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# When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities

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STEPHEN A. ROSENBAUM\*

The team approach to developing an IEP [Individualized Education Program] involves communication and cooperation among you (the parents), your child's teacher(s), and other specialists with different kinds of skills... Think of the team as a circle of participants with your child at the center.

- *Special Education Parent Handbook*<sup>1</sup>

In regard to the IEP process itself, I wish it stood for "Individual Encouragement to Parents." If we could change it, I would change it. In many ways this public law has become our enemy.

-*Kathy Davis*<sup>2</sup>

Over the last eleven years we have seen what a legacy has been created. I can't imagine how it must feel to be a part of the creation of this sad, sad mess--where children are pariahs, their families are the enemy, "special" means "can't-be-done," and education has long been forgotten....For the record, the culture of the Special Education Administration is a closed-mouth, non-collaborative, non-responsive, anti-family fortress. Sincerely, *Ann M.3*

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<sup>1</sup> Oakland Unified Sch. Dist., 21 (1998-99).

<sup>2</sup> Parent, testifying at November 4, 1994 regional hearing of federal agency on disability in Des Moines, Iowa. National Council on Disability, IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: MAKING SCHOOLS WORK FOR ALL OF AMERICA'S CHILDREN 57 (1995). The Council, established as an independent agency in 1984, "work[s] with the President and the Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities." *Id.* at i, 253.

## Introduction

The process by which parents and school officials sit down once a year—if not more often—to collaboratively make decisions about the education of students with disabilities is a radical departure from the typical model for delivery of government services.<sup>4</sup> As one commentator observed a decade ago, this process or “arena for controlled interaction” is one which “places both parents and educators in highly unfamiliar—and often uncomfortable—roles.”<sup>5</sup>

When the Supreme Court first reviewed the federal special education statute,<sup>6</sup> it envisioned parental involvement this way: “[P]arents and guardians will not lack ardor in seeking to ensure that handicapped<sup>7</sup> children receive all of the benefits to which they are entitled under the Act.”<sup>8</sup> Standing in

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<sup>3</sup> Excerpt from an e-mail message to S.P., a California school district special education manager, March 1, 2001 (on file with author).

<sup>4</sup> David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 168 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> The Education for All Handicapped Children Act of 1975 (Pub.L. No. 94-142, 89 Stat. 773).

<sup>7</sup> I strive for “people first” language in this Essay in describing “*students with disabilities*” or “*children with disabilities*,” but use the historically appropriate “handicapped,” when it is a legal term of art or part of a direction quotation. Unlike other marginalized groups in our society, I am unaware of any youth disability rights movement reclaiming epithets like “retard” or “moron” for children in specialized education programs, although some adult activists do use “crip” or “quad” in self-reference. See, e.g., John Hockenberry, MOVING VIOLATIONS: WAR ZONES, WHEELCHAIRS, AND DECLARATIONS OF INDEPENDENCE 31, 87, 220 (1995). On the practice of self-naming and appropriation of prejudicial terms, see Stephen A. Rosenbaum, *The Alien Cloak of Confidentiality: Look Who’s Wearing It Now*, 4 JOHN F. KENNEDY L. REV. 23, note 8 (1992).

<sup>8</sup> Board of Education v. Rowley, 458 U.S. 176, 209 (1982) (citation omitted). The Senate Report on Public Law 94-142 referred to the importance of the IEP meetings as an extension of the evaluation and placement process and as a means for parents to frequently monitor their child’s progress. S.REP. No. 168, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 11, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1435.

stark contrast to the law is the frustration and anger expressed by parents like Kathy Davis and Ann M.

Even before studies were conducted, observers of the shift in federal special education policy after passage of the Education for All Handicapped Children Act<sup>9</sup> predicted “far less effective cooperation between school and parents,” perhaps culminating in “open warfare.”<sup>10</sup> In a survey of parent-administrator interactions conducted more than twelve years ago, researchers discovered that “[m]ost parents describe themselves as terrified and inarticulate” when confronting the special education planning team, perceiving the process as “judgmental rather than...cooperative” and experiencing “feelings of vulnerability and disempowerment”<sup>11</sup> rather than influence and mutual respect.

The parental reaction is all the more troubling because, in theory, parents of students with disabilities have been granted more control over the education of their children than almost every other parent in the nation's public schools,<sup>12</sup>

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<sup>9</sup> The Act since has been renamed the Individuals with Disabilities Education Act (IDEA) and was most recently amended in 1997. 20 USC §1400 *et seq.*

<sup>10</sup> Guy Benveniste, *Implementation and Intervention Strategies: The Case of PL 94-142*, in David L. Kirp & Donald N. Jensen, eds., *SCHOOL DAYS, RULE DAYS* 156 (1986).

<sup>11</sup> Engel, *supra* note 4 at 188. *See id.* note 4 for details on the survey methodology. One commentator adds: “Most parents...would confess that it is often difficult to keep a rational perspective when dealing with their own children.” Anne P. Dupré, *Disability, Deference, and the Integrity of the Enterprise*, 32 GA. L. REV. 393, 493 (1998).

<sup>12</sup> Professor Engel notes that outside the disability context, the requirements for face-to-face meetings and cooperative planning are something that few public school parents and teachers would expect. Engel, *supra* note 4 at 187. However, there are parent involvement parallels for other students with special or compensatory needs, *e.g.*, those enrolled in bilingual or migratory education programs. *See* Stephen Rosenbaum, *Educating Children of Immigrant Workers: Language Policies in France & the USA*, 29 AM. J. OF COMP. L. 429, 450-51 (1981) & notes 167-69. On the importance of parental involvement in a variety of educational issues, *See* Ronald S. Brandt, ed., *PARTNERS: PARENTS & SCHOOLS* (1979). Unfortunately, an individualized learning program for *all* school-age children, developed jointly by school and family, is a mandate waiting to happen. *But See* Assembly Bill 1238, introduced during the

through an elaborate planning and review process founded on principles of due process. Parental rights include notice of the individualized planning meeting and the rights to attend and invite others, review a child's records, to request an independent evaluation, receive notice of change of placement, and to withhold approval of changes in placement or service.<sup>13</sup>

One commentator asserted early in the life of the federal special education law that the statute focuses on the parental role in order "to prod districts into implementation."<sup>14</sup> In effect, parents are "the logical agents of change" where there is no forceful oversight by state or federal agencies.<sup>15</sup>

To some extent the tension that has always been inherent in the Individualized Education Program or IEP<sup>16</sup> procedures has become intensified with the growth of the "full inclusion" movement. While not a legal term of art, full inclusion," or simply "inclusion," refers to the mainstreaming of students with disabilities into regular classes, and participation in activities of the total school environment.<sup>17</sup>

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2001-03 California legislative session, establishing a "personal learning agreement" for low-achieving students to be developed by a team at participating schools, at [http://www.info.sen.ca.gov/pub/bill/asm/ab\\_1201-1250](http://www.info.sen.ca.gov/pub/bill/asm/ab_1201-1250). See also, Martha Minow, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 94 (1990) on the possibility of extending the individualized approach to *all* students—from gifted to disabled-- where "the very meaning of 'different' is remade."

<sup>13</sup> See 20 USC §§1401(a) (20), 1415(b) (1); 34 CFR §§300.500- 300.528.

<sup>14</sup> Benveniste, *supra* note 10 at 153.

<sup>15</sup> *Id.*

<sup>16</sup> The IEP, perhaps the one part of special education jargon known to the general public, is a written statement of a child's educational needs and specific goals, and methodologies for meeting them. 20 USC §1401(19); 34 CFR §§300.340 – 300.350. To speak of the "IEP procedures" or "IEP process" involves everything from the team deliberation and drafting of the statement to its implementation by instructional personnel and specialists to its revision and redrafting by the IEP team of parents, school officials and independent evaluators.

<sup>17</sup> On the educational philosophy and practices, see, e.g., Ann T. Halvorsen & Wayne Sailor, *Integration of Students with Severe and Profound Disabilities: A Review of Research* in Robert Gaylord-Ross, ed., ISSUES AND RESEARCH IN SPECIAL EDUCATION 110-173 (1990); Mary A. Falvey, *Inclusive & Heterogeneous Schooling* (1995); Pam Hunt & Lori Goetz,

This is the ultimate “least restrictive environment” as that term has been used in statutory and decisional law.<sup>18</sup> In addition, the congressional reports accompanying the most recent amendments to the IDEA<sup>19</sup> support a stronger role for parents, with an emphasis on public agency and parent partnerships.<sup>20</sup>

Many manuals and fact sheets produced in recent years, by government agencies<sup>21</sup> and non-governmental organizations,<sup>22</sup> attempt to help parents wend their way

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*Research on Inclusive Educational Programs, Practices, and Outcomes for Students with Severe Disabilities*, 31 J. OF SPECIAL EDUCATION 3-29 (1997); Gail MacGregor & Timm Vogelsberg, *INCLUSIVE SCHOOLING PRACTICES* (1998). See also, Michael A. Rebell and Robert L. Hughes, *Special Educational Inclusion and the Courts: A proposal for a New Remedial Approach*, 25 J. OF L. & EDUC. 523, 537-45 (1996) for an overview of the inclusion and “placement diversity” advocacy perspectives.

