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Counterpoint Introduction—

Are Categorical IEPs Uncategorically Unacceptable?

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In the Winter 2016 issue of the Journal, [1] Karen Czapanskiy, a professor at the University of Maryland's school of law, explained her proposal to revise the Individuals with Disabilities Education Act (IDEA)[2] by replacing individualized education programs (IEPs)[3] with standardized, rule-based templates for those eligible students who share similar evaluation profiles.[4] Her proposal would require school districts to develop these categorical plans via a local public process.[5]

As a result, under this proposal, parents and their children would fit within two groupings. The primary group, presumably accounting for the majority of the eligible students, would be those with common profiles; their parents would have the right to participate in the public process for developing the standardized plans but not to revise them. The second group would consist of the IDEA-eligible children who do not fit within the common profile. For them, the present process of IEPs and the individualized dispute resolution process would remain the

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1. Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1, 2 (2016).

2. 20 U.S.C. §§ 1400 *et seq.* (2014).

3. *See, e.g., id.* § 1414 (d).

4. She originally issued this proposal in an earlier article. Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733, 750, 756, 761–72 (2014) (showing Czapanskiy had previously identified this proposal as one of three suggested Congressional reforms in the IDEA to support parental competence and conserve parental resources).

5. Czapanskiy, *supra* note 1, at 2.

status quo. At the boundary between these two categories, parents in the primary group would have the right to challenge the evaluations and, if successful, fit in the second, individualized group.[6]

Acknowledging that her proposal is "highly controversial," Professor Czapanskiy revisited it in light of the Second Circuit's decision in *Bryant v. New York State Education Department*,[7] which ruled that the state's prohibition of aversive interventions did not violate the IDEA either procedurally in terms of the Act's individualization mandate[8] or substantively in terms of its entitlement for meaningful access to education.[9] More specifically, she asserted that *Bryant* "frames opportunities to develop rule-based plans to provide certain children with a [free appropriate public education]."[10]

Additionally, Professor Czapanskiy found new support for her rule-based approach by examining, as a "test case," thirty-two court decisions arising in New York during the period 2010–2014, purportedly detecting an unpublished rule-based, rather than individualized, approach for students with autism.[11] To illustrate her proposed approach, she suggested a hypothetical rule, or identical educational program, for all students identified with autism spectrum disorder (ASD), with the only additional services based on "educational issues other than those arising out of the child's autism spectrum symptoms."[12] To complete her hypothetical illustration, she subjected her proposed rule—consisting of a "[s]tudent-teacher-paraprofessional ratio of 6:1:1," a specially trained teacher, and specified uniform levels of speech, occupational, and physical therapy—to the regulatory review-and-comment period and, upon the predictable parental challenge, to judicial review.[13] The one revision she engrafted on her

6. *Id.* at 3.
7. Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202 (2d Cir. 2012).
8. *Id.* at 213–14 (ruling that the state's anti-aversives regulation only limits a single method of a wide range of treatments in line with many years of research and is distinguishable from local IEP predetermination).
9. See *id.* at 215–16 (ruling that the state's prohibition does not impede meaningful access to specialized instruction, regardless of whether it impedes maximization, and warrants judicial deference to state policymaking).
10. Czapanskiy, *supra* note 1, at 2.
11. *See id.* at 10–14.
12. *Id.* at 15.
13. *See id.* at 16–22.

original proposal was, based on *Bryant*, to shift the rule-making from the local to state level.[14]

Finally, assuming that the *Bryant*-type approach and analysis were successful, Professor Czapanskiy argued that the net benefits would be superior to the current approach in light of its research base, advantage for non-wealthy parents, transparency, accountability, and predictability.[15] Retaining individualization for evaluation and for the children not within the categorical rules, she argued for reconsidering the "non-democratic" continuation for the educational programing of all IDEA-eligible children.[16]

In light of the prominent position of the IDEA in terms of education litigation[17] and the centrality of the IEP process,[18] this issue's Counterpoint differs from the usual, or standardized, mode of a single response to three significant perspectives in special education law. More specifically, the three accompanying perspectives are those of school attorney David Rubin, parent attorney Jennifer Valverde, and special education professor Mitchell Yell.[19]

To add a brief fourth perspective, that of a "neutral" legal specialist, i.e., one who focuses on the IDEA dispute resolution role of hearing or review officer, I briefly add a few additional comments and questions regarding Professor Czapanskiy's rather radical proposal for "parent-oriented" IDEA reform.[20] Having had the opportunity to read the three Counterpoints, I shall focus, for the readers' sake, on the points that the others either did not address or only partially addressed.

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14. *See id.* at 27–8.
15. *See id.* at 23–33.
16. *Id.* at 34–35.
17. *See, e.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (finding special education to be the most substantial expanding sector of K–12 education litigation).
18. *See, e.g.*, Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 923 n.3 (10th Cir. 1995) (characterizing the IEP as the "cornerstone" of the IDEA process).
19. Although these three respondents are well-experienced and -respected in their identified roles, each one is independent in two notable ways. First, each prepared his or her contribution without having read the other two responses to Professor Czapanskiy's proposal. Second, each wrote as an individual, not as a purported representative of all members of the respective role group.
20. Czapanskiy, *supra* note 4 at 735–36 and 756.

First, Professor Czapanskiy did not directly and specifically explain how her proposal would be implemented—by Congress or the courts. If by Congress, she failed to show how her proposal would be politically feasible and favorable, especially because its primary rationale is not the cost effectiveness argument that predominates criticism of the present IDEA.[21] If, as is inferably more likely based on her references to "a bureaucratic response"[22] and "how [*Bryant*] frames opportunities for rule-based plans,"[23] Professor Czapanskiy intended a regulatory adoption at the state level, followed by a predictable *Bryant*-type challenge in the courts, the odds would appear to be strongly against both state action and judicial affirmation. First, although the IDEA welcomes state variety as part of its structure of "cooperative federalism,"[24] it is highly unlikely that any state, much less a broad-based wave of states, would adopt such a proposal in light of the general opposition—as reflected in the three accompanying Counterpoints—to the proposal in its current form. Moreover, as attorneys Rubin[25] and Valverde[26] explain, Professor Czapanskiy's stretches the relatively thin reed of *Bryant* well beyond the point of breaking in trying to fit her proposal supportively within its scope.[27]

Second, contrary to Professor Czapanskiy's modest attribution,[28] Seligmann's prior article in the JOURNAL did not profess the same or a

21. *See, e.g.*, Wade F. Horn & Douglas Tynan, *Time to Make Special Education "Special" Again, in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 23, 26 (Chester E. Finn, Andrew J. Rotherham, & Charles R. Hokanson eds., 2001).

22. Czapanskiy, *supra* note 4, at 763–34.

23. Czapanskiy, *supra* note 1, at 4.

24. *See, e.g.*, Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733–34 (2d Cir. 2007); Evans v. Evans, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) (recognizing that states may add requirements to the IDEA's foundation).

