

*George Jay Joseph Education Law Writing  
Award Winner*

Public Policy, Parol Evidence and Contractual  
Equity Principles in Individualized Education  
Programs: Marking the “Four Corners” of the  
IEP to Mitigate Unequal Bargaining Power  
between Parent-Guardians and School Districts

MATTHEW SALEH\*

**I. BACKGROUND: THE FOUR CORNERS OF THE IEP**

**A. Introduction**

Recently, the Second U.S. Circuit Court of Appeals joined an ongoing debate concerning whether the “four corners rule” from contract law, should be applied to judicial analysis of Individualized Education Programs (IEPs) for students receiving special education services under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> In contract law, the four corners rule means that where an instrument—such as a contract, will, or deed—is “complete on its face,” a court’s determination of whether the instrument constitutes a total integration must be made from the instrument itself and not from extrinsic evidence.<sup>2</sup> In other words, the

---

\*Matthew Saleh is a Ph.D candidate at Columbia University and earned his Juris Doctor from Syracuse University’s College of Law. This paper received the George Jay Joseph Education Law Writing Award, which recognizes excellence in education law scholarship by law students or graduate students of education. More information about the award is *available at* <http://educationlaw.org/nominations.php#Joseph>.

1. *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 174 (2d Cir. 2012); *Individuals with Disabilities Education Act*, 20 U.S.C. §§ 1400, 1401, 1412, 1415 (2010).

2. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3-3, 103 n.29 (4th ed. 1998); *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 200-210 (1981) (“Where the plain meaning of a[n] . . . agreement is clear, the court may not go beyond the four corners of the document to look for additional evidence of the drafters’ intentions.”).

parties' intended agreement should be derived from the text contained within the four corners of the written page.<sup>3</sup> The four corners rule is utilized in contract law to prevent post hoc unilateral modifications to negotiated agreements.

Scholars and courts differ as to whether the IEP should be construed as a legally binding contract.<sup>4</sup> However, under the IDEA, school districts are required by law to create IEPs for qualifying students to help ensure these students receive a Free and Appropriate Public Education (FAPE).<sup>5</sup>

The IEP is a written instrument that "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives."<sup>6</sup>

3. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3-3, 103 n.29 (4th ed. 1998).

4. *See, e.g.*, Massachusetts Department of Education, IEP Process Guide, 5 (June 2001), available at <http://www.doe.mass.edu/sped/iep/proguide.pdf> (referring to the IEP as a "service contract that sets high expectations for a student and then guides that student's special education services for the next year"); Hawaii State Department of Education, Individualized Education Programs, <http://doe.k12.hi.us/specialeducation/iep.htm> (last accessed on 02/27/13) ("The IEP is not a performance contract. The Individuals with Disabilities Education Act does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement"); Rutgers University School of Law, Special Education Clinic, *The Individualized Education Program: A Guide to Parents and Guardians*, 2 (2011-12), available at <http://specialeducation.rutgers.edu/ieppamphlet2.pdf> ("The I.E.P. is a contract between the child's parent/guardian and the school district. The district is required by law to provide the child what is in the I.E.P."); *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 820 (9th Cir. 2007) (rejecting plaintiff's argument that the terms of an IEP should be interpreted under state contract law, reasoning that the IEP is entirely a federal statutory creation, and courts have rejected efforts to frame challenges to IEPs as breach-of-contract claims); *Stanley C. v. M.S.D. of Sw. Allen Cnty. Sch.*, 628 F. Supp. 2d 902, 937, n.25 (N.D. Ind. 2008) ("The Court also finds that it is unnecessary to address the case law cited by the parties related to whether an IEP is a contract and whether contract defenses apply to IDEA disputes"); *Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 1157 (D. Haw. 2008) (same); *Bishop v. Oakstone Acad.*, 477 F. Supp. 2d 876, 887-88 (S.D. Ohio 2007) (rejecting defendant's argument that the IEP is not a contract and should not be interpreted under principles of contract law); *Ms. K v. City of S. Portland*, 407 F. Supp. 2d 290, 301 (D. Me. 2006) (holding that the IEP is "not a legally binding contract"); *John A. v. Bd. of Educ. for Howard Cnty.*, 400 Md. 363, 385-86, 929 A.2d 136, 148-50 (Md. 2007) ("[A]n IEP does not take the form of a strict contractual relationship between the parties").

5. *Individuals with Disabilities Education Act* §1414(d); *see also Honig v. Doe*, 484 U.S. 305, 320-21 (1988) (explaining that an "appropriate" education under the FAPE requirement must be provided in the least restrictive environment); *see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002) (describing the IEP as the "centerpiece" of the IDEA's FAPE requirement); The FAPE requirement emphasizes special education and related services designed to meet the unique needs of a child in the Least Restrictive Environment (LRE), and to assure that the rights of the child and their parent(s)/guardian(s) are protected; *Individuals with Disabilities Education Act*, 20 U.S.C. 1400(d)(1)(A)-(B) (2012); §1412(5) (outlining "least restrictive environment" under the IDEA).

6. *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 507-08 (2d Cir. 2006) (citations omitted).

Under the IDEA regulations, the IEP must include all services necessary to meet the child's identified special education and related service needs,<sup>7</sup> and local education agencies are legally bound to ensure they provide all services specified by a child's IEP.<sup>8</sup> In this sense, the IEP can reasonably be viewed as a "total integration," regardless of whether it is technically viewed as an actual contract.<sup>9</sup> Importantly for parents, this is only true where the IEP provides FAPE—an IEP which facially fails to comply with the IDEA's FAPE requirement cannot constitute a fully integrated agreement.<sup>10</sup>

Currently, a split in the circuits exists on the issue of whether courts and administrative law judges (ALJs)<sup>11</sup> may look beyond the four corners of the written IEP in determining whether the document's content provides FAPE under the IDEA.

Prior to the Second Circuit joining the debate, three circuits—the First, Sixth, and Seventh—had explicitly condoned judicial reliance on extrinsic evidence in determining whether an IEP provides FAPE.<sup>12</sup> Three other cir-

---

7. 34 C.F.R. § 300.320(a)(4) (2007).

8. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities: Appendix A to Part 300—Notice of Interpretation, 64 Fed. Reg. 12,406-01, 12,471 (Mar. 12, 1999).

9. RESTATEMENT (SECOND) OF CONTRACTS § 209-210 (A written agreement complete on its face is taken to be an integrated agreement in the absence of contrary evidence).

10. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 885 (1984) (Asserting catheterization constituted a related service under the IDEA and must be provided even where was not contained in the IEP); *John A. v. Bd. of Educ. for Howard Cnty.*, 400 Md. 363, 384-87 (Md. 2009) (rejecting school district's argument that it did not have to expend resources/staff for administration of medication because such services were not outlined in the IEP: reasoning that administration of medication constituted a "related service" under the IDEA necessary for provision of FAPE even where not mentioned in the IEP).

11. The IDEA provides that where a dispute arises over a child's educational plan, parent-guardians are entitled to file an administrative complaint called a "due process" complaint with the designated state agency. The due process complaint is unrelated to the constitutional principle of due process. Qualified and impartial hearing officers are assigned by the state agency. Either party may then appeal the case to the state review officer (SRO); the SRO's decision may then be appealed via civil action in state or federal court. *See generally* § 1415(a)-(i).

12. *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist.* 202, 502 F.3d 708, 715 (7th Cir. 2007) ("Under usual circumstances, the court should find it unnecessary to go beyond the four corners of the [IEP] in order to [determine whether it provides FAPE] . . . [h]owever vagueness in the instrument with respect to how its goals are to be achieved may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan"); *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) (holding that where an IEP has not been finalized and agreed-upon by both parties, a court may consider extrinsic evidence to make the determination as to document's contents would provide the requisite "educational benefit" under the IDEA); *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722, 731 (N.D. Ohio 2005) (holding that the school district's failure to include the goals and objectives of agreed-upon occupational therapy services in the IEP did not invalidate the IEP where the substance of the provided services could be gathered from extrinsic evidence), *aff'd by adoption* 294 F. Appx. 997 (6th Cir. 2008).

cuits—the Fourth, Ninth, and Tenth—held that when considering whether an IEP provides FAPE, courts should not look beyond the four corners of the document.<sup>13</sup> This paper makes the argument that—on the grounds of public policy and given the intent of the IDEA—courts should recognize the four corners rule to prevent post hoc unilateral modifications of negotiated IEPs, and should further employ the law of equitable defenses—such as the unconscionability doctrine—to police imbalances in bargaining power amongst parent-guardians and school districts.

The argument for a four corners rule is grounded in the premise that allowing for school districts to present extrinsic evidence—oftentimes directly contradicting the explicit language of the IEP—disadvantages comparatively inexperienced parent-guardians by unnecessarily complicating the terms laid-out in the document. The practice of allowing “reformative testimony” also increases the costs, inefficiencies, and adversarial nature of IDEA service provision generally by increasing opportunities for protracted dispute resolution and encouraging vague IEP drafting approaches by experientially-advantaged school districts. I also argue in this paper that contractual equity principles intended to balance bargaining disparities between parents and school districts (e.g. the unconscionability doctrine, construal of technical boilerplate language, etc.) are needed to supplement the four corners rule and further mitigate unequal bargaining power between parents and school districts. This article uses the four corners rule as a jumping-off point for the discussion of contractual principles in IEPs. This is because courts have already begun considering the transposition of this rule from contract law to the IEP context.