<sup>18</sup> One of the landmark decisions upholding the inclusive education concept is *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994) (combining factors from various circuits to determine appropriateness of full inclusion placement). Attorney Kathryn Dobel gives a personalized account of this case in *Representing Rachel*, 5 UC DAVIS J. JUV. L. & POLICY 219 (2001). For criticism of the full inclusion model, see, e.g., Dupré, *supra* note 11; Anne Proffitt Dupré, *Disability and the Public Schools: The Case Against Inclusion*, 72 WASH.L. REV. 775 (1997); Theresa Bryant, “Drowning in the Mainstream: Integration of Children With Disabilities after *Oberti v. Clementon School District*,” 22 OHIO N.U. L. REV. 83 (1995); and Tamara Wong, *Falling Into Inclusion: Placing Socialization over Individualized Education*, 5 UC DAVIS J. JUV. L. & POLICY 275 (2001).

<sup>19</sup> “IDEA” is the acronym for the current federal special education statute. See *supra* note 9.

<sup>20</sup> See H.REP. No. 95, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 82, *reprinted in* 1997 U.S. CODE CONG. & ADMIN. NEWS 78, 79 and SEN.REP. No. 17, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4-5.

<sup>21</sup> See, e.g., Oakland Unified Sch. Dist., *SPECIAL EDUCATION PARENT HANDBOOK*, *supra* note 1; Area Board 4 on Developmental Disabilities, *INCLUSIVE EDUCATION: A GUIDE FOR FAMILIES, EDUCATORS AND ADVOCATES* (n.d.); and Minnesota Dep’t of Children, Families & Learning, *MAKING THE TRANSITION TEAM WORK* (1997).

<sup>22</sup> See, e.g., Protection & Advocacy, Inc. and Community Alliance for Special Education, *SPECIAL EDUCATION RIGHTS & RESPONSIBILITIES*, ch. 4 at 1-32(8<sup>th</sup> ed. 2000); Ellen S. Goldblatt, *18 Tips For Getting Quality Special Education Services for Your Child* (Jan. 1, 1997), at <http://www.pai-ca.org/pubs/401601.htm>; Bazelon Center for Mental Health

through this process. While they may be instructive or insightful, these primers do not necessarily equip parents for the operational or implementation – not to mention emotional -- issues that are likely to surface throughout their child’s educational career, much less for tackling systemic problems.

In this article, I explore some of the ways in which parents can more effectively participate in educational decisionmaking and oversight.<sup>23</sup> I begin by describing the limitations of litigation against local school districts and problems of the parent-school team mechanism in responding to demands for long-term change. I then suggest forms of advocacy and problem resolution that may better advance parental objectives.

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**[CARTOON #49 “Looking for Luck”-- Michael F. Giangreco, *Flying By the Seat of Your Pants: More Absurdities and Realities of Special Education* © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission.]**

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Law, *Una Nueva IDEA* (1998); and Barbara E. Buswell & Judy Veneris, *BUILDING INTEGRATION WITH THE IEP* (1998). See also the website established by FAPE (Families & Advocates Partnership for Education), at <http://www.fape.org>, for multicultural, family and advocate-oriented materials. FAPE is one of a network of parent-directed PTIs or “parent training and information centers” authorized by Congress to educate and train parents on their rights under IDEA. 20 USC §1483 (2001).

<sup>23</sup> My perspective is informed not only by my professional experience as a litigator with Protection & Advocacy, Inc. in California, part of a federal network of non-profit organizations representing people with disabilities in the attainment of their legal, service and human rights. 42 USC §6000 *et seq.* (2000). I am also the father of David Rafael, a young teenager with significant developmental and physical disabilities, who has been in full inclusion classrooms since kindergarten. Moreover, I have served for several years on the Berkeley school district’s committee which oversees the Berkeley Parents Advisory Comm’ee v. Berkeley U.S.D. settlement agreement (No. C88-3001)( N.D. Cal.), and on the now dormant Inclusive Education Advisory Committee. Some of the observations I make in this Essay are not based on any one conversation. I have chosen not to reveal the names of individuals or school districts where this would breach confidentiality, cause embarrassment or otherwise damage a relationship.

### A List of Limitations

The IDEA is grounded in legal rights -- rights that speak more to procedural protections for children and their families than to any substantive standard of educational quality.<sup>24</sup> Parents are assigned a substantial role in decisionmaking, aptly characterized as “significant bargaining power,”<sup>25</sup> through the IEP. It is one thing to say that school districts and parents must jointly plan a youngster’s education,<sup>26</sup> but quite another to actually put this into practice, balancing the needs for strong student advocacy, respect for professional judgment and a continuing constructive relationship.

One commentator describes the IEP model for resolution as taking the form of a “contract” or “political deal” between family and school. When that model does not work, she posits, the district must turn to a “managerial discretion” approach in which decisionmaking is deferred to an education administrator or manager.<sup>27</sup> The deference does not always work so easily in real life.

Frustrations inherent in the planning process do not all stem from mutual hostility or from parental feelings of

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<sup>24</sup> *Rowley*, 458 U.S. at 193-95.

<sup>25</sup> Bruce Meredith and Julie Underwood, *Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education*, 24 J. OF L. & EDUC. 195, 200 (1995). The parent-school relationship, according to one commentator, is unlike the typical “continuing relationship” insofar as it is highly regulated by statute and involves a government agency and its clients, rather than two private parties. Engel, *supra* note 4 at 167 & note 4.

<sup>26</sup> *Rowley*, 458 U.S. at 176 (state and local education agencies to plan education in cooperation with parents).

<sup>27</sup> Dupré, *supra* note at 463 (citing Professor Lon Fuller’s discussion of polycentric problem-solving). See also, David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in Kirp & Jensen, *supra* note 10 at 36 (quoting an anonymous policymaker who, notwithstanding the protestations of the National School Boards Association, described the IEP“ as a way of individualizing and contractualizing the relationships and involving parents in the process...While it’s said not to be a contract, it is a contract for service delivery.”).



intimidation and vulnerability.<sup>28</sup> Sometimes, there is simply an inability to “get things done,” notwithstanding clearly written goals and objectives and a plan of action. One parent, herself a university trainer of special educators, set out a very detailed chart of her issues and concerns for an upcoming meeting with the special education director. In the “Issues” column, e.g., she wrote:

Accountability:

- Timeliness of Response
- Lack of Response

In the corresponding “Concerns” column, she listed:

- Huge delay between team meeting and actually getting formal IEP document
- Meeting Oct. 23, 2000; received IEP Jan. 9, 2001
- School principal has not been involved in any team meeting
- Lip service, lack of timely, if any, follow-through
- No case manager
- Action only when parents initiate or put other systems in place.<sup>29</sup>

Unfortunately, what appears to be a basic parental expectation about accountability and an almost mundane menu of service delivery gaps ends up as the fodder for protracted meetings, correspondence or administrative or judicial filings. This is the stuff of which many disputes are made and one ought not need to “make a federal case” of it to reach resolution.

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<sup>28</sup> Professor Engel’s study found that “[m]ost parents describe themselves as terrified and inarticulate” in approaching team planning meetings. Engel, *supra* note 4 at 188. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decisionmaking...” *Id.*

<sup>29</sup> Chart prepared by Kathy D. and presented to Dr. G., Jan. 18, 2001 (on file with author).

Before Congress' adoption of a special education statute, it was the filing of lawsuits, together with the momentum of the disability rights movement, that opened the doors of the nation's schools and classrooms to disabled students. The resulting court orders and consent decrees formed the cornerstone of concepts that have since been codified in federal and state law.<sup>30</sup>

Since the passage of IDEA, lawsuits have been filed against local and state school authorities attempting, like most public interest litigation, to "force large, politically unresponsive bureaucracies to follow the clear mandate of the law."<sup>31</sup> Litigation is also effective as part of a larger strategy to increase public awareness, deter illegal agency action or force the disclosure of facts.<sup>32</sup>

Yet, litigation is by no means the ideal vehicle for enforcing statutory rights, in part because it simply heightens the adversarial nature of the relationship between school and family. In one case that ultimately advanced the jurisprudence, by expanding the concept of less restrictive classroom placement, the court nevertheless remarked: "It is regretful that this matter has ended up in litigation where the parties are pitted against each other instead of working together. It is

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<sup>30</sup> For an overview of the key events-- in the judicial, legislative, research and grassroots arenas--culminating in adoption of special education legislation, see Rebell & Hughes, *supra* note 17 at 527-36 and Neal & Kirp, *supra* note 17 at 345-48. "The civil rights movement and the War on Poverty provided the key ideas and context for the movement on behalf of handicapped people." *Id.* at 346.

<sup>31</sup> John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1135 (1976) (citations omitted). Professor Denvir writes about agencies as varied as the welfare department, housing authority and redevelopment agency. He also describes a suit brought against a state board of education for improperly placing a Spanish-speaking child in a class for what was then known as "educable mentally retarded" students. Once the lawsuit was publicized in the press, however, the board agreed to retest the children and reduce cultural bias in the testing process. *See id.* at 1138.

<sup>32</sup> *See id.* at 1136-37. *See also* Randy Shaw, THE ACTIVIST'S HANDBOOK: A PRIMER 206 (2001) (litigation can be part of a broader strategic effort to provoke public scrutiny).

difficult to imagine a worse scenario from the point of view of the child.”<sup>33</sup>

In another case, the court wrote:

[L]itigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must—despite any bad feelings that develop between them—continue to work closely with one another.<sup>34</sup>

According to the critics, lawyers aggravate the process. They sow hostility, delay, expense and mistrust of administrators and thereby inhibit reliance on professional judgment.<sup>35</sup> Equally distressing is the perception that parents accomplish their goals only by bullying their way, with threats of due process hearings<sup>36</sup> or suits.<sup>37</sup> It is not simply harried or disgruntled school officials who have complained. Parents,

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<sup>33</sup> *Oberti v. Bd. of Educ.*, 789 F. Supp. 1322, 2337 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3d Cir. 1993).