25. David Rubin, *Standardized IEPs: One Size Fits None?*, 46 J.L. & EDUC. 227, 227 (2017).

26. Jennifer Rosen Valverde, *An Indefensible Idea: Eliminating Individualization from the Individuals with Disabilities Education Act*, 46 J.L. & EDUC. 235, 238 (2017).

27. For additional, albeit limited, support, see Singletary v. Cumberland Cnty. Sch., 2013 WL 4674874 (M.D.N.C. Aug. 30, 2013) (ruling, inter alia, that predetermining one-size-fits-all IEP states a claim under the IDEA); Kalliope R. v. N.Y. State Educ. Dep't, 827 F. Supp. 2d 130 (E.D.N.Y. 2010) (ruling that the state's requirement barring full day classes with teacher:student: paraprofessional ratio stated a claim under § 504). The Second Circuit had foreclosed any effect of the IDEA ruling in *Kalliope R.*, but did not address the potential alternative effect of § 504. Bryant v. N.Y.S. Educ. Dep't, 692 F.3d at 214. n.7.

28. Czapanskiy, *supra* note 1, at 1 n.2.

similar proposal.[29] More specifically, although observing that the IDEA recognizes separate disability categories, or classifications, Professor Seligmann concluded that the Supreme Court, in its landmark IDEA decision in *Board of Education v. Rowley*[30] "went farther" then such a categorical approach, instead interpreting the IDEA as requiring judicial review in terms of the "personalized and individualized needs of the child."[31]

Third, Professor Czapanskiy failed to acknowledge, much less address, the costly[32] practical problems inherent in her proposal. For example, adding to attorney Valverde's observation in this regard, [33] does Professor Czapanskiy mean that the common profiles align with the current categories or that, à la a Bell curve, they are somehow only the core, average area of each one? Oddly, her hypothetical New York example aligns with ASD,[34] which is broader in scope than the IDEA definition of autism.[35] Additionally, her hypothetical example of the standardized plan complicates rather than clarifies the practical implementation by providing for extra services unrelated to the child's disability.[36] Would these unrelated services be an exception to the lack of the procedural protections of the IDEA? As another example, how would these common profiles work for the various students who qualify under more than one disability category? As a final example, consider the predictable blitz of legal gamesmanship first in the rule-making process and then in the litigation process, primarily by wealthy parents,

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29. Terry Jean Seligmann, Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been, 41 J.L. & EDUC. 71 (2012).

30. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

31. Seligmann, *supra* note 29, at 86.

32. "Costly" in this context refers to not only direct fiscal expenditures but also, per the IDEA legalization of special education, the time-consuming transaction costs of the adversarial model of dispute resolution. See, e.g., David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63 (1985); Perry A. Zirkel, The Over-Legalization of Special Education, 195 EDUC. L. REP. 35 (2005).

33. Valverde, *supra* note 26, at 241.

34. *See supra* text accompanying note 12.

35. *Compare* https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml?utm_source=rss_readersutm_medium=rssutm_campaign=rss_full (NIMH); http://www.dsm5.org/Documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf (DSM-V), *with* 34 C.F.R. § 300.8(b)(1) (2015).

36. *See supra* text accompanying note 12.

to escape the standardized group and remain within the individualized protections of the second group.[37]

Fourth, although Professor Czapanskiy argued that one of the primary advantages of her proposal would be evidence-based practices, this feature is merely a presumed consequence of, rather than additional essential to, its definitionally public process. Even her hypothetical New York example recognized that the regulatory authorities might well include methods that are "inferior" from a research perspective. Indeed, depending on the profile at issue, many of the standardized education plans may not meet the respectively more rigorous standards of "peer reviewed" and "scientifically based" research.[38]

Fifth, Professor Czapanskiy's cited support in thirty-two New York court decisions[39] is clearly questionable on several grounds. For example, all are from New York City, which conveniently squares with the proposal but is far from the generalizable for school districts in terms of its extremely bureaucratized nature. Moreover, her sampling was underinclusive in terms of FAPE cases for students with autism for the selected period and jurisdiction.[40] Additionally, not all of the cases in her selective sample met the purportedly standardized 6:1:1 ratio.[41]

Finally, Professor Czapanskiy's article merits a residual commendation for its willingness to take an unpopular stand that accompanies warranted criticism[42] with a proposed solution that

37. *See supra* text accompanying note 6.

38. 34 C.F.R. §§ 300.35 and 300.320(a)(4) (2015). For a discussion of these standards, *see* Perry A. Zirkel & Tessie Rose, *Scientifically Based Research and Peer-Reviewed Research under the IDEA*, 22 J. SPECIAL EDUC. LEADERSHIP 36 (2009).

39. *See supra* text accompanying note 11.

40. *See, e.g.*, T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145 (2d Cir. 2014); M.H. v. N.Y.C. Dep't of Educ., 712 F. Supp. 2d 125 (S.D.N.Y. 2010), *aff'd*, 685 F.3d 217 (2d Cir. 2012); V.S. v. N.Y.C. Dep't of Educ., 25 F. Supp. 3d 295 (S.D.N.Y. 2014); Scott v. N.Y.C. Dep't of Educ., 6 F. Supp. 3d 424 (S.D.N.Y. 2014); T.G. v. N.Y.C. Dep't of Educ., 973 F. Supp. 2d 320 (S.D.N.Y. 2013); C.G. v. N.Y.C. Dep't of Educ., 752 F. Supp. 2d 355 (S.D.N.Y. 2010); M.N. v. N.Y.C. Dep't of Educ., 700 F. Supp. 2d 356 (S.D.N.Y. 2010).

41. *See* M.T. v. N.Y.C. Dep't of Educ., 47 F. Supp. 3d 197 (S.D.N.Y. 2014); *see also* F.O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499 (S.D.N.Y. 2013).

42. For example, Professor Czapanskiy's proposal is part of her reform package to address the undeniable problems of parents, particularly those who are poor, in achieving the partnership role that is central to the vision of the IDEA. For other commentators who have recognized and suggested reforms for said imbalance, *see generally, Eloise Pasachoff, Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2012) (proposing strengthened public enforcement in light of the socioeconomic disparity of the adjudicatory

stimulates re-consideration of the present IDEA.[43] For example, attorney Rubin's Counterpoint seems to suggest consideration of a more limited version that would use a research-based categorical IEP, much like the IDEA classifications and akin to the medical model,[44] as a starting point for an individualized process.[45]

In any event, I invite and encourage you to read for yourself the thought-provoking proposal of an at least partial outsider[46] of the IDEA, and the accompanying Counterpoints from three inside perspectives. They all merit your careful and complete consideration and evaluation. This federal law will undergo the periodic reauthorization process within the coming years, and the Supreme Court recently granted certiorari for a case that re-visits a key part of the aforementioned[47] *Rowley* decision.[48] Thus, as a result of your diligent deliberations, help determine, as a matter of both legislative and judicial policy, the answer to a core question—what are the most effective ways to improve the IDEA that are in the individual interest of the child with disabilities and the collective interest of the school and society?

