NO IDEA WHAT THE FUTURE HOLDS: THE RETROSPECTIVE EVIDENCE DILEMMA

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The Individuals with Disabilities Education Act's predecessor established a multilevel administrative and judicial review system for special education decisions, and ever since, the volume of special education cases in federal court has ballooned. Most present cases involve disputes over whether the school district drafted an individualized education program capable of providing a child with disabilities a "free appropriate public education." But what evidence parties can bring to these disputes is not settled. Circuit courts are split on whether "retrospective evidence"—evidence that arises after the school district drafts the individualized education program—is admissible. This Note addresses present approaches to admitting retrospective evidence, suggests parsing different categories of retrospective evidence further, and ultimately prescribes rules for admitting certain categories. Especially in light of often intensive federal court factfinding mandated by the IDEA in special education cases, questions of what evidence influence answers of what outcomes.

INTRODUCTION

Since 1975, when Congress made available to individuals with disabilities the promise of a "free appropriate public education" (FAPE),[1] the number of children being served under the Individuals with Disabilities Education Act (IDEA),[2] and its various monikers,[3] has grown steadily. Today, the IDEA serves over six million individuals.[4] As our

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1. See Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, sec. 3(a), § 601(c), 89 Stat. 773, 774–75 (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)) (introducing "free appropriate public education" into education law).

2. Pub. L. No. 101-476, 104 Stat. 1141 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482).

3. The reader should be aware that neither the IDEA nor its previous incarnations lack acronyms. See B.R. ex rel. K.O. v. N.Y.C. Dep't of Educ., 910 F. Supp. 2d 670, 672 n.1 (S.D.N.Y. 2012) ("[A]cronyms have so invaded IDEA practice that this judge, like others before him, is pretty much stuck with having to use them."). The IDEA was previously the EAHCA, see supra note 1, and, following other amendments, was later amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400–1482).

4. See Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Digest of Education Statistics: 2011, at tbl.46 (2011), available at http://nces.ed.gov/programs/digest/

ability to identify individuals with disabilities improves[5] and as our conception of what constitutes a disability broadens,[6] that number will likely continue to increase.[7]

A corresponding surge in the volume of special education litigation has made those cases the most common education cases that a federal district court judge sees on her docket.[8] Most often, litigation focuses on whether a school district has provided an individual student with a FAPE in accordance with the IDEA's commands.[9] Functionally, to provide a FAPE a school district must draft for each student an individualized education program (IEP) that is not only in accordance with procedural safeguards set forth by the IDEA, but also, on the substantive side, "rea-

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d11/tables/dt11_046.asp (on file with the *Columbia Law Review*) (recording nearly 6.5 million individuals served under IDEA in 2009 to 2010).

5. See generally Theresa Glennon, Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities, 60 Tenn. L. Rev. 295, 303–05 (1993) (articulating growing need to identify children with emotional disabilities); Mark C. Weber, The IDEA Eligibility Mess, 57 Buff. L. Rev. 83 (2009) (discussing confusion in identifying and selecting individuals with disabilities).

6. See, e.g., James E. Ryan, Poverty as Disability and the Future of Special Education Law, 101 Geo. L.J. 1455, 1491–94 (2013) ("[I]f testing reveals precisely the same cognitive processing deficit in two students, why should it matter that one student was born with the deficit and the other student acquired it because of childhood poverty?"); Emily Badger, The Lasting Impacts of Poverty on the Brain, Atlantic: CityLab (Oct. 28, 2013), http://www.citylab.com/work/2013/10/lasting-impacts-poverty-brain/7377/ (on file with the *Columbia Law Review*) ("Those who grew up poor later had impaired brain function as adults . . . ."). However, statutory distinctions have also prevented the IDEA from reaching all individuals with disabilities. See Anne P. Dupre, Disability, Deference, and the Integrity of the Academic Enterprise, 32 Ga. L. Rev. 393, 421 (1998) (noting limited statutory definition of disability under IDEA).

7. The gradual inclusion of individuals diagnosed with autism represents a poignant example of the potential for the special education system to grow. See Chad Hinson, Note, A Supreme Paradox: Autism Spectrum Disorder and *Rowley* Misapplication of a Judicial Relic to an Unprecedented Social Epidemic, 5 Fla. A & M U. L. Rev. 87, 97 (2009) ("The number of children with Autism Spectrum Disorder (ASD) receiving treatment in public schools has soared by six hundred percent.").

8. See Perry A. Zirkel & Brent L. Johnson, Commentary, The "Explosion" in Education Litigation: An Updated Analysis, 265 Educ. L. Rep. 1, 6 tbl.2 (2011) (showing reported federal court special education cases outnumbered other categories of education cases in 2000s); see also Michael A. Rebell & Robert L. Hughes, Schools, Communities, and the Courts: A Dialogic Approach to Education Reform, 14 Yale L. & Pol'y Rev. 99, 110 (1996) (recounting "explosion of litigation involving children and schooling").

9. See Andriy Krahmal, Perry A. Zirkel & Emily J. Kirk, "Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor, 9 Tex. J. C.L. & C.R. 201, 219 n.122 (2004) ("FAPE cases . . . continue to be the main source of IDEA litigation . . . ."). Of these cases, over half involve substantive-denial-of-FAPE claims, on which this Note focuses. Perry A. Zirkel, Adjudicative Remedies for Denials of FAPE Under the IDEA, 33 J. Nat'l Ass'n Admin. L. Judiciary 214, 226–27 (2013).

sonably calculated to enable the child to receive educational benefits."[10] While the Supreme Court has at times addressed aspects of the IDEA's FAPE requirement, special education law is still developing in many respects, and courts continue to rule with limited guidance.[11]

This Note addresses a less developed area of IDEA litigation, namely how federal courts should treat "retrospective evidence" in deciding whether the IEP is substantively adequate. Retrospective evidence—as this Note terms it—embodies various categories of evidence that arise after the IEP is written.[12] Take, for instance, this curious example: Courts in many jurisdictions refuse to consider evidence of any later educational benefit[13] the student *actually* received when determining whether the school district provided a FAPE via the IEP.[14] Courts in those jurisdictions, which include circuit courts in the Second, Seventh, Ninth, and Eleventh Circuits, and some district courts in the Sixth and D.C. Circuits, take an approach that excludes evidence of actual progress, and sometimes all other retrospective evidence.[15] Other circuits, including the First, Third, Fourth, Fifth, Eighth, and Tenth Circuits, take varying approaches that generally permit retrospective evidence in evaluating an IEP's appropriateness.[16]

In addressing retrospective evidence, this Note also hopes to fill a gap in the scholarship. Authors have addressed disputes over the burden

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10. Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 206–07 (1982) (articulating two-part test of procedural and substantive requirements of IDEA); see infra notes 39–47 and accompanying text (discussing IDEA's procedural safeguards). See generally Jon Romberg, The Means Justify the Ends: Structural Due Process in Special Education Law, 48 Harv. J. on Legis. 415 (2011) (discussing relationship between IDEA's procedural protections and substantive guarantees).

11. See Romberg, supra note 10, at 417 ("[C]ourts have been hopelessly confused about what [the Supreme Court's] proceduralist vision actually entails."); Jeffrey A. Knight, Comment, When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is—and What Is Not—Material in a Child's Individual Education Program, 41 U. Tol. L. Rev. 375, 375 (2010) ("As a relatively new field, special-education law is terrain not yet fully explored.").

12. See infra Part II.A (considering three categories of retrospective evidence including evidence of actual progress, subsequent IEPs, and evidence of actual implementation).

13. See infra notes 53–56 and accompanying text (tracing definition of "educational benefit" in context of IDEA).

14. The logic here is that evidence of actual progress or regress following the IEP is not "legally relevant" to the question of whether an IEP "*was* calculated to confer some educational benefit." Carlisle Area Sch. v. Scott P. ex rel. Bess P., 62 F.3d 520, 534 (3d Cir. 1995) (emphasis added).

15. See infra Part II.B (providing full discussion of exclusionary approach, under which retrospective evidence is inappropriate basis for understanding IEP).

16. See infra Part II.C (describing nonexclusionary approaches taken by some circuits).

of proof in IDEA litigation,[17] the availability of certain remedies,[18] and the definition of FAPE.[19] Those subjects may be the trenches and barricades deployed in a dispute, but evidence is a party's arsenal,[20] and is less frequently discussed. Evidence, more or less, good or bad, directly influences outcomes.[21]

This Note argues in favor of permitting retrospective evidence as relevant to answering the fundamental question of whether an IEP was reasonably calculated to enable the child to receive educational benefit. Part I of this Note recounts the history of the IDEA and special education law, describes the Act's administrative framework of procedural and substantive requirements, discusses the role of federal judicial review of substantive violations of the IDEA, and analyzes the IEP-centric evidentiary approach of legal proceedings. Part II proceeds to categorize various types of retrospective evidence and describe how such evidence can be relevant, and articulates the development of a circuit split on the admission of retrospective evidence. Part III then proposes that courts should adopt a nonexclusionary approach to retrospective evidence, but courts should also take greater caution with some forms of retrospective evidence than with others. As Part III argues, although the substantive FAPE standard is tethered to the IEP, an IEP-centric approach to *evidence* has unnecessarily seeped into decisions about retrospective evidence and has fueled exclusion, even where such evidence would be probative of an IEP's appropriateness. Instead, as this Note asserts, allowing retrospective evidence substantially improves judicial review, serves purposes of judicial

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17. See generally Jennifer M. Burns, Note, *Schaffer v. Weast*: Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP Under IDEA, 29 Hamline L. Rev. 567 (2006) (discussing burden-of-proof issues under IDEA); Jordan L. Wilson, Note, Missing the Big IDEA: The Supreme Court Loses Sight of the Policy Behind the Individuals with Disabilities Education Act in *Schaffer v. Weast*, 44 Hous. L. Rev. 161 (2007) (same).

18. See infra notes 64–69 and accompanying text (discussing various remedies available under IDEA and prominence of tuition reimbursement as preferred remedy).

19. See infra notes 55–56 and accompanying text (describing debate over definition of FAPE).

20. This Note does not mean to overemphasize the adversarial nature of IDEA proceedings, especially in light of recent efforts to include options for alternative dispute resolution. However, the efficacy of these options is still to be determined. See Steven Marchese, Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA, 53 Rutgers L. Rev. 333, 364–65 (2001) ("[I]ncluding mediation . . . , while worthy, will not result in greater fairness for the disabled children who are covered by the statute without some attention paid to the context within which the parties operate.").

21. See Perry A. Zirkel, Expert Witnesses in Impartial Hearings Under the Individuals with Disabilities Education Act, 298 Educ. L. Rep. 648, 648 (2014) [hereinafter Zirkel, Expert Witnesses] (noting evidence may be outcome determinative in IDEA proceedings).

economy and administrative efficiency, and comports with other commands of the IDEA and Supreme Court jurisprudence.

I. AN OVERVIEW OF THE IDEA ADMINISTRATIVE FRAMEWORK

The IDEA is the primary statutory vehicle that guarantees individuals with disabilities the right to public education. This Part examines the complex administrative framework through which states are required to provide individuals a FAPE and how substantive denial of a FAPE can lead to federal judicial review. Part I.A traces a brief history of the IDEA in the context of special education law. Part I.B provides background on the various procedural and substantive protections state agencies must afford children when formulating their IEPs. Part I.C delves into the due process hearing system for reviewing IEPs and the federal judiciary's role in reviewing claims of substantive inadequacy. Finally, Part I.D discusses how, because of both administrative review processes and the nature of judicial review, the presentation of evidence when evaluating substantive-denial-of-FAPE cases is increasingly focused on the IEP.

