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Keeping the "I" In the IDEA: A Response to a Proposal to Abandon Individualization in Special Education In Favor of Rule-Based Delivery Models

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KEEPING THE "I" IN THE IDEA:
A RESPONSE TO A PROPOSAL TO ABANDON INDIVIDUALIZATION IN SPECIAL EDUCATION IN FAVOR OF RULE-BASED DELIVERY MODELS

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I. INTRODUCTION

Since its enactment[1] people have viewed the Individuals with Disabilities Education Act ("IDEA")[2] with a mixture of promise and skepticism.[3] Many commentators have offered bold and aggressive proposals for reform.[4] Professor Karen Syma Czapanskiy offered one such proposal in her 2016 article, *Kids and Rules: Challenging Individualization in Special Education*.[5] Professor Czapanskiy proposes that schools, rather than developing individualized plans for each child who requires special education, be permitted to offer rule-based

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2. *See* 20 U.S.C. 1400 *et seq.*

3. President Gerald Ford offered the following observation in signing the statute: "Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains." Miriam Kurtzig Freedman, *Special Education: Its Ethical Dilemmas, Entitlement Status, and Suggested Systemic Reforms*, 79 U. CHI. L. REV. 1, 2 & n.9 (2012) (quoting Gerald R. Ford, *Statement on Signing the Education for All Handicapped Children Act of 1975*, 1975 Pub. Papers 1935).

4. For two examples, see Freedman, *supra* note 3, and Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994).

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

plans for children with similar educational needs, such rules being developed through the notice and comment process of the administrative rulemaking process.[6] She posits that a rule-based approach to special education programming is "more likely to be evidence-based, responsive to certain parental and public concerns about special education, freer of discrimination and more faithful to democratic values."[7]

Along with others who have reviewed this proposal,[8] I urge educators and policy makers to exercise caution when considering it. The proposal appears to be motivated by legitimate critiques of the present IDEA system. However, abandoning individualization as Professor Czapanskiy proposes, regardless of the reasons, may create mischief. The purpose of this paper is to identify such areas of potential mischief and to explain why, if implemented, Professor Czapanskiy's proposal would lead to the very problems she critiques.

II. THE PROPOSAL

Professor Czapanskiy's policy proposal, at least at first, is creative and audacious. In proposing to replace individualization with group-based rules, she writes:

> Under my proposal, school systems should be required to adopt, through a public process, rules applicable to the numerous situations in

6. *See id.* at 2–3.

7. *Id.* at 4.

8. *See, e.g.*, David B. Rubin, *Standardized IEPs: One Size Fits None?*, 46 J.L. & EDUC. 227 (2017); Jennifer Rosen Valverde, *An Indefensible Idea: Eliminating Individualization From the Individuals with Disabilities Education Act*, 46 J.L. & EDUC. 235 (2017); Mitchell L. Yell, *Individualization Is Special Education: A Response to Czapanskiy*, 46 J.L & EDUC. 245 (2017); Perry A. Zirkel, *Are Categorical IEPs Categorically Unacceptable?*, 46 J.L. & EDUC. 219 (2017).

> which multiple children fit the same profile and can benefit from the same educational program. Thereafter, whenever a student is found, after careful assessment, to meet the profile, the school system will use the plan that was adopted through the public process. Parents will have an opportunity, along with other members of the community, to comment on the proposed rule and to seek to have it changed. They will not have the opportunity, however, to require the school system to use a different plan for their child if their child meets the profile identified in the rule.[9]

Yet in the very next paragraph, her bold proposal is scaled back:

> To be clear, my proposal is not intended for situations where a student's situation is unusual. In those cases, the IEP should proceed as it does today. Nor am I proposing that students should be assumed to share a common profile in the absence of careful individualized assessment and investigation. If the student's assessment has not been done properly, parents would remain free to contest its conclusions. My proposal is limited to those situations where the student's profile is shared by many others and where the school, after adequate investigation into educa-

9. Czapanskiy, *supra* note 5, at 2–3 (citations omitted). Professor Czapanskiy offered an earlier version of this proposal in 2014. *See* Zirkel, *supra* note 8, at 219 & n.4 (citing Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733 (2014).