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mechanism); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & LAW 107 (2011) (proposing IDEA amendments to strengthen the balance in the IEP and private enforcement process); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802 (2008) (proposing free educational advocate services); Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263 (2008) (similarly but more specifically suggesting IDEA amendment adding legal advocates to the IEP team based on the disparity between parents' "social power" and "their legal power" in the private enforcement process).

43. *See* Czapinskiy, *supra* note 1.

44. For another at least partially analogous example, some of the special education vouchers that ore and more states have passed in recent years are based on a matrix of services that depends on the nature and severity of the child's disability. See, e.g., Florida's McKay Scholarships for Students with Disabilities Program, http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/mckay/

45. Rubin, *supra* note 25, at 232–33.

46. According to her faculty profile in the University of Maryland law school's website (http://www.law.umaryland.edu/faculty/profiles/faculty.html?facultynum=033), Professor Czapanskiy addresses special education issues from the perspective of a specialization in family law.

47. *See supra* note 29.

48. Endrew F. v. Douglas Cnty. Sch. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, 137 S. Ct. 29 (2016) (posing the issue of the level of educational benefit that school districts must confer on eligible children under the IDEA).

Counterpoint—

Standardized IEPs: One Size Fits None?

David B. Rubin*

Professor Karen Czapanskiy's article, *Kids and Rules: Challenging Individualization in Special Education*,[1] proposed dispensing with "individualization" of special education students' IEPs, and substituting standardized, research-based templates for specific student profiles, vetted through a transparent state-level rule-making process. She first explored the concept in an earlier article,[2] and updated her thinking in this latest work in light of an intervening Second Circuit Court of Appeals decision in *Bryant v. New York State Education Department*,[3] upholding a statewide policy banning inclusion of aversive interventions in IEPs. For the following reasons, I concur in part and dissent in part with her proposal.[4]

Individualization has long been considered the hallmark of the IEP-development process, but Czapanskiy raises fair questions about what Congress and the Supreme Court intended individualization to mean and, most importantly, whether plans custom-tailored at millions of IEP meetings across the Nation each year are likely to achieve the best outcomes for students. I concur with her assertion that cobbling IEPs

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1. Karen S. Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1 (2016).

2. Karen S. Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733 (2014).

3. 692 F.3d 202 (2d Cir. 2012). Czapanskiy conceded that locally-adopted rule-based systems, proposed in her earlier article, would be impermissible under *Bryant*.

4. In the author's view, the positions expressed herein are unaffected by the Supreme Court's decision in Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15–827 (March 22, 2017), handed down shortly after this article was completed.

together from scratch is neither necessary nor realistically attainable, or even desirable. I also agree that students would be best served by incorporating educational strategies backed by solid research, proven to work for large numbers of similarly situated students, and publicly aired out ahead of time.

I dissent, however, from her conclusion that *Bryant* authorizes standardized IEPs that districts could implement across the board. The rationale for individualization must be addressed in the context of parental involvement in the IEP development process, and our courts' notion of predetermination. The idealized decision-making model most familiar to the special education community presumes that districts can meet each child's educational needs only through a custom-made plan developed by a committee of educators, parents and sometimes the child, known as the IEP team. District staff conduct assessments to obtain a snapshot of the student's current needs, and the team gathers together at an IEP meeting to craft an individualized program, with an open mind and no predetermined outcome.

The district's professionals on the IEP team are expected to have expertise in their particular fields by virtue of their professional education, state certification and hands-on experience. However, many parents also come to the table with substantial knowledge from their own research, from networking with advocacy organizations, or perhaps because they are educators themselves. Other parents are not as knowledgeable, but still have valuable insights because they know their child better than anyone. In either case, the parents' emotional commitment to their children's welfare naturally tends to affect their objectivity, often undermining the value of their input. Nevertheless, all decisions ultimately require the parents' approval.

To test the validity of this model, I propose to compare it with another one familiar to all parents. When a child requires medical treatment for a serious illness, a different team makes decisions regarding that child's treatment plan. This team is composed of the physician, parents and other family members or caregivers whose involvement will be crucial to the child's recovery, and sometimes the child. The physician gathers all relevant information from the family, recommends any required testing, and proposes a treatment plan once all pertinent data has been gathered. Any testing or treatment requires the parents' informed consent, and due consideration is given to the family's personal preferences whenever possible. Some parents may

have considerable familiarity with the medical concepts involved, and strong feelings about which clinical course of action is best for their child, either from doing their own research or, perhaps, because they have medical backgrounds themselves, but their objectivity also may be affected by their deep emotional involvement.

The physician members of this team do not develop the treatment plan from scratch, but apply well-established courses of treatment with a proven track record of success, adjusted as necessary to meet any unique circumstances. An extensive vetting process, involving academic research and approval by government regulators, typically validates the recommended procedures and medication, based on findings of effectiveness and relative safety. Once the team selects the course of treatment with the parents' informed consent, the parents become partners in implementing those aspects within their power to control, and provide feedback to the medical staff so that any mid-course corrections can be made.

These two models have much in common. Both seek to apply a complex body of technical information to meet a child's needs. The providers have professional training and expertise that parents typically do not have. Parental input is required on those matters within the parents' knowledge, and their "buy-in," if not active participation, is crucial to success. In both cases, parents remain the ultimate decision-makers regarding services for their child through the vehicle of informed consent.

But these models approach "individualization" quite differently. In the medical model, as long as parents have the input and receive the deference described above, most of them would not consider their child's treatment any less individualized because the physician proposed a standardized treatment supported by a record of successful experience with a large population of other similarly situated patients. In the world of special education, however, the mere suggestion of anything standardized breeds suspicion, distrust and accusations of predetermination.

There are reasons for this mindset. Congress adopted the IDEA, in its original form, to remedy the historical exclusion of disabled children

from our public schools. As with much legislation targeting institutional abuse, procedural safeguards were necessary to assure the law's beneficiaries that school districts would not unfairly exploit their "natural advantage."[5] A key element of those safeguards is the participation of parents, not only to provide relevant information and informed consent, but to act as advocates and monitors.

Yet, despite parents' intimate involvement in their children's lives, they typically are not experts on educational methodology. And even if parents' diligent advocacy uncovers shortcomings in the child study team's work from time to time, that does not mean that the parents' preferred course of action is necessarily correct. Parents may be "equal participants" in the IEP discussions, but "[i]t is not appropriate to make IEP decisions based on a majority 'vote.'"[6] The school district is ultimately responsible for providing an appropriate education, subject to the parents' right to challenge that decision through mediation or a due process hearing.[7]

In *Bryant*, the Second Circuit upheld a regulation, adopted by the New York State Education Department, generally prohibiting public school districts, and schools receiving placement of special education students, from using aversive interventions. The regulation reflected the Department's "considered judgment,"[8] after it "made site visits, reviewed reports, and considered complaints from parents as well as school districts and others raising concerns about aversive techniques."[9] The court rejected the plaintiffs' claim that this statewide policy decision constituted unlawful predetermination or denied them their right to participate in an individualized decision-making process.