A. *A Brief History of the IDEA*

Congress enacted the first incarnation of the IDEA in 1975, and the Act's basic provisions have remained constant throughout numerous amendments.[22] While many scholars now consider the IDEA to be an heir to the Supreme Court's promise of equal education in *Brown v. Board of Education*,[23] significant movement in special education law only began nearly twenty years after *Brown* following two influential district court decisions in the District of Columbia and Pennsylvania.[24] Those

22. See LaDonna L. Boeckman, Note, Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students, 46 Drake L. Rev. 855, 864–65 (1998) (describing enactment of IDEA and 1991 amendment); Knight, supra note 11, at 384–87 (chronicling IDEA's subsequent amendments). For an extensive history of the special education system, see generally Boeckman, supra, at 857–64 (recounting education law since early twentieth century); Knight, supra note 11, at 377–83 (discussing modern special education as rooted in eighteenth-century Europe).

23. 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); see Therese Craparo, Note, Remembering the "Individuals" of the Individuals with Disabilities Education Act, 6 N.Y.U. J. Legis. & Pub. Pol'y 467, 500 (2003) ("In the context of the IDEA, many scholars have taken the integration principle of *Brown* and applied it to special education.").

24. Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania (*PARC*), 343 F. Supp. 279 (E.D. Pa. 1972); see Romberg, supra note 10, at 422 ("*PARC* and *Mills*, both brought by lawyers in the disability rights

decisions for the first time placed the plight of individuals with disabilities squarely in the purview of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.[25] The first of the IDEA's predecessors was not long to follow.

As a civil rights statute, the Act's aims were both simple and sweeping. Chief among those aims was "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and "that the rights of children with disabilities and parents of such children are protected."[26] Those simple aims belied the transformative impact that the legislation would have on the educational landscape. Before the words "free appropriate public education" were introduced into legal vernacular, millions of individuals with disabilities remained outside of the public-school system,[27] if they were educated at all.[28] Through the IDEA's FAPE provision, each of those individuals identified with a disability gained a statutory right to a threshold level of education, generally in public school and at the public's expense.[29]

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movement, were instrumental in crystallizing the nascent societal sense that disabled children could and should be educated in the public schools." (footnote omitted)).

25. See *Mills*, 348 F. Supp. at 875 ("[M]any are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination [or] classification into a special program."); *PARC*, 343 F. Supp. at 297 ("[P]laintiffs question whether the state, having undertaken to provide public education to some children (perhaps all children) may deny it to plaintiffs entirely . . . . [T]he evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions.").

26. 20 U.S.C. § 1400(d) (2012) (listing additional purposes, including those of assisting state educational agencies, providing early-intervention programs, assuring capabilities of educators and parents, and assessing efforts to educate children with disabilities).

27. See S. Rep. No. 94-168, at 8 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1432 ("[O]f the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education."); 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, 485 (1991) ("[S]chools continued to provide funds for the education of certain groups of children with disabilities but not for others, doing so as a matter of public largesse, not individual right.").

28. See Craparo, supra note 23, at 507 (commenting IDEA was born "against a backdrop of no education for disabled children").

29. See 20 U.S.C. § 1412(a)(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.").

Congress was able to enact such sweeping reform—in an area traditionally governed by state law—by allotting federal funds to states that willingly guaranteed the substantive right to a FAPE to children with disabilities.[30] The IDEA also required states to institute a complex administrative system that incorporated a multitude of procedural safeguards for guaranteeing a FAPE,[31] to establish due process hearings for alleged procedural and substantive violations,[32] and to agree to submit due process hearing decisions to federal judicial review.[33] The interwoven roles of state and federal actors throughout this process have led many to label the IDEA as a "model of 'cooperative federalism.'"[34] Part I.B elaborates on this administrative scheme, and Part I.C discusses the route to federal judicial review and the role review plays.

B. *The Administrative Framework: An IEP for Every Individual with Disabilities*

The state's obligation to provide a FAPE is triggered once an eligible individual has been classified as having a disability[35] and begins with the formulation of an IEP for the individual. In its most rudimentary form, an IEP is a written document that "sets out the child's present educational performance, establishes annual . . . objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives."[36] A child's IEP is regularly referred to by the child's classroom teacher to conduct

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30. See id. § 1412(a) (articulating requirements of state eligibility for assistance).

31. Id. § 1412(a)(6); see id. § 1415 (enumerating procedural safeguards states must provide).

32. See id. § 1415(f) (requiring impartial due process hearing for review of IEPs).

33. See id. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision made [by an impartial hearing officer] . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought . . . in a district court of the United States . . . .").

34. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999)). See generally Charles F. Sabel & William H. Simon, Minimalism and Experimentalism in the Administrative State, 100 Geo. L.J. 53, 54–55 (2011) (analyzing alternatives to "rule-bound bureaucracy and deference to ineffable expertise").

35. A child with disabilities usually encompasses definitionally any child with disabilities enumerated by statute, 20 U.S.C. § 1401(3)(A), or for children between three and nine any child experiencing certain developmental delays, id. § 1401(3)(B). See generally supra notes 5–7 and accompanying text (noting categorization problems and underidentification).

36. Honig v. Doe, 484 U.S. 305, 311 (1988); see also 20 U.S.C. § 1414(d) (defining contents of IEP); Amy D. Quinn, Comment, Obtaining Tuition Reimbursement for Children with Special Needs, 80 UMKC L. Rev. 1211, 1217 (2012) (noting elimination of short-term benchmarks in 2004 amendments to IDEA).

instruction in accordance with the child's needs.[37] School districts satisfy their FAPE obligation only once they offer an IEP that is (1) formulated in compliance with procedures set forth by the IDEA and (2) "reasonably calculated to enable the child to receive educational benefits."[38] These two requirements are respectively known as the procedural and substantive requirements of a FAPE.

Procedurally, the IDEA requires school districts to convene a team of interested and knowledgeable individuals in order to design an IEP for the coming school year.[39] That team must consist of the parents, a special education teacher, and a school district representative, and it may possibly include others knowledgeable about special education or the child's particular needs[40] (such as a regular classroom teacher or the parents' medical or educational experts).[41] From the IDEA's perspective, including the parents in the IEP process not only increases the likelihood that the IEP team will reach an outcome that is substantively adequate for the child[42] but also may acknowledge the multiplicity of interests among parents, children, and the state inherent in complex special education decisions.[43]

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37. See 34 C.F.R. § 300.323(d) (2013) (requiring IEP be accessible to regular education teacher and special education teacher).

38. Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 206–07 (1982).

39. See 20 U.S.C. § 1414(d)(3) (describing duties of IEP team in designing IEP).

40. See id. § 1414(d)(1)(B) (listing members of IEP team).

41. The role of expert testimony in evaluating the IEP has grown tremendously since the IDEA was first enacted. See Boeckman, supra note 22, at 876 (describing "system that favors those parents that have the time and money to hire someone to represent their position and get either expensive medical testing or expert testimony"); Matthew Scott Weiner, Comment, Material Failure and IEP Implementation: How the Ninth Circuit Pulled the Teeth Out of the Individuals with Disabilities Education Act, 39 Sw. L. Rev. 541, 563 (2010) ("The collaboration of experts is so essential to the IEP process that excusal from the IEP Team is only allowed when strict procedural requirements are met."); infra note 61 and accompanying text (discussing lengthy due process hearings often resulting from introduction of expert testimony).

42. See Huefner, supra note 27, at 486 ("Parental participation was thought by the drafters of the Act to be the surest mechanism against ill-considered decisionmaking."); Romberg, supra note 10, at 427 ("[T]he IDEA reflected Congress's belief that opening the schoolhouse doors and requiring that districts listen to parents' input would ordinarily result in substantively appropriate IEPs, without the need for any significant administrative or judicial review of the IEPs' substantive content."). Before the IDEA was first enacted, parental involvement was not the norm, and its inclusion in the IDEA represented a great advancement in special education law. See Huefner, supra note 27, at 485 ("[M]any school districts identified, labelled, and served special education students without providing for parental involvement.").

43. See Dupre, supra note 6, at 460–61 (describing polycentric concerns of parent, child, community, schools, and other parents in any special education placement decision). Even as a matter of statutory obligation, when drafting an IEP the IEP team *must* consider the concerns of the parents alongside the various strengths and needs of the

Once an IEP is drafted, further procedural protections materialize. The school district must reevaluate the IEP at least yearly in light of proof of progress (or lack thereof), changes in needs, or any other relevant educational or medical information.[44] If the school district intends to change the agreed-upon IEP outside of this mandatory reevaluation process, it must provide not only notice to the parents[45] but also a thorough written explanation for its actions.[46] Ostensibly, all of these procedural safeguards help secure the substantive entitlement of the IDEA and protect that entitlement once it has been guaranteed.[47]

The most important provision of the IDEA, then, is not that the IEP should be designed according to proper procedures but that the state must actually, substantively provide an adequate education.[48] The IDEA

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child. 20 U.S.C. § 1414(d)(3)(A). As a practical matter, because of access barriers, the efficacy of parental involvement in IEP meetings is limited. See David Ferster, Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education, 28 Buff. Pub. Int. L.J. 71, 97–98 (2010) ("In the vast majority of cases, however, teachers and administrators have ultimate control over which educational services, modifications and accommodations find their way in to the IEP."); Sandra M. Di Iorio, Comment, Breaking IDEA's Silence: Assigning the Burden of Proof at Due Process Hearings and Judicial Proceedings Brought by Parents Against a School District, 78 Temp. L. Rev. 719, 734–39 (2005) (describing lack of parent involvement because of factors such as socioeconomic status and overall inefficacy of parent involvement when it occurs); Quinn, supra note 36, at 1221 (discussing how parents may be "overwhelmed by the presumed superior expertise of the educator and administrators," often have "little, if any, experience with special education," and "usually do not hire a lawyer or advocate to attend the IEP meeting . . . because [they] want to be cooperative").

44. 20 U.S.C. § 1414(d)(4)(A) ("The [school district] *shall* ensure that . . . the IEP Team . . . reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved[,] and . . . revises the IEP as appropriate . . . ." (emphasis added)).

45. Id. § 1415(b)(3).

46. See id. § 1415(c)(1) (mandating, among other things, "description of the action proposed or refused" and "explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action").

47. See Thomas A. Mayes, Perry A. Zirkel & Dixie Snow Huefner, Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act, 108 W. Va. L. Rev. 27, 39 (2005) ("The *Rowley* Court viewed this procedural scheme as key to securing the IDEA's substantive entitlement."); supra note 42 and accompanying text (describing how procedural safeguards of parental involvement may themselves be thought of as way of creating substantive adequacy).

48. See Dupre, supra note 6, at 421 ("The most significant provision of the Individuals with Disabilities Education Act is the substantive requirement that states must have a policy that 'assures all children with disabilities the right to a *free appropriate public education*' . . . ." (emphasis added by Dupre) (quoting 20 U.S.C. § 1412(1) (1994))); Andrea Valentino, Note, The Individuals with Disabilities Education Improvement Act: Changing What Constitutes an "Appropriate" Education, 20 J.L. & Health 139, 162–63 (2007) (discussing congressional intent for individuals with disabilities to be effectively

provides little guidance on what a FAPE substantively entails and further defines FAPE only as a publicly funded education that meets state standards and includes an appropriate education.[49] Unanswered is the question of what "appropriate" means.