<sup>34</sup> *Clyde K. and Sheila K. v. Puyallup Sch. Dist.*, No. 3, 35 F.3d 1396, note 5 (9<sup>th</sup> Cir. 1994).

<sup>35</sup> *See e.g.*, Neal & Kirp, *supra* note 27 at 355-57. In reviewing early implementation studies of the due process aspects of the federal statute, Professors Neal and Kirp write: “Parents generally reported both considerable expense and psychological cost in the hearing process. They often felt themselves blamed either for being bad parents or for being troublemakers.” *Id.* at 355. *See also*, Dupré, *supra* note at 445-46 and note 294 (IEP team forum is overtaken by protracted legal battles in which parents challenge academic judgment of other team members).

<sup>36</sup> *See* 20 USC §§1414(b) & 1415 for description of IDEA procedural safeguards and 34 CFR §§300-503 - 300.512 for due process notice and hearing procedures.

<sup>37</sup> School districts “may choose to mollify an unsatisfied parent” rather than proceed with a costly and time-consuming hearing process. Meredith and Underwood, *supra* note 25 at 200. *See also*, discussion of the special education administrative mindset in notes 60, 77, 79 *infra*. Professor Engel quotes a parent in his empirical study as saying, “I really think that unless you open your mouth and you fight, you have no say what goes on with your kid.” Engel, *supra* note 4 at 193. *See also*, the 1994 testimony of one parent at a public hearing in Milwaukee: “I have come to call myself ‘Bonnie the bitch’ because of what I have had to become to fight the system...” National Council on Disability, *supra* note 2 at 123.

too, have been found to be dissatisfied with some of the formalized adversarial proceedings.<sup>38</sup>

Even where litigation has been successful in addressing systemic education issues,<sup>39</sup> the courts are becoming less receptive to class actions concerning special education rights and services.<sup>40</sup> The Ninth Circuit has set a particularly high standard for exhaustion of administrative remedies. In *Hoelt v. Tucson Unified Sch. Dist.*,<sup>41</sup> parents of four disabled children sued a local school district for not providing “extended year” services to their children beyond the regular school year. Two of the claims involved a challenge to policies as unlawful on their face.<sup>42</sup> The Court of Appeals held that plaintiffs had failed to pursue their remedies under IDEA, as they had not allowed the state education agency an opportunity to consider and correct errors in local district policy through its investigation procedure before proceeding to court.<sup>43</sup> That the state department of education

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<sup>38</sup> See e.g., Steven S. Goldberg & Peter J. Kuriloff, “Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education,” 42 EDUC. L. REP. 491, 492-93 (1987) (early research suggesting that hearing outcomes do not provide participants “a sense of subjective justice” and adherence to formal procedures may not be sufficient to satisfy perceptions of fair treatment or full participation during hearing).

<sup>39</sup> See, e.g., *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990) (action by two individuals on behalf of students with emotional disturbance) and *Roncker v. Walker*, 700 F.2d 1058, 1064 (6th Cir. 1983) (appellate court held District Court’s refusal to hold hearing on motion for class certification was error in action challenging restrictiveness of placements for students with mental retardation). For case studies of structural reform in Boston and New York City schools as the result of lawsuits, see Michael E. Rebell, *Educational Opportunities for Children with Handicaps*, in Barbara Flicker, ed., JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 23 (1990).

<sup>40</sup> But see, e.g., *Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1990), cert. denied, 452 U.S. 968 (1981); *José P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982). In both cases, the court found elements of class certification.

<sup>41</sup> 967 F.2d 1298 (9th Cir. 1992).

<sup>42</sup> These were claims that Tucson provided a uniform amount of extended year programming and that the parents were given inadequate notice of procedural rights and failed to state the reasons for denial. 967 F.2d at 1306-07.

<sup>43</sup> The court held that two of the claims were technical or factual in nature and the plaintiffs’ failure to exhaust deprived the court of the benefit of

had not timely responded to a complaint filed by the parents or even completed its investigation before the filing of the suit was discounted, as was the fact that the injunctive relief they sought was unavailable through the administrative process.<sup>44</sup>

This rigid reading of the exhaustion doctrine was reiterated more recently in *Doe v. Arizona Dep't of Educ.*,<sup>45</sup> where the court found that plaintiffs' claim—a local jail's failure to provide special education and related services to a class of all juveniles – was not systemic.<sup>46</sup> Any alleged illegal policy or practice by the jail authorities, the court held, was capable of relief that could be provided by a state administrative forum.<sup>46b</sup> In yet another Ninth Circuit case, the district judge dismissed the class action suit, ruling that before challenging an explicit policy to terminate speech and language therapy for over 400 secondary school students in a large urban school system, plaintiffs had to first exhaust their individual due process remedies in an administrative forum where injunctive relief was unavailable.<sup>47</sup>

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agency expertise and development of an administrative record. *See id.* at 1305-06.

<sup>44</sup> As to the former, the court found that as the state had requested an extension, its “failure to comply strictly with administrative time limits” did not outweigh the potential benefits of a written investigative report. *Id.* at 1308. On the inadequacy of injunctive relief, the court suggested that pursuing individual administrative determinations “would alert the state to local compliance problems and further correction of any problems on a state-local level. *Id.* at 1309.

<sup>45</sup> 111 F.3d 678 (9<sup>th</sup> Cir. 1997).

<sup>46</sup> The court held that a claim is “systemic” only when “it implicates the integrity or reliability of the IDEA dispute resolution procedures” or “requires restructuring of the education system” in order to comply with the Act. *Id.* at 682. Doe’s claim involved only “limited components” of the special education program – i.e. the deprivation of children at one facility that the state department didn’t know about. And, once alerted, the department took remedial action. *Id.*

<sup>46b</sup> *Id.* at 683-84.

<sup>47</sup> The case, *Charles v. Oakland Unified Sch. Dist.*, No. C99-296 (N.D. Cal), is unpublished and was curiously ordered not to be made a part of the court’s database. As one of plaintiffs’ counsel, I could not have written a more textbook illustration of an exception to the exhaustion doctrine than the Oakland speech and language policy: The district explicitly eliminated services to hundreds of middle and high school students in order to

Over time, the nature of the special education problem has evolved from the failure to identify, assess and/or place students to a question of appropriateness--or quality--of the classroom placement and related services. The ability to achieve those objectives through the individualized planning team process has become increasingly elusive. To effectively engage the district authorities, parents and their advocates must exercise a delicate mix of reserve and verve.

### **What's A Parent to Do?**

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preserve therapists for elementary students, which was tantamount to "robbing Peter to pay Paul." And, one of the plaintiffs had earlier filed a complaint with the California Department of Education (No. S-0341-98/99), in accordance with *Hoefl* and *Doe*, but the Department's corrective action plan was minimal and vague. The "exhaustion" hurdle, I surmised, was really on the part of a judge who had only recently ended supervision of a complex and multi-year class action school desegregation settlement.

*Focus on the Big Picture*

As with any agenda that must be accomplished in the space of an academic year, parents should have a short list of goals and objectives. “Goals and objectives” means more than the laundry list of specific learning expectations one has for the student and teaching staff. Choosing one or two things--macro or micro – should allow for some measure of success. Examples include: improving the skills of the instructional aide – or working to replace the aide; purchasing an assistive technology device; or truly implementing a behavior plan.<sup>48</sup>

The quality of the special education program and personnel are some of the hardest things to both insure and monitor. On the importance of recruiting and maintaining high quality staff, one parent wrote in a blistering note to a school administrator about the nonchalant hiring of an aide for her son:

... I can never truly determine why the [instructional assistant] support he requires, to be fully-included instead of fully-*excluded*, has been approached as casually as ‘look at whoever happens to walk in the door’ once a month.<sup>49</sup>

For this parent, her whole school year may need to be devoted to getting a proper aide or to clamoring for change in the district’s recruitment and hiring process.

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<sup>48</sup> It is essential to prioritize the grievances or shortcomings to be redressed. One can surely sympathize with my client whose disappointment and anger in not having a son with Tourette’s syndrome deemed eligible for special education services was compounded by unprofessional and damaging behavior at the hands of a temporary home instructor (Telephone Interview, March 22, 2001). Nonetheless, this parent must sort out her priorities: obtaining special education eligibility or trying to fire the teacher who no longer had contact with her son. Time and energy are only one consideration. Risking further alienation of, or distraction by, district administrators while working on her primary objective—eligibility—is another consideration.

<sup>49</sup> E-mail message, *supra* note 3.

The ritual of writing lengthy IEPs<sup>50</sup> should be reconsidered in instances where parents have confidence in the abilities of the instructional staff and the integrity of school administrators to follow through. This laborious practice seems to follow less from the law than from district or parent culture.<sup>51</sup>

At the risk of stating the obvious, an IEP—the *plan*--should be a document that is easy to follow on a daily basis by general education teacher, support teacher, therapist and paraprofessional alike. An IEP—the *meeting*--should be limited in time and have a focussed agenda. Parents and school staff are too busy to assemble around a table on under-sized chairs for a marathon session of reading aloud from reports that could be circulated in advance.<sup>52</sup>

There is also no need to engage in group wordsmithing, whereby a team scribe painstakingly handwrites goals and objectives in small boxes on pre-cybernetic forms of goldenrod, pink and canary. A district that promotes advance preparation, a smaller list of invitees, and more productive group time could go a long way to

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<sup>50</sup> Public Policy Professor Eugene Bardach posits that the IEP is perhaps the quintessential example of multi-party educational planning, albeit one “marked by not insubstantial piles of paperwork.” Eugene Bardach, *Educational Paperwork*, in Kirp & Jensen, *supra* note 10 at 128. It has the potential to serve as a “useful attention-focusing” device for divergent or opposed interests, who might otherwise lack a forum for participation. *Id.* at 127-28.