Bryant stands for the proposition that the IDEA "does not categorically bar . . . statewide regulations that resolve problems in special education,"[10] when they reflect a considered and fairly debatable

5. Sch. Comm. of Town. of Burlington v. Dep't of Educ., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L.Ed.2d 385 (1985).

6. Letter to Richards, U.S. DEP'T OF EDUC. OFFICE OF SPECIAL EDUC. AND REHAB. SERVICES (Jan. 7, 2010), http://www2.ed.gov/policy/speced/guid/idea/letters/2010-1/richards010710iep1q2010.pdf

7. *Id.*

8. *Bryant*, 692 F. 3d at 214.

9. *Id.*

10. *Id.*

policy judgment that is not "incompatible" with the letter or spirit of the IDEA.[11] "Otherwise," the court observed, "the IDEA would be transformed from a legislative scheme that preserves the states' fundamental role in education to one that usurps the role of the states."[12] So far, so good. The flaw I see in Czapanskiy's analysis is that *Bryant*, and other decisions reaching similar conclusions, focused on specific techniques or practices that states required or banned to advance some narrowly-defined educational policy.[13] My research has uncovered no authority that would permit states to mandate standardized IEPs encompassing the entirety of a student's program.

Bryant itself makes clear that the rule upheld in that case merely "prohibits consideration of a single method of treatment without foreclosing other options,"[14] and that "[n]othing in New York's regulation prevents individualized assessment or precludes educators from considering a wide range of possible treatments."[15] Other decisions have recognized that (1) the "system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's 'unique needs,'"[16] and (2) "[a] 'one size fits all' approach to special education will not be countenanced by the IDEA."[17] A standardized IEP is, on its face, an oxymoron that no court likely would accept.[18]

Still, there is merit in Czpanskiy's assertion that reinventing the wheel at each IEP meeting, or indulging in the fiction that we are doing so, does not optimize students' chances for success. Each student has educational needs that an IEP team should be able to ascertain objectively, and the team's role is to pool their collective resources to identify them. This goal is difficult enough to achieve, and all the more

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11. *Id.* at 213; *see also* Alleyne v. N.Y. State Educ. Dep't, 691 F. Supp. 2d 322, 333, n.9 (N.D.N.Y. 2010) (distinguishing between predetermination in IEPs and the promulgation of statewide regulations).
12. 692 F.3d at 214.
13. *See, e.g., Alleyne,* 691 F. Supp. 2d at 332–33.
14. 692 F.3d at 213.
15. *Id.*
16. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 177 (3d Cir. 1988) (emphasis in original).
17. Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 859 (6th Cir. 2005).
18. 20 U.S.C. 1401(14) (defining "*individualized* education program") (emphasis added).

elusive because there are vast discrepancies in experience, training, resources and legal acumen from one school district to another, and often among different schools within the same district. Similar discrepancies exist from one family to another in terms of educational knowledge, financial resources and access to legal advocacy. As a matter of public policy, I submit that the educational fate of students with substantially similar needs should not rest entirely on the roll-of-the-dice roster of district staff and parents at that student's IEP meeting.

Nor does existing law require such random and inconsistent results. The IDEA itself mandates that each IEP include "a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable*[.]"[19] I see nothing in current law that would bar a state educational agency from analyzing this "research" and determining, through formal rule-making or informal guidance to local school districts, which services are most likely to work for students meeting certain criteria.[20] As Czapanskiy suggested, all stakeholders should be afforded an opportunity for input. When those determinations risk denying students an appropriate education, judicial review is available.[21] Even when these methods and strategies are not mandated by state regulation but merely recommended, child study teams have the prerogative to include them in the IEP if not persuaded otherwise once parents have had a fair opportunity for input, again – subject to challenge through mediation or a due process hearing.[22]

In sum, developing a repertoire of state-supported "best practices" would reduce the risk of arbitrarily different programs for students with similar needs, give hearing officers and courts a standard to evaluate the appropriateness of IEPs in individual cases, level the playing field for families without the resources to hire legal counsel or high-priced

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19. *Id.* § 1414(d)(1)(A)(i)(IV) (emphasis added).

20. An example is the New Jersey Department of Education's *Autism Program Quality Indicators* (2004), http://www.nj.gov/education/specialed/info/autism.pdf.

21. *See, e.g.,* Kalliope R. v. N.Y. State Dep't of Educ., 827 F. Supp. 2d 130 (E.D.N.Y.) (finding plausible a challenge to statewide policy prohibiting use of particular student-teacher ratio).

22. *See supra* note 5.

experts, and lead to better outcomes for all children. Standardized IEPs, on the other hand, are a non-starter.

Counterpoint—

An Indefensible Idea: Eliminating Individualization from the Individuals with Disabilities Education Act

Jennifer Rosen Valverde*

In her recent article, *Kids and Rules: Challenging Individualization in Special Education*, Professor Karen Czapanskiy proposed abandoning the individualized nature of education plans for students with disabilities in favor of uniform plans for students who "fit the same profile."[1] The proposal builds on an idea first expressed in Czapanskiy's 2014 article, *Special Kids, Special Parents, Special Education*, that similarly situated children should receive a standardized Individualized Education Program (IEP) if they will benefit educationally.[2] Czapanskiy posited that uniform IEPs developed through a rule-making process will, among other benefits, increase transparency in special education decision-making,[3] and promote fairness in educational programming and services for students with disabilities.[4] While these are honorable intentions,

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1. Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1, 2 (2016).

2. Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733, 761–72 (2014).

3. *See id.* at 766 (positing that a rule-making or standard-setting process for developing uniform education plans "would give the pubic an opportunity to learn about, respond to, and potentially amend the plan before it is adopted," creating visibility and political accountability).

4. *See id.* at 768 ("If services are prescribed by a rule or a standard . . . all children with the same needs will be treated the same.").

Czapanskiy's proposed "rule-based" IEP model is premised on a faulty assumption about children with disabilities that contravenes the foundation of the Individuals with Disabilities Education Act (IDEA). Her flawed reasoning lacks support in both the case law on which she relies and her purported "test case research." The proposal gives rise to many more questions than it answers. Finally, and perhaps most importantly, the model is rooted in an erroneous definition of fairness, with significant educational consequences for the children with disabilities for whom she allegedly advocates.

I. SPECIAL EDUCATION PROGRAMS AND SERVICES ARE FOR INDIVIDUALS, NOT DISABILITIES

Czapanskiy proposed that, through an administrative rule-making process, school districts adopt uniform IEPs to address the "numerous situations in which multiple children fit the same profile and can benefit from the same educational program."[5] Although Czapanskiy referred to these similarly situated children as having a disability "profile," she neither defined the term, nor offered any detail as to how a child may be determined to have such a profile or who will make such a determination, other than her reference to a "careful individualized assessment and investigation."[6] Instead, she engaged in disability profiling by naming children on the autism spectrum as one example of students with the same "profile."[7] Through this baseless assumption,

5. Czapanskiy, *supra* note 1, at 2.

6. *Id.* at 3.

