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## Caught in the Cross-Fire: The Psychological and Emotional Impact of the Individuals with Disabilities Education Act (IDEA) upon Teachers of Children with Disabilities, A Therapeutic Jurisprudence Analysis

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**Caught in the Cross-Fire:  
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Analysis**

**Richard Peterson\***

I. Introduction

Several years ago as a new semester was beginning in *Special Education Law*<sup>1</sup> I asked each of my students to introduce themselves, explain their interest in the topic, and describe any prior experience they may have had in the field. One student in particular was anxious to share that she had been a special education teacher for several years before deciding to leave the teaching profession and pursue a law degree. Teaching children with disabilities was a career she had envisioned for herself from the time she was in middle school. Throughout her college career nothing dissuaded her from pursuing that goal, and she was confident the choice was right for her life's work.

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1. Pepperdine University School of Law offers a substantive course on Special Education Law that is available as an elective for 2L and 3L students, and is also a pre-requisite or co-requisite for students to participate in the law school's Special Education Advocacy Clinic. Special Education Law is primarily based upon the Individuals with Disabilities Education Act, commonly referred to as the IDEA. *See* 20 U.S.C. §§ 1400–1482, 9567 (2006).

Her positive and enthusiastic perspective dramatically changed, however, once she transitioned from college student to student-teacher, and then from student-teacher to teacher. In the later role she assumed responsibility for a classroom of students where she immediately found herself caught in the middle of systemic dysfunction driven by bureaucratic policies, restraining administrative instructions, limited resources, and the often conflicting demands and expectations of parents. This paradigm frequently led to emotionally charged disputes that pitted parents against the school district, created a conflict spiral, and destroyed any hope for collaborative relationships.

With respect to her decision to leave the field of special education teaching and attend law school, my student said resignedly, "I found the experience so adversarial and my time so dominated by conflict, I figured if I was going to be spending so much time in legal matters I might as well get paid for it."<sup>2</sup> Sadly, my student's dissatisfaction with the field of teaching special education does not appear to be an isolated one.

For more than two decades educational researchers and policy makers have wrestled with the reality that a critical shortage of qualified special education teachers exists in the United States.<sup>3</sup> Studies conducted by many of these scholars have concluded that a significant contributor to this shortage is the inability of state and local education agencies to recruit and retain qualified special education teachers.<sup>4</sup> Further, the inability to recruit and retain a sufficient number of qualified special education teachers threatens the ability of our educational system to provide a free and appropriate public education (FAPE) to children with disabilities as required by the Individuals with Disabilities Education Act (IDEA).<sup>5</sup>

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2. Statement made to author by a law student during the first class meeting of Special Education Law course being taught by the author at Pepperdine University School of Law several years ago.

3. See, e.g., James McLeskey et al., *The Supply of and Demand for Special Education Teachers: A Review of Research Regarding the Chronic Shortage of Special Education Teachers*, 38 J. OF SPECIAL EDUC. 5, 7 (2004).

4. See, e.g., Bonnie S. Billingsley, *Promoting Teacher Quality and Retention in Special Education*, J. OF LEARNING DISABILITIES 370, 375 (2004) [hereinafter Billingsley, *Promoting Teacher Quality*].

5. See, e.g., Bonnie S. Billingsley, *Special Education Teacher Retention and Attrition: A Critical Analysis of the Literature*, 38 J. OF SPECIAL EDUC. 39, 39 (2003) [hereinafter Billingsley, *Retention and Attrition*].

Attrition has frequently been identified in the literature as a major factor in the nationwide demand for special education teachers.<sup>6</sup> For example, an influential publication reported a few years ago that attrition among new special education teachers was as high as 40% within the first five years of entering the teaching profession.<sup>7</sup> Similar findings have been reported in other scholarly literature, although these findings have been challenged by some researchers.<sup>8</sup>

While the shortage of qualified teachers in special education remains an issue of high priority among educational policy-makers, the problem has persisted for many years and few signs of improvement are visible on the horizon.<sup>9</sup> This is especially troubling since the problem is a predictable one considering the significant psychological and emotional stress that is systemically and constantly heaped upon those charged with the primary responsibility for educating children with disabilities.<sup>10</sup> Further, while the science of educating children

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6. McLeskey et al., *supra* note 3, at 5–19.

7. ELIZABETH KOZLESKI ET AL., BRIGHT FUTURES FOR EXCEPTIONAL LEARNERS: AN AGENDA TO ACHIEVE QUALITY CONDITIONS FOR TEACHING AND LEARNING 1, 2 (2000).

8. See, e.g., Erling E. Boe et al., *Teacher Turnover: Examining Exit Attrition, Teacher Area Transfer, and School Migration*, 75 EXCEPTIONAL CHILD. 7, 7–31 (2008); see also Bill Thornton et al., *Reducing the Special Education Teacher Shortage*, 80 CLEARING HOUSE 233-37 (2007). A study published in 2008 questioned the reliability of data used to support findings of extraordinarily high rates of attrition among such teachers, concluding that a more significant factor in this shortage is an insufficient supply of prospective special education teachers. Nevertheless, it is widely acknowledged by special education scholars and policy makers that there is a critical shortage of special education teachers nationally. Further, it is still asserted by some scholars that recruitment and retention of such educators is one of the most serious challenges facing state and local educational agencies in the United States today. Debra W. Emery & Brian Vandenberg, *Special Education Teacher Burnout and Act*, 25 INT'L J. OF SPECIAL EDUC. 119 (2010).

9. See, e.g., John A. Kaufhold et al., *Lack of School Supplies, Materials and Resources as an Elementary Cause of Frustration and Burnout in South Texas Special Education Teachers*, 33 J. OF INSTRUCTIONAL PSYCHOL. 159, 159–61 (2006); see also Susan Fread Albrecht et al., *Working Conditions as Risk or Resiliency Factors for Teachers of Students with Emotional and Behavioral Disabilities*, 46 PSYCHOL. IN THE SCHOOLS 1006, 1016 (2009).

10. See, e.g., KOZLESKI ET AL., *supra* note 7, at 3–10; see also Lori R. Stempien & Roger C. Loeb, *Differences in Job Satisfaction Between General Education and Special Education Teachers: Implications for Retention*, 23 REMEDIAL AND SPECIAL EDUC. 258, 259 (2002).

with disabilities is providing ever-expanding opportunities for improving educational outcomes for this population,<sup>11</sup> new and crushing budgetary restraints are exacerbating the already existing tension that special education teachers experience on a daily basis.<sup>12</sup>

Whether the shortage of special education teachers is primarily caused by attrition or by other factors, it is undeniable that there is significant career dissatisfaction among special education teachers.<sup>13</sup> Most of the literature regarding these issues has focused on the effects of district and school working conditions, teacher assignments, and the affective reactions teachers have to their work.<sup>14</sup> New special education teachers have consistently reported feeling unprepared for their initial assignments and lacking the knowledge necessary to competently provide for the needs of their students.<sup>15</sup> Deficient teacher preparation, insufficient professional development opportunities, inadequate administrative support, and limited resources are said to combine with special education teachers' sense of being overwhelmed by paperwork, isolation, and constantly working in an environment of conflict.<sup>16</sup> The adverse consequences of these conditions are harmful to both students and their teachers, regardless of whether or not such conditions actually provoke teachers to leave the field.<sup>17</sup>

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11. See, e.g., Mary T. Brownell et al., *Special Education Teacher Quality and Preparation: Exposing Foundations, Constructing a New Model*, 76 EXCEPTIONAL CHILD. 357, 366–72 (2010); see also 20 U.S.C. § 1400(c)(4)–(5) (2006); COMM. ON EDUC. INTERVENTIONS FOR CHILD. WITH AUTISM, NAT'L RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM 5, 118, 163, 191, 224 (Catherine Lord & James P. McGee eds., National Academy Press 2001); LYNN KERN KOEGEL & CLAIRE LAZEBNIK, OVERCOMING AUTISM, FINDING THE ANSWERS, STRATEGIES, AND HOPE THAT CAN TRANSFORM A CHILD'S LIFE 11 (Penguin Group (USA) Inc. 2004).

12. Christina A. Samuels, *States Seek Waivers for Special Ed. Cuts*, 29 EDUC. WKLY. 1, 1 (2010).

13. See, e.g., Emery & Vandenberg, *supra* note 8, at 119, 126.

14. See generally BARBARA S. BILLINGSLEY, SPECIAL EDUCATION TEACHER RETENTION AND ATTRITION: A CRITICAL ANALYSIS OF THE LITERATURE (April 2003), available at <http://copsse.education.ufl.edu/docs/RS-2/1/RS-2.pdf>.

15. See, e.g., Susan D. Whitaker, *Supporting Beginning Special Education Teachers*, 34 FOCUS ON EXCEPTIONAL CHILD. 1, 15 (2001).

16. See, e.g., KOZLESKI ET AL., *supra* note 7, at 3–10.

17. See, e.g., Billingsley, *Promoting Teacher Quality*, *supra* note 4, at

The shortage of special education teachers in the United States, and the adverse consequences flowing from factors related to this condition provide a unique opportunity for scholars to study these issues through interdisciplinary research. Educational scholars have typically focused their research on educational practice and institutional policy.<sup>18</sup> Although this scholarship frequently acknowledges the statutory and regulatory foundations of the IDEA, the literature does not generally adopt a legal framework for research purposes. This is not a criticism of educational scholars. It is merely an observation that opportunities exist to study special education teacher issues in a broader context. This Article argues for such an approach, and thus, seeks to analyze the psychological and emotional impact of Special Education Law upon special education teachers through the lens of Therapeutic Jurisprudence.

Therapeutic Jurisprudence is one of the vectors of a comprehensive law movement that began during the last few decades as a means to assess ways by which law and its processes could better serve the needs of society.<sup>19</sup> Examples of other vectors of this movement include: collaborative law,<sup>20</sup> creative problem solving,<sup>21</sup> holistic justice,<sup>22</sup> preventive law,<sup>23</sup>

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370-71.

18. See, e.g., Boe et al., *supra* note 8, at 7–31.

19. See, e.g., Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE, LAW AS A HELPING PROFESSION 465 (Dennis P. Stolle et al. eds., Carolina Academic Press 2000) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE].

20. See, e.g., SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 11–36 (Bradford Publishing Company 2003); see also INTERNATIONAL ACADEMY OF COLLABORATIVE EXPERTS, <https://www.collaborativepractice.com/> (last visited Apr. 1, 2013).

21. See, e.g., Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835 (2003); see also Thomas D. Barton, *Creative Problem-Solving: Purpose, Meaning and Values*, 34 CAL. W. SCH. OF LAW, [http://www.cwsl.edu/main/default.asp?nav=creative\\_problem\\_solving.asp&body=creative\\_problem\\_solving/home.asp](http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/home.asp) (last visited Apr. 1, 2013).

22. See, e.g., J. KIM WRIGHT, LAWYERS AS PEACEMAKERS, PRACTICING HOLISTIC, PROBLEM-SOLVING LAW (American Bar Association 2010).

23. See, e.g., ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS (Lexis-Nexis 2003).

problem solving courts,<sup>24</sup> procedural justice,<sup>25</sup> restorative justice,<sup>26</sup> and transformative mediation.<sup>27</sup> The list is not exhaustive, and the vectors are not exclusive. Indeed there have been occasions where the interests among vectors have overlapped creating synergies and opportunities for collaboration found useful to both.<sup>28</sup> An example of this paradigm is the successful collaboration between Preventive Law and Therapeutic Jurisprudence.<sup>29</sup>

## II. Therapeutic Jurisprudence—An Overview

The Therapeutic Jurisprudence movement was founded in the early 1990's by Professors David Wexler and Bruce Winick<sup>30</sup> as an interdisciplinary approach to evaluating how law acts as a therapeutic agent<sup>31</sup> upon those who engage in its context. It is interdisciplinary in that it invites mental health professionals, legal scholars and experts, as well as researchers from other disciplines to join the study of the psychological and

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24. See, e.g., PROBLEM SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? (Paul C. Higgins & Mitchell B. Mackinen eds., Praeger Publishing 2009); see also JOANN L. MILLER & DONALD C. JOHNSON, PROBLEM SOLVING COURTS: A MEASURE OF JUSTICE (Rowman & Littlefield Publishers 2011).

25. See, e.g., 1 & 2 PROCEDURAL JUSTICE (THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND SOCIETY) (Tom R. Tyler ed., Ashgate Publishing Company 2005); see also PROCEDURAL JUSTICE – THE LIBRARY OF ESSAYS ON JUSTICE (Larry May & Paul Morrow eds., Ashgate Publ'g Co. 2012).

26. See, e.g., MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (Springer Publishing Company 2010).

27. See, e.g., ROBERT A. BARUCH BUSH & JOSPEH P. FOLGAR, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (Jossey-Bass 2004).

28. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE, LAW AS A HELPING PROFESSION 7 (2000).

29. Integrating Therapeutic Jurisprudence and Preventive Law was first proposed by Dennis Stolle in his writing on Elder Law. See Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459 (1996).

30. See, e.g., Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 11 (2006).

31. See, e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (Carolina Academic Press 1990).

emotional impact of law and its processes upon those interacting in legal domains where such consequences are most likely to be pronounced.<sup>32</sup>

With respect to the purpose of Therapeutic Jurisprudence, Bruce Winick has written: "Therapeutic jurisprudence calls for the study of these consequences with the tools of the social sciences to identify them and to ascertain whether the law's anti-therapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values."<sup>33</sup> One of the tools of the social sciences is the literature generated by its scholars. It is also an important tool for therapeutic Jurisprudence scholars. Wexler commented on this when he wrote, "[o]ne of the things Therapeutic Jurisprudence tries to do is to look carefully at promising literature from psychology, psychiatry, clinical behavioral sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system."<sup>34</sup>

In discussing the use of social science literature in Therapeutic Jurisprudence, Wexler has provided examples from the fields of mental health and criminal law; however, its application is not limited to those domains. As the legal areas of Therapeutic Jurisprudence's application have expanded, so have the areas of scholarship applicable to its analysis. In that regard, education, disability, psychology, law, sociology, social work, and perhaps other domains of research are relevant to the application of Therapeutic Jurisprudence to Special Education Law.<sup>35</sup> Therapeutic Jurisprudence provides a

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32. See, e.g., Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 187 (1997).

33. *Id.* at 185.

34. DAVID B. WEXLER & BRUCE J. WINICK, LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996); David B. Wexler, *Therapeutic Jurisprudence: An Overview*, *Disability Law Symposium Legal and Treatment Issues*, 17 T.M. COOLEY L. REV. 125, 129 (2000).

35. This Article argues that there are important intersections between the domains mentioned, and perhaps others, with significant potential for impacting the psychological and emotional consequences associated with implementing Special Education Law for all those who interact in its context. A special education teacher is required to comply with the legal requirements of the Individuals with Disabilities Education Act and its regulations as well as other federal and state laws. Thus, legal research is implicated. The

framework for raising issues and asking questions that illuminate subtleties and nuances in the law that have the potential for causing psychological and emotional consequences that are unintended and that may otherwise go unrecognized.<sup>36</sup> This inquiry expands our ability to observe how law and its implementation impacts society in ways important to its citizens.<sup>37</sup>

It is important to understand that while Therapeutic Jurisprudence is anchored on the premise that therapeutic consequences of the law are important, it acknowledges that other interests are also important and may conflict with therapeutic goals. Therefore, the lens of Therapeutic Jurisprudence makes no assumptions in its application as to the priority of competing claims. David Wexler has written: “[W]hen therapeutic and other normative values conflict, the conflict sharpens the debate, but does not resolve it.”<sup>38</sup>

In its infancy, Therapeutic Jurisprudence involved

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special education teacher enters the profession through teacher credentialing education, and is also subject to the policies and practices of educational agencies, and therefore, educational research is necessarily included. The special education teacher interacts with students with disabilities who require special education in order to receive an educational benefit. The broad spectrum of disabilities and needs associated with them bring a vast array of research associated with disability into this discussion. Frequently, children with disabilities and their families receive services from social workers who become involved in issues associated with the educational needs of their clients. While psychologists are often involved in the education and treatment interventions designed for children with disabilities, teachers often have experiences that bring into focus the field of psychology for themselves. This Article provides examples of research where teachers experience depression, frustration, stress, and burnout. The Merriam-Webster online dictionary defines sociology as: “the science of society, social institutions, and social relationships; specifically, the systematic study of the development, structure, interaction, and collective behavior of organized groups of human beings.” MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/medical/sociology> (last visited Apr. 1, 2013). Education is one of the principle social institutions of society. So are family and law. Therapeutic Jurisprudence seeks to provide a framework utilizing research from some or all of these interconnected domains in that they provide a unique opportunity to uncover issues that may remain concealed when only studied independently.

36. See, e.g., Wexler, *supra* note 34, at 125–28.

37. See, e.g., David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSCHOL. PUB. POL’Y & L. 220, 224–28 (1995).

38. *Id.* at 220, 225.

scholarship in the field of mental health law by analyzing systemic issues.<sup>39</sup> The goal was to improve or even maximize therapeutic outcomes by seeking legal reforms through the legislative process.<sup>40</sup> Therapeutic Jurisprudence has since blossomed into numerous legal practice areas, including for example: criminal law,<sup>41</sup> mental health law,<sup>42</sup> family law,<sup>43</sup> juvenile law,<sup>44</sup> probate law,<sup>45</sup> disability law,<sup>46</sup> employment law,<sup>47</sup> discrimination law,<sup>48</sup> constitutional law,<sup>49</sup> elder law,<sup>50</sup>

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39. Winick, *supra* note 32, at 201.

40. See, e.g., PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 19, at xv.

41. See, e.g., The Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

42. See, e.g., David B. Wexler, *Reflections on the Scope of Therapeutic Justice*, in, RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE 20, 24–26 (Susan L. Brooks & Robert G. Madden, eds., 2010); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).

43. See, e.g., Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

44. See, e.g., A.J. Stephani, *Symposium: Therapeutic Jurisprudence and Children*, 71 U. CIN. L. REV. 13 (2003).

45. See, e.g., Patricia Monroe Wisnom, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345, 1345–62 (1995).

46. See, e.g., Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011); Michael L. Perlin, "For the Misdemeanor Outlaw": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193 (2000); Carole J. Petersen, *Inclusive Education and Conflict Resolution: Building a Model to Implement Article 24 of the Convention on the Rights of Persons with Disabilities in the Asia Pacific*, 40 HONG KONG L.J. 481 (2010).

47. See, e.g., Kenneth A. Sprang, *Therapeutic Justice in the Workplace: The Use of Imago Relationship Therapy in Employment Disputes*, 1 J. ALTERNATIVE DISP. RESOL. EMP. 53 (1999); David C. Yamada, *Employment Law as If People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLA. COASTAL L. REV. 257 (2010).