### **B. *R.E. v. New York City Department of Education***

The Second Circuit’s recent holding in *R.E. v. New York City Department of Education*<sup>14</sup> presents a useful illustration for understand-

---

13. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681-82 (4th Cir. 2007) (holding that an IEP which did not include specifics about the school placement of the child in question could not be read as providing FAPE, and stating that “[i]n evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself”); *City Sch. Bd. of Henrico City v. Z.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005) (rejecting the school district’s argument that extrinsic evidence not included in the IEP, demonstrating that the student would be provided a personal classroom aide, should be considered in determining whether the IEP provided FAPE); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1525-26 (9th Cir. 1994) (remanding to the district court on the issues of whether the IEP in question provided FAPE, and instructing the lower court not to consider extrinsic evidence offered by the school district in making this determination); *Sytsema v. Acad. Sch. Dist.*, 538 F.3d 1306, 1315 (10th Cir. 2008) (Similar).

14. *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 174 (2d Cir. 2012).

ing the substantive elements of the four corners debate. In this case, the Second Circuit considered the question of whether the state review officer (SRO), in determining that an IEP provided FAPE, appropriately relied on “retrospective testimony” from Department of Education personnel pertaining to the educational program the student, a child with autism, would have received if he or she had attended public school.<sup>15</sup>

At issue were competing contentions regarding the amount of individual attention needed by the student, with the child’s parents presenting experts stating that the child needed some allotted time for 1:1 student to teacher and/or paraprofessional instruction, and the Department arguing that the 6:1:1 ratio (6 students, 1 teacher, 1 paraprofessional<sup>16</sup>) was appropriate.<sup>17</sup> In the earliest stages of the dispute, the parents filed for an IDEA due process hearing, and the ALJ held that the 6:1:1 ratio did not constitute an appropriate classroom setting to accommodate the student’s individual needs.<sup>18</sup>

The Department then appealed, and the SRO reversed, relying on reformatory testimony from the special education teacher who would have taught the student had the parents agreed to the IEP.<sup>19</sup> The teacher provided testimony stating that the 6:1:1 ratio would, in fact, have been a 5:1:4 ratio because the class had fewer students than expected and three students had their own paraprofessionals (in addition to the classroom paraprofessional), and thus, the student would have received considerable one-on-one attention from the classroom paraprofessional.<sup>20</sup>

The parents then appealed the SRO’s ruling to the District Court for the Southern District of New York, who reversed the ruling on the grounds that the SRO relied inappropriately on extrinsic testimony.<sup>21</sup>

On further appeal, the Second Circuit limited the consideration of “testimony from Department personnel about the educational program the student would have received if he or she had attended public

---

15. *Id.* at 174.

16. New York City Department of Education, “Paraprofessionals” (2012), available at <http://schools.nyc.gov/TeachNYC/personnel/Paraprofessionals/paraprofess.htm>. (The New York City Department of Education speaking defines “paraprofessionals” as “teaching assistants who provide instructional services to students under the general supervision of a certified teacher”).

17. 694 F.3d at 177-78.

18. *Id.* at 177.

19. *Id.*

20. *Id.*

21. *R.E. v. N.Y.C. Dep’t of Educ.*, 785 F. Supp. 2d 28, 41-43 (S.D.N.Y. 2011), *rev’d* 694 F.3d 167 (2d Cir. 2012).

school,”<sup>22</sup> but it also refused to adopt a “rigid ‘four corners’ rule prohibiting any testimony about services beyond what is written in the IEP.”<sup>23</sup> Falling somewhere in the middle of the circuit split, the Second Circuit reasoned that:

Although we decline to adopt a four corners rule, we hold that testimony regarding state-offered services may only explain or justify what is listed in the written IEP. Testimony may not support a modification that is materially different from the IEP, and thus a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP.<sup>24</sup>

Under this reasoning, the court allowed the Department’s proffered testimony regarding the specific makeup of the 6:1:1 classroom—although this testimony exceeded the information outlined in the IEP—but nevertheless held that the setting was inadequate for the child’s individual needs because it did not guarantee a dedicated aide, the provision of applied behavioral analysis therapy, or any meaningful 1:1 support, all of which were necessary components of the child’s FAPE.<sup>25</sup>

### C. Public Policy and the IEP

This paper makes the argument that—on the grounds of public policy and given the intent of the IDEA—courts should recognize the four corners rule, and contractual equity principles in IEPs. Allowing for school districts to present extrinsic evidence, oftentimes directly contradicting the explicit language of the IEP, disadvantages parent-guardians by unnecessarily complicating the terms laid-out in the document. Parental involvement, especially in the IEP process, is a key procedural safeguard of the IDEA,<sup>26</sup> and the IEP is the primary instrument by which child’s educational rights under the Act are guaranteed.<sup>27</sup>

22. *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 177 (2d Cir. 2012).

23. *Id.* at 185.

24. *Id.*

25. *Id.* at 193-94.

26. 20 U.S.C. §§ 1415(b)(6), (d)(4)(A), (e), (f) & (i)(2)(A); *see also* *C.N. v. Willmar Pub. Schs.*, Ind. Sch. Dist. No. 347, 591 F.3d 624, 630 (8th Cir. 2010) (“The IDEA . . . provides certain ‘procedural safeguards to permit parental involvement in all matters concerning the child’s educational program and [to allow] parents to obtain administrative and judicial review of decisions they deem unsatisfactory or inappropriate’”) (citations omitted).

27. 20 U.S.C. § 1401(9); *see also* *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 530 (2007) (“The IEP, in turn, *sets the boundaries of the central entitlement provided by IDEA*: It defines a ‘free appropriate public education’ for that parent’s child”) (emphasis added).

Under the law and relevant regulations, schools and local education agencies (LEAs) are required to ensure that the parent-guardian of a child with a disability is a member of any group that makes decisions about the educational placement of their child.<sup>28</sup> The IDEA guarantees that parent-guardians participate as “equal members” of their child’s IEP team, and this includes all aspects of the IEP’s development, review, and revision.<sup>29</sup> Under the IDEA, where a dispute arises involving a child’s educational plan, the parent-guardian is entitled to be informed about their Procedural Safeguards regarding dispute resolution alternatives, including administrative complaints, mediation, due process hearings, and litigation.<sup>30</sup> If a parent-guardian believes that their child’s IEP draft (as presented by the district) does not comply with the IDEA, the parent-guardian may file a due process complaint—a type of administrative challenge—with the designated state agency.<sup>31</sup> Either party may then appeal the case to the state review officer (SRO), and the SRO’s decision may then be appealed via civil action in state or federal court.<sup>32</sup>

Drawing from a growing body of literature, this article presupposes that certain parent-guardians enter the IEP process with significant experiential and knowledge/resource gaps regarding the procedural and legal components of the IEP (as compared to the school districts).<sup>33</sup> Many

---

28. § 1415(e).

29. 34 C.F.R. § 300.320 (2007).

30. 20 U.S.C. § 1415(d)(2)(E).

31. § 1415(b)(6). Section 1415(f) mandates that states provide “impartial due process hearings” before impartial hearing officers (IHOs).

32. § 1415(i)(2)(A).

33. A growing body of legal and social science scholarship supports the notion that this experiential gap negatively impacts the parent-guardians’ efforts to enforce their child’s IDEA rights, especially where they do not seek legal representation and especially among low income parent-guardians. See, e.g., Jenny L. Singleton & Matthew D. Tittle, *Deaf Parents and Their Hearing Children*, 5 J. OF DEAF STUDIES & DEAF EDUC. 221, 232 (2000) (explaining experiential disadvantages in IEP drafting process for deaf-member families); Christy Marlett, *The Effects of the IDEA Reauthorization of 2004 and No Child Left Behind Act on Families with Autistic Children: Allocation of Burden of Proof, Recovery of Witness Fees, and Attainment of Proven Educational Methods for Autism*, 18 KAN. J.L. & PUB. POL’Y 53, 67 (2008) (“[S]chool districts have much more experience than typical parents in navigating due process complaints under the IDEA. So even if neither party brings an attorney, parents would still be in an unequal bargaining position. If an agreement is reached, the parties sign a legally binding document at the resolution session”); Janet Klein, *Participation of Culturally, Linguistically and Economically Diverse Parents in the Special Education Planning Process*, UNIV. OF KANSAS SCHOLARLY WORKS iii (2009) (“Results indicated that the nature and outcomes of parent participation in the special education planning process, including that of culturally, linguistically and economically diverse parents, depended on how parents were treated in the process by school professionals, which in turn was shaped by the interaction of institutional and demographic factors”); Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 30 n.134 (2006) (“The [IDEA] mediation process is, however, vulnerable to the power dispar-

courts have acknowledged the prevalence of such experiential inequities, particularly with regard to the school districts' disparate access to school-level information and expert testimony.<sup>34</sup> I argue that the existence of such experiential and resource inequities creates what, in contract law, would be referred to as "unequal bargaining power" between parties to the signed instrument.<sup>35</sup> Transposing principles from contract law, I then argue for the propriety of recognizing safeguards of judicial interpretation, which help parent-guardians establish an equal footing during IEP negotiations. This is especially necessary in the case of low-income parent-guardians, who will inherently have more difficulty

---

pity between school district insiders and inexperienced parent complainants, particularly parents who cannot afford lawyers."); Damon Huss, Comment, *Balancing Acts: Dispute Resolution in U.S. and English Special Education Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 347, 361-62 (2003) ("[C]ritics challenge the efficiency of the IDEA's mediation and due process provisions and the imbalance of power between low-income parents with limited resources and school authorities"); Steven Marchese, *Putting Square Pegs Into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 361-62 (2001) (explaining that parents' lawyers can balance the power between parents and school districts).