7. *See id.* at 10 (presuming that all children on the autism spectrum in the thirty-two Southern District of New York cases examined by Czapanskiy were "children with similar issues" where they had the same disability diagnosis and attended the same private school). Czapanskiy's selection of children diagnosed with a spectrum disorder to make the point that children with the same disability diagnosis meet the same profile makes even less sense since spectrum-based disorders are so-named due to their wide variation in symptoms, skills and severity. *See* Nat'l. Inst. of Mental Health, *Autism Spectrum Disorder: Definition,* http://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml (last visited on Sept. 16, 2016); *see also* Autism Speaks, *About Autism* (2012), https://www.autismspeaks.org/sites/default/files/sctk_about_autism.pdf (last visited on Sept. 16, 2016) (observing that "[i]t is sometimes said that if you know one person with autism; you know one person with autism" due to the fact that the symptoms of autism and their severity vary widely).

Czapanskiy strips individual children of their unique abilities, challenges, resources and environments; she reduces them to little more than their disability diagnosis or category without any discussion, let alone acknowledgment, of the fact that disabilities vary widely in the ways in which they manifest and affect people.[8]

Czapanskiy's total disregard for the uniqueness of students with disabilities runs counter to individualization, which is "*a*," if not "*the*," core concept on which the IDEA is based. Throughout federal special education law, Congress refers to the individualized and unique needs of children with disabilities, and state and local educational agencies' duty to tailor a child's educational program to meet his or her unique needs and enable the child to be involved in and make progress in the curriculum.[9] For example, the IDEA defines special education as, "specially designed instruction, at no cost to parents, to meet the *unique needs of a child with a disability* . . . " (emphasis added).[10] The primary purpose of the IDEA's evaluation process is to "conduct a full *and individual*"[11] evaluation to determine "whether the child is a child with a disability" and "the educational *needs of [the] child.*" (emphasis added).[12] The IEP is designed to "*meet the child's needs that result from the child's disability* to enable the child to be involved in and make progress in the general education curriculum; and *meet each of the child's other educational needs* that result from the child's disability." (emphasis added).[13] The law recognizes the importance of parental participation in the identification, evaluation, IEP development and

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8. *See, e.g.*, Yuir Jang et al., *Individual Differences in the Effects of Disease and Disability on Depressive Symptoms: The Role of Age and Subjective Health*, 59 INT'L. J. AGING AND HUMAN DEV. 125, 126 (2004) (noting that the degree to which a disability or disease affects an individual varies); *see also* Nat'l Ass'n of Special Educ. Teachers, *Characteristics of Children with Learning Disabilities*, http://www.naset.org/fileadmin/user_upload/LD_Report/Issue__3_LD_Report_Characteristic_of_LD.pdf (last visited Sept. 16, 2016) (explaining that children with learning disabilities are a diverse and heterogeneous group of individuals exhibiting different characteristics and difficulties in a variety of areas that range in severity).

9. *See generally* 20 U.S.C. § 1400 et seq. (2016).

10. *Id.* § 1401(29).

11. *Id.* § 1414(a)(1)(A).

12. *Id.* § 1414(a)(1)(C)(i)(II).

13. *Id.* § 1414(d)(1)(A)(i)(II)(aa)-(bb).

placement, and provision of a free and appropriate public education to each individual child.[14]

Thus, in advocating for a "rule-based" IEP, Czapanskiy does not propose merely to change one aspect of special education process, but rather to eviscerate the IDEA.

II. RELIANCE ON *BRYANT* TO JUSTIFY "RULE-BASED" EDUCATION PLANS IS MISPLACED

Czapanskiy erroneously relied on the Second Circuit's decision in *Bryant v. New York State Education Department*[15] as legal justification for her proposal to use the administrative rulemaking process to create uniform education plans. In *Bryant*, the Second Circuit affirmed the propriety of a New York Department of Education regulation prohibiting schools from employing aversive interventions with *any* students, with limited exception and a grandfather clause.[16] Comparable to the rationale for states' bans on the use of corporal punishment in schools,[17] the court reasoned that the regulation stemmed from the N.Y. State Department of Education's "considered judgment" in finding aversive interventions "dangerous,"[18] and served a "legitimate government objective" of "preventing students from being abused or injured."[19] Moreover, the regulation aligned with the IDEA's favoring of positive behavioral supports.[20]

Czapanskiy vastly overgeneralized the holding of *Bryant* when she asserted that "[t]he bottom line . . . appears to be that states are permitted, consistent with the IDEA, to determine that certain

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14. *See, e.g., id.* § 1415(b)(1).

15. *See* 692 F.3d 202 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013) (upholding dismissal of plaintiffs' request for a preliminary injunction on the grounds that New York State's prohibition on the use of aversive interventions with students with behavior disabilities does not violate the IDEA, the Rehabilitation Act of 1973 or the Fourteenth Amendment's due process or equal protection clauses).

16. *See id.* at 209–10.

17. *See e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, § 19.5(a) (1985).

18. *Bryant*, 692 F. 3d at 214.

19. *Id.* at 218.

20. *See id.* at 213.

educational approaches are off limits for IEPs."[21] Consistency of a ban, such as the one in *Bryant*, with the IDEA is merely one piece of a far more complex puzzle. Her attempt to distill a "general" rule from a decision regarding the use of a highly controversial and potentially harmful intervention is unwise and poorly reasoned due to the uniqueness of the *Bryant* facts. Moreover, Czapanskiy incorrectly tried to extend this "general" rule to support the converse proposition, specifically that state rule-making may be used to mandate the use of certain interventions to the exclusion of others through the creation of a rule-based education plan for children who meet a particular profile.[22] Notably, the banning of a potentially harmful intervention, i.e. the "remov[al of] one possible form of treatment from the range of possible options"[23] *without foreclosing other options*, is not the same as requiring a particular intervention be used to the exclusion of others based on disability profiling. Thus, the *Byrant* decision fails to serve as a valid legal basis for adoption and implementation of rule-based IEPs.