48. See, e.g., Ian Freckelton, *Therapeutic Appellate Decision-Making in the Context of Disabled Litigants*, 24 SEATTLE U. L. REV. 313 (2000).

49. See, e.g., Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women are Disproportionately Compromised*, 16 AM. U. J. GENDER SOC. POL'Y & L. 437 (2008); Daniel F. Piar, *A Welfare State of Civil Rights: The Triumph of the Therapeutic in American Constitutional Law*, 16 WM & MARY BILL RTS. J. 649

tort law,<sup>51</sup> workers compensation law,<sup>52</sup> and special education law.<sup>53</sup> Since its inception, more than 1,500 articles, twenty-five symposiums, and sixty books have been published on Therapeutic Jurisprudence,<sup>54</sup> and it has expanded from a top down approach of seeking legislative reform to a bottom up strategy of analyzing ways to implement existing laws in ways that promote increased therapeutic outcomes.<sup>55</sup>

### III. Therapeutic Jurisprudence and Special Education Law

The lens of Therapeutic Jurisprudence is a dynamic tool. David Wexler has said, “When we say the law, we mean the law in action, not simply the law on the books.”<sup>56</sup> Thus, Therapeutic Jurisprudence is meant to focus not only on the text of statutes, regulations, rules, mandates, and the processes of such, but also upon the *legal actors* who are charged with implementing the law. As Bruce Winick wrote, “[T]he roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or anti-therapeutic consequences.”<sup>57</sup>

Historically, when identifying *legal actors* in early Therapeutic Jurisprudence scholarship, the focus was upon

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(2008).

50. See, e.g., Marshall B. Kapp, *Therapeutic Jurisprudence and Older Lives: Well-Intended Laws and Unexamined Results*, 2 J. ETHICS, L., & AGING 3 (1996).

51. See, e.g., Daniel W. Shuman, *Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993).

52. See, e.g., Katherine Lippel, *Therapeutic and Anti-Therapeutic Consequences of Workers’ Compensation*, 22 INT’L J.L. & PSYCHIATRY, NO. 5-6, 521-546 (1999).

53. See, e.g., Richard Peterson, *The Persistence of Low Expectations in Special Education Law Viewed Through the Lens of Therapeutic Jurisprudence*, 33 INT’L J.L. & PSYCHIATRY 375 (2010). This Article is also an example of scholarship relating Therapeutic Jurisprudence to Special Education Law.

54. International Network on Therapeutic Jurisprudence, *Bibliography*, UNIVERSITY OF ARIZONA SCHOOL OF LAW, <http://www.law.arizona.edu/depts/upr-intj/> (last visited Mar. 28, 2013).

55. PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 19, at xv.

56. Wexler, *supra* note 34, at 126.

57. Winick, *supra* note 32, at 185.

lawyers and judges as they were most commonly the ones involved in implementing law and delivering legal services to members of society. As Therapeutic Jurisprudence scholarship evolved, however, it was recognized that in many fields of law the scope of those who could be considered *legal actors* expanded considerably, in that many non-lawyers are intricately involved in tasks associated with implementing law. This is especially true in Special Education Law where many of the procedural requirements associated with providing a free and appropriate public education to children with disabilities is entrusted to educators.<sup>58</sup> The United States Supreme Court underscored this point in the 1982 landmark case, *Board of Education of Hendrick Hudson Central School District v. Rowley*: “The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.”<sup>59</sup>

Therapeutic Jurisprudence as applied to Special Education Law focuses its lens upon the dynamic interplay between law (substantive and procedural) and all of its *legal actors* in order to study the psychological and emotional impact of that interplay upon those interacting in its context. Thus, a preliminary task in this analysis is to identify the *legal actors* in special education and others potentially impacted by this interplay. I contend that in the field of Special Education Law the *legal actors* as well as those interacting in its context experience psychological and emotional consequences in connection with its implementation. Indeed, there is a need for scholarship examining this paradigm from the perspective of those in different roles who live and work in the shadow of the

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58. The Individuals with Disabilities Education Act (IDEA) provides a detailed procedural scheme that includes requirements associated with all phases of providing a free and appropriate public education (FAPE) to children with disabilities. A significant purpose of providing highly specific procedural requirements is to ensure that the rights of children with disabilities and their parents are protected, and is based on the assumption that if educators comply with these procedures there will be greater likelihood of such children actually receiving FAPE. This procedural framework also identifies those within the system required to perform the various functions associated processes of the law.

59. 458 U.S. 176, 207–08 (1982)

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IDEA. In 2010, I authored an Article relative to the psychological and emotional impact of Special Education Law on *children* with disabilities.<sup>60</sup> During that endeavor I formulated an idea of applying the lens of Therapeutic Jurisprudence to Special Education Law from the different perspectives of those involved in its context. Although it is possible and even desirable to evaluate the therapeutic or anti-therapeutic impact of Special Education Law upon all who interact in its context, this Article focuses on analyzing its impact upon *teachers* of children with disabilities. It is left to future scholarship to extend this analysis to others.

Although the focus of this Article is on analyzing the therapeutic or anti-therapeutic consequences of Special Education Law for *teachers* of children with disabilities, an important step in assuring thoroughness of this analysis is identifying the *legal actors* engaged in developing policies, procedures, and practices in Special Education Law, those associated with its implementation as well as those who are the intended beneficiaries of the law.

#### A. *Legal Actors in Special Education Law*

Because an extensive procedural framework is included as an essential component of the IDEA, an efficient way of identifying *legal actors* and *beneficiaries* of the Act is to examine the relevant statutory and regulatory provisions of that procedural framework that reference such persons. For example, in the findings and purposes provisions of the IDEA, Congress identified two essential purposes of the Act: first, to ensure that all children with disabilities have available to them a free and appropriate public education, and second, to ensure that the rights of children with disabilities and the parents of such children are protected.<sup>61</sup> Therefore, in the text of this statute, children with disabilities and their parents are identified as the two primary beneficiaries of Special Education Law.

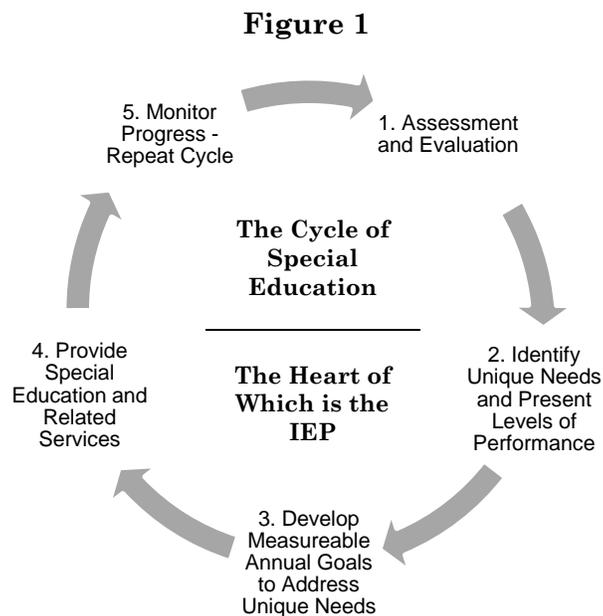
The purposes of the IDEA are implemented through this

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60. See Peterson, *supra* note 53.

61. 20 U.S.C. § 1400 (d)(1)(A), (B) (2006).

procedural framework, which for illustration purposes is referred to in this article as the *Cycle of Special Education*.<sup>62</sup>



At the heart of this procedural scheme is the *Individualized Education Program (IEP)*.<sup>63</sup> The IEP is a “written statement” for each child with a disability that is developed, reviewed, and revised by a “team of individuals,”<sup>64</sup> in accordance with the requirements of the act<sup>65</sup> so that the child receives appropriate special education and related services, and supplementary aids and services “designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>66</sup> The IEP team includes many of the *legal actors* necessary for this

62. See Illustration 1.0 herein. It is helpful to view the processes of Special Education Law as a cycle in that the processes associated with implementing the IDEA are repeated as a child journeys through their educational career.

63. See 20 U.S.C. § 1414(d) (2006); 34 C.F.R. §§ 300.320–300.328 (2011).

64. 20 U.S.C. § 1414(d)(1)(B) (2006); 34 C.F.R. § 300.321 (2011).

65. See 20 U.S.C. § 1401(14) (2006).

66. 20 U.S.C. § 1400(d)(1)(a) (2006).

Therapeutic Jurisprudence analysis. They include:

- The parents of a child with a disability;
- Not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- Not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- A representative of the local educational agency who—
  - is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - is knowledgeable about the general education curriculum; and
  - is knowledgeable about the availability of resources of the local educational agency;
- An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and,
- Whenever appropriate, the child with a disability.<sup>67</sup>

For a particular child, the Cycle of Special Education begins with referral of that child to a *local educational agency*<sup>68</sup>

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67. 20 U.S.C. § 1414(d)(1)(B)(ii)–(vii) (2006).

68. This is frequently undertaken by a Local Education Agency (LEA), often referred to as a “school district.” However, the meaning of “Local Education Agency” or “LEA” extends beyond school districts and is more broadly defined at 20 U.S.C. § 1401(19) (2006); 34 C.F.R. § 300.28 (2011).

for *evaluation*.<sup>69</sup> Evaluations are usually conducted by a multi-disciplinary team of professionals who are required to possess the education, experience, training, and licensure necessary to competently and appropriately perform such procedures.<sup>70</sup> Those who undertake to evaluate and assess children under the IDEA often become a member of the child's IEP team as "an individual who can interpret the instructional implications of [the] evaluation results. . . ." <sup>71</sup> There are two primary purposes declared under the Act for conducting evaluations.<sup>72</sup> The first is to determine if the child is eligible for special education and related services as a "child with a disability."<sup>73</sup> The second, for children found eligible, is to provide the information and content necessary for the development of an appropriate Individualized Education Program (IEP).<sup>74</sup>

There are several statutory and regulatory provisions helpful in identifying categories of potential *legal actors* frequently involved in the process of "evaluations" and "re-evaluations" under the Act. Before a student is eligible for special education services under the IDEA he or she must be found to be a "child with a disability."<sup>75</sup> A "child with a disability" means a child with [mental retardation,] hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this [title] as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason thereof needs special education and related services [to receive an educational benefit.]<sup>76</sup>

Educational agencies responsible for providing a "free

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69. See 20 U.S.C. § 1414(a), (b), (c) (2006); 34 C.F.R. §§ 300.300–300.311 (2011).

70. See 20 U.S.C. § 1414(b)(3) (2006).

71. See 20 U.S.C. § 1414(d)(1)(B)(v) (2006).

72. 20 U.S.C. § 1414(b)(2)(A)(i)-(ii) (2006).

73. See 20 U.S.C. § 1414(b)(2)(A)(i) (2006). A "child with a disability" is defined in the IDEA at 20 U.S.C. § 1401(3) (2006) and in the implementing regulations at 34 C.F.R. § 300.8 (2011).

74. See 20 U.S.C. § 1414(b)(2)(A)(ii) (2006).

75. 20 U.S.C. § 1401(3) (2006).

76. See 20 U.S.C. § 1401(3)(A)9i)-(ii) (2006).

appropriate public education”<sup>77</sup> to children with disabilities are required to assess such children *in all areas of suspected disability*.<sup>78</sup> Therefore, professionals associated with many areas of disability or educational need that become involved in the evaluation of a child suspected of having a disability may become a member of that child’s IEP team, and thus, be considered a *legal actor* for purposes of Therapeutic Jurisprudence analysis. It is also important to understand that the list of disabilities delineated in the IDEA includes the broad category of “other health impairment,”<sup>79</sup> and therefore, professionals associated with disabilities other than those specifically mentioned in the Act may become involved.

While disability labels are helpful in considering eligibility under the IDEA, their usefulness is more limited when it comes to determining the unique educational needs of children with disabilities.<sup>80</sup> To be relevant under the IDEA, disability must impair functioning to the extent that intervention is required for a child to receive an educational benefit.<sup>81</sup> Impaired functioning is observed within the

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77. The phrase “free and appropriate public education” is defined in the IDEA at 20 U.S.C. § 1401(9) (2006) and is often referred to by the acronym “FAPE;” *see also* 34 C.F.R. § 300.17 (2011).

78. 20 U.S.C. § 1414(b)(3)(B) (2006).

79. “Other health impairment” is defined in the regulations associated with the IDEA as follows:

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that— (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child’s educational performance.

34 C.F.R. § 300.8(c)(9) (2011).

80. Wade F. Horn & Douglas Tynan, *Time to Make Special Education “Special” Again*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY*, 38–43 (Chester E. Finn et al. eds., Thomas B. Fordham Foundation and the Progressive Policy Institute 2001).

81. *See* 20 U.S.C. § 1401(3) (2006); 34 C.F.R. § 300.8 (2011).

neurodevelopmental profile<sup>82</sup> of a child. The domains of this neurodevelopmental profile include for example the following: cognitive functioning, speech, language and communication skills, fine motor and sensory issues, gross motor development, social and emotional status, health issues, adaptive behavior and functional living skills, and academic achievement.<sup>83</sup> Assessment and intervention in these domains often involve related services,<sup>84</sup> are frequently interdisciplinary in nature,<sup>85</sup> and may involve multiple members of an IEP team.

In the cognitive domain, assessments are usually performed by a school psychologist.<sup>86</sup> Speech and language

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82. See MEL LEVINE, A MIND AT A TIME 35–38, 42, 246–59 (Simon and Schuster 2002) for an excellent discussion about “neurodevelopmental profiles” and application of this concept to special education. Although the term “neurodevelopmental profile” is not used in the IDEA, the concept as discussed by Dr. Levine provides a useful framework for understanding the term “unique needs,” which is found in the Act.

83. *Id.* at 38–42.

84. Related services are defined in the IDEA as:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26) (2006); see also 34 C.F.R. § 300.34 (2011).

85. See, e.g., JOHN SALVIA ET AL., ASSESSMENT IN SPECIAL AND INCLUSIVE EDUCATION 373 (Wadsworth Publi'g, 12th ed. 2012).

86. See, e.g., *Best Practices in Cognitive Assessment*, in 2 BEST PRACTICES FOR SCHOOL PSYCHOLOGY V 661 (Alex Thomas & Jeff Grimes eds.); Donald L. MacMillan et al., *The Role of Assessment in Qualifying Students as Eligible for Special Education, What is and What's Supposed to Be*, 30 FOCUS ON EXCEPTIONAL CHILD. 1, 12–16 (1997); *Model for Comprehensive and Integrated School Psychological Services*, NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, [http://www.nasponline.org/standards/2010standards/2\\_PracticeModel.pdf](http://www.nasponline.org/standards/2010standards/2_PracticeModel.pdf)

therapists<sup>87</sup> assess in the domain of speech, language and communication, although for children with hearing impairments, audiologists<sup>88</sup> and Deaf or Hard of Hearing itinerant teachers<sup>89</sup> are frequently involved, as are teachers of the visually impaired<sup>90</sup> for that population. Fine motor and sensory issues are typically assessed by occupational therapists,<sup>91</sup> and gross motor needs are the domain of physical therapists<sup>92</sup> and adaptive physical education specialists.<sup>93</sup> The

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(last visited Mar. 31, 2013). It is also important to note that occasionally the nature and extent of a child's disability may require the services of a Neuropsychologist. This is frequently the case for children who have sustained a traumatic brain injury (TBI), or an acquired brain injury (ABI).

87. See, e.g., Ad Hoc Committee on the Roles and Responsibilities of the School-Based Speech-Language Pathologist, *Roles and Responsibilities of Speech-Language Pathologists in Schools*, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION (2010), <http://www.asha.org/docs/pdf/PI2010-00317.pdf>; Ad Hoc Committee on the Scope of Practice in Speech-Language Pathology, *Scope of Practice in Speech-Language Pathology*, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION (2007), <http://www.asha.org/docs/html/SP2007-00283.html#sec1.8>.

88. See, e.g., *Identification of Hearing Loss & Middle-Ear Dysfunction in Preschool & School-Age Children*, AMERICAN ACADEMY OF AUDIOLOGY (May 1997), <http://www.audiology.org/resources/documentlibrary/Pages/HearingLossChildren.aspx>.

89. See, e.g., Susan Foster & Katie Cue, *Roles and Responsibilities of Itinerant Specialist Teachers of Deaf and Hard of Hearing Students*, 153 AM. ANNALS DEAF 435 (2009).

90. See, e.g., American Foundation for the Blind and National Association of Parents of Children with Visual Impairments, *The Central Role of the Teacher of Students with Visual Impairments*, FAMILY CONNECT (last visited Mar. 31, 2013), <http://www.familyconnect.org/parentsite.asp?SectionID=72&TopicID=345&DocumentID=3947>.

91. See, e.g., *Occupational Therapy in School Settings*, THE AM. OCCUPATIONAL THERAPY ASS'N (2010), <http://www.aota.org/Practitioners/PracticeAreas/Pediatrics/Browse/School/School.aspx?FT=.pdf>.

92. See, e.g., *Physical Therapy for Individuals with Disabilities: Practice in Educational Settings HOD P06-95-14-03 [Amended HOD 06-89-40-85; HOD 06-80-09-27; Initial HOD 06-79-14-38] [Position]*, AM. PHYSICAL THERAPY ASS'N, [http://www.apta.org/uploadedFiles/APTAorg/About\\_Us/Policies/HOD/Practice/ChildrenDisabilitiesEducation.pdf#search=%22children%22](http://www.apta.org/uploadedFiles/APTAorg/About_Us/Policies/HOD/Practice/ChildrenDisabilitiesEducation.pdf#search=%22children%22) (last updated Dec. 14, 2009).

93. See, e.g., Deborah R. Shapiro & L. Kristi Sayers, *Who Does What on the Interdisciplinary Team: Regarding Physical Education for Students with Disabilities*, 35 TEACHING EXCEPTIONAL CHILD. 32 (2003).

social and emotional status of a child, which may include behavioral issues, is often evaluated by a school psychologist (with special training associated with behavior intervention) as well as professionals associated with specific disabilities (for example, autism). Depending upon the function(s) of the behavior, professionals from other fields are occasionally involved in this domain, such as occupational therapists, speech and language therapists, behavior specialists, and others.<sup>94</sup> For adaptive behaviors and functional living skills, the school psychologist typically assesses the child while relying upon information and input from other IEP team members. Health issues are the primary domain of school nurses,<sup>95</sup> and assessment of academic achievement often relies upon the input and expertise of teachers as well as school psychologists. People in these various roles are all potential *legal actors* for purposes of this Therapeutic Jurisprudence endeavor, albeit some more than others.