34. See, e.g., *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (3d Cir. 1993) ("In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over the potentially more persuasive witnesses [those who have been directly involved with the child's education], and greater overall educational expertise than the parents."); Schaffer *ex rel. Schaffer v. Weast*, 546 U.S. 49, 64 (2005) (J. Ginsburg, dissenting) ("The IDEA . . . casts an affirmative, beneficiary-specific obligation on providers of public education. School districts are charged with responsibility to offer to each disabled child an [IEP] . . . The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy . . . [as it is most] [f]amiliar with the full range of education facilities in the area . . . informed by . . . experiences with other, similarly-disabled children . . . the school district is . . . in a far better position to demonstrate that it has fulfilled . . . its statutory . . . obligation than the disabled student's parents are in to show that the school district has failed to do so") (citations omitted); *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist.*, 116 N.J. 30, 45-46, 560 A.2d 1180, 1188-89 (N.J. 1989) (in view of the school district's "better access to relevant information," court found that parent's obligation "should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes").

35. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (noting that under California law, "a finding that a contract is unconscionable requires a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results") (citing West's Ann. Cal. Civ. Code §§ 1668, 1670.5(a)); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 100 (1955) ("Cases involving monopolistic or otherwise patently unequal bargaining power and cases arising under contracts between parties bargaining at arm's length"); *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 236-37 (3d Cir. 2012) (outlining the procedure whereby a court may find an agreement unconscionable in the arbitration context due to unequal bargaining positions between the parties involved).



procuring legal representation for the length of the drafting and dispute resolution process.<sup>36</sup>

By its very nature, the admission of extrinsic evidence by courts in educational placement disputes favors the school district over the parent-guardian, as school districts often have not only greater access to funds, legal resources, and expert testimony (which often entails testimony by district employees such as teachers and psychologists), but also substantially more experience with due process hearings and appeals in general.<sup>37</sup>

Recognition of the four corners rule from contract law would strengthen parent-guardians' abilities to both negotiate for concrete services for their child and to exercise their legal right to decline programs, which are facially inadequate without fear of extrinsic revisionism in subsequent legal hearings. Additionally, the adoption of such a rule would create greater efficiency in the IDEA's due process and mediation procedures by deterring school districts from prolonging legal disputes by attempting to rehabilitate inadequate IEPs through retroactive, time consuming, and often costly (not to mention publicly funded) testimony.<sup>38</sup> Presently, the adversarial nature, high cost, and inefficiency of special education dispute resolution procedures constitute some of the most prevalent criticisms of the IDEA's legal framework.<sup>39</sup>

---

36. The comparative inability of indigent parents to afford private legal representation is well documented, especially in the family law context. *See, e.g.*, Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1025, 1037 (2003) (explaining that indigent parents often cannot afford private legal representation); D'Vera Cohn, *Poverty Down, Income Steady in U.S. Survey*, WASH. POST, Sept. 26, 2001, at A18 (demonstrating that indigent parents usually cannot afford to hire legal representation in child neglect proceedings); Janet R. Johnston, *Early Identification of Parents at Risk for Custody Violations & Prevention of Child Abductions*, 36 FAM. & CONCILIATION CTS. REV. 392 (1998) (recognizing that parents who are economically indigent and poorly educated lack knowledge about custody and abduction laws and cannot afford legal representation). Injustices arising from low-income individuals' abilities to procure private legal representation have also been well documented. *See* Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381 (1965) (discussing the inequities resulting from poorer populations' inability to afford private legal representation); Reginald H. Smith, *Justice and the Poor* 8 (1919) (similar); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. POVERTY L. & POL'Y 543 (2009) (discussing such inequities in the context of youth defendants).

37. *See supra* text and citations accompanying notes 33 and 34.

38. *See* Huss, *supra* note 33, at 361-62 ("critics challenge the efficiency of the IDEA's mediation and due process provisions and the imbalance of power between low-income parents with limited resources and school authorities"); Jennifer A. Knox, *The IDEA Amendments of 1997 and the Private Schools Provision: Seeking Improved Special Education, but Serving Only a Select Few*, 49 CATH. U. L. REV. 201 (1999); Marchese, *supra* note 33, at 361-62; Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 WEST'S EDUC. L. REP. 35 (2005).

39. *See* Huss, *supra* note 33, at 361-62.

I supplement my four corners argument with an analysis of the legislative intent of the IDEA's IEP provisions, which I argue, supports the recognition of the four corners rule as well as general principles of contractual equity balancing. The purpose of the IDEA's IEP provisions was to encourage agreement between the parties and school district compliance with the IDEA in an expedient and fair manner. The IEP is meant to be a proactive and fully integrated instrument wherein the parties iron out differences and agree to the terms of a student's education, suitable to all stakeholders.<sup>40</sup> Presently, the lack of equity balancing by ALJs and appellate court judges actually aggravates the adversarial nature of IEP drafting by increasing the potentialities for future legal posturing by both sides to IEP disputes.<sup>41</sup>

Combining these rationales, I argue that the four corners rule should be embraced by administrative and appellate courts, along with a preference for construing vague IEP terminologies against the more experienced party (usually the school district). On public policy grounds, this would be more compatible with the intent of the IDEA's IEP provisions, and would encourage school districts to steer IEP negotiations away from vague litigable terminologies.

As I explain in the next section, the existence of such vague litigable terminologies currently disadvantages parent-guardians and exacerbates the problem of overly-litigated IEPs and special education service provisions generally.

## II. EXPERIENTIAL DISADVANTAGES, SEMANTIC PITFALLS, AND THE IEP DRAFTING PROCESS

### A. Semantic Pitfalls

Practitioners and advocates in the area of special education law are well aware of the fact that experiential disadvantages exist between parent-guardians and school districts, most notably in IEP drafting, media-

---

40. 150 CONG. REC. S5326 (daily ed. May 12, 2004) (statement of Sen. Tom Harkin); see also Margaret M. Wakelin, Note and Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 Nw. J. L. & Soc. POL'Y 263 (2008) (discussing how current practices of sidelining parents as IEP team members run counter to the intent and purpose of the IDEA).

41. See *supra* text and citations accompanying note 38.

tion, due process hearings, and litigation.<sup>42</sup> This is especially so where the parent-guardian enters the process without prior experience and without legal representation.<sup>43</sup> A number of courts have expressly noted the imbalances occurring between schools and families in IEP disputes, particularly regarding access to information and expert testimony.<sup>44</sup> One major manifestation of this experiential gap entails what I term “semantic pitfalls” in IEP drafting. Semantic pitfalls involve the use of drafting terminology, which is vague or interpretable,<sup>45</sup> in favor of the more expe-

42. See *supra* text and citations accompanying notes 33 and 34.

43. See Laura C. Hoffman, *Special Education for a Special Population: Why Federal Special Education Law Must be Reformed for Autistic Children*, 39 RUTGERS L. REC. 128, 139-40 (2011-2012) (“many parents of children with disabilities cannot afford the expenses of legal representation that could potentially take years to prosecute under IDEA”); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 532-33 (2007) (acknowledging that parents in IDEA disputes may not always be able to afford legal representation during prolonged appeals, and noting the “potential for injustice” which would result from disallowing parents from representing their child’s interests by proceeding *pro se* with such appeals); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1413-14 (2011) (“[This article] focuses particularly on the extent to which the [IDEA]’s enforcement regime sufficiently enforces the law for the poor . . . it uses the IDEA to identify certain features of institutional design that can make heavy reliance on private enforcement lead to predictable disparities in enforcement in favor of wealthier beneficiaries as opposed to poor beneficiaries, in contravention of the stated goals of some statutes”).

44. See, e.g., *Obertij v. Bd. of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (“In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child’s education), and greater overall educational expertise than the parents.”); *Schaffer v. Weast*, 546 U.S. 49, 65 (J. Ginsburg, dissenting) (“The IDEA . . . casts an affirmative, beneficiary-specific obligation on providers of public education . . . [s]chool districts are charged with responsibility to offer to each disabled child an [IEP] . . . The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy . . . [as it is most] [f]amiliar with the full range of education facilities in the area . . . informed by . . . experiences with other, similarly-disabled children . . . the school district is . . . in a far better position to demonstrate that it has fulfilled . . . its statutory . . . obligation than the disabled student’s parents are in to show that the school district has failed to do so”) (citations omitted); *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist.*, 560 A.2d 1180, 1188-89 (N.J. 1989) (in view of the school district’s “better access to relevant information,” parent’s obligation “should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes”).

