. Schools need more acronyms like they need more (re)forms. See Duff, *supra* note 36, at 135 (when informed by an interviewer of upcoming IDEA reforms, one school secretary responded: “Oh great . . . more forms.”).

91. “The fight will . . . be won . . . when society fails to notice the length of the bus at all.” Hensel, *supra* note 6, at 1202. I share this view of the fight, but disagree with Hensel that we win by “[c]reating clear eligibility standards [to] assist in insulating these important decisions from the political and ideological insulation.” Professor Weishaar and her colleagues capture my perspective when they state unequivocally: “If change is to be meaningful, it will be necessary to fade the lines between the disabled and the nondisabled in the nation’s classrooms.” WEISHAAR ET AL., *supra* note 32, at 38.

92. Why is it acceptable to say *queer*—and *crip*, *quad*, *gimp* and even *cripple*—but not *spaz*, *idiot* or *retard*? “The ‘R’ Word Campaign,” a grassroots effort initiated in 2007 to inform the public of the prejudicial and discriminatory use of the words “retard” or “retarded,” tries to answer that question. See Stop and Think . . . The “R” Word Campaign, <http://www.therword.org> (last visited Feb. 17, 2008). “Language matters—and they’re absolutely hurtful,” said one state senator referring to words that were the target of legislation in California last year to rid the state codes of the outdated and insulting terms for

will all join their “typically developing peers.”⁹³ Together, they will ride the bus down the great American highway—be it *El Camino Real*⁹⁴, Route 66, the Cumberland Gap⁹⁵—or any other route our children travel to the school that offers them the necessary services and supports on their educational journey.⁹⁶

persons with mental disabilities: *idiot*, *imbecile* and *lunatic*. Jim Sanders, *No Idiots, In State's View, Under Bill*, SACRAMENTO BEE, May 7, 2007, at A1; see also H.R. 760, 2008 Sess., at 1 (Va. 2008); S.J. Res. 620, 2008 Sess., at 1 (Va. 2008) (replacing “mentally retarded” with “intellectually disabled” throughout the Code of Virginia). On the politics of naming, see Stephen A. Rosenbaum, *Hammerin' Hank: The Right to Be Raunchy or FM Freak Show?*, 23 DISABILITY STUDIES QTRLY, nn.51-57 (2003), available at <http://www.brandeis.edu/lemborg/SGHL/DSQ.html> (discussing the reclaiming of outmoded identity terms and epithets).

93. See, e.g., *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 637, n.4 (9th Cir. 2005) (defining “regular” classroom as consisting of both “typically developing” and disabled pupils); *J.L. v. Mercer Island School Dist.*, No. C06-494P, 2006 WL 3628033, at *2 (W.D. Wash. Dec. 8, 2006) (explaining “mainstreaming” as practice of educating disabled students alongside their “typically-developing peers”).

94. Linda D. Kilb, *The State of the ADA and California Law*, Speech at the Hastings College of the Law National Disability Law Symposium (Feb. 3, 2007), available at <http://www.dredf.org/publications/speeches.shtml> (last visited July 2, 2008) (allusion to California’s historic disability rights journey during Spanish colonial times on *El Camino Real*, the Royal Road, of which a small segment borders Stanford University campus).

95. Route 66, traversing the nation’s heartland from Illinois to California, is also known as “The Mother Road.” *The Mother Road: Historic Route 66*, <http://www.historic66.com> (last visited Dec. 18, 2007). The Cumberland Gap had been in use for foot traffic by Native Americans before Europeans colonized America. In 1775, Daniel Boone blazed a trail that became a primary route used by settlers moving into Kentucky and Tennessee, and was later referred to as the “Wilderness Road.” Old US 25E: *Crossing the Cumberland Gap*, <http://www.us-highways.com/cgap00.htm> (last visited Dec. 18, 2007).

96. This may ultimately be the same “less traveled” road that Professor Tractenberg urges us to take, invoking the words of Poet Robert Frost. Tractenberg, *supra* note 66, at 425 (citation omitted).