The same people who perform evaluations and assessments are typically responsible, individually and as members of the child's IEP team, for identifying a child's unique needs in neurodevelopmental domains, determining a child's present levels of academic and functional performance in those domains, drafting measureable annual goals to address those unique needs, and for specifying the specially designed instruction, related services, supplementary aids and services, as well as the accommodations and modifications necessary for the child to have an opportunity to achieve their annual goals.<sup>96</sup>

Thus far, *legal actors* in Special Education Law have been identified in relationship to the roles they play in various functions of the Special Education Cycle. However, before this list is reasonably complete, other key implementers of the Act must be identified. As the IDEA provides, also essential to the IEP team is "a representative of the local educational agency

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94. See, e.g., CYNTHIA A. RICCIO ET AL., *NEUROPSYCHOLOGICAL ASSESSMENT AND INTERVENTION FOR CHILDHOOD AND ADOLESCENT DISORDERS* 237, 272 (John Wiley and Sons, Inc. 2010).

95. See, e.g., NAT'L ASS'N OF SCH. NURSES, *SCHOOL NURSING: SCOPE AND STANDARDS OF PRACTICE* (2d ed. 2011).

96. 34 C.F.R. § 300.304, 300.305, 300.320, 300.321, 300.324 (2011).

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who— is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the local educational agency.”<sup>97</sup> This representative is usually an administrator assigned to the school site the child is attending (or proposed to attend) or an administrator who works at the district level. Frequently both district and site administrators are members of the IEP team.

There may be some argument as to whether or not parents should be considered *legal actors* in this Therapeutic Jurisprudence analysis in that the IDEA charges educational agencies, not parents, with the responsibility of providing a “free appropriate public education” to children with disabilities.<sup>98</sup> However, I contend that parents should be included as *legal actors* in this analysis. While not charged with the legal duties assigned to educators under the IDEA, they are nevertheless essential members of their child’s IEP team and play an important role in determining the success of a student’s educational program, as well as determining the collaborative climate for the team’s interactions.

Although parents are usually not trained in the numerous professions associated with providing special education and related services to children with disabilities, they are often, by virtue of their parental role and family structure, the best experts as to certain aspects of their child’s developmental status and needs. Parents have the unique opportunity, from a historical perspective, to connect members of the IEP team with important information about their child’s development, learning, and functioning in contexts outside of school such as home and community. From the time a child is born, parents usually remain the constant link between the multitudes of people involved in their child’s care and education. In essence, parents are the only permanent members of their child’s IEP team. They observe the child more often, in multiple environments, and frequently are most knowledgeable about subtleties and patterns of their child’s functioning and

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97. 20 U.S.C. § 1414(d)(1)(B)(iv) (2006).

98. 20 U.S.C. §§ 1412, 1413 (2006).

behaviors.

The parent's role in utilization of this expertise may be positive or negative for the parent, educators, others, or all. For example, the parent may be perceived by IEP team members as collaborative, informed, dedicated, organized, competent, energetic, compassionate, reasonable, forward thinking, and nice; or the parent may be perceived as adversarial, judgmental, obstructive, ignorant, passive, irrational, and not nice (or anything in between!). Since perception is reality when people are dealing with relationships and emotions, regardless of the correctness of other people's perceptions about parents, parents frequently play a significant role in determining whether the psychological or emotional consequences of those interactions are therapeutic or anti-therapeutic for themselves and for others. Nevertheless, lest these paragraphs be interpreted as accusing parents of being the principle cause of anti-therapeutic consequences of Special Education Law for educators and other IEP team members, it should be noted that I make no judgment as to the relative frequency or contribution parents make to any anti-therapeutic consequences of special education experienced by others or themselves. In fact, based upon the natural advantage educators have over parents in their role as members of the IEP team,<sup>99</sup> I believe parents are more frequently on the receiving end than the giving end of these anti-therapeutic consequences.

While Congress envisioned a special educational system of cooperative decision-making between educators and parents, it was also recognized that disagreements would arise and that

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99. Courts have often referenced the "natural" advantage that educators have over parents as members of a child's IEP team. In *Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, the Court explained how the law was designed to address this paradigm:

Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements.

471 U.S. 359, 368 (1985); *see also* *Schaffer v. Weast*, 546 U.S. 49, 60 (2005).

educators would have a natural advantage over parents in those situations.<sup>100</sup> Therefore, Congress included Procedural Safeguards in the IDEA so as to further one of the Act's primary purposes of protecting the rights of children with disabilities and their parents.<sup>101</sup> Provisions in the Procedural Safeguards create a legal scheme that allows for adjudication of disputes,<sup>102</sup> and therefore, bring into the special education context other school district personnel, educational agencies, school organizations, attorneys, advocates, community organizations, disability support group organizations, media, politicians, as well as government representatives. Under these circumstances any of the above may become involved in the special education environment in a way that influences therapeutic or anti-therapeutic consequences for those interacting in the process and thus would be identified as *legal actors*.

Having identified *legal actors* potentially influencing the psychological and emotional consequences associated with implementing Special Education Law, this analysis moves on to focus the lens of Therapeutic Jurisprudence on those aspects of this context most likely to influence such consequences for special education teachers. This endeavor will be facilitated by the utilization of three accessories to the Therapeutic Jurisprudence lens: psycholegal soft spots, macro/micro constructs, and key moments.

### B. *Psycholegal Soft Spots*

Although Therapeutic Jurisprudence is a *consequentialist* approach to the law,<sup>103</sup> it has not adopted a normative framework for addressing those consequences, but rather is defined as a "mere lens or heuristic for better seeing and understanding the law."<sup>104</sup> In that way, Therapeutic Jurisprudence relies upon empirical research that is descriptive in nature without applying judgment to the relative

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100. *See, e.g.*, Burlington, 471 U.S. at 359.

101. *See* 20 U.S.C. § 1415 (2006); 34 C.F.R. § 300.500 (2011).

102. 20 U.S.C. §§ 1415(f), (i), (l) (2006).

103. *See, e.g.*, Winick, *supra* note 32, at 190.

104. Wexler, *supra* note 37, at 221.

value of its findings. Bruce Winick commented on this aspect of Therapeutic Jurisprudence in writing, “empirical verification of the truth concerning a particular set of facts cannot justify a normative conclusion concerning, for example, how a rule of law should be changed. One cannot reason from the ‘is’ to the ‘ought’ without explicitly or implicitly adopting a normative viewpoint.”<sup>105</sup>

While resisting a normative framework for applying its research, Therapeutic Jurisprudence has evolved to provide helpful accessories for its lens, such as the utilization of *psycholegal soft spots*, which are defined as “any aspect of the legal relationship or legal process that is likely to produce in the client a strong negative emotional reaction.”<sup>106</sup> The concept of *psycholegal soft spots* spawned from the *preventive law movement*, another vector of the comprehensive law movement.<sup>107</sup> In preventive law, practitioners engage their clients in careful analysis, counseling and planning in order to uncover *legal soft spots*, which are defined as legal vulnerabilities or potential legal problems in a client’s situation. This information is then considered to find ways by which those potential legal problems may be avoided.<sup>108</sup> Dennis Stolle first proposed the integration of Therapeutic Jurisprudence and Preventive Law in the context of Elder Law.<sup>109</sup> Collaboration between scholars of Preventive Law and Therapeutic Jurisprudence ignited synergies that benefited both.<sup>110</sup> A significant contribution to Therapeutic Jurisprudence from that collaboration is the concept of *psycholegal soft spots*, which David Wexler introduced as

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105. Winick, *supra* note 32, at 190.

106. Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law Related School Clinical Education*, *Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 610 (2006).

107. *See, e.g.*, Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 19, at 5, 35.

108. *See, e.g.*, LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS A PLANNER, Foundation Press (1978), *cited in* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 19, at 45–49 (2000).

109. *See* Stolle, *supra* note 29.

110. *See* Stolle et al., *supra* note 28.

follows:

More precisely, we believe that, just as preventive lawyers can anticipate and work with recurring, predictable legal soft spots in certain legal situations and transactions, so too lawyers can learn to anticipate and work with recurring predictable psycholegal soft spots—ways in which certain legal procedures (e.g. litigation or its alternatives) or legal interventions (e.g., filing for bankruptcy or making certain testamentary dispositions) may expectedly produce or reduce anxiety, anger, hurt feelings, and other dimensions of law-related psychological well-being.<sup>111</sup>

In the first publication applying Therapeutic Jurisprudence to Special Education Law, I utilized additional *accessories* for the Therapeutic Jurisprudence lens.<sup>112</sup> One accessory I used is *macro/micro constructs*.<sup>113</sup> Another is the concept of *key moments*<sup>114</sup> in relationship to *psycholegal soft spots* and the *macro/micro constructs*. In that regard it is remembered that Therapeutic Jurisprudence is a tool meant to assist scholars, practitioners, judges, public policy leaders, and others in uncovering situations where the law, or its implementation, acts as a social force in creating anti-therapeutic consequences for those interacting in its context. The Therapeutic Jurisprudence lens is aided by these accessories in identifying and bringing into focus those situations where such consequences may otherwise go unnoticed. It is the organization of information through this framework that facilitates the up close dissection of information for deeper analysis. The accessories used in this Article have been specifically adapted to apply the Therapeutic

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111. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 19, 48.

112. Peterson, *supra* note 53.

113. *Id.*

114. Peterson, *supra* note 53, at 375, 377–80, 390–97.

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Jurisprudence framework in the analysis of any psychological or emotional consequences sustained by special education teachers in the course of their work.

C. *Macro/Micro Constructs*

The use of *macro/micro constructs* in Therapeutic Jurisprudence is not new.<sup>115</sup> Nevertheless, these constructs have not always been used in the same way or for the same purposes. In the context of Special Education Law they were previously utilized in analyzing the psychological and emotional impact of Special Education Law upon children with disabilities in connection with the persistent low expectations they encounter in the course of their educational career.<sup>116</sup> In the context of examining therapeutic or anti-therapeutic consequences of Special Education Law for teachers of such children the focus is not on low expectations, but rather on those aspects of the law, and its implementation, that are most likely to impact those teachers. Thus, the *macro/micro constructs* will be adapted somewhat differently. The same is true with respect to the concept of *key moments*.

The *macro constructs* of this Article include four broad aspects of the special education system that are related with psychological and emotional consequences frequently experienced by special education teachers. The first is *teacher readiness and qualifications* with subpart IV.A.1 addressing *pre-hiring* teacher education, credentialing, and student teaching, and subpart IV.A.2 analyzing *post-hiring* mentoring, training, and in-service. The second aspect is *teacher roles*, while the third is *teacher resources*. The fourth and final aspect is *teacher relationships*. These macro constructs constitute the psycholegal soft spots in this analysis.

As this analysis proceeds, it is helpful to understand that the *macro and micro constructs* of this Article are composed of substantive issues as well as events in time, but that the psychological and emotional consequences flowing from such

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115. See, e.g., Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities*, 13 CLINICAL L. REV. 213, 214–15 (2006); Wexler, *supra* note 37, at 220–36.

116. Peterson, *supra* note 53, at 375, 377–80, 390–97

issues do not necessarily occur contemporaneously with the events in time. In that regard, the Therapeutic Jurisprudence accessory of psycholegal soft spots is adapted for use in this context. For example, the macro construct of *teacher readiness and qualifications* involves events in time associated with a teacher's education and training. Some of those events, such as a teacher's undergraduate education program occur prior to the teacher actually becoming employed in that capacity. Nevertheless, it constitutes a psycholegal soft spot in that the events and experiences of special education teachers associated with their undergraduate education may "expectedly produce or reduce anxiety, anger, hurt feelings, and other dimensions of law-related psychological well-being . . ." <sup>117</sup> even though such consequences may not be produced until a significant time after the teacher preparation and training has been completed.

In fact, prospective teachers are probably unaware at the time of their undergraduate education that their experiences in that context will likely produce psychological and emotional consequences for them in the future. <sup>118</sup> In that regard, it is not until after the teacher is placed in a position of employment, where they are expected to apply the knowledge and skills acquired during their undergraduate teacher preparation, that the expectations flowing from past events collide with the reality of present conditions to create a paradigm of conflict that produces the psychological and emotional consequences addressed in this Article. <sup>119</sup>

There is also an intersection between the substantive and procedural requirements of the Act, its public policy foundations, and the events in time referred to above. The IDEA requires special education teachers to be "highly qualified." <sup>120</sup> The expectation flowing from this requirement is that all children with disabilities will be taught by teachers that are willing and capable of providing quality education that is appropriate and efficacious in promoting student achievement. Whether or not a special education teacher is ready and qualified to perform tasks associated with their

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117. Stolle et al., *supra* note 28, at 7, 47–49.

118. Whitaker, *supra* note 15, at 1.

119. Whitaker, *supra* note 15, at 1–2.

120. 20 U.S.C. §§ 1401 (10), 1412 (a)(14)(C) (2006).

career is closely related to the knowledge and skills they acquire during their teacher preparation education, as well as the knowledge and skills they acquire post hiring as described below. However, psychological and emotional consequences flowing from pre-hiring and post-hiring events may not be manifested until a significant time after the teachers have completed their preparatory education and training. Further, special education teachers are often not provided with appropriate information about the public policy and societal values upon which the IDEA is based. The lack of knowledge regarding the foundations upon which the Act was created is likely to exacerbate anti-therapeutic consequences for such teachers, although as stated above, such consequences may not occur until the teacher acts in a way inconsistent with the findings and purposes of the Act. It is reasonable to conclude that this will usually be when a teacher begins their career in the classroom.

**Table 1**

MACRO CONSTRUCTS PSYCHOLEGAL SOFTSPOTS	MICRO CONSTRUCTS KEY MOMENTS
<p><b>1. TEACHER READINESS AND QUALIFICATIONS</b></p>	<p><b>A. PRE-HIRING (KNOWLEDGE AND SKILLS)</b></p> <ul style="list-style-type: none"> <li>a. IDEA and its values/public policy foundations;</li> <li>b. The cycle of special education, processes of IDEA;</li> <li>c. General education curriculum;</li> <li>d. Effective interventions necessary to promote positive outcomes for students with disabilities;</li> <li>e. Least restrictive environment;</li> <li>f. Communication, collaboration, and conflict management;</li> <li>g. Student teaching: function; quality; structure; effectiveness.</li> </ul> <p><b>B. POST-HIRING (KNOWLEDGE AND SKILLS-SAME ISSUES AS ABOVE IN THE FOLLOWING CONTEXTS)</b></p> <ul style="list-style-type: none"> <li>a. In-service instruction, outside trainings, conferences, and continuing education;</li> <li>b. Mentoring; collaboration, and consultation.</li> </ul>

2. <b>TEACHER ROLES</b>	<b>A. SCOPE, PURPOSES, COHERENCE</b> <b>B. SPECIAL EDUCATION TEACHERS' PERCEIVED VALUE OF THE ROLES ASSIGNED TO THEM</b> <b>C. EDUCATION, TRAINING AND SKILLS NECESSARY TO COMPETENTLY PERFORM TASKS ASSOCIATED WITH ASSUMED ROLES</b> <b>D. INTERSECTION WITH OTHER PSYCHOLEGAL SOFTSPOTS</b>
3. <b>TEACHER RESOURCES</b>	<b>A. ENVIRONMENT/MATERIALS</b> (Classroom; Curriculum; Materials; Technology/Equipment) <b>B. CONSULTATIONS /COLLABORATION</b> (Colleagues; Related service providers; Behavioral specialists; Technology specialists; Administrators) <b>C. TIME</b> <b>D. REWARDS/SALARY</b>
4. <b>TEACHER RELATIONSHIPS</b>	<b>A. STRUCTURAL RELATIONSHIPS BETWEEN IEP TEAM MEMBERS</b> <b>B. TEMPORARY ROLES</b> <b>C. CONFLICTS</b>

#### IV. Therapeutic Jurisprudence and Special Education Teachers: The Analysis

##### A. *Teacher Readiness and Qualifications*

There is an important link between the efficacy of teacher readiness and qualifications, a teacher's sense of success in the classroom, and the nature of psychological and emotional outcomes experienced by special education teachers in consequence of their work. The paradigm in which this link has functioned for many years, and in which it continues to operate today, provides important insight into the root causes for persistent career dissatisfaction reported among many special educators. A key component of that paradigm is the tension created by the long-standing shortage of special education teachers in the U.S.<sup>121</sup> on one hand and the increased focus public policy makers have placed on the importance of having

121. See, e.g., Erica Nance & Raymond L. Calabrese, *Special Education Teacher Retention and Attrition: The Impact of Additional Legal Requirements*, 23 INT'L J. OF EDUC. MGMT. 431 (2009).

highly qualified teachers in every classroom<sup>122</sup> on the other.

In 1983, the National Commission on Excellence in Education, appointed by President Ronald Reagan's Secretary of Education, T.H. Bell, issued a report titled, *A Nation at Risk*,<sup>123</sup> charging that American schools were floundering in mediocrity. Among other recommendations, the Commission advised that significant improvement in teacher training was needed to ensure that all children in the United States received a quality education.<sup>124</sup> In the years that followed, increased attention in public policy decisions was given to improving the quality of elementary and secondary education in the United States.<sup>125</sup> This culminated in the passage of the No Child Left Behind Act of 2001.<sup>126</sup> An important aspect of that legislation relative to special education was the expectation that by the end of the 2005–2006 school year, all children in public schools were to be taught by “highly qualified teachers.”<sup>127</sup>

However, efforts to improve the quality of special education in the U.S. have been impeded by countervailing events that have thwarted efforts to improve the quality and effectiveness of special education teachers. First, as mentioned earlier in this Article, local educational agencies across the nation have struggled for many years to cope with a significant shortage of special education teachers.<sup>128</sup> It is important to recognize that this critical shortage of special education teachers referred to in educational research literature is one of quality not quantity.<sup>129</sup> While statistics published by the Council for Exceptional Children in 2001 revealed that 98% of public school districts in the United States reported special

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122. See, e.g., *Quality Counts 2003: “If I Can’t Learn From You . . .”*, XXII EDUC. WKLY. 2 (Jan. 9, 2003), available at <http://www.edweek.org/media/ew/qc/archives/QC03full.pdf>.

123. NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (April 1983), available at [http://datacenter.spps.org/uploads/SOTW\\_A\\_Nation\\_at\\_Risk\\_1983.pdf](http://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf).

124. FREDERICK M. HESS & MICHAEL J. PETRILLI, *NO CHILD LEFT BEHIND: PRIMER 7–14* (Peter Lang Publ’g, Inc. 2007).

125. Hess & Petrilli, *supra* note 124, at 11.

126. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. §§ 6301–7941 (2006)).

127. 20 U. S. C. § 1412(c)(14) (2006).