45. See, e.g., Wisc. Dep’t of Pub. Constr., *A Guide for Writing IEPs*, 21 (2010), <http://sped.dpi.wi.gov/files/sped/pdf/iepguide.pdf> (outlining the importance of “describ[ing] the services the district will provide to address disability related needs in a manner clear to the parents . . . [including] participat[ion] in extracurricular and other non-academic activities and be educated and participate with non-disabled peers”); S.D. Dep’t of Educ., *Individualized Education Program (IEP): A Technical Assistance Guide*, 17-22 (2013), <http://doe.sd.gov/oess/documents/IEPProcessTAGuide.pdf> (outlining the problem of using unmeasurable terminologies in IEPs, encouraging parents to seek wording which clarifies “when and how much” of a particular special education service they wish their child to receive).

rienced party to the IEP (which is usually the district, absent costly legal services for the parent-guardian). In contract law, a more experienced party with unequal bargaining power will generally not be allowed to profit unconscionably from a less experienced party's lack of sophistication with regard to confusingly technical or esoteric terminologies within an instrument.<sup>46</sup>

The parallels between experiential disadvantages in IEP drafting and the drafting of other legally binding agreements (For example, in the landlord/tenant, insurer/insured, vendor/consumer contexts) are abundant.<sup>47</sup> Yet, the transposition of contractual equity principles to mitigate bargaining power imbalances between parent-guardians and school districts is conspicuously absent from IEP administrative hearings and litigation.<sup>48</sup>

One of the most common semantic pitfalls occurring on the services page of the IEP involves the use of the "and/or" limiting conjunction.<sup>49</sup>

---

46. Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 273 (1991).

47. The most notable parallels include the fact that "repeat players" in these examples (e.g. landlords, insurance companies, commercial vendors, school districts, etc.) typically have already procured legal services for the purposes of planning the instrument and proactively attempting to limit costs and liabilities. With each instrument that "repeat player" negotiates, and with each dispute resolution entered, the entity becomes more experienced, and the legal services retained also have a cumulative effect on the expertise and knowledge of the repeat player. By contrast, non-repeat players (e.g. tenants, insured families/individuals, consumers, parents, children, etc.) often do not retain legal services and do not enjoy the same cumulative experiential effects of multiple instruments and litigations. As such, the less experienced parties to legally binding instruments experience drastic inequities in bargaining power and knowledge. This is a commonly accepted imbalance, which is specifically addressed in various components of contract law.

48. MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL*, 142-43 (Thomson West ed., 3rd ed. 2008) (In contract law, equity is the set of legal principles that supplement strict rules of law where their application would operate harshly); Sherwin, *supra* note 46, at 273 (2008) (The balancing of equities, sometimes referred to as the fairness doctrine, generally holds that one party "should not be allowed to profit from a bargain that resulted from the other's error or *lack of sophistication*") (emphasis added); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 273 (1991).

49. *Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents*, NYS EDUC. DEP'T (last accessed Mar. 6, 2013), <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-programs.htm>. For the sake of argument, consider the following examples from the New York State Education Department's Q and A for "Model IEP Forms" (keeping in mind that New York State is where the dispute in *R.E. v. New York City Department of Education* initially arose): "[e]xamples of supports that may be provided for school personnel include . . . information on a specific disability and implications for instruction . . . training in use of specific positive behavioral interventions . . . and/or, transitional support services," "one-to-one teacher aides and/or teaching assistants [should be] documented in a student's IEP," "[t]he IEP should specify the type of [consultant teacher] services the student will receive (i.e., direct and/or indirect)," "[assistive technology] recommendation should be included on the State's IEP form under Assistive Technology Devices and/or Services,"

In the drafting of a contract, the use of “and/or” usually connotes that if one condition, an alternative condition, or both conditions of the agreed upon term are met, then the term is satisfied. In the educational context, this can be problematic. For instance, if the IEP guarantees a student an allotted amount of one-on-one instruction from a qualified instructor “and/or” paraprofessional, this can technically be interpreted to mean that the school can provide 100% of individual instruction via a paraprofessional rather than a teacher.

This very issue arose in *R.E. v. New York City Department of Education* (the Second Circuit’s recent four corners ruling), where the state review officer determined that the IEP provided for a 1:1 teacher *or* paraprofessional to student ratio, and thus held that individual teacher attention was not required for the child’s FAPE despite expert testimony to the contrary presented by the plaintiffs.<sup>50</sup> The Second Circuit ultimately upheld this aspect of the SRO’s reasoning.<sup>51</sup> Moreover, it is not surprising that the parents in this case fell victim to this particular semantic pitfall, as the New York State Education Department’s model IEP explicitly calls for repeated use of the “and/or” terminology, even where the service provisions on either side of the limiting conjunction are fundamentally different.<sup>52</sup>

Thus, if the parent-guardian hopes to have their child receive at least some one-on-one instruction from a qualified teacher, then the limiting “and/or” conjunction constitutes a semantic pitfall and a potential problem for parent-advocates in the event of a disagreement about the tangi-

---

“group *or* individual services,” etc. (emphasis added)); *C.D. v. Bedford Cent. Sch. Dist.*, No. 10 CIV. 5502(CM), 2011 WL 4914722, at \*9 (S.D.N.Y. Sept. 22, 2011) (“The IEPs call for [plaintiff] to be educated with his mainstream, typical peers, with the support of special education teachers and/or instructional assistants”); see *C.B. v. Pittsford Cent. Sch. Dist.*, No. 08-CV-6462 CJS(P), 2010 WL 1533392, at \*5 (W.D.N.Y. Apr. 15, 2010) (“Plaintiff maintained that the IEP called for consultant teacher services in an 8:1 ratio, without distinguishing between direct and indirect services”); *Kondo-Dresser v. Buffalo Pub. Sch.*, No. 04-CV-0392(Sr), 2010 WL 301916, at \*5 (W.D.N.Y. Jan. 19, 2010) (“Consultant teacher services means direct and/or indirect services, as defined in this subdivision, provided to a student with a disability who attends *regular education* classes and/or to such student’s regular education teachers”).

50. *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 192 (2d Cir. 2012) (determining that an IEP that provided student with 1:1 paraprofessional support rather than 1:1 teacher support was substantively adequate).

51. *Id.*

52. See *supra* note 49 (NYS Educ. Dep’t recommending the utilization of and/or terminology in at least six crucial service provision clauses).

ble services their child is receiving.<sup>53</sup> Consequently, failure to specifically note on the services page, what percentage of instructional time is delivered by a qualified and certified special education teacher can result in a clause, which is vague and litigable during subsequent dispute resolution. Such vagueness often works to the advantage of the experientially-advantaged school district in ensuing disputes.<sup>54</sup>

Another example of a common semantic pitfall involves whether services are delivered individually or in a group setting. If the parent-guardian wants individually delivered services, they are well-advised to include such terminology in the written IEP form, and to avoid qualifying terminologies such as “or,” “and/or,” “some,” etc.<sup>55</sup> If the IEP states that the services are to be provided in a group setting, the parent-guardian is well-advised to specify how many students are in that group and whether it is an appropriately “matched” group in terms of the students’ level of functioning and learning needs.<sup>56</sup> Even vagueness in the definition of “group” within the IEP’s language can lead to the parent-guardian having a different vision of what is occurring in the classroom, versus what is happening in fact.<sup>57</sup> For instance, a reading group could be substantially larger than the parent-guardian intended, or it could contain students functioning at different grade levels.

---

53. See C.B., No. 08-CV-6462 CJS(P) at \*5 (“[p]laintiff maintained that the IEP called for consultant teacher services in an 8:1 ratio, without distinguishing between direct and indirect services”); see also Kondo-Dresser, No. 04-CV-0392(SR) at \*5; (“[c]onsultant teacher services means direct and/or indirect services, as defined in this subdivision, provided to a student with a disability who attends *regular education* classes and/or to such student’s regular education teachers”); see also C.D., No. 10 CIV. 5502 (CM) at \*9 (“[t]he IEPs call for [plaintiff] to be educated with his mainstream, typical peers, with the support of special education teachers and/or instructional assistants”).

54. *Oberti v. Bd. of Educ. of the Borough Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (3d Cir. 1993); *Schaffer v. Weast*, 546 U.S. 49, 65 (2005) (J. Ginsburg, dissenting); *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist.*, 560 A.2d 1180, 1188-89 (N.J. 1989).

55. See, e.g., *Jill W. v. Haw. Dep’t of Educ.*, No. CIV. 12-00061 (SOM/KSC), 2012 WL 4472282, at \*3 (D. Haw. Sept. 25, 2012) (“The IEP stipulated [that] Speech/Language direct services for [plaintiff] w[ould] include *individual and/or small group instruction*”) (emphasis added); *Chester Upland Sch. Dist. v. Pa.*, No. CIV.A. 12-132, 2012 WL 1473969, at \*6 (E.D. Pa. Apr. 25, 2012) (“[Plaintiff] would have the opportunity to interact with students with disabilities within their mainstream classroom and/or receive *small-group instruction from an aid present in the class as required under another student’s [IEP]*”) (emphasis added); *N.S. v. Haw.*, No. CV 09-00343(SOM/KSC), 2010 WL 2348664, at \*2 (D. Haw. June 9, 2010) (student’s IEP stipulated that “OT and speech services will include but are not limited to any combination of the following . . . *individual and/or group instruction*”) (emphasis added).