> tional research and an adequate opportunity for public scrutiny, has adopted a rule about what plan will be used for all students with the same profile.[10]

She concludes that her rule-based system will be limited to "appropriate"[11] cases. Her rule-based system, even when limited to "appropriate" cases, poses several conceptual and application difficulties.

A.A Rule-Based Approach Will Present Major Implementation Questions and Outcome Concerns.

The rule's qualifier "appropriate," however, provides the first barrier to capturing ease in application that Professor Czapanskiy seeks. Special education litigation defines "appropriate" with difficulty[12]; indeed, defining the term at all is akin to eating ice cream with chop sticks. "Appropriate" is fact-specific, illusive, and slippery. If a family can no longer challenge the appropriateness of the education provided under a rule-based system, it takes no great feat of lawyering to recast the claim as inappropriate application of a rule.[13] Consider a

10. Czapanskiy, *supra* note 5, at 3.

11. *Id.* at 5.

12. *See* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) ("We will not attempt to elaborate on what 'appropriate' progress will look like from case to case."); Bd. of Educ. v. Rowley, 458 U.S. 176, 202 (1982) ("The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. *** We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."); Freedman, *supra* note 3, at 12; Dixie Snow Heufner, *Judicial Review of the Special Educational Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483 (1991); Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education"?*, 28 J. NAT'L. ASS'N ADMIN. L. JUDICIARY 397 (2008).

13. *See* Zirkel, *supra* note 8, at 223–24 ("For example, consider the predictable blitz of

parent who would have argued that her child with a specific learning disability did not receive appropriate instruction based on her child's unique needs. Under Czapanskiy's rule-base system, the parent could easily recast her complaint to allege that, because of her child's unique needs, it would not be appropriate to apply the rule to her child. In the second case, the parent raises what is functionally the same claim and relies on the same evidence. Between the two cases, there is no net benefit in ease of application: both cases wind up in litigation.

Further exploration of Professor Czapanskiy's proposal reveals a variety of additional difficulties for the application of such a rule-based framework. For example, the general rule would be that the rule applies to a child if the child "fits" the rule's "profile."[14] But how close does the child have to be to the profile to meet it?[15] How much commonality with peers is required? Assume, for purposes of this article, a rule for providing services to children with autism has three elements. If a profile in the hypothetical rule has three elements, is meeting two of three a good enough "fit"? Within each of these three elements, how close to meeting the element equals a "fit"? Ten on a one-to-ten scale? Five on that same scale? What happens if the profile calls for services a child does not need?[16] A parallel question is what it means to be a unique, "unusual" case that is exempt from the rule.[17] How unusual is unusual enough? Will parents be able to challenge the goodness of fit between their child and the rule's profile? The focus on the "unusual" exception runs contrary to the very nature of

legal gamesmanship . . . in the litigation process, primarily by wealthy parents, to escape the standardized group and remain within the individualized protections of the second group.").

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

15. *See* Zirkel, *supra* note 8, at 223 ("[D]oes Professor Czapanskiy mean that the common profiles align with the current [IDEA disability] categories or that, a la a Bell curve, they are somehow only the core, average area of each one?").

16. Valverde, *supra* note 8, at 241; Zirkel, *supra* note 8, at 223.

17. Czapanskiy, *supra* note 5, at 3.

special education: "All special education students' situations are unusual. In fact, that is why it is called *special* education."[18]

A further difficulty involves the fact that this proposed rule-based approach — with its focus on sameness — does not contain a mechanism to account for other ways of difference.[19] Assume we have three students with autism who meet the three-prong profile in the hypothetical rule. Additionally, one is an English learner;[20] another is gifted and twice-exceptional (a child who is both gifted and a child with a disability);[21] while another is at risk for educational failure because of childhood neglect.[22] How does the rule-based approach account for these three different types of non-autism-related need? Will a parent be able to challenge, under the rule-based model, the rule's inability to address these non-special education needs?