<sup>51</sup> Several years ago, commentators observed the phenomenon of formalistic IEP meetings and routinely written legalistic reports. Benveniste, *supra* note 10 at 156-58 and Neal & Kirp, *supra* note 27 at 353. Education Professor Benveniste noted that so-called “legal regulatory” school districts worship forms over function. *Id.* Professors Neal and Kirp reported on second-hand accounts of two IEP prototypes: the legalistic meeting “in which half the time is devoted to narrow procedural requirements” or “the parent is pressured to sign on the dotted line...” This was contrasted with the child-oriented meeting “faithful to the spirit of the law.” *Id.*

<sup>52</sup> The IEP “can easily run five or six single-spaced pages,” Professor Bardach wrote some fifteen years ago. Bardach, *supra* note 50 at 129. He also noted about joint planning generally that “[t]he more parties involved in the plan...the less likely it is to be meaningful.” *Id.* Plans can easily exceed six pages in length and the team membership can be unwieldy.



insuring satisfaction with both process and outcomes. In addition, training for parents and staff -- with an emphasis more on group decisionmaking dynamics than legalistic elements of the IDEA -- will also improve the IEP process.<sup>53</sup>

### *Acknowledge The "Other Kids"*

One of the factors to be explicitly considered by the district in placing a disabled student in a general education classroom is the effect of that student's presence on the classroom environment and on the education the other children are receiving.<sup>54</sup> Like the cost of providing a child's program, this factor is a big invisible elephant sitting at the tiny formica IEP table.<sup>55</sup> It is sometimes mentioned in whispers.

Although it is counter to the statutory and case law and the philosophical underpinnings of an individualized planning process, parents should themselves consider how their child's program may impact on the larger classroom or school community.<sup>56</sup> Sometimes it will be useful to explicitly acknowledge this at a meeting and other times it is an element to be considered as part of one's advocacy approach. The value is both pragmatic and strategic.

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<sup>53</sup> On the need for more parent training about special education rights and procedures, *see, e.g.*, National Council on Disability, *supra* note 2 at 104-05, 114 and Christopher Borreca, Lucretia Dillard & Michael O'Dell, *The Adversarial Process: Helpful or Hurtful to Achieving the Ends of the IDEA?* in LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 10 (1999).

<sup>54</sup> *See, e.g.*, *Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5<sup>th</sup> Cir. 1989); and *Sacramento City Unified Sch. Dist.*, 14 F.3d. at 1401, 1404. The inquiry involves not only whether there are any disruptive behaviors, but the extent to which the child with a disability requires the teacher's attention to the exclusion of the other students.

<sup>55</sup> Actually, the image I prefer for the fiscal component is that of a big dollar sign hanging over the table.

<sup>56</sup> I do not, however, share the view of some commentators that a child's IEP is "not a proper setting for assessing and implementing an inclusion program" simply because one must identify the impact of the disabled student's presence on others. *Rebell & Hughes, supra* note 17 at 565.

Understanding how a child fits into the larger educational picture allows a parent to think through the fiscal and logistical implications of a particular classroom placement or purchase of services. This enhances bargaining power at the IEP or mediation table. Strategically, it is often useful to acknowledge the constraints or concerns of other players, whether it be the special education administrator, classroom teacher or parents of children without disabilities.

One critic chides inclusionists for their failure to take account of the non-disabled students: "The full inclusion advocates, in their zeal to elevate placement over academic achievement, seem uninterested in a searching examination of the extent to which academic achievement is a function of the classroom as a community."<sup>57</sup> Without giving credence to this observation, it is fair to say that an educational scheme for disabled students which is driven by individual rights may indeed overlook the interests of the larger school community. To that end, a decisionmaking process that involves more stakeholders in the school community may be welcome.<sup>58</sup>

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<sup>57</sup> Anne Proffitt Dupré, 72 WASH.L.REV *supra* note 8 at 842. The inclusion movement perhaps has heightened tensions already existing between special education teachers and advocates on the one hand and the rest of the education community. There are too few resources to distribute equitably amongst all children with disabilities, much less between disabled and non-disabled students. Neal & Kirp, *supra* note 27 at 359. Professors Neal and Kirp argued a number of years ago that the potential for IDEA to distort the allocation of resources "is aggravated by the legal model which treats the parties to a dispute [disabled students and special education administrators] as discrete from the system in which they are located." *Id.*

<sup>58</sup> Policy advocates Michael Rebell and Robert Hughes have proposed a "community engagement dialogic" model to address the broader school and community interests, in particular where it would help to successfully implement inclusion policies on a district basis. Rebell & Hughes, *supra* note 17 at 568-74. This "CED" model involves six steps of broad-based community participation, agenda setting, discussion, ratification of policy resolutions, implementation and evaluation/reconsideration. Key to its success is the role played by a "community dialogue organizer (CDO)," who remains strictly neutral as a facilitator while actively promoting the public interest. This exercise in dialogue may be useful for introducing new educational practices or concepts, such as "inclusion," or even for a periodic program review. However, it can never take the place of the

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**[CARTOON #87 “Incredibly Excessive Paperwork” --  
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*Don't Fight the Wars of Attrition*

“Why do *we* always have to be the ones to make sure it happens?” That has become the special education parent’s refrain. Sometimes the only answer that comes to mind is the same one that our own parents told us, not necessarily leaving us convinced of their wisdom: “Just because.” Ann M. writes:

The silence and inaction are systemic...

Administration means a body will show up, then go away until the next time, when the issues are still the same and the team merely restates the obvious. There is no follow through unless the family takes it upon themselves to dog the system far beyond any reasonable person's patience.<sup>59</sup> There is no compliance unless the family secures legal backup, and even then the district feels no urgency or responsibility to comply.<sup>60</sup>

This is a complaint that transcends class as well as educational and cultural background. It can be uttered by people like Kathy D., who is a married, white university professor living in a middle class Bay Area community or by Francisco R., an ex-Marine, divorced father residing in an East Oakland *barrio*, who shared his own chronicles about “*los*

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student-level decisionmaking that is required in designing and implementing a program of support for students with disabilities—or any other school population or subgroup.

<sup>59</sup> The National Council on Disability came to almost the same conclusion after taking testimony on parent participation in ten cities a few years prior to the reauthorization and amendment of IDEA: “...parents must assume the at times daunting responsibility to ensure that their children receive appropriate services.” National Council on Disability, *supra* note 2 at 62.

<sup>60</sup> Excerpt from e-mail message, *supra* note 3.

*pendejos*” and non-compliance at a recent workshop for Spanish-speaking parents.<sup>61</sup> Perhaps it should not fall to parents to monitor the most mundane of IEP-determined follow-up tasks. But then, it may not be possible to have the power to make very detailed decisions about our children’s day-to-day education and not assume some of the unglamorous responsibility for overseeing implementation. Or, one can protest assumption of this task and attempt to restore it to its rightful “owners” —aides, teachers and administrators. One can also profit from the opportunity to get a first-hand view of classroom management and school administrative dysfunction and store it away in the intelligence file for future skirmishes.

The military and espionage metaphors cannot be overstated. In a bold display of the bunker mentality, one administrator recently shared her IEP maxims with a conference audience – spelled out on the *de rigueur* overhead transparency :

1. Law is not fair.
2. Law is not logical.
3. It is almost always about money.  
(Unless it’s a righteous cause, then be afraid).
4. Ten percent of your cases will take ninety percent of your time.
5. The best way to avoid going to court is to be completely ready to go.
6. There is no way to surrender.<sup>62</sup>

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<sup>61</sup> Francisco R. made his comments at a March 21, 2001 workshop at the Centro de Vida Independiente in Oakland. See text acc. note 29 *supra* regarding Kathy D.

<sup>62</sup> These are the “Rotter’s Rules” utilized by Kathleen M. Rotter, Ed.D., *Managing Due Process in Special Education Cases: ‘The Court Proof IEP Process’ in LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 1 (1999)* (handbook on file with author). Professor Benveniste must have had the Rotters of the world in mind when he wrote fifteen years ago about “IEP reports...less designed to address the problems of the child than to defend the district against potential attack.” Benveniste, *supra* note 10 at 156. See also, Neal & Kirp, *supra* note 27 at 355 on schools’ defensive strategies. But See the “talking points” put forward by Texas schools’ defense counsel as reasons for

Cynicism on the part of educators is an unfortunate by-product of the special ed wars and sometimes it breeds an inappropriately displayed black humor.<sup>63</sup>

The thirst for battle is not exclusively on the part of district officials.<sup>64</sup> School district counsel can regale students' attorneys with tales of parents who litigate for the sake of it. It is said that they lose perspective and cannot seem to get out of combat mode. Sometimes these tales are harmless, but inaccurate, expressions of the lawyer's—and her administrator client's—own frustration. Sometimes they are a strategic ploy. And, sometimes they contain a kernel or more of truth about one's own client. Katy L. is one such client. After an initial bout with her small Silicon Valley school district, in

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parent-school hostility, *e.g.*, overemphasis on procedural protections, as opposed to substantive guarantees, and treatment of parents as “a required nuisance” rather than members of a team. Borreca, *et al. supra* note 53 at 7,9. The attorneys' parting advice is: “Be kind, be gentle, be respectful.” *Id.* at 11.