56. *C.L. v. N.Y.C. Dep’t of Educ.*, No. 12 CIV. 1676 (JSR), 2013 WL 93361, at \*5 (S.D.N.Y. Jan. 3, 2013) (“plaintiffs argue that the proposed classroom grouped [plaintiff] with other students with unsuitably different functioning levels and individual needs”).

57. *Id.*

Failure to specify the percentage of time that a parent-guardian wants their student to be in a general education versus a special education setting, as well as the specific classes in which they participate, constitute other common semantic pitfalls in IEP drafting.<sup>58</sup> For example, if the IEP states that 19 hours are spent with “typical peers,” it is important to designate in the IEP which particular classes the student is taking with typical peers. Again, vagueness in drafting terminology allows parties writing the contract leeway to subsequently define the contract in their own terms.<sup>59</sup> Thus, an IEP stipulation of 19 hours of class time with typical peers, kept vague, can translate to participation only in recess, lunch, and special subjects—rather than in core curricular courses.

In many circumstances of unequal bargaining power, as with IEPs, the more experienced party takes the lead in drafting the instrument based on a boilerplate form as a matter of course.<sup>60</sup> Not all parent-guardians enter the drafting process with knowledge about the specifics of semantics and technical pitfalls in drafting, whereas nearly every school district is ostensibly aware of the malleability of such terms as a result of repeatedly dealing with IEP drafting, implementation, and dispute resolution.

As a result of the recurrent semantic disadvantage experienced by parent-guardians in the IEP drafting process, advocates often encourage parent-guardians to view the IEP as a legally-binding contract and to scrutinize the language as such. However, many parents and guardians cannot afford legal services,<sup>61</sup> and the experiential gap between district

---

58. See, e.g., Taylor P. *ex rel.* Chris P. v. Mo. Dep’t of Elementary & Secondary Educ., No. 06-4254-CV-C-NKL, 2007 WL 2907825, at \*2 (W.D. Mo. 2007) (“According to the IEP, Taylor would be placed in the early childhood special education classroom for 100% of the day, although she would spend *some social time* with her nondisabled peers”) (emphasis added).

59. See *supra* text and citations accompanying note 47.

60. See RESTATEMENT (SECOND) OF CONTRACTS § 163-164 (1981) (explaining the different legal standards for construing contractual “boilerplate” language where the contract was negotiated by two “sophisticated parties” rather than parties of unequal sophistication); RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. k (2000) (“If the servitude and its application to the situation in question should have been readily apparent, the beneficiary’s claims to reliance on the servitude are entitled to greater weight than if the servitude was buried in a mass of boilerplate or obscure verbiage”).

61. Hoffman, *supra* note 43, at 139-40 (“many parents of children with disabilities cannot afford the expenses of legal representation that could potentially take years to prosecute under IDEA”); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 532-33 (2007) (acknowledging that parents in IDEA disputes may not always be able to afford legal representation during prolonged appeals, and noting the “potential for injustice” which would result from disallowing parents from representing their child’s interests by proceeding *pro se* with such appeals).

and parent-guardian is most evident in such instances.<sup>62</sup> School districts, for better or worse, are typically the "repeat players" in IEP meetings and subsequent dispute resolution procedures under the IDEA (including litigation), whereas parent-guardians are the "one-shotters," or at least are comparatively drastically less experienced than the other party to the agreement.<sup>63</sup> Courts in contract disputes have long recognized the need to account for bargaining inequities between repeat players and unsophisticated laymen.<sup>64</sup>

### B. Experiential, Resource, and Bargaining Inequities

School districts typically have attorneys on retainer, often paid hourly out of the district's general operating budget, to work on special education dispute resolution and litigation.<sup>65</sup> Many law firms specialize in offering year-long retainer agreements with local education agencies for special education legal services. Advocates who worked on special education cases and viewed Freedom of Information Act (FOIA) requests

---

62. Pasachoff, *supra* note 43, at 1450.

63. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) (For a classic accounting of how American legal systems favor "repeat players" (specifically in the litigation context); One can easily imagine how Galanter's speculations regarding repeat litigators could be transposed to the context of IEP meetings and due process protections, wherein school districts usually experience multiple disagreements each year and parent-guardians typically experience only one. Many school districts also have legal representation on contract for IDEA procedural hearings, which is significant because even where the parent-guardians do not use an attorney in, for example, mediation (which under the IDEA means that the district may not bring an attorney), the district still benefits greatly from *past* conversations with legal professionals. Comparatively low-resource parent-guardians are unlikely to benefit from previous legal representation in the area of special education law, and I would speculate that this is especially the case with parent-guardians who, for whatever reason, have opted not to bring a lawyer to dispute resolution proceedings).

64. See, e.g., *Fitts v. Unum Life Ins. Co. of Am.*, No. CIV.A.98-00617(HHK), 2006 WL 449299, at \*3 (D.D.C. 2006) (explaining the need for unconscionability doctrine where "repeat players [have] greater expertise and experience"); *Lumbermens Mut. Cas. Co. v. GES Exposition Serv., Inc.*, 303 F. Supp. 2d 920, 922 (N.D. Ill. 2003) (discussing the standards for finding contractual clauses unconscionable where corporate "repeat players" have capitalized on an experiential bargaining advantage over inexperienced consumers); *Oritani Sav. & Loan Ass'n v. Fid. & Deposit Co.*, 989 F.2d 635, 638 (3d Cir. 1993) (same).

65. Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & EDUC. 73, 82 (1998) (reviewing findings from a qualitative inquiry into what causes school districts to contract private attorneys, with most respondents citing disciplinary and special education issues as the primary student-related reasons for seeking legal advice/representation; notably, this study was conducted *prior* to the great influx of special education litigation following passage of the IDEA); Jay P. Heubert, *The More We Get Together: Improving Collaboration between Educators and Their Lawyers*, 67 HARV. EDUC. REV. 531, 541-42 (1997) ("litigation expenses typically come from a school district's general operating budget").



for school district attorney's fees are well aware that districts often spend more on legal fees in individual cases than it would cost to simply fund the child's preferred educational program on an individual case basis.<sup>66</sup> This phenomenon is classically born of the repeat player mentality outlined by Marc Galanter (1974), whereby parties to multiple disputes (past and future) of the same or similar ilk are inclined towards expending great funds and resources towards litigating disputes, which could create negative precedent.<sup>67</sup>

The fact that school districts occasionally spend more to appeal a child's placement than it would cost to simply agree to the placement is highly indicative of the type of cost-benefit analysis common amongst repeat players to legal disputes.

The IDEA's regulations actually discourage both parent-guardians and school districts from bringing attorneys to IEP meetings, understandably reasoning that attorneys increase the "adversarial atmosphere" of such meetings.<sup>68</sup> Other provisions of the IDEA similarly state that during the dispute resolution process, if parent-guardians do not have an attorney present then the school district may not have their attorney attend.<sup>69</sup>

---

66. 5 U.S.C. § 552 (West 2009), *amended by* Pub. L. No. 104-231, 110 Stat. 3048 (indicating that due to the confidential nature of the Freedom of Information Act (FOIA) requests, it is difficult to substantiate this claim with anything other than broad anecdotal evidence); *see, e.g.*, Kari Andren, *School Districts Spend Thousands on Litigation over Special Education*, THE PATRIOT-NEWS (Jan. 27, 2010), [http://www.pennlive.com/midstate/index.ssf/2010/01/school\\_districts\\_spend\\_thousan.html](http://www.pennlive.com/midstate/index.ssf/2010/01/school_districts_spend_thousan.html) (based on interviews with ten special education attorneys in Connecticut. FOIA requests for school district attorney's fees are made by the parent-guardian and are released by state agencies only with regard to that parent's child's case); Rex Dalton, *OC Families Face Fierce Fight for Special Ed Services*, VOICE OF OC (Feb. 13, 2013), [http://www.voiceofoc.org/oc\\_central/article\\_8b9cebf2-0722-11e2-aa19-001a4bcf887a.html](http://www.voiceofoc.org/oc_central/article_8b9cebf2-0722-11e2-aa19-001a4bcf887a.html); Parent Advocates, *The U.S. Supreme Court and Children With Special Needs*, <http://www.parentadvocates.org/index.cfm?fuseaction=article&articleID=7288> (last accessed 02/28/13) ("In some cases, school districts have spent 10-1000% more on lawyers' fees to deny parents their win in court than spend the amount originally requested for the child").

67. Galanter, *supra* note 63, at 102.

68. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities: Appendix A to Part 300—Notice of Interpretation, 64 Fed. Reg. 12478 (Mar. 12, 1999) ("[t]he presence of an attorney could contribute to a potentially adversarial atmosphere at the meeting . . . [t]he same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting . . . [e]ven if the attorney possessed knowledge or special expertise regarding the child . . . an attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child . . . [t]herefore, the attendance of attorneys at IEP meetings should be strongly discouraged").

69. *See, e.g.*, 20 U.S.C. § 1415(f)(1)(B)(i)(III) (during the informal dispute resolution step prior to a due process hearing, the school district may not bring its attorney if the parents are not accompanied by one); § 1415(i)(3)(D)(ii) (stating that attorneys' fees are not awarded for IEP team meetings except in special circumstances).