128. See, e.g., McLeskey et al., *supra* note 3, at 7.

129. See, e.g., *id.* at 14.

education teacher shortages,<sup>130</sup> statistics published in other literature demonstrated that in spite of these reported shortages 99% of all special education teaching positions were filled each year.<sup>131</sup> When school districts do not have qualified personnel to fill these positions, they have them filled by unqualified individuals.<sup>132</sup> According to national statistics from the U.S. Department of Education for 2003, 11.4% of all special education teachers were not fully certified,<sup>133</sup> and for those in the first three years of teaching, 29% were not certified for their primary teaching assignment.<sup>134</sup> Thus, a significant number of teachers found their way into special education classrooms through alternative paths or temporary certification, without appropriate teacher education, mentoring, and training.<sup>135</sup>

In addition to problems associated with the shortage of qualified special education teachers arising from alternative paths to employment, problems also exist with respect to undergraduate and graduate education in teacher preparation programs. Special education scholars have recently commented that “[i]n special education, teacher education research is scattered and difficult to piece into anything resembling a coherent whole.”<sup>136</sup> The empirical foundation upon which special education teacher preparation has been built is described as “more like Swiss cheese than concrete.”<sup>137</sup> As to the difficulties historically associated with this work, scholars have written:

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130. SUSAN BERGERT & JANE BURNETTE, EDUCATING EXCEPTIONAL CHILDREN: A STATISTICAL PROFILE (ERIC Clearinghouse on Disabilities and Gifted Education 2001).

131. McLeskey et al., *supra* note 3, at 14.

132. *See, e.g., id.* at 14.

133. *See, e.g., id.* at 7.

134. ELAINE CARLSON ET AL., SPENSE: STUDY OF PERSONNEL NEEDS IN SPECIAL EDUCATION 1–2 (2002).

135. *See, e.g.,* Erling E. Boe & Lynne H. Cooke, *The Chronic and Increasing Shortage of Fully Certified Teachers in Special and General Education*, 72 EXCEPTIONAL CHILD. 443, 457 (2006).

136. Paul T. Sindelar et al., *Special Education Teacher Education Research: Current Status and Future Directions*, 33 TEACHER EDUC. & SPECIAL EDUC. 8, 9 (2010).

137. *Id.*, at 8.

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After all, teacher preparation has not been a high priority for scholars in our field, and even if it had been, conducting such research is challenging. For one thing, we lack credible and practical outcome measures, and our independent variable, teacher education, is highly variable and unwieldy. Furthermore, as a determinant of what beginning teachers do in their classrooms, initial preparation is overwhelmed by school context.<sup>138</sup>

In spite of these weaknesses, special education literature has produced critically important information, corroborated over time and across research efforts relative to challenges new special teachers encounter as they begin their careers. Summarized findings from the accumulated literature base relative to special education teacher induction provides that

Collectively, these studies suggest that new [special education teachers] struggle with (a) including students with disabilities, collaborating with general education teachers, and working with adults; (b) handling pedagogy, including teaching multiple content areas and reading, securing materials, performing assessment, and addressing student behavior; and (c) managing their varied roles . . . .<sup>139</sup>

Research has linked the struggles identified above with the need for updating and modifying teacher preparation programs so that special education teachers are empowered with the knowledge and skills necessary to accomplish the educational objectives they are expected to achieve with their students. An example is given from a 2010 scholarly article published in

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138. *Id.* at 10.

139. *Id.* (citing BONNIE BILLINGSLEY ET AL., A REVIEW OF TEACHER INDUCTION IN SPECIAL EDUCATION: RESEARCH, PRACTICE, AND TECHNOLOGY SOLUTIONS (Sept. 2009), *available* at [http://ncipp.education.ufl.edu/files\\_5/NCIPP%20Induction%20Exc%20Summ.pdf](http://ncipp.education.ufl.edu/files_5/NCIPP%20Induction%20Exc%20Summ.pdf)).

*Exceptional Children:*

Rapid advancements in technology and the increasing sophistication and accumulation of research on learning, disability, and teaching have contributed to a knowledge base that holds promise for improving the education of students with disabilities. These advances also demonstrate the sophisticated knowledge and skills teachers must have to educate students with disabilities successfully.<sup>140</sup>

This statement illuminates the ongoing tension between two competing discoveries. First, the finding of research providing scientific confirmation that children with disabilities are capable of learning when provided with proven methods of instruction delivered by highly qualified teachers.<sup>141</sup> The second competing discovery is the resistance of society generally and educational systems specifically to discard long-held and erroneous perceptions about the educational potential of people with disabilities that have long been driven by the myths and stereotypes of the medical model.<sup>142</sup>

Indeed, the discoveries referred to above have drawn attention to a multitude of challenges facing educational policy makers, administrators, legislators, and both general and special education teachers as they interact in an educational paradigm of resisted change and conflict. That is not to say

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140. Brownell et al., *supra* note 11, at 367.

141. See, e.g., COMM. ON INTEGRATING THE SCI. OF EARLY CHILDHOOD, DEV. BD. ON CHILDREN, YOUTH, AND FAMILIES, NAT'L RESEARCH COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 3 (Jack P. Shonkoff & Deborah A. Phillips eds., Nat'l Academies Press 2000).

142. See, e.g., RHONA S. WEINSTEIN, REACHING HIGHER, THE POWER OF EXPECTATIONS IN SCHOOLING 77 (Harvard Univ. Press 2002); see also, e.g., THOMAS HEHIR ET AL., COMPREHENSIVE MANAGEMENT REVIEW AND EVALUATION OF SPECIAL EDUCATION REPORT SUBMITTED TO NEW YORK CITY DEPARTMENT OF EDUCATION 54 (Sept. 20, 2005), available at <http://schools.nyc.gov/NR/rdonlyres/BB43599E-F0AE-48E2-B657-5E392D3968D9/0/FinalHehirReport092005.pdf> [hereinafter COMPREHENSIVE MANAGEMENT REVIEW].

problems did not exist in the past; rather, it is to acknowledge the complexities of current difficulties fueled by historical constructs, current constraints, and future expectations.

Historical constructs anchored by deeply rooted attitudes of low expectations and heavily engrained habits of exclusion and benign neglect continues to uphold dysfunctional educational systems that have failed children with disabilities far too long. On the other hand, in those areas where education reform has been informed by updated research and scientific confirmation, children previously thought incapable of academic achievement are now learning to read for pleasure, advancing in the general education curriculum, and sharing in the satisfaction that comes from being included as a member of their school community. In this paradigm progress or regression is observed on a continuum.

Nevertheless, with these advances has come the necessity for special and general education teachers to possess “sophisticated knowledge and skills” necessary to successfully educate children with disabilities.<sup>143</sup> General education teachers typically have little if any training or preparation for educating children with disabilities.<sup>144</sup> Special education teachers have traditionally lacked education and skills necessary to teach the general education curriculum.<sup>145</sup> A substantial need for training and skills associated with collaborative teaching and consultation exist for both general and special education teachers.<sup>146</sup>

Improvements in teacher preparation and professional development have been obstructed by the resistance of many to discard the medical model,<sup>147</sup> and have been exacerbated by the ever-increasing budgetary constraints and economic realities that have universally afflicted state and local educational agencies.<sup>148</sup>

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143. Brownell et al., *supra* note 11, at 367.

144. Brownell et al., *supra* note 11, at 371-72.

145. See, e.g., James M. Kauffman, *Commentary: Today's Special Education and Its Messages for Tomorrow*, 32 J. OF SPECIAL EDUC. 244, 247 (1999).

146. Stempien & Loeb, *supra* note 10, at 264-65.

147. See *infra* Part IV.A.1.a for a definition and discussion of the medical model.

148. Alyson Klein, *Recession's Toll on K-12 Budgets Both Wide and*

There are important aspects of these findings, as well as conclusions from previous research cited in this Article that support the importance of including *teacher readiness and qualifications* in this therapeutic jurisprudence analysis as well as its related *micro constructs*.<sup>149</sup> The *micro constructs* allow for a focused view of the topic's discreet components, and thus, provides an opportunity to explore the more nuanced or subtle matters that might otherwise go unnoticed.

It is not the intent of this Article to suggest answers to all of the questions it raises or solutions to all of the problems it exposes. Rather, recognizing the multi-disciplinary philosophy of Therapeutic Jurisprudence, it is the intent of this endeavor to contribute a perspective derived from work in the field of Clinical Legal Education toward the ongoing efforts among educational scholars, policy makers, and other disciplines, to improve special education teacher effectiveness, and satisfaction.<sup>150</sup> Furthermore, by offering this perspective, it is not my intent to be critical of special educational scholars, especially those whose work is cited herein, or for that matter to be critical of special education teachers, administrators, or policy makers. With the issues raised in this Article it is acknowledged that much good has been brought to society generally, and to the field of education specifically through the dedicated and often unappreciated talents and work of the

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*Deep*, 30 EDUC. WEEK, 16, 16 (2011).

149. *See supra* Part III.C.

150. I have served as Director of the Pepperdine University School of Law Special Education Advocacy Clinic (PSEAC) and Assistant Professor of Law for nearly ten years. The PSEAC is part of the Clinical Legal Education Program of Pepperdine's School of Law. The PSEAC is somewhat unique in design in that while the work of law students enrolled in the clinic involves providing advocacy services to families who have children with developmental disabilities, a primary focus of these efforts is on empowering parents to engage with educators in ways that promote collaboration and increased positive outcomes for the children. This objective increases the pedagogical value of the experiential clinical experience for law students, while at the same time significantly advancing the interests of the clients we serve. In this capacity I have attended more than 700 IEP meetings during the past ten years and have had opportunities to engage with parents, teachers, administrators, related service providers and others in connection with these activities. Our Clinic has also participated in numerous engagements associated with speaking and training educators, parents, and other professionals on issues related to special education law, collaboration, conflict management, and dispute resolution.

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people who have been so engaged. Nevertheless, it seems to go without saying that there remains much to learn, and even more to do, to address significant problems and answer essential questions that obstruct improvement in the field of special education. With that objective clarified, attention is now turned to the *micro constructs* or *key moments* associated with the pre-hiring stage of *teacher readiness and qualifications*.

1. Pre-Hiring

- a. *IDEA and Its Values: Public Policy Foundations*

It is difficult if not impossible to achieve the objectives of a program or fulfill the mission of an organization if those responsible for success are not adequately informed of the purposes and the values upon which they are founded. There is a significant question as to what prospective special education teachers are taught during their teacher preparation about the Individuals with Disabilities Education Act as well as its values and public policy foundations.<sup>151</sup> This is especially important in that since the Act's predecessor, Public Law 94-142, was enacted in 1975, profound changes have evolved in the science undergirding interventions for people with disabilities as well as significant changes in public policy, heightened expectations, and values as to how such people should be treated by society. When teachers do not have an adequate understanding of the legal framework of special education law and the public policy and societal values upon which it has been built, they are subject to being tossed to and fro by every wind of legal doctrine thrust upon them by others whose own knowledge is inaccurate or misunderstood, or by those whose primary motives may be inconsistent with the substance and procedural requirements of the law. The spreading of confusion and misinterpretation of the law among special education administrators and teachers often leads to incoherent, inconsistent, dysfunctional, and anxiety ridden experiences for everyone, including perhaps most teachers of

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151. See, e.g., Sindelar et al., *supra* note 136, at 13-14, (2010)

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children with disabilities.<sup>152</sup>

The most common source of a special education teacher's knowledge and attitude about special education law and practice is the school district where they are employed, and not from their pre-hiring teacher education. Indeed, it has been said, "[A]s a determinant of what special education teachers do in their classrooms, initial preparation is overwhelmed by school context. In this era of high-stakes assessments, district policy and district-sponsored professional development shape what and how beginning teachers teach far more so than initial preparation does."<sup>153</sup>

This is not to say special education teachers do not possess knowledge and familiarity with general terms and provisions of Special Education Law. It merely means that they usually have not been provided with objective instruction and training in fundamental procedural requirements, and they are often confused by mixed messages they receive when the law is explained to them by others in different ways and for different purposes depending upon the context. Usually, the information teachers have about special education law is provided by the school district and in the interpretive light of their employer. In essence they are expected to sing the song according to the music and lyrics given them, regardless of whether or not the tone seems odd to their ears.

Is it possible, or even probable, that the work of special education teachers is often obstructed by the reinforcing power of doing business as usual; where new energy and enthusiasm that comes with fresh knowledge is obstructed by new teachers being continually indoctrinated with customs and bad habits that fail to keep up with improvements confirmed by science, research, scholarship, and the law?

To underscore the significance of this question and the importance of finding its answer, two examples of important information that teachers should know about the public policy foundations of special education law, and the appropriate model for interventions and teaching children with disabilities are discussed. The first is the Congressional findings and

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152. See generally, Peterson, *supra* note 53.

153. Sindelar et al., *supra* note 136, at 10.

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purposes of the IDEA. The second relates to discrediting and discarding of the medical model<sup>154</sup> for interventions and teaching children with disabilities.

With respect to the first example, too many educators are not aware of the key congressional findings and purposes that are delineated in the opening Section of the IDEA.<sup>155</sup> This

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154. See *infra* Part IV.A.1.a for a definition and discussion of the medical model.

155. In addition to those sections of the IDEA cited in the text of the article, the following findings are also important to establishing a foundational understanding of these issues for special education teachers:

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because— (A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system and from being educated with their peers; (C) undiagnosed disabilities prevented the children from having a successful educational experience; or (D) a lack of adequate resources within the public school system forced families to find services outside the public school system. (3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this title has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities. (4) However, the implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities. (5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by— (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to— (i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible; (B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home; (C) coordinating this title with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act

knowledge is especially important because it sets the tone for everything special education teachers do and provides insight as to appropriate criteria special education teachers may use to measure their professional success. The power of the message is evident in this part of the section's text:

(c) Findings. Congress finds the following: (1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.<sup>156</sup>

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of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent; (D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate; (E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible; (F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children; (G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and (H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities (remaining parts of this section omitted). 20 U.S.C. § 1400(c)(2)-(5) (2006).

156. 20 U.S.C. § 1400(c)(1) (2006).

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Knowing the purposes of the IDEA are also an important aspect of having a values compass properly calibrated so as to steer the attitudes and behaviors of special education teachers in a direction consistent with the objectives of the Act. While all of these purposes are important, the following example illustrates this point:

(d) Purposes. The purposes of this title are—  
(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; and (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.<sup>157</sup>

The second example of information and knowledge important to special education teachers relates to the inappropriate model for interventions too often utilized in

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157. 20 U.S.C. §1400 (d)(1)–(4) (2006).

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teaching children with disabilities. Specifically, the outdated but currently overused *medical model*, which has been described as

a dehumanizing attitude which primarily defines a person by pathological labels associated with disease and weakness. These attitudes are accompanied by discriminatory behaviors and educational practices which communicate and reinforce these values among members of society generally, and the adults and children (disabled and nondisabled) within the educational community specifically.<sup>158</sup>

Its continued prevalence in the field of special education is illustrated by this excerpt from a Comprehensive Management Report and Review of New York City's special education program issued by a consulting team led by Dr. Thomas Hehir, a member of the faculty of the Harvard Graduate School of Education:

[M]any practices in NYC appear to be fundamentally driven by a traditional medical model of disability, a paradigm of service delivery that has been criticized in the educational literature. The influence of the medical model is particularly evident with respect to assessment practices. In the area of assessment, the basic orientation of the medical model is that the problems related to underachievement reside in the student and that current diagnostic practices and procedures are reliable and valid for operationalizing special education eligibility criteria irrespective of cultural and linguistic considerations. . . . Under this model, assessments tend to be very similar across students and very focused on the results of testing, on the scores. At the heart of this model

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158. Peterson, *supra* note 53, at 380.

is a reliance on IQ, or on measures that purport not to be IQ (but which are validated with IQ tests) . . . . [T]he medical model orientation that exists today is the same one that existed at the time of the original *Jose P.* judgment.<sup>159</sup>

Similar findings have been reported in major school districts across the country.<sup>160</sup>

That is not to say that the *medical model*<sup>161</sup> is used for the intentional purpose of dehumanizing children with disabilities or to purposefully oppress or discriminate. In fact, one of the reasons this model is so harmful to people and the system is that those who persist in using it typically believe in good faith that it is the appropriate paradigm for designing educational programs for children with disabilities. As it relates to the issues of this Article, it also impacts teachers of children with disabilities by setting the stage for frustration and conflict in their careers. A primary motivation for people entering the profession of teaching is to be successful in that endeavor. Teachers want to make a difference in a child's life and see them make progress in developing their knowledge and skills. They often enter their careers with the perception that they are good at it and will be successful.<sup>162</sup> However, as teachers begin their careers, if they are confronted with a frontloaded perception that disability is a static condition that is impervious to any intervention, teaching, or effort, an insoluble paradox is created that forces teachers to reexamine and adjust their concept of how success as a teacher is to be measured. The impact of this dilemma is compounded when joined with an inaccurate or incomplete knowledge of the IDEA's findings, purposes, and requirements.

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159. COMPREHENSIVE MANAGEMENT REVIEW, *supra* note 142, at 53–54.

160. *See, e.g.*, Peterson, *supra* note 53, at 383–84.

161. COMPREHENSIVE MANAGEMENT REVIEW, *supra* note 142, at 53–54.

162. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 371; *see generally*, Brad Olsen, *How Reasons for Entry into the Profession Illuminate Teacher Identity Development*, 35 TEACHER EDUC. QUARTERLY 23 (2008).

b. *The Cycle of Special Education-Processes of the IDEA*

Many engaged in the context of special education, including special education teachers, find the processes of the IDEA confusing and complex. In the previous section this paradigm was discussed in relationship to a teacher's knowledge of the legal requirements and procedures of the IDEA. In this section the discussion is focused more on the relationship of these processes to the educational objectives of special education. When these processes are viewed as a whole in the context of the Act's findings and purposes they become more coherent, objective, and meaningful. For example, since the early days of Public Law 94-142, even while the ink was still drying on the text of the Act, there has been conflict and contention over the meaning of the phrase "free appropriate public education"<sup>163</sup> and especially over the interpretation of the word "appropriate" as a standard for educational agency responsibility.<sup>164</sup> There is much that can be said about this conflict, the cases that have interpreted the language of the Act, and amendments that Congress has made to it over the years. Such is beyond the scope of this Article.

It is the contention of this Article, however, that the language of the IDEA and the primary U.S. Supreme Court case interpreting its meaning<sup>165</sup> provide a reasonably objective standard allowing for collaborative deliberation and decision making by a child's IEP team, including the child's parents, if all of those engaged in the process act in good faith and with fidelity to the law's purposes and procedural requirements. This is not a new concept,<sup>166</sup> but one that has often been lost in

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163. See, e.g., Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going*, 14 HARV. J.L. & PUB. POL'Y 483, 483-84 (1991).

164. See, e.g., Perry A. Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 466-71 (1983).

165. Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207-08 (1982); see also *supra* Part III.