<sup>63</sup> Joking and venting in the faculty (or cocktail) lounge is one thing, but the crude performance I witnessed at a recent convention of a special education professional association was quite another. The group's parent organization has been a major federal lobbyist on behalf of disabled children, with 90% of its membership composed of special education teachers. Neal & Kirp, *supra* note 27 at 347 & note 25. One keynote speaker—a national yo-yo champion and former administrator – began his *schtick* with a transparency depicting three raccoons next to a pig wearing a mask. “Who's the one trying to fit in?” he asked his audience in an obvious attack on the full inclusion philosophy. He continued with a story about a boy named Fidel --“Ever notice how they always have names like Fidel?”-- whose finger was constantly thrust in his nose and who could never find his way home. Most of the audience of special educators was in stitches. Interestingly, the mockery came not from critics of the law protecting disabled students, but from its supposed supporters. On the phenomenon of popular backlash against disability rights legislation, See Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 493 (2000) (efforts to subvert or de-legitimate new legal regime may include parades of horrors supported by vivid anecdotes, rhetorical attacks and derisive humor leveled at the law).

<sup>64</sup> See Benveniste, *supra* note 10 at 156 (noting the “open warfare” in so-called high conflict school districts and perceived adversary role of parents, even where “belligerent parents” are small in numbers) and Neal & Kirp, *supra* note 27 at 355 (on generalizing about parents and stereotyping).

which we succeeded in keeping her “behaviorally challenging” son Ran in a regular fourth grade classroom, there was no shortage of issues on her agenda—some big and some small. The IEP process was interminable and Katy filed compliance complaints with the state education agency<sup>65</sup> right and left, as one mediation merged into the next. The district eventually sought a restraining order to change Ran’s placement<sup>66</sup> and the saga is still on-going.

At times, parents must simply cut the administration some slack. Just because the district is out of compliance on a notice issue, the procurement of a service, or the timing of a meeting does not mean one should fire off a letter to the state complaints and monitoring unit, any more than one automatically resorts to filing a judicial complaint because of a contractual breach or civil wrong. Discretion on filing must prevail,<sup>67</sup> and goodwill can come as much from withholding action as taking affirmative steps.<sup>68</sup>

It is not hard to see why parents, who must be ever-vigilant, develop a fighter’s instinct and a mistrust or skepticism that colors all thinking about what their children need or what services they *should* be receiving.<sup>69</sup> Moreover,

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<sup>65</sup> State education agencies are required to adopt complaint procedures for alleged violations of state or federal special education laws or non-compliance with a child’s IEP. See 34 CFR §§300.660- 300.662 and 5 CCR §§4640-4670. See *infra* note 92 on “grievance overkill.”

<sup>66</sup> Oak Grove Sch. Dist. v. R.L. (Santa Clara Co. Superior Court No. CV 973347 (Oct. 20, 2000)). The names of the mother and son are fictitious.

<sup>67</sup> Legal Aid folklore has it that new or deadwood attorneys suffer from a “fear of filing” when it comes to lawsuits, but the opposite can be said of the special education parent who is overly prone to filing a compliance complaint. Filing should be strategic in its timing and nature, and the complainant must understand the limitations of the investigative and corrective action processes.

<sup>68</sup> To file or not to file, however, should not be determined simply by a desire to preserve good relations with local school staff. One commentator notes that the strong desire of parents to maintain a relationship with the district, rather than assert claims against it, may lead to capitulation or unwarranted compromise. Engel, *supra* note 4 at 199.

<sup>69</sup> School personnel may perceive parent behavior as misplaced anger or sadness. Some schools’ attorneys posit that the due process hearing may serve as a substitute for parental grieving. Borreca *et al.*, *supra* note 53 at

there is no question that parents of disabled children are forever mindful of their own precarious social and psychological status.<sup>70</sup>

That IDEA has a built-in parent oversight component is no coincidence. It is a recognition of *individual* parental insight and *collective* political influence. Yet, parents do not always know best and do not always know *who* to trust or *when*—including themselves. Unfortunately, the uncertainty and ambivalence can lead more readily to warfare than to peace talks.

### *Respect Professional Judgment*

Parents are encouraged to delineate their own goals and objectives for their disabled youngsters, as a matter of law and sound educational practice. However, they are often either dependent on, or intimidated by, the professionals sitting on the IEP team. In interviews conducted in New York State in the late 1980s,<sup>71</sup> some of the reasons for this were

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7. Other commentators have noted that, unlike parents of non-disabled students, special education parents have considerable power to take out their frustration on staff as well as district personnel. Meredith & Underwood, *supra* note 25 at 57. Accord, Borreca *et al.* at 8, This was vividly conveyed to me at the end of a recent unsuccessful mediation session when Rob, a labor union activist and father of a high school student seeking a modest curriculum change, broke his long simmering silence by yelling “F--- You!” at the special education program specialist. As his lawyer, I had to be mildly apologetic, but as a fellow parent I could secretly empathize or rejoice.

<sup>70</sup> On the immense grieving and coping that accompany the birth and care of a child with a disability, *see, e.g.*, Audrey T. McCollum, *Grieving Over the Lost Dream*, in THE EXCEPTIONAL PARENT 9 (Feb. 1984); Jerry Adler, *What If Your Worst Nightmare Came True?* ESQUIRE 147 (June 1988). Professor Engel’s interviews also reveal a parental perspective that places one’s child as part of a larger school community—or community of children with disabilities – and avoids a “selfish” demand for more services. Engel, *supra* note 4 at 195-97(citing the now classic works by Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 19, 24-63 (1982) and Minow, *supra* note 12 at 105-12, 124-27, 131-39).

<sup>71</sup> See Engel, *supra* note 4. Although the study involved exclusively children with *physical* disabilities, I believe its findings ring true for other youths receiving special education instruction or services. According to

revealed. One mother complained of the patronizing tone from team members whose educational background and training were superior to hers.<sup>72</sup> The experience is not much different today, as parents describe the isolation, disrespect or marginalization they experience at an IEP meeting.<sup>73</sup>

It is supremely difficult for parents to know just when inclusion works and whether it works for their own child.<sup>74</sup>

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Engel, some findings indicate that some parents of *non-orthopedically impaired* youngsters—e.g. whose children received only speech therapy--were actually satisfied with the special education process. *See id.* at 97.

<sup>72</sup> *See id.* at 193, 112-113. The interviewee spoke of being intimidated by “those suit-and-tie guys” and criticized for not fostering her daughter’s independence (“Well, he said, are you sure that ‘Mother’ wasn’t afraid to let her go?... You can call me anything, but don’t talk down to me.”) *Id.* at 193. It is not simply distinctions in social class, as Professor Engel suggests, that lead to perceptions of patronizing behavior. It does not seem that long ago that I bristled when a doctor at the CCS (formerly “Crippled Children’s Services”) physical therapy clinic examining my young son addressed me directly as “Dad.” “I’m not your *Dad*” was my indignant unspoken response.

<sup>73</sup> *See, e.g.,* parent testimony at Boston and Milwaukee public hearings. National Council on Disability, *supra* note 2 at 107 (“I had a ninth grade education and I sat at [team meetings] with people I perceived to have the knowledge to teach my child and felt that, even though my gut told me it wasn’t right, they must know.”) and at 108 (“I was one of those parents who left...IEPs like someone who has left a foreign movie without the subtitles. I felt a very small and incidental part of this procedure...”).

<sup>74</sup> For studies of facilitated social interactions between students with and without disabilities, *see, e.g.,* Pam Hunt, Morgen Alwell, Felicia Farron-Davis & Lori Goetz, *Creating Socially Supportive Environments for Fully Included Students Who Experience Multiple Disabilities*, 21 JOURNAL OF THE ASS’N FOR PERSONS WITH SEVERE HANDICAPS 53 (1996) and SoHyun Lee & Samuel L. Odom, *The Relationship Between Sterotypic Behavior and Peer Social Interaction for Children with Severe Disabilities*, 21 JOURNAL OF THE ASS’N FOR PERSONS WITH SEVERE HANDICAPS 88 (1996). I recall the principal at my son’s elementary school introducing the teacher of “our included students” at an open house. In the same vein, I once overheard Zack, a middle schooler, telling his teacher that he had been waiting “with the other inclusion students.” In this sense, “included” simply becomes a euphemism for “retarded” or “special ed.” In fact, I just learned at David’s transitional IEP meeting that Berkeley High School has an “inclusion room.” How does this differ from a resource room or special day class? If one is truly “included,” the word itself should fade away as a modifier.



Advocates, too, may be uncertain and must rely on client and expert predilection.<sup>75</sup> Finding a neutral expert is no easier in this context than in civil litigation generally.<sup>76</sup> Not surprisingly, the parent who is unhappy with an assessment provided by district staff or a district contractor, tends to seek a specialist more amenable to his position regarding program eligibility, choice of placement, or need for services or therapy.<sup>77</sup>

Nevertheless, if the IEP team is to have any collaborative success, parents must find a way to be receptive to the analyses and recommendations made by specialists employed or retained by the school district, without always suspecting bias, incompleteness or incompetence.<sup>78</sup> This does

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<sup>75</sup> As Katy and Ran L's lawyer, *see supra* text acc. note 64, I was obliged to advocate zealously on their behalf. More often than not, however, I was uncertain about the appropriateness of a full inclusion setting for Ran as the parents and district officials came to such radically opposite conclusions.

<sup>76</sup> In a major appellate case favoring a full inclusion placement, the court relied exclusively on the testimony of the parents and their experts regarding success of the student in the regular classroom, discounting the testimony of the school district officials. *Oberti v. Bd. of Educ.*, 995 F.2d at 1210, note 10. *See also*, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 294-95 (7<sup>th</sup> Cir. 1988) (deferring to parents' experts on placement decision).