However, despite good intentions, such attempts at procedural safeguards do very little to protect parent-guardian's IDEA rights in IEP drafting, because school districts typically have attorneys on retainer and thus benefit from the cumulative effects of repeat drafting, due process, and litigation. If anything, the IDEA's attempts to remove attorneys from the process exacerbate the semantic and bargaining disparities between the parties. They do so by creating the illusion of an equal playing field, which instills in parent-guardians a false sense of cooperativeness and equal footing in drafting the terms of the IEP.

At first glance, it may even appear that the four corners rule advocated in this article could disadvantage un-represented parent-guardians by imposing a strict contractual interpretation framework on them, potentially exacerbating the problem of semantic pitfalls by limiting the ALJ or appellate judge's abilities to imagine a reasonable interpretation of the language within the IEP document. However, many ALJs and judges already do engage in such methods of strict interpretation (perhaps as a matter of habit and legal training),<sup>70</sup> and the capacity for school districts to incorporate reformative testimony only heightens the parent-guardian's disadvantage in this respect.

Most notably, "and/or" limiting conjunctions are typically recognized in the contractual-legal sense by ALJs and judges, legitimizing disadvantages experienced by parent-guardians in the semantic sense, and ultimately opening the door for the district to enter testimony that explains retroactively how, in the most minimal sense, the terms of the contract were satisfied.<sup>71</sup> In fact, considering how often the disparate nature of the services

---

70. See, e.g., C.B. v. Pittsford Cent. Sch. Dist., No. 08-CV-6462 CJS (P), 2010 WL 1533392, at \*5 (W.D.N.Y. Apr. 15, 2011) ("[p]laintiff maintained that the IEP called for consultant teacher services in an 8:1 ratio, without distinguishing between direct and indirect services"); C.D. v. Bedford Cent. Sch. Dist., No. 10 Civ. 5502(CM), 2011 WL4914722, at \*9 (S.D.N.Y. Sept. 22, 2011) ("The IEPs call for [plaintiff] to be educated with his mainstream, typical peers, with the support of special education teachers and/or instructional assistants"); Kondo-Dresser v. Buffalo Pub. Schs., No. 04-CV-0392 (SR), 2010 WL 301916, at \*5 (W.D.N.Y. Jan. 19, 2010) ("Consultant teacher services means direct and/or indirect services, as defined in this subdivision, provided to a student with a disability who attends *regular education* classes and/or to such student's regular education teachers" (quoting N.Y. COMP. CODES R. & REGS. Tit. 8, § 200.1 (2010))).

71. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*9; see also Upper Freehold Reg'l Bd. of Educ. v. T.W. ex rel. T.W., 496 Fed. Appx. 238, 241 (3d Cir. 2012) ("The ALJ noted that when T.W. was placed in Project Child's full-day preschool program for the . . . school year, he 'did not receive the therapies and/or related services that the [District] would have provided pursuant to the draft IEP'" (citation omitted)); S.H. ex rel. A.H. v. Plano Indep. Sch. Dist., 487 F. Appx. 850, 866 (5th Cir. 2012) ("The need for ESY services must be documented from formal and/or informal evaluations provided by the district or the parents" (quoting 19 TEX. ADMIN. CODE § 89.1065 (2012))).

on either side of the “and/or” conjunction in an IEP are at issue in disputes between parents and districts, it is amazing that no court has yet taken it upon themselves to consider the potential bargaining inequities which inhere in the adoption of such terminologies.

One may question why so many parent-guardians would agree to such terminology initially and then subsequently argue against its strict interpretation during dispute resolution. The likely answer is that parent-guardians are not thinking in a contractual-legal mindset during IEP team meetings (which, per the IDEA regulations, often bear merely the façade of a cooperative and non-adversarial environment) and are later surprised at the unfavorable interpretation of services terminology adopted by their child’s school. In turn, the language of the IEP becomes a legal advantage for the district during dispute resolution, where the parent-guardian already carries the burden of proof in establishing that the IEP did not provide FAPE.<sup>72</sup>

---

72. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 58 (2005). Prior to *Weast*, lower courts had long acknowledged a theory of “implied legislative intent” within the IDEA, emphasizing school districts’ greater experience and resources in reasoning that the IDEA’s IEP provisions likely imposed a lighter burden of proof on parents than on school districts in IEP disputes. *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist.*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398-99 (9th Cir. 1994); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); Anne E. Johnson, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings to Balance Children’s Rights and Schools’ Needs*, 46 B.C. L. Rev. 591, 593-94 (2005). However, in *Weast*, the Supreme Court held that, under the IDEA, the burden of proof in due process hearings challenging an IEP was properly placed upon the student, who was the party seeking relief, rather than the school district. *Weast*, 546 U.S. at 58. The court reasoned that the legislature was “silent” on the issue of who bore the burden of proof in IDEA administrative hearings, but acknowledged the legislative intent that the Act’s procedural safeguards serve as the ultimate assurance that parents and children’s rights under the IDEA remain protected. *Id.* at 60 (rejecting “implied legislative intent” regarding burden of proof in due process hearings, but noting the “legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP”) (quoting *Bd. of Edu. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)). As noted earlier, parental involvement in the IEP drafting and educational decision-making processes constitute procedural safeguards central to IDEA compliance. The Court reasoned that “adequate compliance” by school districts with such procedural safeguards was the mechanism prescribed by the legislature for IDEA compliance, and reasoned that burden shifting in IEP disputes was therefore not to be read into the Act. *Id.* (emphasis added). This article’s argument for contractual equity principles in dispute resolution comports with both the holding in *Weast* and the legislative intent of the IDEA’s IEP provisions, even as acknowledged by *Weast*. Such equity principles would not alter either party’s burden of proof in arguing for or against the validity of a student’s IEP. Rather, such rules of interpretation would serve as a prophylactic measure protecting the intended purpose of the IEP drafting process by deterring districts from capitalizing on future resource and experiential advantages in the dispute resolution stage of a disagreement. The party bringing the challenge would still have the legal burden of persuasion in demonstrating the inadequacy of the IEP, but they would not be further tasked with overcoming bargaining inequities

It is important to note that the four corners rule in the IEP context would, in theory, be supplemented by equity *balancing* mechanisms, meaning that it would not be applied equally to experienced and inexperienced parties to the instrument alike. In contract law, equity principles supplement strict rules of law where their application would operate harshly.<sup>73</sup> The purpose of equity balancing in such circumstances is to ensure that one party is “not . . . allowed to profit from a bargain that resulted from the other’s error or *lack of sophistication*.”<sup>74</sup> This equitable principle could clearly be transposed to the IEP team context, where many districts and even state education departments openly favor vague litigable terminologies in IEPs, and most parents simply lack the sophistication to understand the legal problems they are creating for themselves down the line. It is also important to note that the school controls the IEP drafting process in the most technical of senses: they literally write the document, based on templates provided by higher agencies, subject only to the parent-guardian’s approval or amendment.

Considering some of the examples of semantic pitfalls provided above, it is easy to imagine how the semantic disadvantage is further aggravated by the inclusion of extrinsic testimony. In contract law, legal protections are often recognized where experienced vendors capitalize on experiential inequities with consumers.<sup>75</sup> Put another way, a contract

---

during the IEP drafting process as well. Put simply, the legal-experiential inequities experienced by parents during dispute resolution would not “spill over” into the IEP drafting process. Bargaining inequities could thus be recognized to safeguard the procedural safeguard of parental involvement, while leaving the burden of persuasion with parents in subsequent hearings and litigation.

73. GLENDON ET AL., *supra* note 48 at 142-43.

74. Sherwin, *supra* note 48 at 273 (emphasis added).

75. *See, e.g.*, Oritani Sav. & Loan Ass’n v. Fid. & Deposit Co. of Md., 989 F.2d 635, 638 (explaining the state-level contract law doctrine of *contra proferentem*. “New Jersey law prescribes construing an insurance contract to comport with the parties’ intent and reasonable expectations . . . New Jersey recognizes that the language of insurance contracts is often the result of technical semantic constructions and unequal bargaining power . . . [and thus] generally embraces the application of the doctrine of *contra proferentum* [sic] to insurance contracts” (citations omitted)); Sparks v. St. Paul Ins. Co., 495 A.2d 406, 412 (N.J. 1985) (“The recognition that insurance policies are not readily understood has impelled courts to resolve ambiguities in such contracts against the insurance companies” (citation omitted)); Fitts v. Unum Life Ins. Co., No. Civ.A.98-00617(HHK), 2006 WL 449299 at \*3 (D.D.C. Feb. 23, 2006) (“The [*contra proferentem*] doctrine is applied to insurance contracts because insurance contracts are typically drafted by the insurance company, because insurance companies tend to be repeat players with greater expertise and experience in insurance matters than plan beneficiaries, and because beneficiaries have no opportunity for arms-length negotiation over the terms of the plan” (citation omitted)). The unconscionability doctrine in contract law also outlines rules of interpretation favoring consumers where “repeat players” enjoy an imbalance in bargaining power and include contractual clauses that capitalize on said imbalance. *See, e.g.*, Lumbermens Mut. Cas. Co. v. GES

between two experienced vendors is viewed differently than a contract between an experienced vendor and a novice consumer.<sup>76</sup>

I propose a similar framework for IDEA administrative hearings and subsequent appeals under the IDEA. While scholars, courts, and state education departments tend to differ as to whether the IEP is to be viewed as a legally binding contract,<sup>77</sup> the fact that some circuits have adopted the four corners rule is indicative of a need to clarify the equities of the IEP drafting process. Notably, the Ninth Circuit has rejected the notion that the IEP is to be interpreted under state contract law, and yet have adopted the four corners rule *from* contract law as a legal safeguard for parent-guardians (and, implicitly, as a recognition of dispute resolution and legal/resource imbalances).<sup>78</sup>

In the next section, I put the four corners rule into context, outlining the contract law underpinnings which would, hypothetically, lead courts to utilize the rule as a method for encouraging fairness by mitigating unequal bargaining power between the parties.