In addition to the concerns raised above, it is not clear how Czapanskiy's proposal would deal with a situation in which a child meets more than one profile.[23] Assume a child who meets the "autism profile" is also blind and meets a profile for students who are blind. How will the two profiles work together, if at all? Is this an unusual case because the child

18. Yell, *supra* note 8, at 249 (emphasis in original).

19. For an outstanding article discussing the legal concept of difference, see Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L.L. REV. 111 (1987).

20. *See, e.g.*, Amanda L. Sullivan, *Disproportionality in Special Education Identification and Placement of English Language Learners*, 77 EXCEPTIONAL CHILD. 317, 317 (2011).

21. *See, e.g.*, Letter to Delisle, 62 IDELR 240 (2013), *available at* https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/13-008520r-sc-delisle-twiceexceptional.pdf; *see generally* Perry A. Zirkel, *Legal Update of Gifted Education,* 39 J. EDUC. GIFTED 315 (2016).

22. KRISTEN KELLY ET AL., *Advocating For Educational Success For Children In Foster Care*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 607 (Donald N. Duquette et al. eds., 3rd ed. 2016).

23. Zirkel, *supra* note 8, at 223.

meets two profiles? Or is it common but uncontemplated, because the child meets two of "numerous"[24] situations?

Even children who have only the difference that the profile is designed to address will have different degrees of need.[25] Assume we have three children with autism who fit the profile. One has greatest need in expressive communication; one has greatest need in receptive communication; and one has greatest need in social interactions. Will the potential rule be agile enough to address intra-profile variation?

Finally, it is unclear how the Czapanskiy proposal would handle a situation in which a child does not make progress in the rule-defined educational approach. Assume one of the children with autism who met the three prongs in the hypothetical profile. The child receives instruction as required by the rule, but the child does not make progress or makes less progress than expected. How much lack of progress, and for what duration, is required before officials determine that the child no longer meets the profile? It is reasonable to expect that all of the lack-of-progress challenges to specific IEPs[26] will then be recast as challenges to the rule's appropriateness to an individual child, based on that individual child's lack of progress.

Schools already group students with similar goals and services in similar placements, and that process is fraught with the difficulty that Professor Czapanskiy identifies.[27] For the reasons I have stated, moving that grouping one analytical step

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

25. *See* Valverde, *supra* note 8, at 237; Yell, *supra* note 8, at 249–50.

26. *See, e.g.*, C. B. v. Special Sch. Dist. No. 1, 636 F.3d 981 (8th Cir. 2011) (case successfully challenging a school district's apparent failure to respond to a child's lack of progress).

27. Professor Valverde makes this point boldly: "Thus, the illegal practice of some school districts does not, in any way, justify the proposed rule." Valverde, *supra* note 8, at 241.

earlier (at the "similar needs" stage, rather than the "similar services" stage) and codifying it by a rule-based system makes this grouping less precise and more likely to be tainted by the some of the same difficulties that appear to have prompted Professor Czapanskiy's call for reform in the first place, such as a lack of responsiveness to parental concerns and a lack of focus on evidence.[28]

B. Individualization is an Educational Practice with Demonstrated Efficacy.

While I sympathize with Professor Czapanskiy's critique of the hidden sameness of special education programs, hidden from public view under a FERPA[29] invisibility cloak,[30] the solution she proposes (in effect taking hidden sameness and making that sameness public) assumes that individualization is not necessary for many children with disabilities to receive special education benefit. As noted later in this section, this downplay of the value of individualization runs against the education and social science literature. While it is true that children with disabilities with similar needs are likely to learn with similar instructional methods,[31] this is a matter of flexible likelihoods that is not amenable to reification by a rule for several reasons.

First, individualization is an effective educational approach for children with disabilities.[32] While certain broad

28. For other discussions of the implementation problems posed by Czapanskiy's proposal, see Valverde, *supra* note 8, at 239–42; Yell, *supra* note 8, at 250–51; and Zirkel, *supra* note 8, at 222–24.

29. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (commonly abbreviated "FERPA").

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

31. *Compare id. with* JOHN L. HOSP ET AL., THE ABCS OF CURRICULUM-BASED EVALUATION: A PRACTICAL GUIDE TO EFFECTIVE DECISION-MAKING 148 (2014) (defining "individualized instruction," including small group instruction where teaching is "specifically tailored" to each group member's needs).

32. *See, e.g.*, JOHN HATTIE, VISIBLE LEARNING FOR TEACHERS; MAXIMIZING

instructional approaches and strategies are effective for children with disabilities,[33] each approach requires individualization and nuance in application.[34] Individualization is a basic, well-established, and documented tenet of special education practice, not a legal hoop to jump through or avoided by the adoption of a one-size-fits-most rule.

Second, taking a general likelihood and establishing it as a rule runs the risk of falling into aptitude-by-treatment-interaction[35] quicksand. Ysseldyke and Marston elaborate:

> It is assumed that individual differences among members of the disability category are directly linked to the extent to which they profit from different kinds of instruction. Or, it is assumed that there are specific instructional strategies or tactics that work uniquely with members of specific disability categories; that is, that performance on aptitude measures

IMPACT ON LEARNING, 235 (2012) (showing that individualized special education in reading has a high effect size (0.43)). In contrast, "ability grouping" has a very low effect size (0.12). *Id.* at 206-07, 253.

33. *Id.* at 251 (showing that "comprehensive interventions for learning disabled students" have a very high effect size (0.77)); *see also* Jim Ysseldyke & Doug Marston, *Origins of Categorical Special Education Services in Schools and a Rationale for Changing Them*, *in* SPECIAL EDUCATION IN TRANSITION: FUNCTIONAL ASSESSMENT AND NONCATEGORICAL PROGRAMMING 1, 6 (Daniel J. Reschly et al., eds. 1999).

34. *See* Yell, *supra* note 8, at 249–50; *see also* Susan Stainback & William Stainback, *Changes Needed to Strengthen Regular Education*, in ALTERNATIVE EDUCATIONAL DELIVERY SYSTEMS: ENHANCING INSTRUCTIONAL OPTIONS FOR ALL STUDENTS 17, 23–24 (Janet L. Graden et al., eds. 1988).

35. *See, e.g.*, Daniel J. Reschly & W. David Tilly III, *Reform Trends and System Design Alternatives*, *in* SPECAL EDUCATION IN TRANSITION: FUNCTIONAL ASSESSMENT AND NONCATEGORICAL PROGRAMMING 19, 20–21 (Daniel J. Reschly et al., eds. 1999); James E. Ysseldyke & Sandra L. Christenson, *Linking Assessment to Intervention*, *in* ALTERNATIVE EDUCATIONAL DELIVERY SYSTEMS: ENHANCING INSTRUCTIONAL OPTIONS FOR ALL STUDENTS 91, 94 (Janet L. Graden et al., eds. 1988).

> interacts with treatments to produce different kinds of outcomes (Aptitude x treatment interactions — ATIs).[36]

While noting that instructional strategies and approaches work across disability categories and among children who are IDEA-eligible, and noting that different instructional strategies work when teaching specific content and skills, Ysseldyke and Marston conclude that there "are few, if any, aptitude by treatment interactions."[37] For this reason, the research shows that ATI has low effectiveness,[38] to the point of being described as a "failure."[39] A rule premised on the assumption that all children with Attribute X need Instructional Approach Y risks low effectiveness because it glosses over the possibilities that (1) the Instructional Approach Y may help children with other attributes and (2) children with Attribute X may also benefit from Instructional Approach Z. Professor Czapanskiy's rule-based approach must be sufficiently nimble to step around the ATI trap. Experts like Yell doubt that it could be: "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."[40]