The Supreme Court's main pronouncement on the issue of appropriateness came in *Board of Education v. Rowley ex rel. Rowley*.[50] Amy Rowley was a deaf first-grade student performing well in school. After convening an IEP meeting, the school district determined that Amy would not require an interpreter but that a hearing aid that enhanced her residual hearing, regular instruction from a tutor for the deaf, and speech therapy would be sufficient.[51] Amy's parents initiated a due process hearing challenging the appropriateness of the IEP on the ground that the school district improperly denied their request for an interpreter, and eventually they sought federal judicial review.[52] Then-Justice Rehnquist wrote on behalf of the Court and decided that Amy had received a FAPE, substantively, because in recommending other services targeted to Amy's hearing needs the IEP was "reasonably calculated to enable the child to receive educational benefits."[53] The Court made clear in *Rowley* that under this *objective*-reasonableness standard the IDEA in no way intended "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children" but only intended to provide "some educational benefit."[54]

Rowley resolved some confusion, but not all of it. Following *Rowley*, a flurry of scholarship has focused on precisely how much educational benefit qualifies as "some educational benefit."[55] Courts have encoun-

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educated in the public-school system). Indeed, procedural violations only amount to denial of a FAPE if those violations "impeded the right to a free appropriate public education," "significantly impeded the parents' opportunity to participate," or "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii) (2012).

49. 20 U.S.C. § 1401(9).

50. 458 U.S. 176 (1982).

51. Id. at 184–85.

52. Id. The precise manner in which due process proceedings and federal judicial review operate is the subject of the next section. See infra Part I.C (discussing route to federal judicial review).

53. *Rowley*, 458 U.S. at 207.

54. Id. at 200.

55. See, e.g., Mark C. Weber, Common-Law Interpretation of Appropriate Education: The Road Not Taken in *Rowley*, 41 J.L. & Educ. 95, 102, 112 (2012) [hereinafter Weber, Common-Law Interpretation] (noting "strained nature of Justice Rehnquist's effort in *Rowley* to define the term appropriate education" and arguing "post-Act and pre-*Rowley* commentary and caselaw lined up strongly in favor of proportional maximization as the content of appropriate education"); Scott Goldschmidt, Comment, A New IDEA for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities, 60 Cath. U. L. Rev. 749, 751 (2011) (noting circuit split in definition of "appropriate" education).

tered similar definitional difficulties, with one court infamously analogizing the *Rowley* substantive-adequacy standard to requiring a "serviceable Chevrolet," not "a Cadillac."[56] And, as Part II examines, courts are conflicted regarding what sorts of evidence to consider in determining whether an IEP meets this standard. For now, Part I.C discusses how a claim of substantive denial of a FAPE initiates a state-level due process mechanism that eventually could lead to federal judicial review.

C. *The Road to Federal Court: Substantive Denial of a FAPE*

For parents who claim that their child's IEP was not reasonably calculated to enable the child to receive educational benefit, the IDEA also established various state-level administrative review mechanisms and further opportunities to seek federal judicial review of those administrative decisions. Indeed, the most vital *procedural* right under the IDEA may be the due process right to challenge a substantively deficient IEP at a hearing,[57] before an impartial hearing officer knowledgeable about special education law,[58] with the assistance of counsel.[59] At the hearing, parties may introduce evidence, confront and cross-examine witnesses, and present argument on whether a FAPE was substantively denied through a deficient IEP.[60] Realistically, with the volume of witness testimony—and especially with the growing amount of expert testimony

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56. Doe ex rel. Doe v. Bd. of Educ., 9 F.3d 455, 459–60 (6th Cir. 1993). Further confusion exists regarding whether the FAPE question ends with an appropriate IEP. See P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 739 (3d Cir. 2009) ("The right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education."); see also Huefner, supra note 27, at 493 ("The Court's review of Amy's progress in her regular classroom suggests that it was creating two standards of benefit applicable in slightly different situations."). Arguably, the statutory language of the IDEA suggests that an appropriate education (as defined by *Rowley*) and a conforming implementation of the IEP create two separate substantive requirements. See 20 U.S.C. § 1401(9) (2012) (defining FAPE as requiring both appropriate education and special education "provided in conformity with the [IEP]"); Solomon A. Metzger, Compensatory Education Under the Individuals with Disabilities Education Act, 23 Cardozo L. Rev. 1839, 1858 (2002) (noting either "faulty IEP or implementation effort" as basis for relief); Perry A. Zirkel, The "Snapshot" Standard Under the IDEA, 269 Educ. L. Rep. 449, 452 (2011) (differentiating "FAPE-implementation from FAPE-formulation cases").

57. See Romberg, supra note 10, at 446 (noting due process hearing is "conventionally thought of as the primary locus of procedural rights granted by the IDEA"); Craparo, supra note 23, at 479 ("The most significant of the procedural safeguards is the right to an impartial due process hearing . . . .").

58. 20 U.S.C. § 1415(f)(3)(A)(ii)–(iv) (describing qualifications of impartial hearing officer). The IDEA also requires that the hearing officer be a neutral arbiter insofar as she cannot be an employee of the state educational agency or the school district. Id. § 1415(f)(3)(A)(i).

59. Id. § 1415(h)(1).

60. Id. § 1415(h)(2).

involved[61]—a single hearing can take multiple days across the span of several months.[62] An impartial hearing officer's written decision may then be appealed to a review officer from the state department of education.[63]

The remedy that parents most often seek from these hearings is private-school tuition reimbursement,[64] although others are available as well.[65] Tuition reimbursement reflects practical considerations. Parents who believe their child has not received a FAPE must swiftly choose one of two options: Either they test out the public-school system under a potentially deficient IEP, or they remove the child from the public-school system in order to attempt an appropriate, but likely costly, private education.[66] Tuition reimbursement recognizes the difficult position of

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61. See, e.g., Terry Jean Seligmann, *Rowley* Comes Home to Roost: Judicial Review of Autism Special Education Disputes, 9 U.C. Davis J. Juv. L. & Pol'y 217, 219 (2005) ("[A]dministrative determinations on issues . . . are often the subject of lengthy hearings with expert testimony.").

62. See Quinn, supra note 36, at 1228–29 (noting some arduously long due process hearings, including hearings with nearly thirty meetings); see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985) (describing IDEA proceedings as "ponderous").

63. 20 U.S.C. § 1415(g).

64. The Supreme Court has broadly agreed upon a three-prong test—the *Burlington/Carter* test—that governs tuition reimbursement: (1) First, courts consider whether the IEP proposed by the school district was "reasonably calculated to enable the child to receive educational benefits"; (2) courts next ask whether the private placement was appropriate to the child's needs; and (3) if both prongs are satisfied, the court enjoys broad discretion in considering equitable factors relevant to fashioning relief. *Burlington*, 471 U.S. at 370; accord Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993); see also 20 U.S.C. § 1412(a)(10)(C)(ii) ("[A] court or a hearing officer *may* require the agency to reimburse the parents for the cost of that enrollment." (emphasis added)).

65. While the IDEA does not sanction general money damages, other remedies are possible under the court's broad discretion. See Metzger, supra note 56, at 1840–50 (discussing how "money damages were soundly rejected by the early IDEA cases" and are unavailable in nearly every jurisdiction). For example, under the same equitable principles that govern tuition reimbursement, a school district might offer compensatory education in the form of additional educational services to supplement presumed education loss. See Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 128–30 (2011) (discussing contours of and approaches to compensatory-education remedy); see also Metzger, supra note 56, at 1861 ("The conversation in the courts concerning the appropriate formula for an award of compensatory education is ongoing . . . .").

66. For many parents, a deficient IEP thus represents a Catch-22. Lewis M. Wasserman, Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004, 21 St. John's J. Legal Comment. 171, 184–85 (2006) (noting "grim choice of either accepting the IEP offered by the public agency, notwithstanding its perceived deficiencies, or front[ing] the cost of what they believe to be an appropriate placement"). But the IDEA also provides attorneys' fees provisions to alleviate the burden of seeking tuition reimbursement. 20 U.S.C.

parents and allows reimbursement of "expenses that [the school district] should have paid all along and would have borne in the first instance had it developed a proper IEP."[67] Parents whose children remain in public school for some duration may either later withdraw their child from public school and seek tuition reimbursement, or leave their child in school and seek compensatory education.[68] Other remedies can be granted as well, as courts exercise broad discretion in shaping awards, basing judgments on myriad equitable concerns.[69]

Parties who are dissatisfied with the result of administrative proceedings may seek judicial review in federal district court.[70] Federal judicial review of administrative decisions is both broad and narrow. As one judge explained, district court judges encountering claims of substantive IDEA violations occupy "the paradoxical position of [being] both an independent factfinder and a judicial body bound to review and give deference to the findings of an administrative agency."[71] Under the IDEA, district courts must conduct an *independent* judicial review of the administrative record on a preponderance-of-the-evidence standard, considering additional evidence as necessary.[72] This review standard implies fairly broad powers for federal judges, who review the record and are expected to be factfinders in IDEA actions.[73]

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§ 1415(i)(3)(B)(i); see Kelly D. Thomason, Note, The Costs of a "Free" Education: The Impact of *Schaffer v. Weast* and *Arlington v. Murphy* on Litigation Under the IDEA, 57 Duke L.J. 457, 473–85 (2007) (discussing attorneys' fees provision in light of recent decision limiting recovery of expert fees).

67. *Burlington*, 471 U.S. at 371.

68. See supra note 65 (mentioning compensatory-education remedy).

69. See Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 (2d Cir. 2007) ("[T]he district court enjoys broad discretion in considering equitable factors relevant to fashioning relief."); see also, e.g., Streck v. Bd. of Educ., 408 F. App'x 411, 415–16 (2d Cir. 2010) (denying direct monetary relief but affirming relief in form of escrow account to fund future education).

70. Because of the extensive review process for IEPs, seeking federal review can often be prohibitively costly, especially for parents who must pay the cost of private-school tuition up front. See Hyman, Rivkin & Rosenbaum, supra note 65, at 113–14, 121–26 ("[D]ue process hearings and mediation are underutilized and are used mostly by wealthy families with financial means for a private school funding remedy."); Thomason, supra note 66, at 483–85 (discussing relative burdens of parents and school districts in IDEA litigation). See generally Marchese, supra note 20, at 352 (discussing "more expeditious" option of mediation where state bears cost, which results in "considerably lower cost to the parties"). Not to mention, due process hearings may take many meetings, over the course of several months, to complete. See supra note 36 and accompanying text (discussing lengthening span of due process hearings because of increasing expert testimony).

71. Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 507 (E.D.N.Y. 1996).

72. 20 U.S.C. § 1415(i)(2)(C) (2012).

73. See Seligmann, supra note 61, at 253 ("The district court approaches such a dispute as both a reviewer of the administrative record and a potential fact-finder

But federal judicial review is not unbounded. The Supreme Court in *Rowley* warned that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."[74] Accordingly, district courts, in considering the factual record, *must* defer when administrative decisions implicate matters of "educational policy." *Rowley* justified its partial-deference standard of review with both a federalism concern (that is, the role of the federal government in overseeing, not commandeering, state educational agencies)[75] and concerns about the judiciary's institutional competence.[76] While read broadly, deference to "educational policy" decisions of due process hearing officers might cover every aspect of IDEA litigation—after all, the IDEA itself is a statute effecting educational policy—courts have not read *Rowley* this way. Instead, courts generally enforce "an intermediate standard of review between substantial deference and de novo."[77]

However, there are two scenarios where limited deference may be due and where district courts have been willing to disagree with administrative decisions. First, though deference is owed on matters of "educational policy," courts may still conduct an independent, unhindered review of "objective evidence."[78] Presumably, while judges may be ill-

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itself . . . ."); see also Krahmal, Zirkel & Kirk, supra note 9, at 204–05 (discussing mixed factfinding and appellate role of district court).

74. Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 206 (1982).

75. See id. ("The very importance . . . attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought.").

76. See id. at 208 ("We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973))).

77. Krahmal, Zirkel & Kirk, supra note 9, at 203–04 (footnote omitted). However, courts have been somewhat inconsistent about the precise standard of review for IDEA cases brought up to federal court. See id. at 203 (finding courts' "widespread confusion" in differentiating between review standard and evidentiary directives). There is further evidence the strong deference presumption is eroding, but that discussion is beyond the scope of this Note. See, e.g., M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 240–44 (2d Cir. 2012) (examining appropriate deference regime and situations where deference should not apply).

78. See *Rowley*, 458 U.S. at 207 n.28 ("[A]chievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit."); Wasserman, supra note 66, at 182 n.57 ("The *Cerra* Court stated[] that '[i]n order to avoid impermissibly meddling in state educational methodology, a district court must examine the record for any objective evidence indicating whether the child is likely to make progress or regress under the proposed plan.'" (quoting Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2d Cir. 2005))); see also Krahmal, Zirkel &

equipped to handle decisions of teaching methodology or allocations of particular services, they can more easily assess such evidence as past grades or class advancement.[79] Second, *Rowley*'s deference command limits district court factfinding only, not district court application of relevant legal standards. No court or commentator seriously contends that the judiciary cannot patrol what the applicable legal standards for evaluating evidence are[80] or what *kinds* of evidence are permissible in the first place.[81] Because the judiciary shapes the rules applicable to IDEA proceedings, courts effectively exercise substantial influence over the legal infrastructure of due process hearings, state review, and federal judicial review.[82]

With the structure and limitations of judicial review in mind,[83] Part I.D next considers one of the consequences of the IDEA framework: an increasing evidentiary focus on the IEP.

Kirk, supra note 9, at 204 ("At least two federal circuits have described the standard of review in IDEA cases as a 'sliding scale' . . . .").

79. See Wasserman, supra note 66, at 221 ("Fact finding by the tribunal is made easier by objective evidence. It helps avoid credibility issues."); Perry A. Zirkel, "Appropriate" Decisions Under the Individuals with Disabilities Education Act, 33 J. Nat'l Ass'n Admin. L. Judiciary 242, 251 (2013) (discussing how objective evidence might include grades or year-to-year advancement).

80. See, e.g., Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005) (determining burden of proof in IDEA proceedings).

81. See Krahmal, Zirkel & Kirk, supra note 9, at 203 ("[T]he standard of judicial review 'should never be mistaken for . . . evidentiary directives,' such as the quantum and burden of proof or the standard for admission of additional evidence." (quoting Martha Davis, A Basic Guide to Standards of Judicial Review, 33 San Diego L. Rev. 469, 469 (1988))); see also Susan G. Clark, Judicial Review and the Admission of "Additional Evidence" Under the IDEIA: An Unusual Mixture of Discretion and Deference, 201 Educ. L. Rep. 823, 832–34 (2005) (discussing how circuit court rulings set standard for evidence).

82. As a practical matter, impartial hearing officers and state review officers must heed the commands of federal courts, since those courts directly review administrative decisions. Moreover, states are expected to implement the IDEA in compliance with federal law. See 20 U.S.C. § 1413(d)(1) (2012) ("If the State educational agency, after reasonable notice and an opportunity for a hearing, finds that a local educational agency . . . is failing to comply with any requirement . . . the State educational agency shall reduce or shall not provide any further payments to the local educational agency . . . ."); see also Rebell & Hughes, supra note 8, at 112 (noting while courts "lack the educational expertise and the staff resources to monitor closely implementation of systemic reforms," they "can clarify principles, marshal resources, and compel compliance with stated goals").

83. One final limitation on judicial review is that the facts are largely limited to the due process hearing record. While the IDEA contemplates that additional evidence—say, of new witnesses, more experts, or additional evaluative reports—may be admitted, courts have used caution when accepting additional evidence. See Krahmal, Zirkel & Kirk, supra note 9, at 210–11 (discussing most common approach as adopting "rebuttable presumption in favor of foreclosing additional evidence"). Circuits are also split on the

D. *IEP-Centric Dispute Resolution: All About Evidence*

Combined, the IDEA's various procedural and substantive safeguards and the peculiar role of judicial review create a dispute-resolution process where the evidentiary focus is on the student's IEP. From day one, extensive procedural protections govern IEP formulation and effectively freeze it once formulated.[84] Following *Rowley*, the substantive component of an appropriate education has been defined around a standard that then naturally implicates aspects of that IEP.[85] This section explores how, increasingly, evidence about the IEP matters and addresses accompanying policy concerns. Above all, this section frames the Note's later discussion of "retrospective evidence," which, as a type of evidence that arises *after* the IEP, inherently relates to features of IEP-centric dispute resolution.

After *Rowley*, due process hearings—the first chance for parties to present evidence in an adversarial proceeding before a knowledgeable arbiter—have evolved into lengthy, and weighty, ordeals involving numerous experts who opine on the IEP's appropriateness.[86] One might initially expect that deference to educational policy might encourage the introduction of other, non-IEP evidence. But instead, the reluctance of district courts to overturn administrative decisions only furthers parties' accumulation of an IEP-based evidentiary record so that IEPs are adjudged favorably the first time, at the due process hearing level.[87] Considering the extent of litigation over the document, it becomes no wonder that various commentators label the IEP as the "centerpiece,"[88]

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precise standard for accepting additional evidence, but that split is beyond the scope of this Note. See id. at 208–15 (describing circuit split); see also, e.g., Roland M. v. Concord Sch. Comm., 910 F.2d 983, 996 (1st Cir. 1990) ("As a means of assuring that . . . judicial review does not become a trial *de novo*, thereby rendering the administrative hearing nugatory, a party seeking to introduce additional evidence at the district court level must provide some solid justification for doing so.").

84. See supra notes 39–47 and accompanying text (describing procedural safeguards afforded by IDEA before and after IEP formulation). Numerous amendments to the IDEA have only furthered the procedural importance of IEP formation. See Weber, Common-Law Interpretation, supra note 55, at 125–27 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2006)) (describing addition of peer-reviewed research requirement in IEP design in newest amendment).

85. See supra notes 50–54 and accompanying text (discussing creation of *Rowley* standard whereby substantive adequacy is adjudged through IEP).

86. See supra notes 61–62 and accompanying text (noting length of due process hearings, especially in light of need to present expert testimony on IEP appropriateness).

87. See supra notes 74–77 and accompanying text (discussing substantial deference given to impartial hearing officers). Furthermore, various barriers to admitting additional evidence make federal judicial review adopt the same narrow focus as the due process hearings. See supra note 83 (describing general reluctance to accept additional evidence and extend judicial review beyond scope of due process hearing).

88. Honig v. Doe, 484 U.S. 305, 311 (1988).

"blueprint,"[89] or "'cornerstone'"[90] of the IDEA's FAPE guarantee.[91] Increasingly, evidence matters.[92] And, at various stages of the dispute, each piece of evidence has become directed toward parsing the IEP.[93]

Yet an IEP-centric dispute-resolution process can be dangerous if not managed properly.[94] For one, zeroing in on the IEP risks ignoring some practical educational realities. A child's educational plan does not end at the IEP. IEPs generally do not include some important information, such as what school a particular student will attend or who the teacher will be.[95] IEPs are often formulated in generic and nondescript terms, with little elaboration on the extent of special education services to be provided.[96] And an appropriate IEP is not enough—how teachers and administrators implement it is relevant to the efficacy of the educational program.[97]

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89. Hyman, Rivkin & Rosenbaum, supra note 65, at 117 (internal quotation marks omitted).

90. Craparo, supra note 23, at 477 (quoting Office of Special Educ. Programs, U.S. Dep't of Educ., Twenty-Second Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, at x (2000)).

91. Scholarship, too, is almost unanimous about the importance of the IEP. See, e.g., Seligmann, supra note 61, at 223 ("The central document defining the special education and services that are to be provided to a child with a disability is the IEP . . . ."); Di Iorio, supra note 43, at 723 ("The most important component of a free appropriate public education is an individualized education program . . . ."); William D. White, Comment, Where to Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings, 84 N.C. L. Rev. 1013, 1014 (2006) ("A central feature of the statute is the . . . development of an IEP for every disabled child in every public school system receiving federal funds."). At least one scholar has compared the IEP, with all of its process formalities, to a contract between a school district and a parent. See Romberg, supra note 10, at 457–64 (discussing how school district's agreement to IEP results in "parents' right to *enforcement*" that is "highly contractual in nature").

92. See Zirkel, Expert Witnesses, supra note 21, at 648 ("As these IDEA impartial hearings become more and more legalized, the . . . evidentiary[] rules become increasingly significant for not only the impartial hearing officers . . . but also the immediate parties and the larger special education community.").

93. See Weber, Common-Law Interpretation, supra note 55, at 127–28 (describing "enhanced attention to what services are in the IEP").

94. See Boeckman, supra note 22, at 878 ("[T]he attention of all involved, from parents to administrators, is shifted from the individual student to the ensuing legal battle.").

95. See R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 187 (2d Cir. 2012) ("At the time the parents must decide whether to make a unilateral placement based on the IEP, they may have no guarantee of any particular teacher. Indeed, even the Department cannot guarantee that a particular teacher . . . will not quit or become otherwise unavailable for the upcoming school year.").

96. See O'Toole ex rel. O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 706–07 (10th Cir. 1998) (finding IEP adequate despite vague and cryptic statements that related services would be provided "as appropriate").

97. See supra note 56 (describing evolving doctrine of implementation claims).

Furthermore, Supreme Court precedent in *Rowley* can be read as condoning evidentiary interest in matters beyond the mere IEP. While *Rowley* was partially concerned with the objective reasonableness of the IEP, Justice Rehnquist also expressed that "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education."[98] Analogously, it would do little good for each school district to spill ink on IEPs only to have students receive no actual benefit. Indeed, the Supreme Court cursorily noted that subsequent "'evidence firmly establishes that Amy is receiving an "adequate" education, since she performs better than the average child in her class and is advancing easily from grade to grade.'"[99] Though the admissibility or inadmissibility of this evidence was never argued (and is the focus of the next Part), evidence that Amy was *actually* succeeding in school despite a somewhat lacking educational plan was at least a factor in Justice Rehnquist's opinion.[100]

A final concern with centering evidence around the IEP is the vanishing role of the federal judiciary in an administrative system designed with the principle of cooperative federalism.[101] While the IDEA only involves the judiciary in a supervisory capacity (albeit one with statutorily robust review powers),[102] even that role may be vitiated if the special education system focuses only on the IEP. Because federal judges are expected to know little about matters of educational policy and to defer

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98. Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 200–01 (1982).

99. Id. at 209–10 (quoting Rowley ex rel. Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), aff'd, 632 F.2d 945 (2d Cir. 1980), rev'd, 458 U.S. 176).