### III. CONTRACTUAL EQUITY IN IEP DRAFTING AND SUBSEQUENT DISPUTES

#### A. Balancing the Equities

The concept of a contract law-*esque* balancing of the equities is frequently cited by courts hearing IEP disputes.<sup>79</sup> Often, such courts take

---

Exposition Servs., Inc., 303 F. Supp. 2d 920, 922 (discussing the standards for finding contractual clauses unconscionable where corporate "repeat players" have capitalized on an experiential bargaining advantage over inexperienced consumers).

76. See, e.g., *Lumbermens*, 303 F. Supp. 2d at 922 ("[petitioner] suggests that regardless of choice of law, the imbalance of bargaining power between the parties renders the clause unconscionable . . . [however] [b]oth [parties] are corporate repeat players, not consumers, and [petitioner] has not pointed to any facts suggesting that the liability limitation clause was unenforceable for any reason").

77. See *supra* text and citations accompanying note 4.

78. See, e.g., *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1525-26 (9th Cir. 1994) (adopting the four corners rule for IEPs); *but see* *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 819 (9th Cir. 2007) (rejecting plaintiff's argument that the terms of an IEP should be interpreted under state contract law).

79. See *Aliah K. ex rel. Loretta M. v. Haw. Dep't of Educ.*, 788 F. Supp. 2d 1176, 1194 (D. Haw. 2011) (stating that, in balancing the equities of the IEP dispute, the court could not overlook the parent/plaintiff's unwillingness to participate in the IEP drafting process); *W.M. v. Lakeland Cent. Sch. Dist.*, 783 F. Supp. 2d 497, 504 (S.D.N.Y. 2011) ("Although deference is due

into consideration the relative financial harm that will accompany the losing party to a particular IEP placement or reimbursement ruling as part of this balancing, as well as (in the case of the child) educational deficiencies that would result from a negative ruling.<sup>80</sup> Moreover, as outlined above, a number of courts have openly embraced contract law principles in analyzing IEP agreements.<sup>81</sup>

The goal of contract interpretation is to ascertain and give effect to the parties' intent "as reasonably manifested by the language of the agreement."<sup>82</sup> "Clear and unambiguous terms" in a contract are generally deemed conclusive, and when they are present, a court typically will not construe the contract or look to extrinsic evidence but will merely apply the contractual provisions.<sup>83</sup> A contract or provision is ambiguous if a reasonable person would find it subject to more than one interpretation.<sup>84</sup>

---

to school authorities when issues of education policy are involved . . . such deference is less weighty here where the issue in dispute is the balancing of the equities, a matter as to which district courts not only have particular expertise but also broad discretion . . . [w]here a school district fails to provide a FAPE and the private placement is found to be appropriate, "the district court enjoys broad discretion in considering equitable factors relevant to fashioning relief." (citations omitted); *K.B. v. Haledon Bd. of Educ.*, Civil Action No. 08-4647 (JLL), 2010 WL 2079713, at \*3 (D.N.J. May 24, 2010) (engaging in a balancing of the equities to determine whether the proposed IEP was "reasonably calculated to enable the child to receive meaningful educational benefits" (quoting *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010)).

80. See *W.H. ex rel. B.H. v. Clovis Unified Sch. Dist.*, No. CV F 08-0374 LJO DLB, 2009 WL 2959849, at \*7 (E.D. Cal. Sep. 10, 2009) ("[I]f the [Court] rules that Student is currently ineligible for special education and related services, . . . District would suffer financial harm. District would be required to use resources to put together an IEP and create a special education plan for Student"); see also *Bd. of Educ. of Albuquerque Pub. Sch. v. Miller*, No. CIV. 05-487 MCA/LFG, 2005 WL 6168485, at \*6 (D.N.M. 2005) ("I . . . conclude that whatever threat of irreparable financial harm [the school district] may suffer as a result of its present obligation to reimburse the [parent/child] is outweighed by the much greater and more irreparable threat of harm to the child, who benefits from the relief awarded"); *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 114, 125 (D.D.C. 2005) ("The public interest lies in the proper enforcement of the orders of the Court and the IDEA and in securing the due process rights of special education students and their parents provided by statute. These interests outweigh any asserted financial harm to [the district]").

81. See *supra* text and citations accompanying notes 12 and 79.

82. *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008) (citing *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600 (Ind. 1990)).

83. *N. Assur. Co. v. Grand View Bldg. Ass'n*, 183 U.S. 308, 361-62 (1902).

84. *Bartlett v. Frederick Cnty.*, 246 F. Appx. 201, 202 (4th Cir. 2007) (quoting *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 829 A.2d 540, 547 (Md. 2003)); *Weaver v. Caldwell Tanks, Inc.*, 190 F. Appx. 404 (6th Cir. 2006); *Myles v. Gen. Agents Ins. Co. of Am., Inc.*, 197 F.3d 866, 869 (7th Cir. 1999) (quoting *Piers v. Am. United Life Ins. Co.*, 714 N.E.2d 1289, 1290 (Ind. Ct. App. 1999)).

The four corners rule is a contractual principle intended to help courts reasonably ascertain the intent of the two parties to the agreement.<sup>85</sup>

In transposing the four corners rule from contract law to the IEP context, the Ninth Circuit noted that “[t]he requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes” between parent-guardians and school districts, and furthermore “will greatly assist parents in ‘presenting complaints with respect to any matter relating to the . . . educational placement of the child.’”<sup>86</sup> This is true, but only if such clear interpretive guidelines are supplemented with some method of balancing the inherent bargaining disparities between parent and district.

This is where a further transposition of the unconscionability doctrine from contract law is needed to supplement strict rules of law which would, and currently *do*, “operate harshly”<sup>87</sup> by allowing the more experienced party not only unfettered discretion in the drafting of the instrument but also unchecked capacity to “reform” the language of that draft through subsequent evidentiary and testimonial admissions at administrative hearings and on appeal. A simple process of equity balancing by ALJs and judges in such circumstances would go a long way in ensuring that the more experienced and resourced party is not permitted to “profit from a bargain that resulted from the other’s error or lack of sophistication.”<sup>88</sup>

---

85. *Davis v. Raytheon Tech. Servs. Co. L.L.C.*, No. 1:10-cv-1365-JMS-MJD, 2012 WL 5499416, at \*3 (S.D. Ind. Nov. 13, 2012) (“Indiana follows ‘the four corners rule’ that extrinsic evidence is not admissible to add to, vary or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction” (quoting *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006))); *Ko Olina Dev., L.L.C. v. Centex Homes*, 497 F. Appx. 732, 733 (9th Cir. 2012) (“We look no further than the four corners of the document to determine whether an ambiguity exists, and the parties’ disagreement as to the meaning of a contract or its terms does not render clear language ambiguous” (citing *Standford Carr Dev. Corp. v. Unity House, Inc.*, 141 P.3d 459, 471 (Haw. 2006))); *Harper Enters., Inc. v. Aprilia World Serv. USA*, 270 F. Appx. 458, 460 (8th Cir. 2008) (“Where the settlement language is unambiguous, courts look only to the terms of the settlement; absent ambiguity, ‘the court need not resort to construction of the contract, and instead intent is determined from the four corners of the contract’”) (quoting *Parks v. MBNA AM. Bank*, 204 S.W.3d 305, 311 (Mo. Ct. App. 2006)); *Weaver v. Caldwell Tanks, Inc.*, 190 F. Appx. 404, 412 (6th Cir. 2006) (“Absent an ambiguity, the meaning of the contract must be determined from the ‘four corners’ of the contract”) (citing *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000)); *Home Ins. Co. v. Chi. & Nw. Trans. Co.*, 56 F.3d 763, 767 (7th Cir. 1995) (“This so called four-corners rule holds that if a contract is clear on its face and the text contains no clue that the contract might mean something different from what it says, then the inquiry is over—no evidence outside of the contract may be considered”) (citation omitted).

86. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (citation omitted).

87. *GLENDON, ET AL.*, *supra* note 48, at 142-43.

88. *Sherwin*, *supra* note 48, at 273.