C. A Rules-Based Approach Will Be Effective Only If It Focuses on Causes, Not Solely on Effects.

While Professor Czapanskiy is wise to point out the crucial role of a "careful assessment" in determining whether

36. Ysseldyke & Marston, *supra* note 33, at 6.
37. *Id.* The exception they note is for children with sensory impairments. *Id*
38. *See, e.g.*, HATTIE, *supra* note 32, at 234, 253 (effect size of 0.19).
39. Reschly & Tilly, *supra* note 35, at 20.
40. Yell, *supra* note 8, at 250.

a child meets the rule and preserving to parents their right to challenge assessment methods and results,[41] her proposal does not address one of the most important problems that confront any attempt at providing special education services — the temptation to focus solely on *how* students are not meeting standards without also focusing on *why* students are not meeting standards.[42] If the root cause is not addressed, the child's progress toward meeting standards can be frustrated by adult action just as much as by inaction.[43] This happens because placing a child in an environment that would otherwise be a good fit for the child (by focusing on the ways the child meets the rule), while allowing needs or threats to remain unaddressed (by ignoring needs not addressed by the rule), presents an ongoing risk to the child.[44] In fact, instructional strategies that do not attend to root causes for the child's lack of performance may make performance worse.[45] Thus, any rules-based approach must be grounded in evaluations that are nuanced and address root causes. Otherwise, the instruction provided will address only surface-level needs, and in a superficial way.

As an example, consider two children who fidget at their desks and do not pay attention to their classwork, staring re-

41. Czapanskiy, *supra* note 5, at 2–3.

42. *See, e.g.*, Lee Kern & Glen Dunlap, *Developing Effective Program Plans for Students with Disabilities*, *in* SPECIAL EDUCATION IN TRANSITION: FUNCTIONAL ASSESSMENT AND NONCATEGORICAL PROGRAMMING 213, 214 (Daniel J. Reschly et al., eds. 1999).

43. This may be one reason why aptitude by treatment interaction has not shown promise. *See generally supra* notes 36–41. Similar children may have similar aptitudes, but different root causes for their aptitudes. A surface-level approach to their aptitudes common aptitudes may gloss over real differences in instructional need. See infra notes 46-47 and accompanying text.

44. *Cf.* Thomas A. Mayes, *Understanding Intersectionality between the Law, Gender, Sexuality, and Children*, 36 CHILD. LEG. RTS. J. 90, 104 (2016) (placing an LGBTQ child in foster care in a heterosexist — but otherwise suitable — setting "is likely to further harm the child").

45. *See, e.g.*, B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682, 697-99 (S.D. Ohio 2011) (mismatch between child and intervention led to "escalating behaviors" and unsuccessful plans).

peatedly around the room. One has attention deficit hyperactivity disorder (ADHD), and one has post-traumatic stress disorder (PTSD). On the surface, the two children exhibit similar behaviors; however, the root causes for their behavior could not be more different.[46] The child with ADHD cannot sustain attention; on the other hand, the child with PTSD is hypervigilant.[47] The child with PTSD is trying to pay attention to everything all at once. Applying an instructional approach to the child with PTSD to help her "pay attention," an approach that may be successful for a child with ADHD, will be counterproductive. If the child with PTSD is placed in programming because the child met the rule-based "ADHD profile," at best the child's instruction will be ineffective. At worst, the child will be harmed.

D . Rules-Based Approaches Run the Risk of Essentialism

A rules-based approach runs the risk of being reductionist. Without robust protections and continual vigilance, the possibility exists of an insidious drift toward essentialism: once I know an attribute about you, that knowledge is all I need to know about you.[48] The child moves from fitting the profile to being

46. *See, e.g.*, Steven P. Cuffe et al., *Comorbidity of Attention Deficit Hyperactivity Disorder and Post-Traumatic Stress Disorder*, 3 J. CHILD & FAM. STUD. 327 (1994); Julian D. Ford et al., *Child Maltreatment, Other Trauma Exposure, and Posttraumatic Symptomatology Among Children with Oppositional Defiant and Attention Deficit Hyperactivity Disorders*, 5 CHILD MALTREATMENT 205 (2000); Dan Weinstein et al., *Attention-Deficit Hyperactivity Disorder and Posttraumatic Stress Disorder: Differential Diagnosis in Childhood Sexual Abuse*, 20 CLINICAL PSYCHOL. R. 359 (2000).