100. See Huefner, supra note 27, at 493 (arguing *Rowley* decision was not predicated on IEP but on sufficient actual progress). While evidence of actual progress is a form of retrospective evidence that will be discussed in Part II.A.1, *Rowley* only addressed the question of what legal standard to follow. The Court there dealt trustingly with the established evidentiary record, as commanded by the IDEA. See 20 U.S.C. § 1415(i)(2)(C) (2012) (describing judicial review as review of administrative record). Not at issue was whether the preceding admission of retrospective evidence was correct in the first place, although the district court in a footnote actually addressed that evidence and admitted it. See *Rowley*, 483 F. Supp. at 531 n.4 ("Procedurally, this case is before me in a rather awkward posture . . . . In spite of the limited scope of my review, however, evidence concerning Amy's current status is relevant to my determination of the 'appropriateness' of injunctive relief at this stage.").

101. In the IDEA, a stated purpose of federal involvement is to actually ensure appropriate education. See 20 U.S.C. § 1400(d)(1)(C) ("The purposes of this chapter are . . . to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities."); supra notes 30–34 and accompanying text (discussing IDEA as model of cooperative federalism).

102. See *Rowley*, 458 U.S. at 183 ("Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, . . . and by the provision for judicial review.").

on those matters,[103] a content-focused substantive review of an IEP would likely be fruitless, even if informed by expert testimony.[104] Whether, say, twenty or thirty minutes of occupational therapy is sufficient for a child with autism is a consideration that is likely far removed from the average federal district court judge's mind.[105] The IEP-centric process therefore risks cabining judicial review to procedural questions, except in the rare situation where overwhelming objective evidence exists.[106] Yet, an IEP designed through proper procedures alone cannot guarantee a FAPE.[107]

Despite these risks, questions of evidence are naturally also questions of administrability. States, parents, and courts each have independent countervailing efficiency interests in focusing the dispute on the IEP. For the state, expanding the scope of dispute resolution to consider information or matters outside of the IEP taxes already scarce educational resources.[108] Similarly, broadening the focus beyond the IEP cannot guarantee for the parents a more expeditious dispute-resolution process; in fact, it may lead to still-lengthier hearings, an unpalatable possibility considering that these disputes may arise yearly and that tuition may take years to be reimbursed.[109] Finally, with the rise of special education cases in the federal court system,[110] and the difficulty of reviewing those cases, courts have an interest in not needlessly prolonging IDEA proceedings.[111]

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103. See supra notes 74–76 and accompanying text (discussing reasons for judicial deference).

104. For comparison, the *Rowley* Court "refused to engage in any serious substantive review of Amy Rowley's IEP." Romberg, supra note 10, at 427.

105. See Krahmal, Zirkel & Kirk, supra note 9, at 218 ("Purposely insular when compared to the IDEA hearing officers, the courts, i.e., the federal judiciary and the state reviewing courts, are generally removed from the vagaries of everyday life and especially from the specialized areas such as special education of children with disabilities.").

106. See Huefner, supra note 27, at 492–93 ("An exclusively document-oriented review would appear to preclude courts from assessing whether any benefit has actually resulted and instead would confine judicial review to a consideration of the design of the IEP and what the design was expected to produce.").

107. See id. at 487 ("[P]rocedural safeguards alone do not assure a student with disabilities the substantive right to an appropriate education in the least restrictive environment appropriate to the student's needs."); see also supra notes 95–97 and accompanying text (describing potential gaps between IEP and its implementation).

108. Krahmal, Zirkel & Kirk, supra note 9, at 220–21 (describing limited availability of resources and advocating efficient dispute-resolution system consisting of "expert and prompt due process hearings").

109. See supra notes 61–62 and accompanying text (discussing how review of IEP can span months).

110. See supra note 8 and accompanying text (discussing newfound prevalence of special education cases).

111. See Krahmal, Zirkel & Kirk, supra note 9, at 219 ("[I]t is a waste of scarce judicial resources to use judges to accept evidence liberally and make decisions about

How much prominence should the IEP retain in adjudications of whether a FAPE has been substantively provided? "Retrospective evidence," as a form of evidence outside of the IEP, inherently involves also a question of whether the process should be more IEP-centric or less. Part II's discussion positions the retrospective evidence dilemma squarely in this debate.

II. RETROSPECTIVE EVIDENCE AND A SUBSTANTIVELY ADEQUATE EDUCATION

In assessing whether an IEP was reasonably calculated to enable the child to receive educational benefit, an evidentiary question arises: What should judges look at in making these determinations? Some evidence is uncontroversial. Judges may freely examine the due process hearing record, the IEP itself, and certain information the IDEA designates as relevant for IEP creation, such as past progress in relation to academic goals and academic or medical reports.[112] Judges might also consider evidence of previous grades or year-to-year advancement.[113]

But whether courts should consider testimony or information that accrues *after* the IEP is formulated is still an unresolved issue. This Part discusses the circuit split that has developed in resolving the question of retrospective evidence. Part II.A defines retrospective evidence and discusses the potential relevance of three categories that will later be analyzed. Part II.B then traces the development of the exclusionary approach, which prohibits retrospective evidence, and Part II.C describes various nonexclusionary approaches taken by other circuits.

A. *Categories of Retrospective Evidence: Relevance and Some Basic Concerns*

Courts are often asked to assess an IEP's substantive adequacy with evidence that temporally follows the IEP—evidence that is retrospective in nature. The Second Circuit has termed testimony about the education that a child withdrawn from public school would have received had she attended as "retrospective testimony."[114] But the categories of evidence

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FAPE because 1) they lack the requisite expertise, and 2) the IDEA, by its very nature, is individualized, . . . putting the focus on particular factual nuances rather than generalizable legal precedents."); see also Clark, supra note 81, at 830–31 (discussing need to conserve scarce judicial resources).

112. See 20 U.S.C. § 1414(d)(3)–(4) (2012) (describing relevant considerations in IEP development and review).

113. See Mrs. B. ex rel. M.M. v. Milford Bd. of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997) (finding review may "involv[e] examining such objective evidence of progress as grades and test results," but may not "impermissibl[y] meddl[e] in state educational methodology").

114. See R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 174 (2d Cir. 2012) ("[T]estimony . . . about the educational program the student would have received if he

that postdate the IEP are broader still, and this Note terms all such evidence "retrospective evidence."

While courts do not often differentiate between categories of retrospective evidence in their rulings or reasoning, different types of retrospective evidence are relevant for differing reasons[115] and reveal differing policy concerns. This section attempts to highlight peculiarities in three common types of retrospective evidence: (1) evidence of actual progress, (2) IEPs from subsequent school years, and (3) evidence of how an IEP would have been implemented.[116]

1. *Actual-Progress Evidence.* — The first potential category of retrospective evidence comes in the form of evidence of a student's progress or lack of progress under the proposed IEP (together, "actual-progress evidence").[117] As the student undergoes instruction under the IEP, actual progress can be monitored. Similar to evidence of achievement in previous school years, evidence of later achievement may come from the student's passing or failing grades, grade-level advancement, or progress in relation to measurable goals on the IEP.[118] Evidence of actual progress might also be presented through expert reports or expert testimony following independent evaluations of the student that discuss how she is faring in school.[119] Progress, or lack thereof, can be relevant in demonstrating the IEP's appropriateness. Presumably under the IDEA's

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or she had attended public school . . . for ease of reference we refer to in shorthand as 'retrospective testimony.'").

115. For purposes of familiarity, this Note uses the definition of "relevance" provided by the Federal Rules of Evidence. See Fed. R. Evid. 401 (defining "relevance" as tendency to influence probability of consequential fact).

116. The aim of this Note is not to enumerate all possible forms of evidence that might follow the formulation of an IEP. For instance, parents might later claim that the IEP was deficient because the IEP team did not consider certain services when those services were at issue. See Mandy S. ex rel. Sandy F. v. Fulton Cnty. Sch. Dist., 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) (noting "community-based program" was never requested). Parents might also claim that the child's medical or educational needs have changed since the IEP was last formulated or bring previously unavailable information about those changed needs. See T.J. v. Winton Woods City Sch. Dist., No. 1:10-cv-847, 2013 WL 1090465, at *10–*13 (S.D. Ohio Mar. 15, 2013) (examining post-IEP medical and educational evaluations). Parents who transfer their children to private school might also try to update the court on progress at the new placement. E.g., D.C. v. Mount Olive Twp. Bd. of Educ., No. 12-5592 KSH, 2014 WL 1293534, at *23 (D.N.J. Mar. 31, 2014); see also Clark, supra note 81, at 832–33 (describing private-placement evidence).

117. Functionally, adjudicators who let in evidence of actual progress would also let in evidence of lack of progress. One is merely the converse of the other, and the relevant consideration is the *extent* of progress.

118. See, e.g., Huefner, supra note 27, at 513 (describing courts' use of such evidence).

119. See, e.g., D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 561–62 (3d Cir. 2010) (examining later evidence given by neuropsychologist, speech pathologist, and other professionals).

guidance, appropriate IEPs are more likely to generate positive results, and less likely to generate negative results, than inappropriate IEPs.[120] This presumption may even be the IDEA's lodestar.[121]

Evidence of actual progress can be both incredibly compelling and incredibly dangerous. There is some cognitive dissonance at play when a judge finds that a student received a FAPE because the IEP was reasonably crafted, when in fact she later received a wholly dysfunctional education and made no educational progress. It might even seem antithetical to the purpose of the IDEA to construe the law as merely a guarantee of a process-generated document and not of actualized educational benefit.[122] For the same reason, it may be difficult for judges to find an IEP inappropriate, even if the IEP was poorly crafted, when there is evidence of substantial progress being made under the IEP.[123] Evidence of actual progress thus implicates dangers of hindsight bias[124]—evidence that a student is progressing or failing to progress under an IEP might lead a judge to excessively weigh the possibility that such result occurred because of the IEP's appropriateness or inappropriateness.

2. *Subsequent IEPs.* — Sometimes, a party may also seek to introduce the following year's IEP to indicate that the IEP at issue was not reasonably calculated.[125] The logic here is fairly straightforward, too. Because school districts are required by the IDEA to redraft IEPs to account for past failures, a revised IEP might suggest some amount of miscalculation

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120. See Huefner, supra note 27, at 508 ("Although the district is not accountable for a failure to achieve IEP objectives, and the IEP is no guarantee of success, if its implementation does not result in progress, some aspect of the IEP must be inappropriate.").

121. See supra notes 22–29 and accompanying text (tracing history of special education laws and congressional and judicial desires that children with disabilities advance).

122. See 20 U.S.C. § 1400(d)(1)(A) (2012) (explaining purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 200–01 (1982) ("It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.").

123. An analogous puzzle arises when judges consider what to do when the IEP is not being implemented, but when the student is succeeding nonetheless. See Knight, supra note 11, at 408 ("Implementation failures, contentious as they are, risk being overshadowed by an even more complex problem. What should be done where a child, whose IEP is not being fully implemented, is succeeding academically?").

124. See generally Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571, 591 (1998) [hereinafter Rachlinski, Judging in Hindsight] (describing operation of hindsight bias in operation of objective standards).

125. See, e.g., M.H. ex rel. H.H. v. N.Y.C. Dep't of Educ., No. 10 Civ. 1042(RJH), 2011 WL 609880, at *11 n.6 (S.D.N.Y. Feb. 16, 2011) (rejecting use of evidence of subsequent IEPs).

in the previous one.[126] Even if changes made in the subsequent IEP are not dispositive of previous appropriateness, one could infer that revisions will, at the very least, be more likely to occur on an inappropriate IEP than on an appropriate IEP. This would be all the more true if neither the child's needs nor any other circumstances changed so as to justify a significant IEP adjustment.[127]

Subsequent *unrevised* IEPs may be relevant in a second, narrower, manner. Showing a consistent failure to revise or update IEPs as required might be relevant for a judge when considering if the present IEP was reasonably calculated.[128] In essence, parents may attempt to locate the present dispute in a pattern of consistently—past, present, and future—neglectful IEP drafting.