III. ILLEGAL USE OF DE FACTO "RULE-BASED" IEPS DOES NOT JUSTIFY THEIR CODIFICATION

Czapanskiy informally analyzed thirty-two special education cases in the Southern District of New York involving children with autism to determine, among other things, whether an unpublished rule already exists regarding educational programming for these children and, if so, whether it is beneficial.[24] Czapanskiy presumed that these children have the same profile simply because all are on the autism spectrum, 75% live in a two-parent household, and all were unilaterally placed by their parents in the same expensive private school.[25] She also found the IEPs offered to these children "striking[ly]" similar: "Almost every" one calls for placement in a "District 75" school for "students who are on the autism spectrum, have significant cognitive delays, are severely

21. Czapanskiy, *supra* note 1, at 8.
22. *See id.* at 8–9.
23. *Bryant*, 692 F. 3d at 218.
24. *See* Czapanskiy, *supra* note 1, at 10.
25. *See id.* at 10, 12–13.

emotionally challenged, sensory impaired and/or multiple disabled;" each includes "some" combination of services, e.g. occupational, physical, and speech and language therapies, with *variations* in rate, frequency, duration and method of delivery; "many" include counseling and behavior management; "some" include a 1:1 aide; and "a number" include year-round schooling.[26] From this "evidence," Czapanskiy concluded that some school districts do not individualize education plans for students with autism.[27]

Based on my 15+ years of experience in the field, I agree that some school districts try to predetermine IEPs for some students by fitting them into educational programs instead of creating programs to fit their individual needs. However, the lack of uniformity in the New York City IEPs analyzed by Czapanskiy demonstrates quite the opposite; by her own admission, the IEPs varied with respect to the types, rates, frequency and delivery of related services, the supplemental supports provided, the length of the school year, and more.[28]

Of greater concern is Czapanskiy's tacit suggestion that since some school districts already illegally use de facto rule-based IEPs based on disability profile, we should codify this practice.[29] Czapanskiy asserted that public input into, and publication of, *de jure* rules will lessen mistrust between districts and parents and improve school district accountability since they must abide by the stated rules.[30] However, she neglected to consider that issues of accountability and mistrust will persist over the way in which districts assess students and "fit" them into a profile. She also failed to address the substantially reduced role that parents will play in the education of their own child, since state rules will dictate IEPs. Czapanskiy argued that *de jure* rules will enable every child to "receive[] *some* evidence-based services appropriate to his or her educational needs" (emphasis added);[31] yet, she did not

26. *Id.* at 12.
27. *See id.* at 14.
28. *See id.* at 12.
29. *See* Czapanskiy, *supra* note 1, at 30 ("Schools are bureaucratic institutions and, as in all bureaucratic institutions, sameness is preferred over difference. Rule-based plans, where appropriate, are a way to align norms with the practice.").
30. *See id.* at 30–31.
31. *Id.* at 23.

mention that this is a lesser FAPE, or free and appropriate public education, standard than that required by the IDEA and a far cry from the "meaningful benefit" standard to which many states adhere.[32] Thus, the illegal practice of some school districts does not, in any way, justify the proposed rule.

IV. CZAPANSKIY'S PROPOSAL GIVES RISE TO MORE QUESTIONS THAN ANSWERS

Czapanskiy's "rule-based" IEP model opens the door to other substantive, logistical and practical questions. First and foremost, she failed to provide any information on how state educational agencies should develop disability profiles or specifics on how they should create uniform IEPs to match them. She argued that rule-based IEPs will use only evidence-based interventions,[33] but offered no guidance on how to develop uniform IEPs where no evidence-based interventions to address the area(s) of need yet exist. She admitted that administrative rule-making is time-consuming, that addressing a proposed rule or petitioning for a new one can be expensive, and that parents with limited resources are therefore unlikely to engage in the process.[34] Yet, Czapanskiy assumed that "lower-resourced parents" will benefit from involvement of "higher-resourced parents" since all children with the same needs will get the same IEP.[35] She never discussed whether IEP goals and objectives, too, will be standardized, how educational progress will be measured under the uniform IEP system, or what will happen when a child does not progress under the uniform plan. Further, Czapanskiy did not consider the realistic possibility that her model may waste resources where a child is required to receive certain services at a profile-driven rate and frequency, but does not actually need them.

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32. *See, e.g.*, *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *see A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152 (D.D.C. 2005).

33. *See* Czapanskiy, *supra* note 1, at 23.

34. *See id.* at 29; *see generally* Office of the Fed. Register, *Guide to the Rulemaking Process*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Sept. 16, 2016); *see also, e.g.*, N.J. Dep't of Educ., *Administrative Code Adoption Process*, http://www.state.nj.us/education/code/process.htm (last visited Sept. 16, 2016).

35. *See* Czapanskiy, *supra* note 1, at 29–30.

Finally, Czapanskiy suggested that with rule-based IEPs, school districts more willingly will evaluate students because they will know what a child needs if found eligible.[36] In so asserting, she failed to consider that school districts may adapt their evaluation processes to identify "profiles" instead of individual student needs, and that school districts cannot know what they will have to provide before evaluating unless they require students to fit programs instead of programs to fit students. These are among the many questions that remain unaddressed.

V. "RULE-BASED" EDUCATION PLANS ARE FOUNDED ON AN INCORRECT DEFINITION OF FAIRNESS THAT FAVORS EQUALITY OVER EQUITY IN EDUCATION

In arguing that uniform education plans created via administrative rule-making will promote fairness because all children who have the *same* disability profile will have the *same* educational program and services, Czapanskiy misconstrued the concept of fairness as premised on equality.[37] Equality is based on the concept of "sameness;" it promotes fairness only where everyone starts from the same place, has the same needs and abilities, and requires and benefits from the same type and extent of help.[38] Equity, in contrast, is based on the recognition that individuals have different abilities, strengths, resources and needs; it requires that everyone get what he or she needs in order to succeed.[39] As stated earlier, children with disabilities vary widely in their

36. *See id.* at 27.

37. *See* Czapanskiy, *supra* note 4; *see also id.* at 736 (positing that rule-based IEPs will "help to ensure equality among special needs parents."); *see* Czapanskiy, *supra* note 1, at 23 (stating that "[w]here a rule governs the process, at least every child to whom the rule applies should be offered the same program.").

38. *See* CITY OF PORTLAND OFF. OF EQUITY AND HUM. RTS., THE PROBLEM WITH "EQUALITY" (last visited Sept. 20, 2016); *see also* Surbhi S, *Difference between Equity and Equality* (July 21, 2016), http://keydifferences.com/difference-between-equity-and-equality.html (stating that equality is providing the same thing to everyone whereas equity ensures people have what they need).

39. *See id.*; *see also* Paula Braveman and Sofia Gruskin, *Defining Equity in Health*, 57 J. EPIDEMIOL. COMMUNITY HEALTH 254, 254, 256 (2003) (stating inequity and inequality are not synonymous and defining equity as social justice or fairness grounded in principles of distributive justice).

symptomatology, severity, abilities and needs;[40] as a result, they are not equal. Children with disabilities require *equity* in education, with each getting what is needed to succeed. Without this, fairness can never be achieved.

Czapanskiy's ill-conceived rule-based IEP proposal dehumanizes children with disabilities by encouraging the use of disability profiling, flies in the face of the IDEA by advancing a one-size-fits-all, square peg-round hole approach to educating children with disabilities, and is not logical, practical or viable. Czapanskiy's proposal harms the very children whom she sets out to protect, thus rendering the "rule-based" IEP model an indefensible idea.

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40. *See supra*, Part I.