By analogy, this balancing would not be altogether different than the tack taken by courts towards construing boilerplate language in contracts where: (a) one party has expertise in the technical language used; (b) the other party is unsophisticated as to the "obscure verbiage" utilized in the instrument; (c) the more sophisticated party played a disproportionate role in drafting the instrument; and (d) the court determines that the boilerplate terminologies do not adequately represent the "intent" of the less sophisticated party to the instrument.<sup>89</sup> Considering the fact that many school districts utilize "model" IEPs provided by state education departments, the boilerplate analogy is not unfounded.<sup>90</sup>

The balancing called for in this article is comparable to the common law contractual doctrine of *contra proferentem*, which simply prescribes the construal of an instrument "to comport with the parties' *intent and reasonable expectations*," and acknowledges the fact that the language of certain types of contracts is often "the result of technical semantic constructions and unequal bargaining power."<sup>91</sup> For example, in the insurance policy context, courts will frequently assume that insurance consumers do not readily understand every technical term in the policy that they sign, and as a result they systematically resolve ambiguities in such contracts against the party with greater knowledge and bargaining power.<sup>92</sup>

Part of the reasoning for this rule of interpretation involves the fact that the providers typically control the policy writing process, are "repeat players," and beneficiaries have disproportionate opportunity for arms-length negotiation over the terms of the plan.<sup>93</sup> These imbalances, while certainly more extreme in the insurance context, are nevertheless analogous to the IEP context. In all areas of contract law, the unconscionability doctrine further outlines rules of judicial interpretation favoring consumers entering agreements with "repeat players" who enjoy an "imbalance of bargaining power" and include contractual clauses which capitalize on said imbalance.<sup>94</sup>

---

89. RESTATEMENT (SECOND) OF CONTRACTS § 163-164 (1981); RESTATEMENT (THIRD) OF PROP.: SERVIDUES § 3.1 (2000).

90. See, e.g., N.Y. State Educ. Dep't, *supra* note 49.

91. Oritani, Sav. & Loan Ass'n v. Fid. & Deposit Co., 989 F.2d 635, 638 (3d Cir. 1993) (emphasis added) (citation omitted).

92. Sparks v. St. Paul Ins. Co., 495 A.2d 406, 414 (N.J. 1985).

93. Fitts v. Unum Life Ins. Co., No. Civ.A.98-00617(HHK), 2006 WL 449299, at \*3 (D.D.C. Feb. 23, 2006) (citation omitted).

94. Lumbermens. Mut. Cas. Co. v. GES Exposition Servs., 303 F. Supp. 2d 920, 922 (N.D. Ill. 2003).



The applicability of such rules of interpretation to the IEP context is obvious and in conjunction with the four corners rule would have a positive influence on the effectiveness of the IEP as a proactive means for agreeing to educational services without having to resort to costly, adversarial, and inefficient dispute resolution procedures. If ALJs and judges were to adopt these rules of interpretation, school districts would experience more pressure to negotiate frankly with parent-guardians and parent-guardians would experience a greater capacity to advocate on behalf of their child. Such rules of interpretation would not only lead to more efficiency and equity from a public policy standpoint, but as I argue in the next section, would lead to greater adherence to the legislative intent of the IDEA's IEP provisions.

### **B. The Legislative Intent of the IDEA's IEP Provisions**

The public policy rationale for applying the parol evidence rule and contractual equity balancing to judicial interpretations of parental "intent" in IEP drafting is clear, for the very reason that the public policy rationale for the IEPs existence is itself evident in the legislative history of the IDEA. The goal of the written IEP, as outlined by the Legislature during the Act's 2004 reauthorization, is to serve as a "critical protection . . . for parents and children to transform the [state] constitutional requirement[s] [of educational access] into a practical reality throughout the country."<sup>95</sup> Senator Tom Harkin observed that getting the IEP "plan in place in the first place, rather than after any problems occur, is critical to making [the IDEA] work for everyone."<sup>96</sup>

Furthermore, courts have long noted that Congress intended for IEP procedural compliance by school districts to guarantee "parents and guardians a large measure of participation" in their child's educational decision-making and that "the resulting IEP included 'much if not all of what Congress wished in the way of substantive content.'"<sup>97</sup>

Finally, regulations issued shortly after the IDEA's initial passage made clear that the IEP team meetings were not intended to be an extension of

---

95. 150 CONG. REC. S5250-02 (daily ed. May 12, 2004) (statement of Sen. Harkin).

96. *Id.*

97. *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982), superseded by statutes, as recognized in *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033, at \*4 (W.D. Wash. Dec. 8, 2006)).

the adversarial process, or rather a prelude to dispute resolution.<sup>98</sup> Rather, these regulations explained that the “presence of an attorney could contribute to a potentially adversarial atmosphere at the meeting . . . that would not necessarily be in the best interests of the child.”<sup>99</sup> We can infer from this that the IEP’s preparation, as a matter of public policy and legislative intent, should be as free from the constraints of adversarial posturing as possible. Any rule of interpretation, which strengthens the autonomy of the IEP, which distances it from the IDEA’s dispute resolution process, is therefore closer to the legislative intent of the IDEA’s IEP provisions.

Thus, the IDEA’s IEP requirements were intended to be proactive programmatic safeguards of children’s federal right to educational access, not instrumentalities for retroactive dispute resolution purposes. On the grounds of public policy, school districts should be incentivized to be more specific in the IEP drafting process (particularly with regard to potentially ambiguous terminologies such as related services, individual instruction, group learning, etc.), rather than intentionally vague for the purposes of future adversarial proceedings.

In conjunction with one-another, a four corners rule and a principle of equity favoring the reasonably intended meanings of parent-guardians during IEP drafting would create such an incentive. If vague terms are interpreted in favor of parent-guardians, not only as a recognition of bargaining inequities but also of the IDEA’s intent, then school districts will face obvious incentives to clarify terminologies utilized in the IEP drafting process (or else face a less-favorable interpretation from ALJs and judges). Moreover, members of IEP teams on both sides of the table will experience greater negotiational autonomy in reaching agreement absent the encumbrances of looming disagreements about the meanings of vague IEP boilerplate language.

From a public policy standpoint, this will force future subjects of disagreement into the IEP team meetings and parent-guardians will be presented with a more viable opportunity to advocate for the specific services they want for their child. As a result, the Legislature’s intent that the IEP instrument would be a proactive rather than a retroactive method for

---

98. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities: Appendix A to Part 300—Notice of Interpretation, 64 Fed. Reg. 12478 (Mar. 12, 1999).

99. *Id.*

reaching agreement on special education services would be more practicable, and disagreements would ideally be transferred from the dispute resolution setting to the written page.

Rather than opening the door to intentional vagueness in IEP drafting, which likely originates with the district (assuming that parent-guardians do not ever *want* to feel shortchanged regarding their student's special education services, and seek due process or litigation as a result), and then further allowing the party with greater resources and knowledge of the school setting to reform this intentional vagueness through retrospective evidence and testimony, ALJs and judges should construe vagueness in favor of the less-experienced party and should limit the entrance of extrinsic evidence only to those terms which similarly-situated parties could reasonably disagree on.

By way of example, if a parent-guardian sought an IEP stipulation or amendment for "X hours of class time with typical peers each week," it would not be reasonable for a judge to assume that the agreed-upon term is satisfied by X hours of inclusion in non-core curricular courses such as recess, lunch, and special subjects. In construing such a term, judges should assume that the parent-guardian's intent was in the best interests of their child, and the school district should have the burden of proving that the term should be otherwise construed. Similarly, if the IEP stipulates "one-on-one attention from a qualified teacher and/or paraprofessional," it would not be reasonable to assume that the parent intended for all one-on-one attention to be provided by the aide.

Rather, ALJs and judges should take into account the obvious bargaining inequities between parents and districts in construing vague terms. This form of balancing would encourage both parties to actively negotiate the real meanings of service terms, and would discourage the use of legalese or semantic vagueness by the experientially advantaged party to the instrument. In other words, the transposition of the four corners principle, as supplemented by contractual equity rules, would enhance the incentives for school districts to comply with the intended purpose of the IEP, and potentially steer disputes away from the adversarial setting.

#### IV. CONCLUSION

It is typically the desire of both parties to a contract that they extract the greatest amount of benefit from the instrument with the lowest pos-

sible risk of back-end cost and inconvenience.<sup>100</sup> A well-crafted instrument maximizes benefits for both parties by allocating front-end costs in an efficient manner which mitigates the potential for back-end expenditures, such as costly and time consuming litigation.<sup>101</sup> When parties to an instrument “agree to vague terms (or standards) . . . they delegate to the back end the task of selecting proxies: for example, the court selects market indicators that serve as benchmarks for performance.”<sup>102</sup>

Conversely, when they agree to specific terms, they implicitly delegate to the front end, and ultimately mitigate inefficiencies and prolonged disputes about the intended meanings within the instrument.<sup>103</sup> In arguing for the recognition of the four corners rule and contractual equity principles in IEP disputes, this article advocates measures for encouraging IEP team members to allocate costs and human capital on the front-end as a means to avoid the back-end costs (and educational consequences) resulting from prolonged legal disputes. The only way in which this can be accomplished is by evening the playing field for parents during the negotiation process. In so doing, ALJs and appellate judges could do much in the way of reforming the IEP to comport with the legislative intent of the IDEA.

---

100. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 814 (2006).

101. *Id.* at 814, 817-19.

102. *Id.*, at 814.

103. *Id.*