Nevertheless, reference to subsequent IEPs imparts particular dangers. As with actual progress, subsequent IEPs involve some degree of hindsight bias. A changed IEP may become overly suggestive of a conclusion that the previous IEP was inadequate.[129] But also, relying too heavily on the contents of a subsequent IEP might disincentivize school districts from making IEP revisions in the first place.

3. *Actual-Implementation Evidence.* — Finally, courts may be asked to assess evidence that the actual implementation of an IEP would have been somehow different than what was specified on paper. Specifically, when a student is withdrawn from public school, the state might seek to introduce evidence that the school district would have provided more or different services than were listed, or necessary to list, on the IEP.[130]

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126. See 20 U.S.C. § 1414(d)(4)(A)(ii) (requiring revision of IEP to address previous lack of progress, results of reevaluation, and other changes in needs).

127. See id. (listing five categories of information considered in revising IEPs).

128. See Indep. Sch. Dist. No. 283 v. S.D. ex rel. J.D., 948 F. Supp. 860, 878 (D. Minn. 1995) ("We do not suggest that the chronology of successive IEPs is not of relevance, or that a cumulative failure of school authorities to properly address a student's learning disabilities is extraneous to a challenge of that student's educational placement.").

129. Cf. Fed. R. Evid. 407 (disallowing evidence of subsequent remedial measures); Rachlinski, Judging in Hindsight, supra note 124, at 617–18 (describing mistaken assumption that "because the world gets wiser as it gets older, therefore it was foolish before" (internal quotation marks omitted)).

130. See, e.g., F.O. ex rel. Brendan O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499, 517–18 (S.D.N.Y. 2013) (considering evidence that specific teacher would have implemented services beyond IEP). On the other hand, parents might seek to introduce evidence that the IEP was not actually being implemented. See 20 U.S.C. § 1401(9)(D) (defining FAPE as education provided in conformity with IEP). Because that evidence is relevant to failure-to-implement claims, and not to inappropriate-IEP claims, it is not included in this Note's definition of retrospective evidence. See generally David G. King, Note, *Van Duyn v. Baker School District*: A "Material" Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs, 4 Nw. J.L. & Soc. Pol'y 457 (2009) (discussing Ninth Circuit standard for implementation claims); Knight, supra note 11, at 392–94 (describing circuit split requiring full and substantial compliance with

Relevance here requires some inference since generally IEP implementation and drafting are wholly separate processes.[131] Assume first that education professionals drafting IEPs view the IEP as one component of the overall educational scheme. Then the school district might try to introduce evidence of the broader implementation scheme to show that it was reasonable in drafting an IEP that would have, in the context of a now-known future implementation, enabled the child to receive educational benefit in the whole (even if the IEP was facially inadequate).

But there are also particular policy difficulties with actual-implementation evidence. Unlike other forms of evidence, this evidence sometimes consists of information that the school district could have offered the parents in the first place but chose not to disclose.[132] Courts may also find it difficult to square a determination that the IEP was inappropriate with the fact that the school district was willing to provide more, or better, services than the services listed.[133] Yet, allowing a school district too much leeway in later supplementing the IEP's services with evidence of actual implementation could disincentivize careful drafting in the first place.

Each category of retrospective evidence brings special complications. Despite this, courts that consider retrospective evidence rarely disaggregate the particular type of evidence being considered from general doctrines. Part II.B next discusses how circuits that adopt an exclusionary approach have considered theories of relevance and policy concerns.

B. *The Exclusionary Approach: The Rule Against Retrospective Evidence*

Courts in exclusionary jurisdictions, including the Second, Seventh, Ninth, and Eleventh Circuits, exclude all retrospective evidence from consideration in substantive-denial-of-FAPE proceedings. In the development of the rule against retrospective evidence, courts seldom considered whether such a generalized rule covering all categories of retrospective evidence would be appropriate. Part II.B.1 begins by discussing how the rule originated from a single opinion in the First Circuit and why courts continue to follow it, and Part II.B.2 discusses a recent reformulation from the Second Circuit.

IEP); Weiner, supra note 41, at 549–59 (critiquing Ninth Circuit approach to implementation claims).

131. See supra note 56 (describing status of implementation claims in IDEA litigation).

132. See, e.g., *F.O.*, 976 F. Supp. 2d at 518 (addressing school district expert's testimony that certain teaching methods and devices are also usually used in child's classroom).

133. Courts have been quite willing to find IDEA violations when an IEP is not fully implemented. See Knight, supra note 11, at 392 (stating courts have required at least substantial compliance with IEPs).

1. *The* Roland M. *Meme.* — The seedlings of the retrospective evidence rule originated in the decade after *Rowley* from the First Circuit's opinion in *Roland M. v. Concord School Committee*.[134] There, the parents contended that the district court wrongly found the IEP appropriate because, as they argued, their child's lack of subsequent academic progress necessarily demonstrated the IEP's inappropriateness.[135] In affirming the district court's disposition, the First Circuit agreed with the parents that the student's lack of progress was *relevant*, but rejected that it was *dispositive*.[136] This conclusion seemed consistent with the limited guidance of *Rowley*, where the Supreme Court, too, considered how the student was progressing under the contested IEP.[137] Indeed, *Roland M.* even suggested that if the district court had ignored or excluded evidence of actual progress, some error might be found at the appellate level.[138]

While *Roland M.* sounded in general acceptance of retrospective evidence—or at least of evidence of actual progress—the court also cautioned the use of retrospective evidence with strong language. The opinion continued with a metaphor that would soon be reinterpreted by other circuits: "An IEP is a snapshot, not a retrospective."[139] This was to say the *Rowley* reasonable-calculation standard was an objective standard, and therefore courts should try to deduce "what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."[140] The lesson *Roland M.* sought to impart was caution toward judicial review under objective standards.[141] Lack of pro-

134. 910 F.2d 983, 992 (1st Cir. 1990).

135. Id. at 991.

136. See id. ("Hence, actual educational results are relevant to determining the efficacy of educators' policy choices. But, appellants confuse what is *relevant* with what is *dispositive*." (footnote omitted) (citation omitted)).

137. See Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 209–10 (1982) ("'[E]vidence firmly establishes that Amy is receiving an "adequate" education, since she performs better than the average child in her class and is advancing easily from grade to grade.'" (quoting Rowley ex rel. Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), aff'd, 632 F.2d 945 (2d Cir. 1980), rev'd, 458 U.S. 176)). The extent to which and reason that the Supreme Court relied on this evidence of actual progress remain a mystery.

138. See *Roland M.*, 910 F.2d at 991 n.4 ("Appellants pounce upon the district court's dictum that [the student's] progress at Landmark was 'irrelevant to the question whether the Concord program was appropriate.' Although the court's choice of terminology was infelicitous, . . . the judge fully understood the evidentiary value of comparisons between [the student's] past and present academic progress.").

139. Id. at 992.

140. Id.; see also *Rowley*, 458 U.S. at 206–07 (directing courts to consider whether IEP was "*reasonably calculated* to enable the child to receive educational benefits" (emphasis added)).

141. See *Roland M.*, 910 F.2d at 992 ("[A]ctions of school systems cannot, as appellants would have it, be judged exclusively in hindsight."). See generally Rachlinski,

gress, while relevant, could not be the *only* consideration in determining the substantive adequacy of an IEP.

Though *Roland M.* did not designate any evidentiary rule, it inspired other courts to formulate a rule against retrospective evidence, one that remains today. Shortly following *Roland M.*, portions of opinions for a divided Third Circuit panel in *Fuhrmann ex rel. Fuhrmann v. East Hanover Board of Education* hinted that the *Rowley* standard might involve some temporal evidentiary cutoff.[142] In separate opinions, both the concurrence and the dissent cited *Roland M.*[143] The former believed that *Roland M.* stood for the contention that "evidence of what took place after the hearing officer rendered his decision . . . is not relevant" in determining appropriateness.[144] The latter believed the opinion stood for a position that actual progress retained some evidentiary value.[145] The opinion of the court inaugurated the rule against retrospective evidence by explicitly siding with the concurrence's temporal bar and grounded its decision in *Roland M.*'s reasoning that courts should not engage in "'Monday Morning Quarterbacking.'"[146] But, as Part II.C elaborates, the majority also confusingly suggested that it would leave the door open for a type of relevance analysis.[147]

Judging in Hindsight, supra note 124, at 591 (discussing perils of hindsight information affecting objective standards).

142. See 993 F.2d 1031, 1040 (3d Cir. 1993) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.").

143. Somewhat unusually, *Fuhrmann* generated three separate opinions. One judge wrote an opinion for the court, another a concurrence, and a third judge an opinion concurring in part and dissenting in part. See id. at 1031. Because the third judge dissented with respect to the retrospective evidence question, for ease of reference, this Note refers to his opinion as a dissent. See id. at 1043–44 (Hutchinson, J., concurring in part and dissenting in part) (advocating relevance of retrospective evidence).

144. Id. at 1041 (Mansmann, J., concurring).

145. Id. at 1043 (Hutchinson, J., concurring in part and dissenting in part) ("'[A]dditional evidence' can include 'evidence concerning relevant events occurring subsequent to the administrative hearing.'" (quoting Town of Burlington v. Dep't of Educ., 736 F.2d 773, 790 (1st Cir. 1984), aff'd sub nom. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985))).

146. See id. at 1040 (Garth, J., opinion of the court) ("Judge Mansmann and I are in complete agreement as to the time when we must look at the 'reasonable calculation' made pursuant to *Rowley*."); see also Rachlinski, Judging in Hindsight, supra note 124, at 602 ("Judicial instructions, suppression of evidence, and the standard of persuasion are the usual 'quality control' mechanisms for judgment in the courtroom.").

147. See *Fuhrmann*, 993 F.2d at 1040 ("Therefore, evidence of a student's later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit."). What has survived in the Third Circuit is not *Fuhrmann*'s temporal bar, but this relevance analysis. See infra Part II.C.1 (discussing Third Circuit's present approach).

Circuit courts in the Seventh and Ninth Circuits subsequently adopted a rule against retrospective evidence, crediting *Roland M.*'s cautionary language but not its determination that actual-progress evidence could be relevant. Those jurisdictions therefore adopted the *Fuhrmann* concurrence's strict temporal rule disallowing all evidence following the IEP as a matter of practice,[148] if not as a matter of law.[149] Slowly, *Roland M.*'s command that an IEP could not "be judged *exclusively* in hindsight"[150] transformed over time into a rule that "an IEP must be 'evaluated prospectively and *not* in hindsight.'"[151] Without a keen eye to this distinction, it has become quite common for courts to refer directly to *Roland M.*'s "snapshot" language as substantive reasoning that supports wholesale exclusion of retrospective evidence.[152]

Even in circuits where a strict retrospective evidence rule has not been explicitly adopted, courts have been unwilling to consider retrospective evidence of various sorts.[153] Those courts' understandings of

148. See, e.g., M.B. ex rel. Berns v. Hamilton Se. Sch., 668 F.3d 851, 862–63 (7th Cir. 2011) (refusing to consider evidence of actual progress). The Ninth Circuit has adopted this bar with regard to evidence of actual progress. See Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) ("Instead of asking whether the [IEP] was adequate in light of the [student's] progress, the district court should have asked the more pertinent question of whether the [IEP] was appropriately designed and implemented so as to convey [the student] with a meaningful benefit.").