<sup>77</sup> The IDEA permits a parent to obtain an independent evaluation at public expense if, e.g., she disagrees with the accuracy of the school district's evaluation or classification. 20 USC §1415(b) (1); 34 CFR §300.502. In addition to specialized instruction, eligible students may also receive such "related services" as are required to benefit from special education, e.g., speech and language therapy, occupational or physical therapy, behavioral intervention, adaptive physical education, counseling and guidance, diagnostic medical services, etc. 20 USC §1401(22); 34 CFR §300.24.

<sup>78</sup> Some commentators have argued that the legalization of special education policy leads to a mistrust of schools and inhibits the discretion of professionals who may now find themselves in the role of defendants. Neal & Kirp, *supra* note 27 at 359. Another notes the tendency of some parents to distrust the school's assessment when exposed to outside advice. Benveniste, *supra* note 10 at 158. Professor Benveniste's early 1980s critique about distrust may be as valid today, but not necessarily because a parent seeks a private or "non-public" school placement.

not mean, however, that one must abandon rights or acquiesce.<sup>79</sup>

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**[CARTOON #3 “Tenacious Advocate” --Michael F. Giangreco, *Flying By the Seat of Your Pants: More Absurdities and Realities of Special Education* © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission.]**

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### *Articulate the Parental Perspective*

As a counterpoint to respect for professional judgment, parents must be willing to make interventions that are appropriate to their part as the child's primary caregiver. This may again be stating the obvious, but it is a role that has been obscured by specialists and bureaucrats who expect submissiveness<sup>80</sup> or gratefulness.<sup>81</sup> It is also a role forgotten

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<sup>79</sup> Professor Engel writes convincingly about the trust dilemma when he suggests that there are trade-offs in the emphasis on continuing relationships, rather than rights. Engel, *supra* note 4 at 199-203. Relatively disempowered parents “frequently forego the assertion of claims that could move their children out of segregated settings and inadequate programs.” *Id.* at 205. Only through power-sharing by members of the planning team and a commitment to a “relationships perspective” can there be more integration of children with disabilities in schools. *Id.*

<sup>80</sup> The submissive role may be all too easily assumed for members of some non-dominant cultural groups. Three Korean-born middle class mothers of children in special education classes told me recently that they have been taught to never question the teacher's authority. “It's part of our culture,” one of them said, echoing a trait to which a great many ethnic minorities lay claim. (Interview with author, March 28, 2001).

<sup>81</sup> Although writing about resistance to disability rights in another context – court opinions interpreting accommodation claims of disabled employees under the ADA—the remarks of English Professor Lennard Davis are *à propos* of how parents seeking supports or services for their children are viewed by school officials: When “special needs” are invoked, “too often the requester is seen as overly self-concerned, overly demanding.” Lennard Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 197 (2000). “Compliance is now seen as an act of ‘generosity’ with all its resonance of charity, almsgiving, philanthropy, and altruism—that general attitude that disability activism and laws have sought to change into a discussion of rights,

by parents who believe they are supposed to be educational experts themselves.<sup>82</sup> Parents *are* experts in knowing and raising their own children<sup>83</sup> and have the legal and moral obligation to plan for, and dream about, them.<sup>84</sup>

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fairness and equity.” *Id.* at 204. Professors Neal and Kirp wrote several years ago that special educators were inclined to view some parents as “ripping off” the school system, depriving other children of benefits...” Neal and Kirp, *supra* note 27 at 355. Again, the perceived “rip-off” or “looting the public treasury,” *id.* at 358, by today’s administrator is not necessarily because a parent seeks private placement, but may be due to her request for a one-on-one instructional aide or high-tech assistive technology.

<sup>82</sup> Not surprisingly, the level and quality of parental involvement varies according to wealth, formal education and child’s degree of disability. Benveniste, *supra* note 10 at 154. *See also* National Council on Disability, *supra* note 2 at 101 (former special education student from Boston attributed his success in school to his parents’ advanced education and relative wealth, which gave them “the ability and knowledge to essentially face down the educational system...”) and 122 (“...parents who are poor, or [from] minority communities, have other family stress or have limited English proficiency, continue to be disenfranchised,” according to a parent testifying at Philadelphia public hearing). The different perspective—or confusion—about what attitude or role should be adopted by the lay parent yields different responses in Professor Engel’s study: One parent confesses her being “unschooled as far as the therapies and teaching and whatnot” and not wanting to second-guess the professionals. In response, a planning team chair offered: “That’s a very intelligent approach to education. I wish more people felt that way...We are fallible too, but maybe we are a little better [able] to make a judgment than parents.” Engel, *supra* note 4 at 190 & notes 99-101.

<sup>83</sup> *See, e.g.*, Marilyn Patterson, *Being A Professional Parent*, THE EXCEPTIONAL PARENT 22 (Aug. 1983) and Patricia L. Howey, *Preparing for Team Meetings: The Parents’ Report to the IEP Team*, THIRD ANNUAL COPAA (COUNCIL OF PARENT ADVOCATES & ATTORNEYS) CONFERENCE L-1, L-3 (2000) (on file with author) on the important contribution parents make as information gatherers and accumulators of knowledge about their children through daily interactions with their child at home, with the family, in the community.

<sup>84</sup> The concept of “person-centered planning” is at the forefront of self-determinist disability thinking and is easily adapted to student “transition plans” for older students or IEPs generally in the IDEA context. *See, e.g.*, J. Stephen Newton, Robert H. Horner & Lori Lund, *Honoring Activity Preferences in Individualized Plan Development: A Descriptive Analysis*, 16 THE JOURNAL OF THE ASS’N FOR PERSONS WITH SEVERE HANDICAPS 207 (1991); California Dep’t of Developmental Services, INDIVIDUAL

It may be hard for non-lawyers to adhere to the jurist's maxim: reasonable people may differ -- but it is worth recalling this when confronting educators and administrators across the table. It has become almost a cliché for parents to bring cookies<sup>85</sup> to an IEP meeting—at least the *first* time—as a way to offset tensions and display friendliness and cooperation. Willingness to step outside of a district-conceived caricature or profile of a whiny or demanding parent will help to facilitate collaboration and mutual understanding. Parents should also try to be seen by school personnel and by other parents at times when they are not wearing their special ed parent hats.<sup>86</sup> Just like their children, they risk being pigeon-holed and stereotyped.

### *Organize!*

In what has become a classic text for community lawyers, a former legal aid attorney writes that there are four ways to help clients use the attorney's knowledge:

- “(1) informing individuals and groups of their rights,
- (2) writing manuals and other materials, (3) training lay advocates, and (4) educating groups for

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PROGRAM PLAN RESOURCE MANUAL: A PERSON-CENTERED APPROACH (2000), Capitol People First and Protection & Advocacy, Inc., *Your IPP (Individual Program Plan): It's Not Just a Piece of Paper*, at <http://www.pai-ca.org/pubs/401001.htm> (1998).

<sup>85</sup> Donuts, croissants, or even organic baby carrots, may be brought instead of cookies, depending on the culinary and cultural milieu or the statement one chooses to make.

<sup>86</sup> I took great pleasure in initiating construction of a poetry garden on a vacant plot at my son's elementary school. Quite apart from the intrinsic satisfaction, I was not oblivious to the fact that this allowed me to be seen by the principal, teachers and other parents not merely as the (demanding) father of a disabled child, but as someone who contributes to the greater good of the school community—including the leveraging of \$10,000 in gardening funds from the City Council. I also helped serve food at school events, wrote items for the PTA newsletter and actually enjoyed a level of “normal” school involvement that was *not* centered on developing and monitoring David's special education plan. It also helps to be the parent of other children *without* disabilities attending the same school.

confrontation. None is particularly glamorous, but all are extremely important.”<sup>87</sup>

Another experienced practitioner and law school clinician makes a similar observation in suggesting that there are two ways attorneys can empower people: first, individually within a “supportive attorney-client relationship” and second, through the process of group organizing in the public sphere.<sup>88</sup> Indeed, one commentator declares that “[c]ommunity organizing is *the* essential element of empowering organizational advocacy.”<sup>89</sup> Empowerment and self-advocacy approaches must therefore complement the traditional legal devices.<sup>90</sup>

Much of the literature about lawyers and organizers is directed at communities of color, poor people and other marginalized groups. Why should parents of children with disabilities be concerned about organization and mobilization?

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<sup>87</sup> Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1056 (1970). On the value of community legal education and lay advocacy, see Stephen A. Rosenbaum, *Pro Bono Publico Meets Droits de l'Homme: Speaking a New Legal Language*, 13 LOY. L.A. INT'L & COMP. L.REV. 499, 504-05 and publications cited in notes 29 & 31 (1991).

<sup>88</sup> Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 PUB. INT. L. REP. 49, 50 (1991). It is the second role that is the most challenging, largely because professional legal education does not promote organizing skills or the value of community work. Moreover, there are limited resources for advocates to do organizing work. *Id.* at 54.

<sup>89</sup> William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455, 456 (1994) (emphasis in original). Professor Quigley goes on to say that if an organization had to choose as its sole advocate an accomplished traditional lawyer or a good community organizer, “it had better, for its own survival, choose the organizer.” *Id.* In contrast to Quigley and others, Professor Trubek sees a leadership role for lawyers to “effectively promote transformative strategies.” Trubek, *supra* note 88, at 54. For more on the empowerment perspective, see articles cited in Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, note 3 (1992).

<sup>90</sup> In addressing ways to reverse resistance to the larger disability rights movement, one commentator notes that “while law can be very enabling, reliance on legal strategies can also be a problem in bringing about social change.” Michael S. Wald, *Comment: Moving Forward, Some Thoughts on Strategies*, 21 BERKELEY J. EMP. & LAB. L. 473, 474 (2000).