166. See, e.g., Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 443-61 (2011);

the rhetoric and low expectations themes generated by the “basic floor of opportunity” language of the U.S. Supreme Court decision in *Rowley*.<sup>167</sup>

It is helpful to view special education law in the context of a cycle.<sup>168</sup> The cycle begins with identification and referral of a child suspected of having a disability for evaluation and assessment.<sup>169</sup> The purposes and procedural requirements of this process are meant to provide efficacy and credibility to this step. There are two fundamental purposes for evaluation and assessment under the IDEA. First is to determine if the student is a “child with a disability,” and thus, eligible for special education and related services, and second is to provide the information necessary to develop an appropriate educational program for the child.<sup>170</sup> The question then arises, what is an appropriate educational program? The cycle of special education allows for understanding and action. The next step in the cycle of special education involves utilization of evaluations and assessments by the student’s IEP team in order to identify a child’s unique needs.<sup>171</sup> Unique needs are deficits in the domains of a child’s neurodevelopment profile that impede functioning.<sup>172</sup> Along with identifying unique needs, assessments and evaluations should assist the IEP team in determining the present levels of a child’s performance or

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*see also* Zirkel, *supra* note 164, at 466–71.

167. *Rowley*, 458 U.S. at 207–08; *see also supra* Part III.

168. *See* Illustration 1.0 on page 11.

169. Either a parent or, subject to parental consent requirements of 34 C.F.R. § 300.300, an educational agency, may refer a children suspected of having a disability for evaluation. 34 C.F.R. § 300.301(b) (2011). Additionally, educational agencies have a duty to find children with disabilities who reside within the geographical boundaries of their jurisdiction and who are in need of special education and related services. 20 U.S.C. §§ 1412(a)(3), 1413(a)(1) (2006); 34 C.F.R. § 300.111 (2011).

170. *See, e.g.*, 34 C.F.R. §§ 15, 300.304(b)(1)(i)(ii) (2011).

171. *See, e.g.*, 20 U.S.C. §§ 1414(a)(1)(C)(i)(II), 1414(b)(4)(A) (2006); 34 C.F.R. §§ 300.301(c)(2)(ii), 305(a)(2)(i)(B), 300.305(d)(1) (2011).

172. The IDEA provides that children are to be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B) (2006). Further, the IDEA requires that educational agencies “gather relevant functional, developmental, and academic information . . .” about the child. 20 U.S.C. § 1414(b)(2)(A) (2006). Sometimes these requirements are not understood in the context of the possible domains where disability may be found. To better understand this issue it is helpful to understand the concept of a person’s neurodevelopmental profile. *See* LEVINE, *supra* note 82, at 35–38, 42, 246–59.

functioning in those domains.<sup>173</sup> The IEP team should then be able to visualize the baseline of a child's functioning in key areas of development. From this baseline information, growth and progress may be objectively measured in each domain where a child has unique needs.

After the child's unique needs are identified and the child's present levels of performance in relation thereto are determined, the next step in the cycle is to draft measurable annual goals which should represent an estimation of the progress and development to be anticipated in consequence of implementing the child's Individualized Education Program.<sup>174</sup> It should be noted that to this point in the cycle of special education there is no determination or decision as to the special education and services a child is to receive. Rather, the process focuses on discussion and analysis of the student's unique needs and the development of reasonably challenging yet achievable annual goals designed to address those unique needs.<sup>175</sup> Congress intended that the procedural scheme of the

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173. 20 U.S.C. § 1414(d)(1)(A)(i)(I) (2006).

174. 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2006).

175. Adherence to sequence in the process of developing a child's IEP is an essential element for objective and successful collaboration between parents and educators, as well as positive outcomes for the student. As the Supreme Court explained in *Rowley*, "The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program.'" *Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dis. v. Rowley*, 458 U.S. 176, 181 (1982). A child's unique needs are determined by evaluations and re-evaluations of the student as explained in sections (a), (b), and (c) of 20 U.S.C. §1414 (2006). These provisions come before subsection (d), which specifies the legal requirements for an IEP. The specific elements of *sequence* that I am referring to herein are found in subsections: I, II, III, and IV of 20 U.S.C. §1414(d)(1)(A)(i) (2006). Subsection "I" requires the identification of present levels of performance related to "academic achievement" and "functional performance." Subsection "II" then requires development of a written "statement of measurable annual goals, including academic and functional goals . . . [that are] . . . designed to . . . meet the child's needs that result from the child's disability [in order] . . . to enable the child to be involved in and make progress in the general education curriculum [and] meet each of the child's other educational needs that result from the child's disability." Subsection "IV" then requires that the IEP specify the "special education and related services" that are to be provided so that the child will be empowered "to advance appropriately toward attaining [his or her] annual goal[s]." Special education and related services cannot be determined until measureable annual goals have been developed because the nature and

IDEA be utilized by IEP team members as a means to seek consensus in a collaborative and non-adversarial manner.<sup>176</sup>

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amount of those services is directly related to what is necessary for the child to have an opportunity to achieve his or her annual goals. Measureable annual goals cannot be appropriately developed until a child's present levels of performance associated with a child's academic achievement and functional performance are determined, and this cannot be properly done until appropriate evaluations and re-evaluations have been accomplished. Each step builds on the previous step, and if adhered to with fidelity and in good faith, allow for an objective determination of each element of a student's IEP.

176. *See, e.g.*, S. REP. NO. 108-185, at 57 (2003). The committee addressed changes made in the reauthorization of the Act in order to encourage cooperation and non-adversarial collaboration in developing educational programs for children with disabilities. *Id.* The following are examples of statements in the Senate Report relative to this issue:

The committee is discouraged to hear that many parents, teachers, and school officials find that some current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere, in regards to special education. In response, the committee has made changes to promote better cooperation and understanding between parents and schools, leading to better educational programs and related services for children with disabilities.

*Id.* at 6.

The committee encourages parents to work with school personnel and the IEP team in a cooperative and common sense way in determining the best course of action for the child that results in the child's continued right to receive a free appropriate public education, and a safe and secure classroom for all children. The committee believes that a child's right to receive a free appropriate public education does not have to conflict with a safe and secure classroom for all.

*Id.* at 44.

The committee recognizes the critical role that parent training and information centers (PTIs) play in helping parents and schools work together to ensure that children with disabilities receive the educational and related services necessary to improve educational performance. The committee has made minor revisions to emphasize that PTIs should encourage parents and schools to work in the most cooperative and effective manner possible, to help children with disabilities meet developmental and

Realizing that would not always be possible, Congress ensured that the procedural scheme of the IDEA also provides a means by which IEP team members may address conflict if they get stuck and cannot agree.<sup>177</sup>

Admittedly the paperwork associated with this process is demanding, but it becomes less so if special education teachers see the benefit and understand the purposes for it and are thus able to approach paperwork in a more efficacious and efficient manner. If this task is viewed as wasteful busy work undertaken for the mere purpose of technical compliance with meaningless legal mishmash, the time taken to do it will be resented, and the quality of the work product will reflect that perspective.

However, where assessments and evaluations have produced qualitative and relevant information from which a child's unique needs and present levels of performance have been determined and from which clear and concise measureable annual goals have been developed, the framework for collaboration, consensus building, and true team functioning has been constructed. Further, for those occasions where other IEP team's members have not acted with fidelity and compliance with the purposes and requirements of the IDEA, special education teachers will be able to exercise their own considered judgment in the process, empowered by knowledge and understanding, and not by confusion and mixed signals received from others as they participate in the process.

With the objective foundation of measurable annual goals that address a child's unique needs, the IEP team is in position to discuss and determine the special education and services necessary to afford the student an opportunity to achieve those

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functional goals, as well as challenging academic achievement goals that have been established for all children. In particular, the committee hopes that PTIs will encourage parents to explore and take advantage of alternative methods of dispute resolution, as well as inform parents of their rights and responsibilities under IDEA.

*Id.* at 57.

177. *See, e.g.*, 20 U.S.C. § 1415 (2006); 34 C.F.R. §§ 300.500–300.537 (2011).

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goals.<sup>178</sup> Therein lays the standard for determining *appropriate* education. The question of “how much” is answered in determining what is necessary to allow the student an opportunity to achieve their goals; nothing more and nothing less. Too often the paperwork associated with this process is viewed only in its context of technical legal compliance and not with the perspective of being a valuable tool for collaboration and consensus building. In the absence of experiencing success with this framework, teachers too often view IEPs and the paperwork associated with them as adversarial and time wasting diversions from their important work of teaching.

The assertions of this section recognize the fact that the ideal is often not the reality, and that fidelity and compliance with these procedures will sometimes be obstructed by others who are irrational, unreasonable, or who may be acting in bad faith or with sustained ignorance. Nevertheless, there needs to be an objective standard from which people may judge the appropriateness and success of their efforts. Everyone needs to play by the same rules if there is to be any hope for coherence, collaboration, effectiveness, and success.

c. *General Education Curriculum*

It is not only the No Child Left Behind Act,<sup>179</sup> but also the discrediting of the medical model<sup>180</sup> that has heightened the need for special education teachers to be better trained and prepared to teach the general education curriculum. As more recognition is given to the abilities of children with disabilities to learn and progress in the general education curriculum, there is an increased need for special education teachers to be competent in teaching the fundamental knowledge and skills associated with academic learning, especially reading and math.<sup>181</sup> Brownell, Sindelar, Kiely, and Danielson recently explained the dynamics and importance of this fact in their article, *Special Education Teacher Quality and Preparation:*

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178. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2006).

179. No Child Left Behind Act of 2001, 20 U.S.C. § 6319 (2006).

180. *See supra* Part IV.A.1.a for a definition and discussion of the medical model.

181. Brownell et al., *supra* note 11, at 372.

*Exposing Foundations, Constructing a New Model:*

As students with disabilities are likely to need intensive assistance in reading, writing, and mathematics, special education teachers should have sufficient preparation in these content areas to enable them to teach students in elementary, middle, and high school. They also need to develop an instructional repertoire that integrates domain knowledge with knowledge of intensive interventions and assessments. . . . To develop such extensive expertise, special education teachers will require preparation in both general and special education. Research evidence has demonstrated that general education teachers with special education preparation are better prepared to meet the literacy and mathematics needs of students with disabilities than teachers who lack it. . . . We believe that, after entering the field, special education teachers should undertake advanced preparation in special education focused on either elementary or secondary level. This advanced preparation would target knowledge and skills needed to (a) provide direct services to students . . . . and (b) collaborate with general education colleagues . . . . Such expertise is important for two reasons. First, . . . preparation in special education has a value-added effect on the achievement of students with disabilities. *Also*, expertise in how to assess, support, and remediate literacy and numeracy skills is essential for providing access to the general education curriculum. If special education teachers do not help students access the general education curriculum, then they fail to add value to their students' education.<sup>182</sup>

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182. *Id.* at 371-72. (emphasis added).

For decades, children with cognitive disabilities such as Down Syndrome were assumed incapable of learning to read with phonemic awareness and other basic skills essential for academic progress, and were instead diverted into reading programs where the primary emphasis was on learning sight words necessary for functional living skills.<sup>183</sup> Thus, these children were deprived of one of the greatest enjoyments of life, reading for pleasure. This paradigm still prevails where the medical model<sup>184</sup> is embraced as the foundation for special education programming.

Even where special education teachers are competent and prepared to teach general education curriculum, they are often subject to frustration and conflict when working in environments steeped in the traditions of the medical model.<sup>185</sup> Where special education teachers have not been adequately prepared or trained to teach these skills, they are subject to experiencing a teaching environment doomed to failure and frustration. With this dilemma teachers feel the need to reconcile expectations and values with the reality of circumstances as they are, rather than as they are expected to be. This inevitably creates a strong likelihood of special education teachers experiencing anti-therapeutic consequences in connection with their work.

d. *Effective Interventions Necessary to Promote Positive Outcomes for Students with Disabilities*

The question raised by this *key moment* is to what extent have teacher preparation programs kept up with the development of scientifically proven methods for teaching children with disabilities? According to Congressional findings associated with the latest IDEA amendments, one of the impediments to successfully implementing the IDEA has been “an insufficient focus on applying replicable research on proven

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183. PATRICIA LOGAN OELWEIN, *TEACHING READING TO CHILDREN WITH DOWN SYNDROME, A GUIDE FOR PARENTS AND TEACHERS* 1–7 (Woodbine House, Inc. 1995).

184. *See supra* Part IV.A.1.a for a definition and discussion of the medical model.

185. *Id.*

methods of teaching and learning for children with disabilities.”<sup>186</sup> This acknowledgement is made more tragic by the following statement, which reveals how long this disconnect has existed between what science and experience has validated as effective educational methods and strategies, and what is actually being used in our schools:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by— (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to— (i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible; (B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home; (C) coordinating this title with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent; (D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate; (E) supporting high-quality, intensive pre-service preparation and professional development for all personnel who

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186. 20 U.S.C. § 1400 (c)(4) (2006).

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work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible; (F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children; (G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and (H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.<sup>187</sup>

One area where this is especially problematic for special education teachers is the domain of behavior intervention. More and more, special education teachers are expected to teach children with a wide variety of disabilities and behavior challenges.<sup>188</sup> To what extent have teachers been empowered with the knowledge and skills necessary to successfully fulfill this expectation? Too often, special education teachers are thrown into situations where they encounter student behaviors for which they do not have adequate training or expertise, and for which they do not receive adequate support. Even where the expertise of a behavior specialist is made available to the teacher, the trained expert's time is often spread so thin that the intensity and frequency of consultation and intervention is inadequate to be successful and effectuate change.

From where does this disconnect arise? Are teachers

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187. *Id.* § 1400(c)(5) (2006).

188. Marilyn S. Kaff, *Multitasking is Multitaxing: Why Special Educators Are Leaving the Field*, 48 PREVENTING SCH. FAILURE 10, 12 (2004).

taught appropriate and scientifically proven methods for teaching children with disabilities in their teacher credentialing programs, only later to abandon this knowledge in favor of conforming to outdated and ineffective strategies given to them by their school district employers? Or are teacher-credentialing programs continuing to promulgate the ineffective interventions and teaching methods Congress labeled as impeding implementation of the Act? Or is there some other explanation? These are questions in need of answers obtained through credible research connected with concerted efforts and sustained planning to extract the roots maintaining this dysfunctional paradigm.

e. *Least Restrictive Environment*

Perhaps no principle of the IDEA is more misunderstood and misused by the system of special education than that of the *Least Restrictive Environment* (LRE). What is taught in teacher preparation programs and the manner by which it is implemented in school districts often intersect in the lives of special education teachers in a variety of ways, resulting in therapeutic or anti-therapeutic consequences for them. The language of this requirement is bold and pregnant with public policy foundations.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>189</sup>

The public policy values of the IDEA generally and the

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189. 20 U.S.C. § 1412(a)(5) (2006).

LRE in particular are found in decisions of two United States circuit courts decided in 1971 and 1972.<sup>190</sup> It was these decisions and others like it, which provided motivation for Congress to enact the Education for All Handicapped Children Act a few years later in 1975.<sup>191</sup> The decision in *Mills* was decided on Constitutional principles of equal protection and due process, and held that all children with disabilities were entitled to a free and appropriate public education.<sup>192</sup> Moreover, the decision required that this education be provided “within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.”<sup>193</sup> A consent decree was entered in the case of *Pennsylvania Association for Retard Children v. Pennsylvania* with similar requirements based on constitutional grounds of equal protection and due process.<sup>194</sup> At that time many similar cases were being decided or pending across the nation.<sup>195</sup>

In spite of the fact that this concept is both a civil rights law and an educational strategy,<sup>196</sup> when implemented, outdated educational philosophies predominately trump civil rights, and are again, usually driven by the medical model discussed above.<sup>197</sup> For example, a report produced by an

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190. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children (“PARC”) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

191. Education for All Handicapped Children Act, Pub L. No. 94-142 (1975).

192. *Mills*, 348 F. Supp. at 874-75.

193. *Id.* at 880.

194. See 334 F. Supp. 1257, *modified*, 343 F. Supp. 279.

195. S. REP. NO. 94-168, at 1430 (1975). The following excerpt references twenty-seven other cases: “This legislation was originally introduced as § 3614 on May 16, 1972. It followed a series of landmark court cases establishing in law the right to education for all handicapped children. Since those initial decisions in 1971 and 1972 and with similar decisions in 27 States, it is clear today that this ‘right to education’ is no longer in question.” *Id.*

196. See, e.g., H. RUTHERFORD TURNBULL III & ANN P. TURNBULL, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* 257 (Love Publ'g Co., 6th ed. 2000).

197. See *supra* Part IV.A.1.a for a definition and discussion of the medical model.

objective evaluation of the Seattle Public Schools found widespread evidence of this paradigm.

In general, special educators perceive that inclusion of students in general education is an option but not a value; mixed messages come from central office and school leadership. This type of programming is not only ineffective for students and families but, even more importantly, perpetuates the myths that students with disabilities need to be placed in segregated programs and that it is not the responsibility of general educators to own and teach all learners.<sup>198</sup>

Similar findings were reported in a study of schools in New York where the district was criticized for segregating children with disabilities by making placement decisions based upon district convenience and bureaucratic expediency “rather than creating a process by which school staff would be supported to determine whether existing services could be reconfigured or additional services could be provided that would meet the needs of the student.”<sup>199</sup> This approach to the least restrictive environment is prevalent in other school districts across the country.<sup>200</sup>

In addition to the harm suffered by children with disabilities by the dysfunctional implementation of the LRE, the obstruction and mixed messages discussed above create an insoluble problem for special education teachers, who are either ignorant of the appropriate application of the civil rights

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198. URBAN SPECIAL EDUC. LEADERSHIP COLLABORATIVE EDUC. DEV. CTR., INC., SPECIAL EDUCATION: ORGANIZATIONAL, PROGRAM, AND SERVICE DELIVERY REVIEW, SEATTLE PUBLIC SCHOOLS, A REPORT OF THE EXTERNAL CORE TEAM 12 (Oct. 2007), *available at* <http://www.seattleschools.org/modules/groups/homepagefiles/cms/1583136/File/Departmental%20ContCon/special%20education/UrbanCollaborativeReportFinal.pdf>.

199. COMPREHENSIVE MANAGEMENT REVIEW, *supra* note 142, at 64.

200. *See, e.g.*, THOMAS HEHIR AND ASSOCIATES, SPECIAL EDUCATION FOLLOW-UP REPORT 3 (Sept. 2008), *available at* <http://www.sandi.net/Page/37452>.

component of this principle or faced with the organizational and systemic philosophies of their employer, and feel compelled to support a position in opposition to correct principles. Thus, they become stuck in the middle between what they are told to do and the demands of parents who become empowered with knowledge of the civil rights aspects of this law.

f. *Communication, Collaboration, and Conflict Management*

Conflict is inevitable in special education. The very nature of the context and the detailed features of its procedural framework bring people with different perspectives and interests together in an emotionally charged environment. Here they are expected to communicate, cooperate, and collaborate in order to reach consensus on issues where significant disagreement often exists. The emotional and psychological consequences of this conflict are natural and foreseeable considering what is at stake in the outcomes of these negotiations. Yet, educators and parents are rarely provided with the training or resources necessary to fulfill this expectation.