149. See *Adams*, 195 F.3d at 1149 (citing *Fuhrmann* with approval); Bd. of Educ. v. Ill. State Bd. of Educ., 938 F.2d 712, 717 n.4 (7th Cir. 1991) (citing *Roland M.*'s hindsight language favorably).

150. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) (emphasis added).

151. *M.B.*, 668 F.3d at 863 (emphasis added) (quoting *Ill. State Bd. of Educ.*, 938 F.2d at 717 n.4 (affirming district court opinion refusing to consider post-IEP evaluation of later progress and citing *Roland M.*'s hindsight language favorably); see also *Adams*, 195 F.3d at 1149 ("We do not judge an [IEP] in hindsight; rather, we look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated . . . .").

152. See, e.g., K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 808 (8th Cir. 2011). A preliminary Westlaw search locates over forty opinions that used *Roland M.*'s exact "snapshot" language. Search Results, WestlawNext, http://westlawnext.com (go to All State and All Federal jurisdictions; search "(snapshot /s retrospective) & 'individuals with disabilities education'") (on file with the *Columbia Law Review*) (last visited Aug. 19, 2014).

153. T.J. v. Winton Woods City Sch. Dist., No. 1:10-cv-847, 2013 WL 1090465, at *10–*13 (S.D. Ohio Mar. 15, 2013) (disallowing later expert reports of child's educational needs); S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 66–67 (D.D.C. 2008) (rejecting evidence of subsequent progress as irrelevant); Mandy S. ex rel. Sandy F. v. Fulton Cnty. Sch. Dist., 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) (discounting parent's claim that IEP was deficient because it did not propose educational program not requested when IEP was drafted), aff'd, 273 F.3d 1114 (11th Cir. 2001). Courts in these jurisdictions may be somewhat conflicted. See, e.g., Berger v. Medina City Sch. Dist., 348 F.3d 513, 521–22 (6th Cir. 2003) (considering actual classroom performance before

retrospective evidence are likely only intensified by the fact that many scholars consider exclusion of retrospective evidence to be the unquestioned norm.[154] Yet as Part II.C explains, the First and Third Circuits, where the retrospective evidence rule developed, actually continued along a different path and never entirely excluded retrospective evidence.[155]

2. *The Second Circuit Refinement.* — Until recently, the Second Circuit remained undecided on whether it would adopt a rule against retrospective evidence.[156] However, in *R.E. v. New York City Department of Education*, the court was faced squarely with the problem—this time, whether the state could introduce evidence that a student would have received an education different from what was written in the IEP had the student remained in public school.[157] Both *R.E.*'s holding and reasoning notably differed from the traditional model.

While *R.E.* purported to adopt a rule in line with a "majority" of circuits,[158] in reality the Second Circuit modified the general rule. Instead of outright exclusion, *R.E.* held that "[r]etrospective evidence that *materially alters* the IEP is not permissible"—that is, retrospective evidence that *does not* materially alter the IEP might be allowed.[159] Part of

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concluding resolution of case "does not depend on this issue"); Smith v. District of Columbia, 846 F. Supp. 2d 197, 201–02 (D.D.C. 2012) (finding actual progress to be "'important factor'" (quoting Roark ex rel. Roark v. District of Columbia, 460 F. Supp. 2d 32, 44 (D.D.C. 2006))).

154. See, e.g., Wasserman, supra note 66, at 197 ("A proposed public placement is evaluated prospectively, that is as of the time it was developed, rather than retrospectively with the benefit of 20/20 hindsight."); Hinson, supra note 7, at 102–03 ("Essentially, this means that a school is not legally held accountable based on a lack of academic progress of the child.").

155. See infra Part II.C (describing approach of First and Third Circuits, and other nonexclusionary-approach courts).

156. See D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 598–600 (2d Cir. 2005) (noting other circuits' approach to retrospective evidence while leaving Second Circuit's position as open question).

157. In other words, actual-implementation evidence. See R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 185 (2d Cir. 2012) ("This appeal primarily calls upon us to consider the appropriateness of what we have labeled 'retrospective testimony,' i.e., testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had attended the school district's proposed placement.").

158. Id. at 186 ("We now adopt the majority view that the IEP must be evaluated prospectively as of the time of its drafting and therefore hold that retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered . . . .").

159. Id. at 188 (emphasis added). The Second Circuit also made an exception that when a school district omits a required service from the IEP in good faith, evidence may be introduced that the school district amended the IEP within the IDEA's thirty-day resolution period. See id. ("A school district that inadvertently or in good faith omits a required service from the IEP can cure that deficiency during the resolution period

the opinion focused on evidence of actual implementation, which other circuits had not squarely addressed. *R.E.* elaborated that under its "materially alters" standard, parties could only bring evidence that "explain[ed] or justifie[d]" what was on the IEP.[160] Hence, courts would exclude actual-implementation evidence that a different teacher, teaching method, or staffing ratio would have been used.[161] *R.E.* also addressed in dicta other categories of retrospective evidence and sided with the strict exclusionary approach on retrospective evidence.[162] Subsequent IEPs would presumably also be excluded because information therein would not be "reasonably known to the parties at the time of the placement decision."[163]

R.E.'s reasoning for excluding retrospective evidence was markedly different from the reasoning of other courts. While *R.E.* cited *Roland M.* and *Fuhrmann*, it never explicitly adopted the First and Third Circuits' hindsight reasoning.[164] The Second Circuit was partially animated by parity and fairness concerns. *R.E.* reasoned that barring school districts from introducing actual-implementation evidence could be partially justified by a reciprocal bar on parents introducing evidence of lack of progress.[165] Perhaps, too, it would be unfair to hold a school district liable on evidence not reasonably known when the IEP was drafted.[166]

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without penalty once it receives a due process complaint."); see also 20 U.S.C. § 1415(f)(1)(B) (2012) (providing thirty days for school district to resolve due process complaint claims).

160. *R.E.*, 694 F.3d at 186. Practically speaking, the Second Circuit has found that retrospective evidence does not materially alter the IEP when that evidence is not relied upon in making a determination of appropriateness. See, e.g., K.L. ex rel. M.L. v. N.Y.C. Dep't of Educ., 530 F. App'x 81, 85 (2d Cir. 2013) (upholding IEP where there was sufficient admissible evidence); H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 F. App'x 64, 67 (2d Cir. 2013) (finding no error when "district court did not rely on her testimony to affirm the SRO's conclusion that the . . . IEP was appropriate").

161. See *R.E.*, 694 F.3d at 186–87 ("The district, however, may not introduce testimony [of] a different teaching method, . . . evidence that modifies this staffing ratio . . . [or] evidence that a child would have had a specific teacher or specific aide.").

162. This statement presumes that it would be confusing to apply the Second Circuit standard to other categories of retrospective evidence. For instance, evidence of actual progress does not materially alter the IEP, nor could it possibly.

163. *R.E.*, 694 F.3d at 186–87; see also F.O. ex rel. Brendan O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499, 512–13 (S.D.N.Y. 2013) (declining to consider evidence of subsequent IEPs under *R.E.* standard). However, *R.E.* also left the door open for evidence that suggested an IEP was not being properly implemented. *R.E.*, 694 F.3d at 187 n.3 ("However, evidence that the school district did not follow the IEP as written might be relevant in a later proceeding to show that the child was denied a FAPE because necessary services included in the IEP were not provided in practice.").

164. See *R.E.*, 694 F.3d at 185–87 (citing *Roland M.* and *Fuhrmann* favorably without analysis).

165. See id. at 187 ("[T]his rule does not unfairly skew the reimbursement hearing process. Parents who end up placing their children in public school cannot later use

The Second Circuit also reasoned that, because of the IDEA's structure, parents rely on the accuracy and completeness of the IEP-generating process and the IEP itself when making critical educational choices such as private-school enrollment.[167] As the "centerpiece" of the IDEA's framework, the IEP and its formulation should have been the center of the inquiry, not any evidence that arose afterward.[168] Therefore, evidence of actual implementation would be disruptive to a system where the IEP was the informational center of gravity. However, *R.E.* never addressed how this reliance justification mapped onto categories of retrospective evidence that could not possibly have arisen during the drafting phase, including evidence of actual progress or subsequent IEPs.[169]

In the wake of *R.E.*, the choice now facing courts is whether a materiality standard for excluding retrospective evidence is a productive doctrinal change. The Second Circuit has not settled what would be a difference in the IEP material enough to justify exclusion of retrospective evidence.[170] And recent attempts to apply the standard have been equally perplexed.[171] These developments at least demonstrate that the tra-

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evidence that their child did not make progress under the IEP in order to show that it was deficient from the outset."); cf. Michelson v. United States, 335 U.S. 469, 486 (1948) ("[T]his law is archaic, paradoxical, and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other.").

166. See *R.E.*, 694 F.3d at 186–87 (discussing what was reasonably known during placement decision); see also Rachlinski, Judging in Hindsight, supra note 124, at 624 ("Judgments tainted by the hindsight bias . . . can . . . smack of unfairness.").

167. See *R.E.*, 694 F.3d at 186 ("At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents."); supra notes 64–69 and accompanying text (describing difficulties inherent in tuition-reimbursement decisions).

168. *R.E.*, 694 F.3d at 188.

169. See id. at 185–88 (providing no consideration of how reliance justification functions in other contexts).

170. See id. (providing only specific instances that are certainly materially different, such as different teaching method or different classroom size); see also Marion Walsh, Second Circuit Rules that School Districts Cannot Use Retrospective Testimony to Rehabilitate Defective IEPs, Littman Krooks LLP: Special Needs Planning Blog (Sept. 21, 2012), http://www.specialneedsnewyork.com/2012/09/second-circuit-rules-that-school-districts-cannot-use-retrospective-testimony-to-rehabilitate-defective-ieps/ (on file with the *Columbia Law Review*) (noting "many open questions" including "line between testimony that *explains* an IEP and testimony that rehabilitates a deficient IEP").

171. Courts in the Second Circuit subsequently seemed to allow evidence regarding how the IEP would have been implemented, with the only limitation being: just not too much. Compare F.L. ex rel. F.L. v. N.Y.C. Dep't of Educ., No. 12-4575-cv, 2014 WL 53264, at *2 (2d Cir. Jan. 8, 2014) (permitting evidence "explain[ing] how *listed* services would be provided"), with C.F. ex rel. R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 80 (2d Cir. 2014) (rejecting evidence that "more specific behavioral intervention plan" would be created). For a more robust critique, see infra notes 261–264 and accompanying text.

ditional rule is not immovable. Still, the core of the rule against retrospective evidence remains largely intact: Evidence that temporally follows an IEP should be excluded. But not all circuits have followed this, and Part II.C next considers workable alternatives from circuits that diverge from this rule.

C. *The Nonexclusionary Approach(es): A Range of Rulings*

Circuits that do not follow the exclusionary approach have adopted motley rulings with regard to retrospective evidence. This section locates two overarching approaches. Part II.C.1 elaborates on approaches that broadly accept relevant retrospective evidence, and Part II.C.2 describes the First Circuit's approach that accepts retrospective evidence but asymmetrically weighs evidence of progress over evidence of lack of progress.