First, children with disabilities *are* a historically marginalized population, whose struggles or campaigns continue to be waged, if only to preserve the *status quo*. Second, as noted above, the fact that their and their parents' legal entitlement is procedurally strong, does not necessarily translate into substantive success in the IEP conference room, much less the classroom. Third, as a disabled children's parents subgroup, parents of color and those who are non-English speakers, immigrants, less educated or reside in poorer school districts, are not necessarily positioned to wield the legal club.

Sometimes, when discussions, negotiations, pleading or demanding go nowhere when pursued on behalf of one student by one family, it takes a larger voice to make the disability community heard.<sup>91</sup> This is particularly true with personnel or systemic problems, such as the lack of training of aides, the poor quality of support provided by a given teacher, the failure to establish a new school site for full inclusion classrooms, the lack of a private changing area for students who need assistance with personal hygiene.

These issues require the same kinds of tactics successfully used by other social groups seeking control over bureaucratic decisionmaking. It could take the form of letter-writing or calling meetings with high-level school authorities.<sup>92</sup> It could also mean speaking at public meetings of the Board of Education, mobilizing a large number of

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<sup>91</sup> Special education administrators do not like it when parents talk to each other. "Parents may get too much information" was the response of one Bay Area director to a request from a student teacher that the parents of middle school full inclusion students greet parents of incoming students at the middle school open house. Instead, the student teacher, herself a parent of a disabled child, passed out a simple questionnaire to parents of "included students," asking such harmless questions as: "In retrospect, what information do you wish you could have received prior to your child's entry into middle school?" and "What information regarding your experience at W— [School] would you like to pass on to elementary students?" (April 3, 2001 questionnaire) (on file with author).

<sup>92</sup> But, beware the tendency to write a four-page, single-spaced letter for the least infraction to the Superintendent, with copies sent to each member of the board of education, the local state representative and both United States senators. Parents would do well to subscribe to their own exhaustion of remedies doctrine before embarking on such "grievance overkill."

requests to convene IEP teams, the *en masse* filing of compliance complaints or due process hearing requests,<sup>93</sup> or contacts with the print or broadcast media.<sup>94</sup> It can be used to supplement a litigation strategy or, better yet, in lieu of litigation. To be successful does not take a large number of individuals, but it does mean having a narrow focus, a clear agenda and operating in a short time frame.

A few years ago, a key support teacher left the Berkeley schools at the end of the spring semester. The teacher had pioneered the full inclusion model at two different elementary schools and was instrumental not only in supporting a number of students, but in nurturing the still new concept of inclusive education.<sup>95</sup> Her departure would mean not only a loss for individual students who just had been placed successfully in regular classrooms, but a void at a critical juncture for the district. Despite requests from individual parents, the special education director would not commit to hiring a replacement who had the training or experience to run a successful inclusion program. In addition, she increased the caseloads of the remaining support teachers and dissolved the parent-teacher task force which had been

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<sup>93</sup> See *supra* note 65 on the filing of compliance complaints and requests for due process hearings.

<sup>94</sup> Successful organizing has been accomplished through the use of “media activism” in which members of a particular community are involved in the development and implementation of a media plan. Robert Bray, *SPIN WORKS!: A MEDIA GUIDE FOR COMMUNICATING VALUES AND SHAPING OPINION* 98 (2000). See also, Wald, *supra* note 90 at 475(media strategy has to be part of any mobilization effort to shape public opinion on the disability rights movement).

<sup>95</sup> The teacher, Morgen Alwell, a protégée of Professor Pam Hunt of San Francisco State University and outspoken in-house advocate of full inclusion, was also one of the researchers who facilitated social interactions between students with and without disabilities at this elementary school. See Hunt *et al.*, *supra* note 74. Successful implementation of inclusion can be achieved where institutions of higher learning or information and referral networks work in partnerships with school districts.

active in promoting inclusion and serving as an information clearinghouse and support group.<sup>96</sup>

Parents of the students at the affected school, together with a number of parents of “included students” at other sites, quickly rallied behind two ad hoc parent leaders. Following a few face-to-face meetings and many phone calls, the group agreed on the text of a letter. A temperate but forceful letter, signed by a number of parents, was faxed to the program director before the staff summer vacation.<sup>97</sup> By summer’s end, the director had agreed to a reconstituted task force, now designated an “advisory committee,” but there was no word on the new support teacher.

Days before school began, a new teacher was hired. It was evident to the parents from her professional background and initial interactions that she had no clue about working in a full inclusion environment.<sup>98</sup> They decided to give her a “probationary period” of sorts, before clamoring for her termination. After less than a month, the parents began complaining to the special education director—through faxes, a phone call-in day and eventually a meeting. Just before the winter holiday break, the new teacher was transferred to a special day class at another school and a replacement began just after the New Year. Where school years and the education of young children is concerned, the trial periods are of necessity very short. Despite the parents’ determination to

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<sup>96</sup> Some of these problems had already been alluded to in a survey conducted by the district’s information and referral network “partner.” See California Confederation on Inclusive Education Needs Assessment Summary of Berkeley U.S.D. (March 1996) (identifying “extensive need for assistance” to district’s full inclusion plans in areas of personnel, preparation and parent involvement) (on file with author).

<sup>97</sup> The parents also expressed dismay about the size of teacher caseloads and the qualifications of instructional assistants. Letter of July 16, 1997 (on file with author). Incidentally, changing technology benefits activists as much their disabled children: Today that same letter would be more expeditiously sent by *e-mail*, as the parent senders and recipient administrators are now on-line.

<sup>98</sup> Although cheerful and well-meaning, she failed to grasp concepts as basic as “curriculum adaptation” and asked parents to modify their children’s math homework assignments.



wait only two weeks before protesting, it still took almost a full semester to remove the teacher.

There is a downside to the absence of community organizing—even when the law appears to be favorable. For example, Paul S. and his parents sued the Santa Bonita school district<sup>99</sup> for using improper suspension and disciplinary procedures and for failure to identify Paul as a student needing special education services. A complaint and petition for writ of mandate<sup>100</sup> was filed in state court on behalf of taxpayers and Paul, a first grader, against the school district for violations of the California Education Code and IDEA concerning assessment for special education, referral to a community day school program and due process and equal protection violations. The case was not filed as a class action,<sup>101</sup> but the attorneys were hoping to make policy

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<sup>99</sup> Fictitious names are used here for the defendant school district and student plaintiff as the parties are barred from revealing any of the terms of the settlement. (Ventura Co. Superior Ct. No. CIV-193789). The student, from a poor Spanish-speaking family, was expelled from his regular school program for exhibiting unacceptable behaviors. The complaint charges that the District failed in its duty to assess Paul for specific learning disabilities or other eligibility for specialized instruction. Instead, he was referred to a “Student Study Team (SST),” which is a typical, but often inadequate, school district response to children who are not achieving at grade level. Many districts use the SST process to delay assessment or evaluation for special education eligibility. See *infra* note 108.

<sup>100</sup> Cal. Code Civ. Proc. §1085.

<sup>101</sup> California Rural Legal Assistance, my co-counsel in the Paul S. case, is prohibited from filing class action lawsuits under the terms of its grant from the Legal Services Corporation. 42 USC §2996e(d)(5). Neither Protection & Advocacy, Inc. nor its counterparts in other states operate under such a restriction. However, Rep. James C. Greenwood has asked the General Accounting Office (GAO) to conduct a study of class action litigation undertaken by protection and advocacy agencies across the country. (Telephone Interview with GAO Asst. Director Jim Musselwhite, April 5, 2001). One advocate of progressive lawyering writes that despite formal restrictions, if legal aid and non-profit lawyers are to achieve institutional change, they must engage in lobbying, power-brokering, organizing, educating and representing controversial clients. Angelo N. Ancheta, *Review Essay: Community Lawyering*, 81 CAL. L. REV. / 1 ASIAN L.J. 1363, 1399 (1993).

changes in the rural and largely poor Latino district, based on the experience of the one student.

A few weeks before trial, a recalcitrant superintendent agreed to some very basic policy clarifications and bilingual publication of the policies in parent notices and handbooks, allowing the case to settle.<sup>102</sup> The modest victory might have been greater had the plaintiff's legal team been able to mobilize a large number of parents to attend informational and training workshops in tandem with the lawsuit. As it was, the district authorities felt little public heat and almost no pressure from parents, except for the mother of Paul S. In the end, the goal of organizing is to make parent constituents an effective voice in making decisions about the education of their disabled children—with or without a lawyer at their side.<sup>103</sup>

### *Form Alliances*

Related to the need for organizing and mobilizing is the necessity of building alliances with other organizations that are not involved, exclusively, in special education or matters affecting persons with disabilities. Common sense suggests that there is truth in the slogan of farmworkers, immigrants, internationalists and other activists:

*¡El pueblo unido jamás será vencido!*<sup>104</sup>

Most organizers would agree that there is unity in numbers and more can be accomplished both long- and short-term if different interest groups unite around issues of common

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<sup>102</sup> Ventura Co. Superior Ct. No. CIV-193789. Petition for Order Authorizing Minor's Compromise (Feb. 13, 2001). The district refused any proposal that would invite Protection & Advocacy, Inc. to train teachers or parents or even a joint advocate-district training workshop. Even the suggestion of a joint press statement announcing the settlement -- as a positive and collaborative development -- was nixed by the superintendent.