Counterpoint—

Individualization Is Special Education: A Response to Czapanskiy

Mitchell L Yell*

Individualized education programs (IEPs) are at the heart and soul of the Individuals with Disabilities Education Act (IDEA).[1] In her provocative article, *Kids and Rules: Challenging Individualization in Special Education*, Karen Syma Czapanskiy proposed abandoning the IEP requirements of the IDEA in favor of standardized plans for many students with disabilities.[2] I agree that there are problems in the implementation of the IDEA. Czapanskiy, however, conflates implementation problems with irrelevancy. I believe her proposals, which are bureaucratic in nature, would vitiate the central purpose of the IDEA.[3] Her solutions are based on a misunderstanding of (a) the importance of parental participation in special education, (b) the heterogeneous nature

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1. *See* Barbara D. Bateman, *Individualized Education Programs for Children with Disabilities*, *in* HANDBOOK OF SPECIAL EDUCATION 91 (James M Kauffman & Daniel P. Hallahan eds., 2011).

2. *See* Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1, 1 (2016).

3. The central purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; to ensure that the rights of children with disabilities and parents of such children are protected... to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities." 20 U.S.C. § 1401(c)(d)(1)(A-B) & (3) (2012).

of students with disabilities, and (c) the centrality of individualization in the IDEA.

I. PARENTAL PARTICIPATION IN THE SPECIAL EDUCATION PROCESS

Bateman explained that the most basic IEP requirement is that a student's parents be full, equal, and meaningful participants in the development of their child's IEP, along with school district personnel.[4] In her article, Czapanskiy argued that parents are often not meaningfully involved in IEP development. I agree that parents and school-based personnel have never fully realized the promise of meaningful collaboration in the IEP process.[5] However, Czapanskiy's argument that standardized plans are more likely to be "responsive to parental and public concerns" than the current "individualized regime"[6] is counterproductive for two basic reasons. First, Congress and courts have repeatedly emphasized the importance of meaningful parental participation in special education programming. Second, scholars and the U.S. Department of Education have researched and provided funding to encourage and improve parental participation in special education.

Congress emphasized the central role of parents in developing their children's IEP and ensuring the provision of free appropriate public education in the finding and purposes section of the IDEA:

> Almost thirty years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—strengthening the role and responsibility of parents and ensuring that

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4. *See* Barbara D. Bateman, *Individualized Education Programs for Children with Disabilities, in* HANDBOOK OF SPECIAL EDUCATION 93 (James M. Kauffman & Daniel P. Hallahan eds., 2011).

5. *See, e.g.,* Ann Turnbull, Rud Turnbull, Elizabeth J. Erwin, Leslie C. Soodak, & Karrie A. Shogren, Families, Professionals, and Exceptionality: A Special Partnership 214 (2011); *See* Marilyn Friend, *Co-Teaching: An Illustration of the Complexity of Collaboration in Special Education,* 20 J. Educ. & Psychol. Consulatation 9, (2010); *See* H. Rutherford Turnbull III, Karrie A. Shogren, & Ann P. Turnbull, *Evolution of the Parent Movement, in* Handbook of Special Education 639 (James M. Kauffman & Daniel P. Hallahan eds., 2011).

6. Czapanskiy *supra* note 2, at 4.

> families . . . . have meaningful opportunities to participate in the education of their children . . . .[7]

Dr. Edwin Martin was a key player in virtually every piece of legislation that affected children with disabilities from Title VI of the Elementary and Secondary Education Act to the Education for All Handicapped Children Act (EAHCA) of 1975, renamed the IDEA in 1990. Dr. Martin, who served as an early commissioner of the Bureau of Education of the Handicapped and the first Assistant Secretary of Education for Special Education and Rehabilitative Services in the U.S. Department of Education, observed:

> I realized that parents had provided the energy and will to create special education programs wherever they occurred. . . . It became apparent to me that there would be little, if any, special education if the parents had not created it, directly or through political persuasion.[8]

No doubt Dr. Martin would agree with the Ninth Circuit Court of Appeals' conclusions that interference with parental participation in IEP development undermines "the very essence of the IDEA"[9] and that an "IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's need are not involved or fully informed."[10]

Special education researchers have shown the importance of parental participation in special education programming and development. For example, Iovannone, Dunlap, Huber, and Kincaid referred to parents' participation in their child's IEP development as a core component of effective educational programming[11] because "a collaborative partnership with the family can contribute to the effectiveness of interventions and programming."[12] Additionally, the federal government has funded and

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7. 20 U.S.C § 1400(c)(5)(B) (2012).

8. EDWIN W. MARTIN, BREAKTHROUGH: FEDERAL SPECIAL EDUCATION LEGISLATION 1965–1981 22 (2013).

9. *See* Amanda J. *ex rel.* Annette J. v. Clark Cnty. Sch. Dist., 267 F.3d. 877, 892 (9th Cir. 2001).

10. *Id.*

11. *See* Rose Iovannone, Glen Dunlap, Heather Huber, & Don Kincaid, *Effective Educational Practices for Students with Autism Spectrum Disorders,* 18 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 150, 153 (2003).

12. *Id.* at 161.

supported research and provided resources to educate parents. The Office of Special Education Programs in the U.S. Department of Education have expended federal resources in encouraging and improving parent participation in special education through the funding of Parent Training and Information Centers in every state.[13]

Unfortunately, Czapanskiy's recommendations would weaken parents' involvement in the development of their children's special education programming as to be almost nonexistent. Although students' parents would have the opportunity to comment on any proposed rule that state officials may develop, parents would "not have the opportunity, . . . to require the school system to use a different plan for their child if their child meets the profile identified in the rule."[14] On November 17, 2015, at an event held at the White House to celebrate the 40th anniversary of the IDEA, H. Rutherford Turnbull, a featured speaker at the celebration, warned against efforts to remove the voice of parents from special education.[15] I believe that Czapanskiy's proposals, if adopted by policymakers, would lead to removal of these crucial parent rights and undermine the essence of the IDEA.

II. THE HETEROGENEOUS NATURE OF SPECIAL EDUCATION STUDENTS

Czapanskiy apparently anticipated objections to her proposals to largely remove parents from special education by asserting "my proposal is not intended for situations where a child's situation is unusual."[16] This statement represents an oversimplified view of the students with disabilities who are served in special education. A saying in the field of autism is that "when you've seen one child with autism, you've seen one child with autism." This maxim, which I believe applies equally to all

13. *See* CENTER FOR PARENT INFORMATION AND RESOURCES, http://www.parentcenterhub.org/find-your-center/.

14. Czapanskiy, *supra* note 2, at 3.

15. The White House IDEA 40th Anniversary Celebration Panel Discussion, YOUTUBE (Nov. 17, 2015), *https://www.youtube.com/watch?v=jayefjgcSms*.

16. Czapanskiy, *supra* note 2, at 3.

students with disabilities, illustrates the great heterogeneity of students with disabilities and that there are no "usual" special education students.

All students exhibit differences from one another. In general education the differences among students are relatively small, which enables them to benefit from general education programming.[17] The cognitive, learning, behavioral, communication, sensory, and physical characteristics of students in special education, however, differ significantly from the norm to the extent that they require individualized designed programming to fully benefit from their education.[18] For special education programming to succeed with an individual student, it is critical that educators understand what evidence-practices are appropriate for a student and under what conditions.[19] Similarly, Iovannone, Dunlap, Huber, and Kincaid noted, "implementation of any component may vary in its form of level of intensity depending on the individual student's needs and characteristics."[20] All special education students' situations are unusual. In fact, that is why it is called *special* education.