Parents frequently feel an overwhelming sense of responsibility, inadequacy, and fear associated with decisions they are expected to make as a member of their child's IEP team. They are asked to consider and consent to recommendations made by educators and related service providers when such parents typically have neither the professional knowledge nor experience necessary to confidently make these decisions. This dynamic is exacerbated by the fact that poor economic conditions in general and sharp budgetary restraints in particular provide a discouraging basis for persuading parents to trust and accept educators and their recommendations when made under these conditions.

While local educational agencies struggle to balance their budgets as they are confronted by significant and poorly funded governmental mandates, teachers often feel the brunt of this conflict as they are the face of the school district to parents and are charged with the responsibility to be as effective as possible with what they have available to them, even if not enough to

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satisfy the desires and needs of the children they serve. To have any hope of being successful in this role, teachers must have the knowledge and skills necessary to facilitate collaboration and work through conflict in a constructive way. Some people naturally have the disposition, personality, and skills useful for this endeavor, but many do not. Despite being such an essential skill, a question arises as to how much focus and attention is or should be given to developing these skills during a teacher's credentialing education. It is an issue that should be carefully studied and analyzed.

*g. Student Teaching: Objectives; Quality; Structure; Effectiveness*

The primary purpose of reflecting on this topic is to suggest that there are issues constituting *key moments* in the therapeutic jurisprudence analysis of this Article that are in need of further research. Educational scholars have previously pointed out their concerns with respect to the quality and scope of this component of a special education teacher's credentialing preparation.<sup>201</sup> While student teaching has been an important part of teacher training for many years, problems are predictably associated with how the objectives, quality, and structure of this experience are determined and implemented. What are the objectives of student teaching? Are the placements of prospective special education teachers determined by how well those objectives are met, or are they based upon what is convenient and available at the time? How is the quality of student teaching placement options determined and monitored? What are the criteria for this analysis? What is the structure of the student teaching experience and how is it determined? And, of course, how is the effectiveness of student teaching evaluated both in short and long term measures?

The questions raised above are especially important for the

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201. See, e.g., Greg Conderman & Antonis Katsiyannis, *Instructional Issues and Practices in Secondary Special Education*, 23 REMEDIAL & SPECIAL EDUC. 169–79 (2002); Brenda Scheuermann et al., *Problems with Personnel Preparation in Autism Spectrum Disorders*, 18 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 197–206 (2003).

therapeutic jurisprudence analysis of this Article when considered in the context of all other *key moments* influencing therapeutic or anti-therapeutic consequences flowing to special education teachers in the course of their career. It is in the student teaching experience that the prospective special education teacher must find coherence between the theory and practice of special education teaching. The experiential learning component must connect the public policy, values, and purposes of Special Education Law with what actually happens in the real world, as well as the attitudes and values of those who make it happen. If special education teachers, especially those who are new to the field, are confronted with practices and attitudes that contradict the public policy underpinnings of the IDEA, it is predictable that anti-therapeutic consequences will follow for such teachers.

## 2. Post Hiring

### a. *In-Service Instruction, Outside Trainings, Conferences, and Continuing Education*

Special Education is a dynamic field, fed by the discoveries of significant research and evolving practice, and fueled by the astonishing success that is observed when appropriate and scientifically proven methods are implemented and student progress is objectively monitored, measured, and supported by objective data. However, this success has been uneven and inconsistent. In the educational environments I have observed, it is not happening more often than it is, as persistent obstacles block its expansion and interfere with making it so. One such obstacle is the quality and scope of in-service instruction, as well as special education teacher access to quality outside trainings, conferences, and continuing education. By access to the latter, I primarily mean providing special education teachers with the time, resources, and compensation for participating in these functions. By quality and scope of the former, I do not mean the quality of the presenters or their instructional abilities, but rather the quality and accuracy of the information being presented, which is frequently the substance of what they themselves have erroneously been

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taught to be accurate, and believe to be so. It is the unfortunate and seeming perpetuation of error in perpetuity.

This assertion is not meant to criticize the efforts or the intent of individuals providing such instruction, neither is it meant to suggest that this paradigm exists universally nor to the same degree everywhere. Rather, it is a systemic problem, the extent and severity of which is seen on a continuum differing geographically in scope and magnitude, not only among states and regions, but also between school districts and among schools. But it is not geography itself that is the most important element; rather, the single most important factor in determining the quality of special education for a particular child is the teacher.<sup>202</sup>

Educators who only know error perpetuate it in their teaching, and the negative impact on themselves and others is the same whether done intentionally or not. Perhaps nowhere have I observed this phenomenon more often than in special education, and especially in the cycle of that process.<sup>203</sup> Whether it occurs for lack of quality, quantity, or access, the impact is the same. One example of perpetuating error and its impact upon students and teachers will suffice for present purposes; the failure to develop meaningful and measurable annual goals related to a child's unique needs as those needs are determined by evaluation and assessment. In a high majority of IEP meetings that I have attended for children with disabilities over the years, goals and objectives written by special education teachers neither have been coherent or measureable, nor have they been directly related to the individual child's unique needs. Further, they frequently have not been written so as to be understandable by the child's parents. Thus, while in a state of confusion the child's parents are asked to approve and consent to the implementation of the proposed goals. The confusion experienced by parents contributes to an environment of mistrust and negativity,

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202. *See, e.g.,* JENNIFER KING RICE, TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES 3 (Economic Policy Institute 2003), available at [http://www.epi.org/page/-/old/books/teacher\\_quality\\_exec\\_summary.pdf](http://www.epi.org/page/-/old/books/teacher_quality_exec_summary.pdf).

203. *See supra* Part IV.A.1.b for a discussion regarding cycle of special education.

which fuels an already emotional and conflict ridden paradigm.

If special education teachers are not appropriately taught and trained with respect to the purpose, practice, and importance of writing appropriate and measureable annual goals, and of assuring that data collection and progress monitoring is integrated into the teaching process, the perspective that this paperwork is an annoying waste of time, born of clueless bureaucrats and unthinking policy makers, will be exacerbated, and the essential purposes for such will be thwarted. The diminishment of respect for the processes of special education not only undermine positive systemic functioning, but also significantly impacts the psychological and emotional consequences for those interacting in its context, including special education teachers.

b. *Mentoring, Collaboration, and Consultation*

Special Education scholars have long emphasized the need to mentor and support new special education teachers.<sup>204</sup> These educators frequently begin their careers with enthusiasm and optimism, confident that they will succeed in achieving their goal of making a positive difference in the lives of the children they teach.<sup>205</sup> But as Bonnie Billingsley has written, “[M]any special educators do not survive the path from hopeful beginner to highly qualified, experienced teacher. Many beginning special educators leave their positions<sup>206</sup> . . . and nearly half leave within the first 5 years.”<sup>207</sup>

New special education teachers often report feelings of

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204. Marlene White & Christine Y. Mason, *Components of a Successful Mentoring Program for Beginning Special Education Teachers: Perspectives from New Teachers and Mentors*, 29 *TEACHER EDUC. & SPECIAL EDUC.* 191–201 (2006).

205. Stempien & Loeb, *supra* note 10, at 264.

206. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 371 (citing CYNTHIA C. GRIFFIN ET AL., *NEW TEACHER INDUCTION IN SPECIAL EDUCATION* (2003), available at <http://copsse.education.ufl.edu/docs/RS-5E/1/RS-5E.pdf>; David M. Miller et al., *Factors that Predict Teachers Staying In, Leaving, or Transferring from the Special Education Classroom*, 65 *EXCEPTIONAL CHILD*. 201 (1999).

207. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 371 (citing Judith D. Singer, *Are Special Educators' Career Paths Special? Results from a 13-year Longitudinal Study*, 59 *EXCEPTIONAL CHILD*. 262 (1992)).

isolation and lack of support necessary to meet the challenges they face as novice educators in highly stressful environments.<sup>208</sup> Common complaints include the absence of opportunities for collaboration with other teachers and the inaccessibility for consultation with those having knowledge and expertise in specialized fields associated with the needs of their students. Speaking of this time in a special educator's career, Billingsley has written: "The beginning teacher period has been described as one of 'shock' and 'survival.'"<sup>209</sup>

It is perhaps no wonder that beginning their first day on the job new special education teachers encounter difficulties. They are expected to assume responsibility for numerous tasks including, for example, providing specialized instruction appropriate to the individual needs of diverse students, managing limited resources (and frequently procuring materials at their own expense), budgeting time, completing mountains of paperwork, attending meetings, engaging in parent communication, and dealing with emotionally charged conflict arising out of their responsibilities.<sup>210</sup>

In order to perform many of the duties referred to above with competence and efficacy, teachers require a depth of knowledge and skill that frequently only comes from experience.<sup>211</sup> When new special education teachers are thrust into a dysfunctional environment where they are expected to perform tasks for which they lack the necessary experience and skills, it is highly predictable that significant anti-therapeutic consequences will be experienced by them.<sup>212</sup> Thus, providing mentoring, guidance, and feedback from other teachers who observe their work is essential for the psychological and emotional well-being of teachers and to promote the efficacy and effectiveness of their work.<sup>213</sup>

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208. Miller et al., *supra* note 206.

209. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 371.

210. *Id.*

211. Whitaker, *supra* note 15, at 1.

212. *Id.*

213. Susan Moore Johnson, *Teaching's Next Generation*, 19 EDUC. WEEK 1 (2000), available at <http://www.edweek.org/ew/articles/2000/06/07/39johnson.h19.html?tkn=WTFP01OtUdjWXwarjitK5L1tT%2FL1C3%2BPG&print=1> (stating "schools must be organized to ensure that novice teachers are supported and

## B. *Teacher Roles*

### 1. Scope, Purposes, and Coherence

The word “role” has been defined in its sociological context as “a character assigned or assumed” (such as a teacher, father, or mother)<sup>214</sup> and also as “a socially expected behavior pattern usually determined by an individual’s status in society.”<sup>215</sup> Merton asserted that the social structure of society has resulted in the creation of *role-sets*, which he defines as “that complement of role-relationships in which persons are involved by virtue of occupying a particular social status.”<sup>216</sup> Thus, in the *role-set* of elementary and secondary education, the roles of teacher, principal, school psychologist, school board member, and superintendent are all examples of individual members of that *role-set*.<sup>217</sup> Individuals who compose an IEP team may be said to be members of a *role-set* within the context of Special Education.

The term *role-set*, however, is to be distinguished from the term, *multiple-roles*.<sup>218</sup> While *role-set* refers collectively to a group of individuals who each assume a particular *status-role* and who interact together within a related social structure,<sup>219</sup> *multiple-roles* refer to the various *status-roles* occupied by an individual.<sup>220</sup> In that regard, people may have *multiple-roles* within multiple *role-sets*. For example, an educator may assume roles of teacher, employee, and colleague in one *role-set*, and wife, mother, and nutritionist in another.

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evaluated as they learn to teach. This calls for well-matched mentors, release time to observe skilled colleagues, curricula that offer guidance about what and how to teach, and attentive peers and administrators who watch them teach, offer advice, and assess their performance.”).

214. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/role> (last visited Apr. 10, 2013).

215. *Id.*

216. Robert K. Merton, *The Role-Set: Problems in Sociological Theory*, 8 BRIT. J. OF SOC. 106, 110 (1957).

217. *Id.* at 111.

218. *Id.*

219. *Id.*

220. *Id.*

In their book, *Beyond Reason*, Fisher and Shapiro provide important insight into the relationship between the roles people assume or are assigned in life, and how positive or negative emotions are produced as people engage in the activities associated with them.<sup>221</sup> The term “role” refers to more than a label.<sup>222</sup> Every role includes functions, tasks, and responsibilities people are expected to perform in connection with the roles they assume in various contexts of their life.<sup>223</sup> Roles may also be distinguished between those that are *conventional* and those that are *temporary*.<sup>224</sup> In the present section the discussion is limited to *conventional roles*<sup>225</sup> often associated with special education teachers. As Fisher and Shapiro have written, “*Conventional roles* are commonly accepted<sup>226</sup> roles that people play within an organization<sup>227</sup> or community.”<sup>228</sup> Some of the conventional roles typically associated with a special educator include: teacher, employee, member of professional association(s), and union member. However, the conventional roles of special education teachers

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221. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON, USING EMOTIONS AS YOU NEGOTIATE* 115–36 (Penguin Books 2005).

222. FISHER & SHAPIRO, *supra* note 221, at 120.

223. *Id.*

224. FISHER & SHAPIRO, *supra* note 221, at 115–33.

225. FISHER & SHAPIRO, *supra* note 221, at 115–20. The meaning and context of the term “conventional roles” as used in this Article is adapted from this book. *Id.*

226. By “accepted” it is not necessarily meant to say that the person willingly or voluntarily assumes the particular role; rather, it means that when the person is acting in, or performing the tasks and responsibilities associated with the particular role it is done within the context of a socially accepted status. Thus, an educator assigned to provide instruction in a classroom assumes the role of a teacher, the role of a colleague when considered in the context of fellow teachers, and the role of an employee in the context of employment by a school district. However, the educator may be assigned additional roles such as record-keeper, behaviorist, assistive technology consultant, and so on, without doing so happily or voluntarily, and yet there is usually some generally understood and accepted status associated with the role. This holds true regardless of whether or not the person is qualified to perform the tasks and functions of the role, or in fact does so. Thus, a person can assume the role of teacher in a competent or incompetent manner.

227. Such organizations may be formal or informal. They may also exist in the context of family, neighborhood, church, community, profession, service, city, state, nation, or any other group of people interacting together.

228. FISHER & SHAPIRO, *supra* note 221, at 118.

are not uniformly defined in purpose, delineated in scope, or reasonably limited in number. For example, in addition to the above, special educators often assume additional roles of behaviorist, curriculum developer, bookkeeper, data collector, counselor, fundraiser, and so on.

*Temporary roles*<sup>229</sup> relate to how we are acting in the moment and will be discussed later under Teacher Relationships in Part IV.D. In either case, people want the roles they assume or that are assigned to them to be personally fulfilling,<sup>230</sup> and when they are not it is predictable that the person will experience resentment and frustration leading to the provocation of negative emotions.<sup>231</sup>

Fisher and Shapiro describe three “key qualities” of a personally fulfilling role.<sup>232</sup> First, the role must have a clear purpose. “A clear purpose provides an overarching framework to your behavior.”<sup>233</sup> Second, the role must be personally meaningful. “A meaningful role incorporates your skills, interests, values, and beliefs into the task at hand.”<sup>234</sup> Lastly, the role cannot be a pretense. “[T]he core concern that each of us has with role is not a matter of who you should pretend to be, but rather with the role that defines who you really are.”<sup>235</sup> As will be seen from the discussion below, the numerous roles that teachers of children with disabilities are expected to assume frequently do not incorporate the qualities necessary to be personally fulfilling.

In 1998, the Council for Exceptional Children (CEC) released findings from a national survey of more than one thousand special education teachers that concluded: “Poor teacher working conditions contribute to the high rate of special educators leaving the field, teacher burnout, and substandard quality of education for students with special needs.”<sup>236</sup>

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229. FISHER & SHAPIRO, *supra* note 221, at 127–33.

230. *See, e.g., id.* at 117–25.

231. *Id.* at 115.

232. *Id.* at 117–18.

233. *Id.* at 117.

234. *Id.*

235. *Id.* at 118 (emphasis omitted).

236. Council for Exceptional Children, *CEC Launches Initiative on*

This survey was closely followed by CEC's appointment of a Presidential Commission to identify and assess obstacles preventing children with disabilities from receiving a high quality education. One of the compelling realities proclaimed by the Commission's 2000 Report, *Bright Futures for Exceptional Children*, was that too often "special educators are asked to fulfill roles that are fragmented, ambiguously defined, and obscured by conflicting responsibilities."<sup>237</sup> One teacher quoted in the report said, "As special educators, we wear many hats. We are required to be case managers, consultants, classroom teachers, secretaries, and disciplinarians."<sup>238</sup> Another teacher said, "My frustration is trying to be 'all things to all people.' I am supposed to keep perfect paperwork, collaborate with regular education teachers, train and grade peer tutors, keep in constant contact with parents, and still find time to teach my students."<sup>239</sup> Indeed, some have concluded that teaching students is no longer the primary role of special educators, not for lack of desire, but because other role responsibilities such as those specified above get in the way.<sup>240</sup>

In her article, *Multi-tasking is Multi-taxing: Why Special Educators Are Leaving the Field*, Marilyn Kaff identified numerous roles that special education teachers said they assume during a typical week. They include "teacher, co-teacher, co-planner, collaborative consultant, team member, case manager, student advocate, diagnostician, and resource manager."<sup>241</sup> Participants in Kaff's study also indicated the amount of time they spent each week on the following tasks:

[D]elivery of direct instruction to students;  
delivery of instruction with another teacher;  
monitoring student progress; allocation of  
resources for student support; supervision of  
paraprofessionals; monitoring the use of  
curricular adaptations and modifications in

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*Special Education Teaching Conditions*, CEC TODAY 2, 7(1998).

237. KOZLESKI, ET AL., *supra* note 7, at 5.

238. *Id.* at 8.

239. *Id.*

240. Kaff, *supra* note 188, at 10-12.

241. *Id.*

general education settings; case coordination; advocacy/mentoring; paperwork; developing Individualized Education Programs (IEPs); collaboration consultation with administrators; general and special educators; designing and implementing modifications of curricular materials; collaboration/consultation with parents; evaluation of students; and student scheduling.<sup>242</sup>

It is not just the excessive number of roles that special education teachers are expected to fulfill that is problematic for them. Another significant challenge related to roles faced by special education teachers is the frequent lack of consensus as to what they are, should be, or who should decide them. In that regard, Billingsley's research has delineated a number of such problems that afflict special education teachers, including: "*role ambiguity* (necessary information is unavailable for a given position), *role conflict* (inconsistent behaviors are expected from an individual);<sup>243</sup> *role dissonance* (teachers' own role expectations differ from the expectations of others;<sup>244</sup> and *role overload* (having more to do than is reasonable)."<sup>245</sup> Billingsley also explained the overlapping impact that one role problem has on another: "These various role problems are related. For example, role overload can lead to role conflict, with special educators feeling torn between the teaching tasks they feel are critical and the burdensome bureaucratic requirements that demand their time."<sup>246</sup>

The conditions discussed above obstruct the ability of special education teacher's to have fulfilling roles in their

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242. Kaff, *supra* note 188, at 10, 11–12.

243. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 372 (citing John R. Rizzo et al., *Role Conflict and Ambiguity in Complex Organizations*, 15 ADMIN. SCI. Q. 130–63 (1970)).

244. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 372 (citing Russell Gersten et al., *Working in Special Education: Factors that Enhance Special Educators' Intent to Stay*, 67 EXCEPTIONAL CHILD. 549 (2001)).

245. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 372 (citing BONNIE BILLINGSLEY ET AL., IMPROVING THE RETENTION OF SPECIAL EDUCATION TEACHERS: FINAL REPORT (1995)).

246. Billingsley, *Promoting Teacher Quality*, *supra* note 4, at 372.

career. Where role ambiguity, conflict, dissonance, and overload exist there can be neither clearly defined purpose associated with them<sup>247</sup> nor will they be personally meaningful.<sup>248</sup> Instead roles become a pretense for defining special education teachers in ways neither true to who they really are or want to be nor consistent with their training, skills, and experience;<sup>249</sup> rather, tasks are bound to conform to numerous involuntary roles that special educators can only pretend to play.<sup>250</sup> The inevitable result of this paradigm is the anti-therapeutic consequences experienced by special educators that has infected the system of special education in the United States, and continues to do so with no end in sight.

## 2. Special Education Teachers' Perceived Value of the Roles Assigned to Them

While it is true that the roles expected to be assumed by special education teachers have grown wide in scope, long in time, and overwhelming to many of those in the field, an exacerbating factor is the constant degradation of purpose, and diminished value frequently attached to tasks associated with these roles. For example, it is not just the enormous amount of paperwork teachers are required to complete that causes resentment, but also the fact that special education teachers often have not been taught the essential purposes of the process so that the relationship between the required tasks and the values of the IDEA are appropriately understood, respected, and seen as important. When I hear special

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247. FISHER & SHAPIRO, *supra* note 221, at 117–18. A clearly defined purpose is an essential element for a role to be fulfilling and thus satisfying to the person acting in it.

248. *Id.* A second essential element for a role to be fulfilling for the person acting in it is that it must be personally meaningful.

249. *Id.* The third essential element for a role to be fulfilling is that tasks and functions of the role must be consistent with the training, education and skills of the person assigned to it. In special education, teachers are too often asked to assume roles without their having the skills necessary to appropriately perform the tasks associated with them.

250. *Id.* Associated with the third essential element of a fulfilling role is the fact that when these elements are not present, the person assuming the role becomes a pretender and whether intentionally or not, is forced into the inevitable position of trying to be someone they are not.

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educators condemn paperwork, it is usually in the context of viewing the endeavor as useless busywork, undertaken primarily for the purpose of technical compliance with legal requirements, while at the same time taking up precious moments that could be spent teaching their students.

This is further magnified by the frequent failure of educational agencies to provide special education teachers with the support and training necessary for them to perform these tasks in a manner that is efficient, effective, and in furtherance of the values and purposes for which they have been created. Under these circumstances, special education is not viewed by special educators as a coherent cycle where the various tasks associated with its processes are recognized as interrelated and interdependent. Rather, special education is seen as a complex web of disconnected bureaucracy and time wasting busywork. For example, without a foundational recognition of its importance and purposes, paperwork tasks such as drafting annual goals and monitoring their progress become disconnected from evaluations, assessments, and identification of a child's unique needs. Thus, student IEP goals become more aligned with generic classroom routines rather than built upon information and data from a child's evaluations and assessments. This not only undermines the essential principle of individualization under the IDEA, but also increases the negative psychological and emotional impact of the process upon special education teachers. When building a house or a child's educational program, where the foundation of either is weak and flawed, those components added upon it are doomed to failure, and with that failure, frustration and disappointment for those who are the builders as well as those who are its occupants.

On the other hand when annual goals are appropriately written in a concise, coherent, and measureable fashion so as to address priorities related to a child's unique needs that have been derived from individual assessments and evaluations, the cycle of special education turns more smoothly, IEP teams collaborate more effectively, and decisions regarding the special education and related services necessary for a child to receive a

free and appropriate education are made more abundantly.<sup>251</sup> This is made possible because the IEP team becomes empowered to interact within a valued procedural framework that provides objective information for communication, negotiation, and collaboration.<sup>252</sup>

The comments made in this section are not meant to ignore or minimize the legitimate concerns that special education teachers have about the significant paperwork requirements of their job. Rather, these comments underscore the fact that the teacher's paperwork burden is frequently exacerbated by the dysfunctional, erroneous, and inadequate policies, practices, and training programs of too many educational agencies, as well as their failure to inculcate in the minds and hearts of these teachers the values and purposes underlying the tasks they are expected to perform.

### 3. Education, Training, and Skills Necessary to Competently Perform Tasks Associated with Assumed Roles

In addition to the overwhelming number of roles assigned to special education teachers, many of which are poorly designed and vaguely structured, special education teachers are often not provided with the training, instruction, and skills necessary to competently and appropriately perform the tasks associated with them. In essence, special education teachers, especially those who are new to the profession, are too often unprepared for the roles they are expected to assume and the tasks they are expected to perform in connection with them. In that regard, Tonnsen and Patterson said,

New teachers aren't always prepared for the challenges they'll find in the profession. They enter the field expecting—and often being expected—to do what the veteran teacher has been doing for years, with equal success. They

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251. *See, e.g.*, BARBARA D. BATEMAN & CYNTHIA M. HERR, WRITING MEASUREABLE IEP GOALS AND OBJECTIVES (Attainment Co. Inc. 2006).

252. *Id.*

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face long days, filled with little time for reflection and planning. They face children with problems they can't understand. They face a bureaucracy that forces them to teach a prescribed curriculum in a prescribed manner. . . . Just months earlier, most of these new teachers were carefree college students, idealistic to a fault. If they're thrown into a classroom and expected to succeed with little or no support, it's no wonder many of them quickly become disillusioned.<sup>253</sup>

#### 4. Intersection with Other Psycholegal Soft Spots

The anti-therapeutic consequences of special education teacher role issues may be seen in another kind of cycle, albeit, not the cycle of special education discussed above. Rather, this is the spiraling cycle of systemic dysfunction. Educators are frequently instructed about legal requirements associated with the IDEA, and the importance of educators and educational agencies remaining "in compliance" with those mandates as they engage in the processes of special education. Further, such instruction may be provided in the context of anecdotal case studies where parents, advocates, or attorneys have seized upon such non-compliance by initiating procedural safeguard processes such as compliance complaints or due process litigation. There is nothing inherently wrong with this type of training, and in fact it may be very useful in relationship to learning the law in context and application.

However, where the basis of training, instruction, and practices are primarily formulated upon objectives of achieving technical compliance with legal procedures, without the balance of the law's values and purposes, the risk of provoking mistrust and conflict rises substantially. Educational IEP team members soon begin communicating recommendations to parents as to placement and services with the added phrase "and we believe this offer is *defensible*." Before long, the focus is more on what language will hold up under legal scrutiny rather

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253. Sandra Tonnsen & Susan Patterson, *Fighting First Year Jitters*, 14 EXEC. EDITOR 29 (1992).

than how special education and related services will contribute to a child's increased functioning.

C. *Teacher Resources*

1. Environment & Materials (Classroom; Curriculum; Materials; Technology/Equipment)

Perhaps nothing is more frustrating to a professional than trying to do their work without the necessary tools and resources. In preparing land for the construction of a building, a grading contractor could hardly be expected to accomplish the task if only equipped with a soup spoon to move dirt. Likewise, a carpenter would be obstructed in framing the structure if provided with nails, but no hammer or other means by which to drive them. Patients would rebel against a dentist foregoing the administration of numbing medication to the mouth before drilling in connection with a root canal because the medication was expensive or inconvenient to obtain. And the list goes on!

Nevertheless, that is what is expected every day in the classrooms of numerous special education teachers across the country. The *CEC Bright Futures Report* referred to previously in this Article addressed this issue:

Special educators can do effective work only if they are given appropriate resources, materials, and reasonable caseloads. However, they report that they often do not have the materials they need. In many schools, the special education program is still the last on the list for books, instructional materials, classroom space, and equipment.<sup>254</sup>

An example of this situation is found in the statement of a teacher quoted in the *Bright Futures Report*: "The principal refuses to purchase reading curriculum material for my students. . . . When given the option of purchasing [books] one grade level lower than the student's actual grade, the answer is

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254. KOZLESKI ET AL., *supra* note 7, at 11.

NO!”<sup>255</sup> Another teacher is quoted in the same report addressing problems with both classroom and materials: “I have a small, narrow room, with one dry erase board and 15 desks. I do not have access to an overhead [projector]. My school’s supply ran out before Special Ed got their equipment.”<sup>256</sup>

I have personally observed this dilemma for teachers over the years. The following example will further illustrate this point. A few years ago I was asked to assist a gifted high school student with blindness who was not receiving her advanced placement and AP books and materials in a timely manner, and sometimes not at all. During the previous summer term she did not receive her brailled text until a few days before the course was to end. Just before the fall term of that year was to begin her counselor telephoned and told her she would not be able to take one of her AP courses, not because she was unqualified, but rather because the school had not obtained the necessary books and materials for her.

About the same time, the school district’s teacher for visually impaired students resigned. When I later spoke with this teacher, she indicated that a major factor in her leaving was the constant failure of the school district to provide the resources and support necessary for her to do her job appropriately. “At one time . . .” she continued, “our entire VI program was situated in a ten-by-ten room which was expected to accommodate all students, materials, equipment and instruction.”<sup>257</sup> When the VI teacher left her position, other educators were assigned by school district administrators to fill in, even though these teachers did not possess the knowledge or expertise necessary to carry out the responsibilities associated with that position. This caused further dysfunction with the VI program and mounting complaints were lodged by parents, not only against the district, but also against the unfortunate assigned teachers who were just trying to do the

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255. *Id.*

256. *Id.*

257. Need Source Statement made to the author by VI teacher in connection with a due process complaint filed against the school district on behalf of the student by the Pepperdine School of Law Special Education Advocacy Clinic

best they could with what they were given, which unfortunately was not very much. These teachers had not asked to work in the VI program, and refusing the assignment may have been construed as a career decision. This is just one example of many over the years that I have observed where teachers have been assigned positions or asked to perform tasks for which they were unqualified and inexperienced.

Parents frequently complain that their children have been bringing home the same worksheet or reading the same book year after year so that they now quote the text from memory without looking at the words. They say their children rebel in doing worksheets because they have already completed the same ones over and over and they are bored by the absence of variety. Further, parents indicate their children are frequently given material that is not interesting, challenging, or seemingly relevant to anything of importance in their life.

2. Consultation/Collaboration:

Administrators; Colleagues; Related Service Providers;  
Behavioral Specialists; Technology Specialists

The issues associated with consultations and collaborations for special education teachers have already been touched upon in the discussion above regarding the *Post Hiring* micro construct of *Mentoring, Collaboration, and Consultation*. It is appropriate that this topic be included in both places as it represents an essential element of both *Teacher Learning and Preparation* as well as a *Resource* for special educators that must be identified and allocated within the bureaucratic plans and budgets of educational agencies.

Special education teachers are expected to possess the knowledge and skills necessary for them to provide specialized instruction to their students within the context of their educational training and credential. However, the needs of children with disabilities related to their education and development are often diverse and complex.<sup>258</sup> Thus, the

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258. See, e.g., Vito Loiacono & Barton Allen, *Are Special Education Teachers Prepared to Teach the Increasing Number of Students Diagnosed with Autism*, 23 INT'L J. OF SPECIAL EDUC. 120, 122 (2008).

process of special education is multi-disciplinary in that it anticipates the participation of related service providers, administrators, parents, and other professionals working together as a team to assure that each child with a disability has an opportunity to receive a free appropriate public education that will meet their unique needs and “prepare them for further education, employment, and independent living.”<sup>259</sup> A special education teacher cannot be expected to possess the universe of knowledge and skills represented by the array of IEP team members involved in the education of children with disabilities. For example, sometimes a student will display challenging behaviors that not only impede the learning of the student, but also others in the classroom. Determining and implementing successful interventions for the negative behaviors of children with disabilities is often difficult and complex. The function of such behaviors may involve factors calling for the expertise of behavioral specialists, psychologists, occupational therapists, speech and language therapists, or others with the training and experience necessary to implement interventions that will successfully reinforce appropriate behavior while extinguishing negative ones.<sup>260</sup>

Of course this is also true for teachers who have children with disabilities placed in general education classrooms, where in such cases the special education teacher is expected to become a resource to the general education teacher for collaboration and consultation. Yet, too often special education and general education teachers are expected to accept all students assigned to them regardless of the student’s needs or the qualifications of the teacher. In that role teachers may be told to implement a particular plan or intervention, or may simply be expected to handle the needs of their students the best they can with whatever materials or skills they happen to have. Teachers report that they are frequently not prepared or qualified to perform tasks assigned to them under such circumstances.<sup>261</sup>

Studies have shown a significant correlation between

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259. 20 U.S.C. § 1400(d)(1)(A) (2006).

260. See, e.g., KOZLESKI ET AL., *supra* note 7, at 5.

261. See, e.g., Richard P. Iano, *Special Education Teachers, Technicians or Educators?*, 23 J. OF LEARNING DISABILITIES 462-63 (1990).

success and the satisfaction of colleagues (general and special education teachers) as well as administrators and service providers.<sup>262</sup> Morale and commitment to career are enhanced when special education teachers feel a strong sense of professional community in their working environment.<sup>263</sup> This sense of community involves administrative support, collaboration among colleagues, consultation with necessary experts, meaningful professional development, and opportunities for educators to participate in making decisions that impact their work. Where this is missing, as it often is, teachers are likely to experience anti-therapeutic consequences, which sustain a paradigm of dissatisfaction among such educators.

### 3. Time

With the multitude of roles and tasks assigned to special education teachers, it is not surprising that “time” is perhaps the most significantly limited resource they encounter in their profession. This is not a challenge for which new special education teachers are prepared or even forewarned; however, it is one that has been identified in the literature for many years.<sup>264</sup> A 1995 study by Morvant, Gersten, Gillman, Keating, and Blake found that 68% of special education teachers reported not having enough time to do their work.<sup>265</sup> Since then, caseloads, responsibilities, roles, and expectations have increased substantially, and I wonder now if any special education teacher would profess to have adequate time to complete their work in a timely manner. I suspect not. It is true that many professionals in a variety of occupations

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262. See, e.g., Susan J. Rosenholtz & Carl Simpson, *Workplace Conditions and the Rise and Fall of Teachers' Commitment*, 63 SOC. OF EDUC. 241, 244 (1990); see also Bonnie S. Billingsley, *Teacher Retention and Attrition in Special and General Education: A Critical Review of the Literature*, 27 J.OF SPECIAL EDUC. 137 (1993) [hereinafter Billingsly, *Teacher Retention*].

263. See, e.g., Gersten et al., *supra* note 244, at 549, 561.

264. See, e.g., Emery & Vandenberg, *supra* note 8, at 119.

265. *Id.* (citing MARTHA MORVANT ET AL., 1 ATTRITION/RETENTION OF URBAN SPECIAL EDUCATION TEACHERS: MULTI-FACETED RESEARCH AND STRATEGIC ACTION PLANNING, FINAL PERFORMANCE REPORT (1995)).

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regularly profess to never having enough time in a day to accomplish all of the tasks they would like to have completed, and there are always those in any occupation that are unorganized, slow, or poor stewards of the time allotted them. But this example of time shortage for special education teachers is not a worn-out cliché that is limited in scope; rather, it is a giant net cast wide and deep enough to snare even the most organized and time bound practitioners among the group.

Special education teacher's lack of sufficient time to complete their work intersects with other *key moments* in this paradigm and exponentially exacerbates the anti-therapeutic consequences of them all. Special education teachers are confronted with excessive and poorly designed roles for which they are not supported or prepared. They encounter enormous loads of paperwork for which they do not understand the value or purpose. They face conflict with parents on one side and administrators on the other, and with all of this they contend with one deadline after another. At the intersection of these circumstances they combat the reality of being caught up in a hopeless situation that only serves to puncture their optimism and deflate their motivation. In short, they experience substantial anti-therapeutic consequences associated with the systemic dysfunction of the special education process.

#### 4. Rewards/Salary

Rewards associated with a career mean different things to different people depending upon the nature of their occupation and the personal perspective of those engaged in it.<sup>266</sup> Some rewards are extrinsic while others are intrinsic,<sup>267</sup> and may involve, for example, matters such as compensation, power, prestige, honor, recognition, advancement, professional development, service, and relationships.<sup>268</sup> Rewards may also relate to one's success in their job however that success may be

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266. See, e.g., VICTOR H. VROOM, *WORK AND MOTIVATION* 34–56, 57–114 (Jossey-Bass, Inc. 1995).

267. See, e.g., KEVIN RYAN & JAMES M. COOPER, *THOSE WHO CAN, TEACH* 3–6 (Wadsworth, 13th ed. 2012).

268. VROOM, *supra* note 266, at 34–114.

measured and by whom.<sup>269</sup> Additionally, people often have different priorities as to the motivating power of these rewards.<sup>270</sup> Nevertheless, regardless of the individual variation that often exists among people regarding occupational reward preference, careers such as teaching are said to attract people who are generally motivated more by particular kinds of rewards.<sup>271</sup>

In education, it has been said that career rewards derive primarily from a teacher's work with students.<sup>272</sup> In that context, such rewards include the satisfaction a teacher experiences when students learn what they are supposed to learn from their teaching efforts.<sup>273</sup> Appropriate student achievement linked to the work of an educator has a tendency to enhance a teacher's sense of accomplishment, status, and purpose.<sup>274</sup> This typically generates positive emotions, which in turn promotes greater commitment to career and pursuit of continuing professional development, as well as providing increased energy and the emotional availability necessary to serve students better.<sup>275</sup> Thus, an upward spiral of rewards is reinforced in a continuing cycle throughout a teacher's career.

However, studies have identified a number of factors, which too often combine to obstruct the flow of such rewards to special education teachers, resulting in frustration, detachment, and a sense of hopelessness.<sup>276</sup> Negative emotions reinforce a downward spiral of limited energy and emotional exhaustion.<sup>277</sup> In this paradigm, a different kind of continuing cycle is likely to be created with adverse consequences for both

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269. *Id.*

270. *Id.*

271. RYAN & COOPER, *supra* note 267, at 3–6.

272. *See, e.g.*, Rosenholtz & Simpson, *supra* note 262, at 244; *see also* Billingsley, *Teacher Retention*, *supra* note 262.

273. *See, e.g.*, Eric Shyman, *Examining Mutual Elements of the Job Strain Model and the Effort–Reward Imbalance Model Among Special Education Staff in the USA*, 39 EDUC. MGMT. ADMIN. & LEADERSHIP 349, 351 (2011).