<sup>103</sup> Professor Tremblay summed up the view of "rebellious advocates" this way: "[T]he most important function of mobilization is the creation of political influence that impacts upon the ability of the community to control bureaucracy—even in the absence of professional assistance." Tremblay, *supra* note 89 at 958.

<sup>104</sup> "The people united will never be defeated!"

concern.<sup>105</sup> In the schools context, there are a host of constituencies who could potentially form coalitions: parents of other subordinated or marginalized students. These include students of color, immigrants, speakers of English as a second language, gay and lesbian youth, students from families with incomes below the poverty level, and under-achieving students. There are as well the standard school and community groups: PTA, school board advisory committees, seniors' organizations, religious congregations and faith-based organizations, city commissions and other ad hoc government and educational associations.<sup>106</sup>

That these organizations exist does not mean the alliances are easily forged. It can take a long time to eradicate barriers, demonstrate areas of mutual concern, raise consciousness and build trust and confidence. Sometimes groups can meet each other in the absence of a political emergency, as when the organization of parents of Berkeley secondary school special education students held a joint meeting with the newly established group, Parents of Children of African Descent. The latter group had just been awarded school board funds to create an intensive tutoring program for failing high school students. Both groups had an interest in the implementation of new policies on proficiency testing and high school exit exams. At other times, it may take a crisis to unite.

Lawyers and other advocates can be instrumental in making inter-organizational contacts.<sup>107</sup> In two rural communities, for example, a Protection and Advocacy, Inc. attorney has joined forces with local California Rural Legal Assistance attorneys. In Geyserville, the lawyers met with a group of parents of mainly Latino students, some of whom were already identified as eligible for special education and

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<sup>105</sup> See e.g., Ancheta, *supra* note 101 at 1393.

<sup>106</sup> Professor Wald suggests that in creating "a new social vision" for the disability rights movement the search for allies must be even broader and should include women, gays and lesbians, poor people, labor and business. Wald, *supra* note 90 at 475.

<sup>107</sup> Trubek, *supra* note 89 at 54.

others who were formally or informally labeled “at risk.”<sup>108</sup> In Santa Bonita, the lawyers hope to bring together a similar group of parents for information and training on special education, discipline and English language policies, having learned from the recently-settled lawsuit<sup>109</sup> about the importance of building coalitions.

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**[CARTOON #90 “Let’s Play Due Process”-- Michael F. Giangreco, *Flying By the Seat of Your Pants: More Absurdities and Realities of Special Education* © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission].**

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### *Don’t Litigate—When You Can Mediate*

Alternative dispute resolution (ADR) is not new in the special education context. Experimentation with ADR models of negotiation, conciliation,<sup>110</sup> arbitration and mediation were reported from the early years of the IDEA forerunner statute.<sup>111</sup> In fact, there has been a great deal of success with informal resolution of disputes that would otherwise go to a

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<sup>108</sup> California law provides for “student study teams” to assist students at risk of academic failure in the “regular education” context. CAL. EDUC. CODE §54726(b) (2000). School districts must first consider and utilize the resources of the regular education program before referring a student for special education instruction and services. The line dividing the at-risk students and those identified as special education-eligible is not a particularly bright one and is sometimes a barrier to students receiving necessary services or accommodations. See issues raised in Paul S. v. Santa Bonita Elem. Sch. Dist., *supra* note 99. The Geyserville meeting was unusual in the attendance and support level by parents whose children were *not* enrolled in special education services, but who came from a common ethnic and social milieu.

<sup>109</sup> See , *supra* note 102.

<sup>110</sup> Conciliation is one model that tends to be overlooked. One Oregon county uses a team approach to conflict resolution, with an emphasis on mending relationships. See A. Engiles, M. Peter, S.B. Quash-Mah, & B. Todis, CONCIILIATION PROGRAM: TEAM-BASED CONFLICT RESOLUTION IN SPECIAL EDUCATION (1996).

<sup>111</sup> See Goldberg & Kuriloff, *supra* note 38 at 496 and sources cited therein.

due process hearing.<sup>112</sup> The 1997 amendments to the IDEA strongly encourage parties to mediate disputes.<sup>113</sup>

Other ADR options also have the potential to resolve decisionmaking disputes in a non-adversarial fashion<sup>114</sup> and can be utilized before reaching the request for due process hearing threshold. Still nascent in the world of IDEA, mediation and other forms of ADR could benefit from more creative experimentation. The limitations are imposed only by the imagination of the involved parties.<sup>115</sup>

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<sup>112</sup> One special education director explains how he was convinced that “there must be a better way to deal with problems” after his first year on the job, when “I spent more time talking with our attorney than I did with any of my teachers.” Vernon Shaw, *Alternative Dispute Resolution: Why and How?*, LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 1 (1999). Shaw also notes the high cost of going to hearing and the hardening of positions that “destroy[s] any possibility of building trust...”. *Id.* But see National Council on Disability, *supra* note 2 at 126-27 (dissatisfaction expressed by parents who did not view mediation process as impartial or who had difficulty implementing mediated agreements).

<sup>113</sup> 20 USC §1415(e); 34 CFR §300.506. See also, CAL. EDUC. CODE §§56500.3, 56503. For an account of the special education mediation experience in California, see Elaine Talley, *Mediation of Special Education Disputes*, 5 UC DAVIS J. JUV. L. & POLICY 239 (2001). But see, Shaw *supra* note 112 at 1 (school district proponent of ADR faults California mediation model as akin to arbitration or settlement conference, whereby “[t]he mediator shuttles between the parties and pressures the parties to make an agreement.”).

<sup>114</sup> For more on ADR models in the special education context, see Steven S. Goldberg & Dixie S. Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703 (1995); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997); Andrea Shemberg, *Mediation as an Alternative Method of Dispute Resolution for the IDEA: A Just Proposal?*, 12 OHIO ST. J. ON DISP. RESOL. 739 (1997); Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J. OF L. & EDUC. 37 (1999).

<sup>115</sup> Mediator and Consultant Lyn Beekman promotes a number of non-traditional, common-sense options, including a mutually “ready cop” to quickly resolve post-agreement disputes or a “God” to fact find and make decisions for a limited time. Lyn Beekman, *King Solomon Approach: Mediating Special Education Disputes*, LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH

It is perhaps less obvious that some *systems-wide* problems, that are otherwise the subject of a compliance complaint, are also amenable to mediation.<sup>116</sup> This is particularly the case with grievances about the quality or delivery of programs and services. The failure to engage in “best practices” is not easily labeled as a *legal* violation. Mediation is less costly and time-consuming for the state than an investigation. For the advocate, there are fewer risks of a finding of (*pro forma*) compliance or a weak corrective action plan.

In a recent complaint filed against a Marin County school district, for example, the parents--unhappy with their experience in a high school full inclusion program—alleged failure to implement IEPs and furnish properly trained staff. They recommended changes in the case management system, training of aides and other staff, upper level program coordination and mechanisms for local parent input.<sup>117</sup> While requests for mediation of compliance complaints—as opposed to due process petitions—are not that routine, the state agency furnished one of its deputy general counsels as a mediator. The district’s lawyer has taken a narrow view of the compliance process as well as the complaint itself, but agreed to the mediation and continuing dialogue.<sup>118</sup>

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DISABILITIES 8 (1999). A mediation agreement can cover non-special education matters as well. *See id.* at 7. Appointing a neutral facilitator to run an IEP meeting to change the environment is another ADR technique. *Id.* at 8 and Shaw, *supra* note 113 at 2.

<sup>116</sup> *See, e.g.*, California regulations allowing for mediation of compliance complaints filed with the state education agency. 5 CCR §§4660(a) (1)-4661. There is no explicit authorization under federal law for mediation of state complaints, but the preamble to the regulations implementing the 1997 IDEA amendments suggests that mediation be utilized to attempt resolution of complaints as well as due process hearing requests. 64 FED. REG. 12,418, 12,611-12,612 (March 12, 1999). Moreover, there is a regulatory requirement that state education agencies include negotiations and technical assistance activities among those procedures designed to implement resolution of state complaints. 34 CFR §300.661(b) (2).

<sup>117</sup> Cal. Dep’t of Educ., Special Educ. Div., Complaint. No. S-0638-00/01 (on file with author).

<sup>118</sup> *See* April 10, 2001 Letter from S.W. to Stephen Rosenbaum (on file with author).

This effectiveness of approach depends, of course, on the disposition of the district or its counsel and the skill and mindset of the mediator.<sup>119</sup> Where successful, group complaint mediation can also enhance parent satisfaction with the process and outcome.<sup>120</sup>

### Conclusion

My message is not to avoid litigation and conflict with professionals at all costs. Lawsuits and individualized—even adversarial -- parental pressure tactics do have their place in the development and implementation of special education programs. Parent advocates must, however, search for ways to break out of conventional school-family relationship models and explore new ways of resolving differences. This will ultimately enhance parents’ role in the collaborative decisionmaking process and assure that our students with disabilities receive the kinds of instruction, services and supports they need to fulfill their educational goals.

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<sup>119</sup> The California regulation requires appointment of “a trained mediator or mediation team...” 5 CCR §4661(a) (3). Neither the mediator nor I, as complainants’ attorney, could convince opposing counsel to use the mediation forum to resolve systemic issues, despite her willingness to entertain allegations of *individual* violations of law or IEP transgressions and despite her clients’ efforts at the mediation conference to go beyond posturing and the parameters of what constitutes compliance under the law.

<sup>120</sup> Rebell and Hughes argue, in support of their “CED” model, *supra* note 58, that where all the stakeholders are included in candid, open dialogue, the result is effective communication, mutual understanding and a desire to search for the common good. Rebell and Hughes, *supra* note 17 at 568 and notes 235-238.