47. *See* the sources cited in note 46 for the similarities and distinctions between ADHD and PTSD.

48. Valverde, *supra* note 8, at 236–37 (citations omitted). For discussion of essentialism in other contexts, *see, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Adrien Katherine Wing, *Brief Reflections toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181 (1990).

defined by the profile.[49] The child is no longer described by the profile: the child and the profile have collapsed together into a totality.

Professor Valverde's critique of the proposed rule-based system identifies its essentialist character:

> Instead, she engaged in disability profiling by naming children on the autism spectrum as one example of students with the same "profile." Through this baseless assumption, 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 acknowledgement, of the fact that disabilities vary widely in the ways in which they manifest and affect people.[50]

The motive for engaging in essentialism is clear: essentialism, or "disability profiling,"[51] is "easy" and emotionally safe[52] to the profiler. Once the child becomes the profile, the role of the adults and the environment may be ignored or excused.[53] The child has needs because the child "meets" an external profile, rather than the child's teachers have been providing instruction lacking evidentiary support. Essential-

49. *See* Ysseldyke & Marston, *supra* note 33, at 8.

50. Valverde, *supra* note 8, at 236–37 (citations omitted).

51. *Id.* at 236.

52. Harris, *supra* note 48, at 605.

53. Compare assessment practices that focus solely on the learner and not the relationship of the learner to the instructor, the material, or the environment. Ysseldyke & Marston, *supra* note 33, at 8–9.

ism simultaneously "helps to organize experience" while "denying some of it."[54] This easy path leads to incomplete knowledge and thereby limits the likely success of rule-based systems that assume an essentialist character.

E. Walking Back from Individualization Runs Counter to Other Pertinent Laws.

Rolling back the legal obligation (whether or not it is currently implemented in practice) for IEP Teams to individualize for each child runs against the prevailing legal winds. For that reason, any change to IDEA that would allow for rule-based decision-making risks running counter to IDEA's civil rights roots, as described below.

First, individualization is a hallmark of federal statutes protecting the civil rights

of persons with disabilities. The Americans with Disabilities Act ("ADA")[55] and Section 504 of the Rehabilitation Act of 1973 ("Section 504")[56] embody a requirement of employers, state and local governments, and public places to make reasonable accommodations to disabled persons.[57] The notion of a reasonable accommodation is context based, founded on individual need in the particular circumstances.[58] For example, what a reasonable accommodation is in the employment context will depend on the interaction between the essential func-

54. Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51 (1988), quoted in Harris, *supra* note 48, at 607.

55. 42 U.S.C. §§ 12101–12213.

56. 29 U.S.C. § 701 et seq. Section 504 and the ADA provide largely overlapping coverage and protections to public school students with disabilities. *See, e.g.*, PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (3d ed. 2013).

57. *See supra notes* 55-56.

58. *See generally supra* notes 55-56.

tions of the position, the employee's disability, and the employer's resources, a very individualized calculation.[59]

Additionally, in the elementary and secondary education context, IDEA is not the only statute that governs. Section 504 and the ADA do, as well,[60] and may impose obligations beyond the IDEA.[61] Section 504 regulations require public schools "to meet *individual* educational needs of" children with disabilities "as adequately as the needs of [children without disabilities] are met."[62] Could a rule-based means of delivering IDEA services run afoul of Section 504's adequacy requirement, a requirement that contains an individualization element?[63] If it does, then compliance with the IDEA will be no defense.[64]

Finally, individualization is a hallmark of juvenile and family law.[65] Just as formulaic special education would do a disservice to children, families, and educators, so would cookie-cutter custody orders or visitation schedules. Additionally, for children in state care because of abuse or neglect, the law requires services to be child-specific-services that the child needs to be safe and have a permanent home, not services that the child welfare agency has readily available.[66] "The whole child, not simply the facets of the child's

59. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW (4th ed. 2016) *at* § 4:20.