274. *See, e.g., id.*

275. *See, e.g., id.*

276. *See, e.g.*, Stempien & Loeb, *supra* note 10, at 264; Whitaker, *supra* note 15, at 3.

277. *See, e.g.*, Martin Haberman, *Teacher Burnout in Black and White*, 1 NEW EDUCATOR 153, 155–58 (2005).

student and teacher. While special educators are apt to begin their careers with enthusiasm and confidence that they will rarely find success in their work,<sup>278</sup> too often they find themselves confronted by assignments for which they feel unprepared and unqualified.<sup>279</sup> They are likely to be loaded down with numerous and poorly designed roles where the things that they are required to do are more determined by bureaucratic policies and practices of their employing school district than by what they have been taught in their graduate education.<sup>280</sup> Additionally, special education teachers are frequently assigned students with a wide range of disabilities and behaviors without the training, support, and materials necessary to meet their student's needs.<sup>281</sup> Without opportunities for continuing professional development, as well as collaboration with colleagues, special education teachers are prone to feel isolated.<sup>282</sup> Without support from administrators and others, special educators are not likely to benefit from feeling that their work is important and of value to their students and others.<sup>283</sup> Thus, like a burst of wind extinguishing sparks in the tinder of a new campfire, the flame of a beginning special educator's optimism is apt to be snuffed out before it has a chance to ignite the reinforcing timbers of experience and success.

#### D. *Teacher Relationships*

When Congress first enacted Public Law 94-142 in 1975 it envisioned a procedurally oriented special education system guided by collaboration between educators and parents working together for the common purpose of assuring that all children with disabilities received a free and appropriate public

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278. Tonnsen & Patterson, *supra* note 253, at 29.

279. Stempien & Loeb, *supra* note 10, at 258, 259, 264.

280. *See, e.g.*, Sindelar et al., *supra* note 136, at 10.

281. *See e.g.*, Kaff, *supra* note 188, at 10, 13-14; *see also* Kauffman, *supra* note 145, at 244, 247.

282. *See, e.g.*, Whitaker, *supra* note 15, at 3.

283. *See, e.g.*, Linda Evans, *Understanding Teacher Morale and Job Satisfaction*, 13 TEACHING & TCHR. EDUC. 831, 840 (1997).

education.<sup>284</sup> Recognizing the natural disadvantage parents would have as members of a team predominated by educators and related service providers, and the fact that such collaborative aspirations would not always be achieved, a scheme of procedural safeguards was included in the act to insure a means by which parents could challenge decisions made by educational agencies.<sup>285</sup>

While Congress anticipated that disagreements would arise between parents and educators, it is less clear that Congress comprehended that individuals associated with the process of special education would frequently form complex and dynamic alliances, not always transparently, or on one side or the other. In fact, the legislative history and subsequent commentary by the Courts seemed to assume a two-dimensional relationship paradigm, with parents on one side and everyone else (educational agencies, teachers, administrators, and related service providers) on the other.<sup>286</sup> Thus, reference to disagreement between parents and educators presupposed that most non-parent participants would fall under the umbrella of educators and unite their voice with theirs in such conflicts.

In reality, the actual relationship paradigm often inspired by the IDEA is multi-dimensional, with variable alignment of parties and interests. While it is true that administrators, teachers, related service providers, and staff associated with an educational agency will frequently respond to conflict with parents in formal unanimity, these formal alliances are often undermined by the inter and intra personal conflict experienced by these individuals as they act in the various roles assumed in the process. To examine this multi-dimensional paradigm, I begin by illustrating the structural relationship between IEP team members, followed by a discussion of the various roles assigned or assumed by them. I conclude by considering the conflicts that arise under the structure of these relationships and how they impact the psychological and emotional consequences of the process for special educators.

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284. *Burlington*, 471 U.S. at 359.

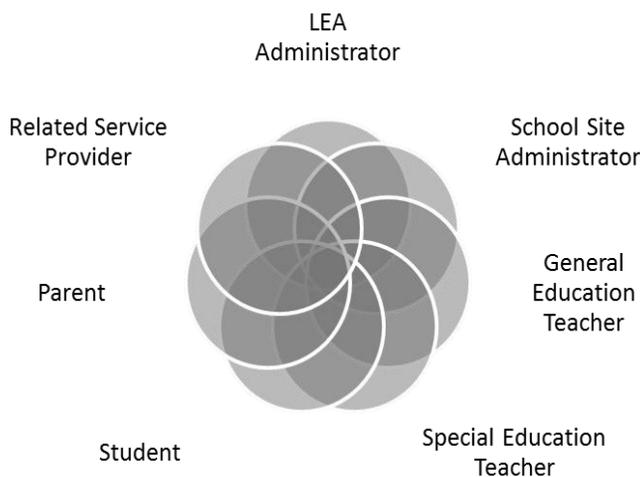
285. *Id.*

286. *See, e.g.*, 20 U.S.C. § 1415 (2006).

### 1. Structural Relationships Between IEP Team Members

Typical members of an IEP team were previously identified in Part III.A in connection with the discussion about *legal actors* in the application of *Therapeutic Jurisprudence* to Special Education Law. Illustration 2.0 helps visualize the multi-dimensional nature of the relationships between IEP team members. Although there may be more significant interaction between some team members than others, there is often some level of interaction between and among all of them. Since the focus of this Article is on the psychological and emotional impact of Special Education Law on teachers of children with disabilities, the overlapping nature of this paradigm will primarily address the intersection of such relationships with special education teachers.<sup>287</sup>

**Figure 2**



287. Although it is special education teachers who are most often associated with teaching children with disabilities, general education teachers also play an essential role in this endeavor. This is especially so considering the increased attention being given to providing all children with access to the general education curriculum and mandates associated with the principle of the least restrictive environment.

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As mentioned in Part IV.C.2, special education teachers are typically assigned numerous roles in connection with their work. The present discussion revisits and expands upon the concept of roles to address the dynamic of temporary roles. It is important to understand the meaning of temporary roles, how they are assumed or chosen, and how they impact the quality and productivity of relationships in the working environment of special education teachers.

## 2. Temporary Roles

The typical conventional roles associated with the career of a special educator often trigger an assumption of temporary roles which may impact the quality of relationships shared by special education teachers. Temporary roles are defined in the context of how a person feels and acts in the moment, and may be chosen purposefully and strategically, or may simply be assumed unknowingly in response to the attitude and actions of others.<sup>288</sup> The following is a list of common temporary roles: “Talker, Listener, Devil’s advocate, Collaborator, Competitor, Accommodator, Compromiser, ‘Joker’, Learner, Brainstormer, Advocate, Victim, Aggressor, Problem Solver, Colleague, Informal Mediator, Facilitator, Host, Guest, Evaluator, Option Generator, and Advisor.”<sup>289</sup> Additional examples of temporary roles include: Mentor, Counselor, Supplier, Micro-manager, Busy-body, Trouble-maker, Adversary, and Enemy.<sup>290</sup>

In my discussions of this topic with law students, educators, parents, and professionals, I find most people are able to distinguish between temporary roles that are typically considered positive or negative. For example, in most situations people consider Collaborator, Colleague, Informal Mediator, Problem Solver, Facilitator, Option Generator, and Advisor as positive, whereas Micro-manager, Aggressor, Busy-body, Trouble-maker, Adversary, and Enemy are generally seen as negative. Some may be viewed as either positive or negative

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288. See, e.g., FISHER & SHAPIRO, *supra* note 221, at 127–33.

289. See, e.g., *id.* at 129. This list is not meant to be exhaustive.

290. See, e.g., FISHER & SHAPIRO, *supra* note 221, at 130.

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depending upon the context as well as the intent and skills of the person playing the role.

How special education teachers select, adopt, and act in these temporary roles at any given time, has much to do with the quality of communication and the nature of the relationship existing between themselves and others with whom they interact. However, it is predictable that acting in positive or negative temporary roles will have a corresponding and reinforcing impact upon the effectiveness of a teacher's interpersonal communication skills and the quality of their relationships so that determining the origin of any component becomes somewhat like the attempted analysis of what came first, the chicken or the egg. For example, in the context of this Article, the overloading assignment of dysfunctional conventional roles to a special education teacher may produce the perception of hopelessness, frustration, and career dissatisfaction for an educator, which then may become reflected in the nature of communication the teacher has with others. Or a teacher may have a personality disposition inclining them to adopt particular temporary roles over others. Take for example the person who is naturally inclined to be assertive, competitive, and adversarial. Acting consistent with that disposition may strain the relationship, trigger assumption of negative temporary roles by another, escalate the person's own assumption of negative temporary roles, or cause all of these consequences. Regardless of which came first, improving a negative paradigm begins with understanding what "is" rather than the order in which "it" came to be. Ultimately, what is important is that policy-makers, teacher education leaders, and special education teachers themselves understand the nature and importance of temporary roles, communication, conflict, and relationships, and the fact that these elements impact and exacerbate the psychological and emotional consequences flowing from each of them.

### 3. Conflicts

Conflict in and of itself is neither negative nor positive. It is how we react to it that makes it so.<sup>291</sup> Destructive or non-productive conflict is the predictable consequence of the negative paradigm described above. As special education teachers become overwhelmed by vaguely designed and poorly implemented conventional roles, the relationship paradigm evolves into an emotionally charged powder keg, ready to blow up as it is ignited by negative temporary roles that are fueled by dysfunctional communication. The following example will help explain this dynamic.

Just before the school year begins, a new special education teacher is unexpectedly assigned five new students in addition to ten on his original class roster. The ten students on the original class roster range in age from 5–7 and all function at similar levels with respect to the cognitive and social domains of their neurodevelopmental profile.<sup>292</sup> Until the change was made to the class roster the teacher had been enthusiastic about his new job and confident that he would be successful in meeting the needs of his students. However, the events transpiring since then have transformed his enthusiasm into dread and his confidence into despair.

First, the teacher learns that his new students range in age from 6–9 and that their prior placement was structured to address significant behavior challenges associated with sensory and communication issues. The parents of these five children are already unhappy with the school district about their children's educational program. This is the third placement change in a year for four of them, and they believe their children's behaviors have escalated in large part because of the lack of stability and consistency in their educational environment. The first week of school the parents attend a

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291. *See, e.g.*, WILLIAM W. WILMOT & JOYCE L. HOCKER, *INTERPERSONAL CONFLICT* 21 (The McGraw-Hill Cos., Inc., 8th ed. 2010); *see also*, DUDLEY WEEKS, *THE EIGHT ESSENTIAL STEPS TO CONFLICT RESOLUTION: PRESERVING RELATIONSHIPS AT WORK, AT HOME, AND IN THE COMMUNITY* 7 (Tarcher 8th ed. 1994); *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 75 (Morton Deutsch & Peter T. Coleman eds., Jossey-Bass, 2d ed. 2006).

292. *See, e.g.*, 20 U.S.C. § 1414(b)(3) (2006).

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“back to school” meeting with the teacher and pummel him with questions about the program and his teaching experience. Meanwhile, the parents of the original ten students have heard rumors that a handful of aggressive and behaviorally disordered children were being dumped into their child’s classroom and are concerned that their children will pick up bad habits, or worse, become injured. So, as of the first week of school, the emotional climate is already highly charged, and the new teacher is wondering how he will manage the first month, let alone the year.

By the time the second week ends the teacher is convinced that he has neither the training nor the skills to address the behavioral challenges of his new students. He was told by the school psychologist that a behavioral specialist would be consulting with him and coming into his classroom to provide support. He was also told that the district occupational therapist and speech and language therapist assigned to the school would be doing the same. By the end of the third week it has not happened. All of these individuals are struggling with challenges of their own as they try to adjust schedules in order to provide IEP services to students on their caseload according to the IEP requirements of each student. Behaviors escalate in the classroom. Emotions and conflict continue to escalate. The prospects for a good year for anyone quickly fade.<sup>293</sup>

Of course the assignment of new and unexpected students is not required to create the conflict paradigm described in the example above. Teachers are often assigned students with needs for which they are not prepared or qualified to provide interventions. It may be complex behavior challenges, unmet sensory needs, communication deficits, health issues, or any number of other requirements. It may be the expectation of providing instruction to an unreasonably high number of students or children with a wide variety of needs that spread the teacher’s time too thin to meet any of them. Under these circumstances teachers frequently feel obligated to do their best without complaint or may simply perceive they have no other alternative. As problems escalate the multi-dimensional

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293. This example includes the factual account of an actual experience by a special education teacher. I have seen variations of this example a number of times over the years.

relationships are impacted and conflict among and between them are exacerbated. On one hand, teachers resent the position they have been placed in by district and site administrators. On the other hand, they resent the blame and adversarial communications constantly heaped upon them by parents who challenge their skills, motives, and commitment. Under these unpleasant circumstances they face the discouraging reality that the needs of their students are not being met and feel that the enthusiasm and confidence with which they began their career is quickly slipping away. This may result in their leaving the field of education or, as some scholars have concluded, may decide to stick it out and simply “retire on the job.”<sup>294</sup> They may adjust expectations for themselves and for their students or may seek other ways to relieve the “cognitive dissonance”<sup>295</sup> that inflicts them. In any case, the psychological and emotional consequences for special education teachers will be destructive, not only for the educators themselves, but also for their students, parents, and for the very system<sup>296</sup> meant to serve them.

## V. Conclusion

In March, 2012, Met Life released a report titled *The American Teacher*, which included findings from a survey of 1,001 U.S. public school teachers in 2011.<sup>297</sup> The study found that satisfaction among U.S. public school teachers was at the lowest level in two decades.<sup>298</sup> For purposes of this Article

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294. Gersten et al., *supra* note 244, at 550.

295. The term “cognitive dissonance” relates to the discomfort one experiences when there is an inconsistency between what a person believes and their actions. LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1–31 (Stanford Univ. Press 1957).

296. By “system” I mean the processes of Special Education as provided in the IDEA and its regulations.

297. *The MetLife Survey of the American Teacher: Teachers, Parents and the Economy*, MET LIFE, INC., (March 2012), <http://www.metlife.com/assets/cao/contributions/foundation/american-teacher/MetLife-Teacher-Survey-2011.pdf>. Met Life has published a report relative to U.S. public school teachers annually since 1984.

298. The following questions were used to evaluate the percent of teachers who were very satisfied. In 2011, 2001, 1987, 1986, and 1984 the question read, “All in all, how satisfied would you say you are with your job

however, that was not the most significant finding in this report. Indeed, only 4% of the teachers surveyed reported teaching special education.<sup>299</sup> Further, although much of the publicity regarding the report has pointed to teacher satisfaction being at the lowest levels in two decades, it is important to note that it had been significantly lower during the preceding decade.<sup>300</sup> What is significant in the Met Life data relevant to issues in this Article is the identification of factors associated with current teacher dissatisfaction, including for example, elimination of programs and services, decline in quality of education resources and facilities, increased student and family needs, pessimism about student achievement and the relationship of the above with the economic changes and severe budget reductions that have been so prevalent in schools during the last few years.<sup>301</sup>

In that regard, factors associated with teacher dissatisfaction identified in the 2012 report are corroborated by findings from the 2006 Met Life teacher report which found the following factors associated with teacher satisfaction:

Teacher is not assigned to classes that s/he feels unqualified to teach; Teacher feels that his/her salary is fair for the work done; Teacher has enough time for planning and grading; School does not have problems with threats to teachers or staff by students; School does not have problems with disorderly student behavior; Teacher is treated as a professional by the community; Teacher has adequate involvement

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as a teacher in the public schools?" In 2009, 2008, 2006, 2003, 1995, 1989, 1988, and 1985 the question read, "All in all, how satisfied would you say you are with teaching as a career?" In 1989 the percentage of teachers with a "very satisfied" response was 44%. It was not that low again until 2011. *See id.* at 14.

299. *Id.* at 84.

300. *Id.* at 14. The percentage of teachers who responded that they were "very satisfied" with their job as a teacher or teaching as a career was lowest in 1986 at 33%. From then until 2008 the trend was higher until reaching its peak in 2008 at 62%. For those who would attribute NCLB to the decrease in teacher satisfaction it is important to note that the percentage increased from 52% in 2001 to 62% in 2008. *Id.*

301. *Id.* at 13–32.

in team building and problem-solving; Teacher has adequate ability to influence policies that affect him/her; Teacher has adequate time for classroom instruction; Teacher has adequate ability to influence student promotion or retention; Teacher has adequate involvement in shaping the school curriculum.<sup>302</sup>

While the deep decline in teacher satisfaction for general education teachers corresponds in time with the economic crisis of 2008 and the budgetary crunch experienced by educational agencies in the wake of that storm, the factors resulting from this paradigm have been present in the lives and careers of special education teachers for decades. Indeed, these factors have been discussed in the pages of this Article.

It may be that as the national economy improves so will the career satisfaction of public general education teachers. As budgetary cuts are eased and factors associated with teacher satisfaction improved, it may be anticipated that the previous upward trend of teacher satisfaction will reappear. But similar factors negatively impacting the career satisfaction of special education teachers have existed for decades, and while they have been greatly exacerbated by the budgetary realities of the last few years, the problems negatively impacting teacher satisfaction for special education teachers have always been present and will not be relieved by improvements in the national economy alone.

The most essential prerequisite to a student receiving an appropriate education is having a qualified, skilled, and dedicated teacher.<sup>303</sup> As Henry Brooks Adams said, “A teacher affects eternity; [they] can never tell where [their] influence stops.”<sup>304</sup> Of course while the influence of a teacher never ends, that influence may be good or bad depending upon the quality

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302. *The MetLife Survey of the American Teacher: Expectations and Experiences*, MET LIFE, INC., 77 (2006), <http://www.eric.ed.gov/PDFS/ED496558.pdf> (emphasis omitted).

303. See, e.g., KOZLESKI ET AL., *supra* note 7, at 1.

304. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 287 (Jean Gooder ed., Penguin Books 1995). This book was first published posthumously in 1918.

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of education a student receives from that teacher. As observed from the extensive research and writing that has evolved on this topic, the importance of generating and protecting an adequate supply of highly qualified special educators cannot be overstated. The critical shortage of quality special education teachers has continued too long, and the problem will continue to obstruct purposes of the IDEA until the issue is addressed by educators, politicians, and parents in public policy and practice and throughout all of the areas impacting a teacher's career, from teacher education to teacher induction, and from teacher induction to continuing professional development, training and experience.<sup>305</sup>

Improving the career satisfaction of special education teachers will require that all domains of the social institution of public education associated with such satisfaction be addressed systematically, consistently, and coherently. Teachers who continually experience anti-therapeutic consequences associated with the psychological and emotional impact on them of their careers cannot be expected to produce the kind of long-term positive impact on the future spoken of by Henry Adams, although their influence may affect eternity in long-term negative ways, and in the end, that fact should provide the motivation necessary to implement the changes necessary to change this paradigm.

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305. See, e.g., Brownell et al., *supra* note 11, at 366–74.