It is not realistic to expect that a rule-based plan will appropriately address the needs of special education students. There are evidence-based practices that work very well when used with certain students with disabilities. For example, using a systematic instructional program based on applied behavior analysis is very effective when teaching children with autism and students with severe disabilities.[21] However, the incredible diversity of needs within these populations of students—e.g., intelligence scores ranging from far below the mean of one hundred to considerably above the mean, virtually no language development to well-developed language skills, sensory and physical impairments to intact sensory and physical abilities—contradicts the notion that state-level bureaucrats can develop a rule-based standardized plan "for the many

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17. *See* WILLIAM L. HEARD, SHEILA ABLER-MORGAN, & MOIRA CONRAD, EXCEPTIONAL CHILDREN 7 (10th ed. 2017).

18. *See id* at 7.

19. *See* Paige C. Pullen & Daniel P. Hallahan, *Special Education Categories, in* HANDBOOK OF SPECIAL EDUCATION 173 (James M. Kauffman & Daniel P. Hallahan, eds., 2011).

20. Iovannone et al., *supra* note 11, at 153.

21. *See, e.g.*, Erik Drasgow, Mark Wolery, James Halle, & Zahra Hajiaghamohseni, *Systematic Instruction of Students with Severe Disabilities, in* HANDBOOK OF SPECIAL EDUCATION 516 (James M. Kauffman & Daniel P. Hallahan eds., 2011); *See* Iovannone et al., *supra* note 11, at 154.

students who share similar assessments and would benefit from the same plan."[22] Even if Czapanskiy's assertion that many students share a common profile were true, there is no evidence that such a profile can be matched by educators to the interventions and programs that they use with their students.

Although Czapanskiy does not address this issue directly, because she offered a hypothetical rule for students with autism,[23] I assume that she proposes that officials in state education agencies develop the systematic plans by category of disabilities (e.g., a plan for students with autism and a separate plan for students with learning disabilities). However, the most recent study of special education teacher licensure reported that only five states used a categorical licensure system.[24] In such a system, teachers are licensed to teach in a certain disability area, such as autism, and usually teach children who have that classification.[25] Three states had noncategorical licensing systems. In these systems, special education teachers are not licensed by disability category; rather, they have a generic special education license and the special education classes they teach may include students from any category of disability. Eighty percent of states have a mixture of categorical and noncategorical licensure systems. "[N]early all of [these states have] retained categorical options in the areas of visual impairment and hearing impairment," but are noncategorical with regard to all other disabilities.[26] How could any standardized state plans be appropriate for all students with autism, emotional disturbance, learning disabilities, intellectual disabilities, or speech and language impaired? In noncategorical or mixed categorical states special education teachers still require an understanding of the unique needs of their students and a knowledge of which evidence-based practices would be appropriate for whom and under what conditions.[27] How would Czapanskiy's proposal for standardized plans work in

22. Czapanskiy, *supra* note 2, at 1.
23. *See id.* at 15.
24. *See* William L. Geiger et. al., *Patterns of Licensure for Special Education Teachers*, *in* HANDBOOK OF RESEARCH ON SPECIAL EDUCATION TEACHER PREPARATION 36 (Paul T. Sindelar, Erica D. McGraw, Mary T. Brownell, & Benjamin Ligngaris-Kraft, eds., 2014).
25. *See id.* at 35.
26. *Id.* at 36.
27. *See* Pullen & Hallahan, *supra* note 19, at 173.

noncategorical or mixed categorical states? How would these plans work for children in early childhood special education (ages birth to three), who are served under the category of developmental disabilities? How would such plans address the needs of students with multiple disabilities? Czapanskiy failed to address these issues in her article. Her proposal for standardized plans for "usual" students with disabilities is unrealistic.

III. THE CENTRALITY OF INDIVIDUALIZATION IN SPECIAL EDUCATION

Czapanskiy's cited as support for her argument to abandon IEPs, per her previous article,[28] that in passing the original version of the IDEA in 1975 "Congress intended from the start that states adopt categorical responses rather than individualized plans" for students with disabilities.[29] Her argument is revised legislative history.

To individualize a student's special education program has unquestionably been a central tenant of the IDEA and special education since the original passage of the law. The U.S. Senate Subcommittee on the Handicapped sent a report to the U.S. House of Representatives on Congressional intent and justification for including the IEP in the original Act.[30] According to the report "the movement toward individualization, involving the participation of the child and the parent, as well as all relevant educational professionals, is a trend gaining even wider support in educational, parental, and political groups throughout the nation."[31] According to Senator Robert Stafford of Vermont, a co-sponsor of the Education for All Handicapped Children Act (EAHCA) of 1975, to best accomplish the goal of providing students with disabilities with a special education appropriate to their needs, Congress required that (a) student's special education programs be individualized, and (b) school-based personnel collaborate with students' parents in developing the student's

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28. Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J. L. REFORM 733 (2014).

29. Czapanskiy, *supra* note 2, at 22 n. 2.

30. *See* U.S. S. Subcomm. on the Handicapped Act as amended through December 31, 1975, 137, U.S. S., 90th Cong., 2nd Sess. on S.J. Res. 137 (1976).

31. *Id.*

IEP, which Stafford referred to as "the base-line mechanism"[32] of the law. In addressing the detractors of the law who objected to the services determined through the collaborative planning between parents and teachers that leads to the IEP, Stafford wrote: "To let that proposition stand would render useless the central part of this Act as we wrote it and intended it to be carried out."[33]

Fred Weintraub directed legislative and judicial advocacy activities for the Council for Exceptional Children (CEC) during the development and passage of the EAHCA and played a critical role in the hearings leading up to the bill and its eventual passage. In an address to the 2012 convention of the CEC and a subsequent article on the 90th anniversary of the CEC, he wrote the following about the importance of individualization in special education:

> The cornerstone of special education policy for the past four decades has been individualization. IDEA was and remains unique in educational policy in that it prescribes no truth in what is appropriate for children with disabilities. Rather, it provides for a process whereby an individualized education program (IEP) team that knows the child determines what is appropriate for the child. This principle of building a program around a child, as opposed to fitting a child into a program, was a revolutionary departure from the traditions of general and special education in that it assumes that there are no common outcomes or approaches.[34]

Czapanskiy's prescription for substituting bureaucratically created standardized plans for individualized programming would accomplish nothing short of dismantling the unique and revolutionary nature of special education. However well intentioned, Czapanskiy would eliminate the elements that truly make special education special.

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32. Sen. Robert T. Stafford, *Education of the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 75 (1978).

33. *Id.* at 79.

34. Frederick J. Weintraub, *A Half Century of Special Education: What We Have Achieved and the Challenges We Face*, 45 TEACHING EXCEPTIONAL CHILD. 53 (2012).