60. *See id. at* §§ 2:53 through 2:55.

61. *See generally* K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013) (recognizing that Title II of the ADA may impose a requirement to provide more services than would be required by the IDEA).

62. 34 C.F.R. § 104.33(b)(1) (emphasis added).

63. For a comparison of the substantive standards under the IDEA and Section 504, see Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?*, 5 WEST'S EDUC. L.Q. 369 (1996).

64. *See generally K.M.*, 725 F.3d 1088 (IDEA compliance is no defense when the ADA imposes a higher standard).

65. Like Professor Czapanskiy, I have a background in children and the law. *Compare supra* note * (my background) *with* Zirkel, *supra* note 8, at 225 & n.46 (Professor Czapanskiy's background).

66. VIVEK S. SANKARAN, *Representing Parents in Child Welfare Cases*, *in* CHILD

life that are easily addressed, is entitled to reasonable efforts toward reunification and to timely permanency."[67] A similar logic set would apply to children with disabilities: all of their needs must be addressed, not merely the needs that adults know how to address.

F. The Harms Professor Czapanskiy Hopes to Address with a Rules-based Delivery System are Worthy of Attention.

Like others who have reviewed her proposal,[68] I agree with Professor Czapanskiy's identification of the problems with special education in America. We see a lack of evidence-based instruction, a persistent achievement gap, a system that is in many places inhospitable to — and impenetrable by — parents and that parents do not trust, and a system that is insulated from public scrutiny by FERPA.[69] This bleak picture compels a response; however, the response must be something with a reasonable chance of success. For the reasons I have explained above, I have serious reservations about whether a rule-based system is the appropriate solution to the serious problems presented.

Rather than abandoning individualization in favor of a rule, might it not be more helpful to provide support for schools to improve special education practice? For example, schools that accelerate the growth of children with disabilities may serve as models to schools where the achievement gap is not declining. Other schools could learn from the experience

WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 767, 791 (Donald N. Duquette et al. eds., 3rd ed. 2016) ("They should consider all the programs available in the county – not those typically used by the [child welfare] agency.").

67. Mayes, *supra* note 44, at 105.

68. *See supra* note 8.

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

of these high-performing, high-growth schools, through observation of teaching in action or through dissemination of resources — including resource banks, decision-making flowcharts, and de-identified special-education documents that resulted in notable progress for specific students with specific special education needs.[70] As an additional example, school leaders can provide coaching and oversight to special-education professionals – techniques already at their disposal – to ensure that IEPs are individualized, evidence-based, and implemented.[71]

III. CONCLUSION

I appreciate Professor Czapanskiy's bold vision. In my opinion, her focus is on the things that matter. She challenges aspects of the status quo that deserve attention. However, I fear that Professor Czapanskiy's proposal, were it to be adopted, would not make things better. Perhaps she, or other proponents of such a rule-based system, will be willing to address my concerns, several of which others hold,[72] by providing additional explanations or modifications to this proposal in their future scholarship. Perhaps proponents of a rule-based system will be able to show that my concerns are misplaced or alarmist. In any event, I look forward to further dialogue about this bold vision and a common effort to improve special education services and outcomes in the United States.

70. *See* Rubin, *supra* note 8, at 232–33 (urging the development of a "repertoire of state-supported 'best practices,'"). For information on scaling and implementation of school improvement activities, see Dean Fixsen et al., *Statewide Implementation of Evidence-Based Programs*, 79 EXCEPTIONAL CHILD. 213 (2013).

71. *See e.g.,* Thomas A. Mayes, Special Education for School Leaders: An Organizational Self-Assessment Framework, Presentation at the School Administrators of Iowa School Law Conference, Feb. 9, 2016.

72. *See supra* note 8.