1. *Pure Retrospective Evidence Jurisdictions.* — While many circuits took *Roland M.* to stand for a retrospective evidence rule, an opposite—and perhaps more original—strand of *Roland M.* quietly survived in the Third Circuit following *Fuhrmann*. That strand has subsequently been adopted as a nonexclusionary approach in other circuits, including the Fourth, Fifth, and Tenth Circuits, while taking on differing dimensions in each. The story here returns again to *Fuhrmann*, an opinion that sent mixed messages, and which agreed to a temporal evidentiary cutoff while also suggesting that evidence of actual progress might be relevant.[172]

Roughly two years later, the Third Circuit in *Susan N. v. Wilson School District* spent several pages explicitly clarifying *Fuhrmann*, which it labeled an "unusual" opinion, and explained the circuit's approach to retrospective evidence.[173] This time, parents sought to supplement a district court record with evidence that their child failed to make progress in public school, evidence not available at the time of the due process hearing.[174] *Susan N.* first determined that, despite facial agreement, *Fuhrmann*'s opinion for the court and concurrence actually spelled out two different approaches to retrospective evidence.[175] While the former approach suggested the possibility of relevant retrospective evidence, the latter adopted a temporal bar.[176]

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172. See supra notes 142–147 and accompanying text (discussing *Fuhrmann* opinion's interpretation of retrospective evidence rule).

173. 70 F.3d 751, 760–62 (3d Cir. 1995).

174. Id. at 760.

175. See id. at 762 ("However, despite Judge Garth's statement that 'Judge Mansmann and I are in complete agreement as to the time when we must look at the "reasonable calculation" made pursuant to *Rowley*,' the two judges may have come to different conclusions as to the consequences of that holding." (citation omitted) (quoting Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993))).

176. Id.

Susan N. ultimately concluded *Fuhrmann* stood not for the concurrence's (and exclusionary approach's) strict temporal bar but for a "less restrictive approach" to retrospective evidence.[177] Under *Susan N.*'s rule, courts could "admit evidence dating from a time after both the school district and the hearing officer made their decisions, but only in determining the reasonableness of the school district's original decision."[178] In other words, courts could admit retrospective evidence when it was helpful and relevant in answering the *Rowley* inquiry.[179] As in *Roland M.*,[180] the court determined that lack of educational progress could be relevant, but not dispositive.[181] *Susan N.* made clear that such evidence did not make an IEP per se inappropriate without an independent showing that it was not reasonably calculated.[182]

The Third Circuit justified its acceptance of retrospective evidence on the IDEA's statutory purpose. *Susan N.* found significant the IDEA's stated purpose "'to assure that all children with disabilities have available to them . . . a free appropriate public education.'"[183] Like the *Rowley* Court, the court was also concerned with the possibility that children would *actually* receive no educational benefit.[184] The Third Circuit rule thereby required courts, on an operational level, to engage in a detailed analysis of how the student was faring in public school when determining an IEP's appropriateness.[185] Nevertheless, judges were expected to

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177. Id.

178. Id.; see, e.g., D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 567–68 (3d Cir. 2010) (engaging in detailed analysis of student's subsequent progress under IEP).

179. *Susan N.*, 70 F.3d at 760 ("[A] court must exercise particularized discretion in its rulings so that it will consider evidence relevant, non-cumulative and useful in determining whether Congress' goal has been reached for the child involved.").

180. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) ("But, appellants confuse what is *relevant* with what is *dispositive.*").

181. *Susan N.*, 70 F.3d at 762 ("Such evidence may be considered only with respect to the *reasonableness* of the district's decision at the time it was made.").

182. Id. ("[A] student's subsequent failure to make progress in school does not retrospectively render an IEP *per se* inappropriate.").

183. Id. (quoting 20 U.S.C. § 1400(c) (Supp. II 1990)). *Susan N.* also found relevant another statutory provision that allowed the introduction of additional evidence. See id. (citing 20 U.S.C. § 1415(e)(2)). Introduction as additional evidence was merely the manner in which retrospective evidence was introduced in *Susan N.* and was not necessarily applicable to all introductions of retrospective evidence. See supra note 83 (discussing rules of additional evidence).

184. See supra notes 98–100 and accompanying text (discussing *Rowley*'s focus on actual results in framing IDEA's broader purpose).

185. See, e.g., D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 567–68 (3d Cir. 2010) (parsing meaning of high grades in special education classrooms versus regular classrooms).

exercise restraint to avoid the dangers of hindsight bias.[186] Despite the broad language of *Susan N.*'s holding, the case did not have an opportunity to make clear how this reasoning would apply to other categories of retrospective evidence now potentially allowable under its rule.[187]

This conception that retrospective evidence could be relevant under the *Rowley* standard has also gained some traction in the Fourth and Fifth Circuits. Those circuits focused primarily on evidence of actual progress. The Fourth Circuit rejected a rule against evidence of actual progress,[188] though that circuit hinted a court might be more interested in evidence of progress than lack of progress.[189] The Fifth Circuit has taken yet a more open stance toward such evidence and incorporated actual progress as a factor that district courts *must* consider.[190] The circuit has even gone so far as to label evidence of actual progress "one of the most critical factors" in determining whether the IEP was appropriate.[191] While neither the Fourth nor Fifth Circuit described in detail their reasoning for accepting evidence of actual progress, presumably those courts also found compelling a particular reading of *Rowley* that sanctioned concern for the actual educational benefit provided to students.[192]

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186. *Susan N.*, 70 F.3d at 762 ("Courts must be vigilant to heed Judge Garth's warning that '[n]either the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement.'" (quoting Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993))).

187. See id. at 760–62 (addressing actual-progress evidence without considering other typologies).

188. See M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 326–27 (4th Cir. 2009) ("To be sure, however, progress, or the lack thereof, while important, is not dispositive.").

189. See id. at 327 ("[W]e have concluded that, in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit."). The full extent of this asymmetric approach is epitomized in the First Circuit's rulings. See infra Part II.C.2 (discussing First Circuit's approach).

190. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F., 118 F.3d 245, 253 (5th Cir. 1997) (listing "positive academic and non-academic benefits" as one of four factors under *Rowley* standard). The other three factors are: "(1) [T]he program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders.'" Id.

191. Hous. Indep. Sch. Dist. v. V.P. ex rel. Juan P., 582 F.3d 576, 588 (5th Cir. 2009).

192. *M.S.*, 553 F.3d at 327 (citing Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 207 n.28 (1982), as support for stance on retrospective evidence). In a footnote, the Fifth Circuit stated that its approach tracked a federal regulation that prescribed implementation procedures of the IDEA. *Michael F.*, 118 F.3d at 253 n.29 (citing 34 C.F.R. § 300.346(a)(5) (1997)). That regulation, designating short-term objectives to be achieved and concerning the provision of actual educational benefit to children with disabilities, mirrored similar language from *Rowley*. Compare 34 C.F.R. § 300.346(a)(5) ("The IEP for

One final variation on the general permissive approach originated in the Tenth Circuit. While that circuit also allowed retrospective evidence, its reasoning was couched in a sense of realism not present in other opinions.[193] The Tenth Circuit rested its reasoning on an expansive understanding of what constitutes an educational program. In its words, "[A]n IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document."[194] The court thus conceptualized the educational program as "an on-going, dynamic activity."[195] Because an IEP would also be evaluated as an ever-changing program, courts naturally could not "ignore the fact that an IEP is clearly failing" (i.e., actual-progress evidence).[196]

The Tenth Circuit's reasoning led also to a conclusion that a school district could not "continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student,"[197] a conclusion that seemed to leave room for the permissibility of evidence of subsequent IEPs. Under that reasoning, an unchanged subsequent IEP following lack of actual progress might help show a pattern of systematic neglect, or unreasonableness, in IEP drafting, which would defeat a claim of reasonable calculation.[198] Like other circuits taking a nonexclusionary approach though, the baseline conclusion of the Tenth Circuit was similar: If retrospective evidence is introduced to answer whether an IEP was reasonably calculated to enable the child to receive educational benefit, that evidence should be allowed.

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each child must include . . . [a]ppropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved."), with *Rowley*, 458 U.S. at 182 (describing statutory command that IEP should include "short-term instructional objectives" (quoting 20 U.S.C. § 1401(19) (1976))).

193. See O'Toole ex rel. O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 702 (10th Cir. 1998) ("[W]e do not hold that a school district can ignore the fact that an IEP is clearly failing, nor can it continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student.").

194. Id. The Tenth Circuit also purported that it agreed with the retrospective evidence rule developed by other circuits; however, its broadened definition of an educational program essentially vitiates the rule. See id. at 701 ("Moreover, if we are evaluating an IEP prospectively only, we agree with the Third Circuit which has said that 'the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.'" (quoting Carlisle Area Sch. v. Scott P. ex rel. Bess P., 62 F.3d 520, 534 (3d Cir. 1995))).

195. Id. at 702.

196. Id.; see Tyler V. ex rel. Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-1J, No. 07-cv-01094-PAB-KLM, 2011 WL 1045434, at *3 (D. Colo. Mar. 21, 2011) (considering lack of progress under Tenth Circuit standard, but rejecting claim because parents brought no other evidence).

197. *O'Toole*, 144 F.3d at 702.

198. Cf. Fed. R. Evid. 404(b)(2) (stating evidence of specific acts "may be admissible for another purpose, such as proving . . . plan, knowledge . . . [or] absence of mistake").

2. *The First Circuit's Asymmetric Counterpart.* — Even among circuits adopting a nonexclusionary approach—where varying theories for accepting retrospective evidence abound—the First Circuit's approach deserves special attention. As the beginning of the retrospective evidence dilemma, the First Circuit's opinion in *Roland M.* meant everything, to everyone.[199] Unsurprisingly, given the general acceptance of *Roland M.*, the opinion is still good law, and the First Circuit's own interpretation of the decision demonstrates another unique approach.[200]

After *Roland M.*, the First Circuit continued to accept evidence of actual progress and lack of progress, but with asymmetric legal significances.[201] The First Circuit in *Lessard v. Wilton-Lyndeborough Cooperative School District* clarified what *Roland M.* stood for within the circuit.[202] Following the example of *Rowley*, actual educational progress was *sufficient* to demonstrate that an IEP provided a FAPE.[203] But because "lack of progress" did not "necessarily betoken[] an IEP's inadequacy,"[204] *mere* lack of progress was *insufficient* to uphold a claim of substantive denial of FAPE.[205] Thus, in the First Circuit, the cautionary language of *Roland M.* extended only as far as the facts of that case—to evidence of a student's *lack* of progress at the public-school placement.[206] When it came to evidence of a student's progress, that same caution toward hindsight review would not hold.[207] In essence, evidence of progress would retain much greater legal significance than evidence of lack of progress in judicial proceedings.

While *Lessard* did not make explicit the First Circuit's reasoning, that reasoning may not be difficult to divine. The Eighth Circuit, which traces

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199. See supra Part II.B.1 (discussing meaning of *Roland M.* in exclusionary-approach jurisdictions).

200. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008) (considering *Roland M.* favorably in discussion of retrospective evidence).

201. Id. ("Actual educational progress can (and sometimes will) demonstrate that an IEP provides a FAPE.").

202. See id. (explaining parents are misconstruing precedent and "invert[ing] the rule of decision").

203. Id.

204. Id.

205. See id. ("[A]n inquiring court ought not to condemn that methodology ex post *merely* because the disabled child's progress does not meet the parents' or the educators' expectations." (emphasis added)); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) ("[A]ctions of school systems cannot, as appellants would have it, be judged *exclusively* in hindsight." (emphasis added)).

206. See *Roland M.*, 910 F.2d at 991 ("[T]he parents' claim that their son's academic progress at [the placement] necessarily demonstrated the inadequacy of [the school district's] IEPs will not wash . . . .").

207. See *Lessard*, 518 F.3d at 29 (finding to hold otherwise would "invert[] the rule of decision").

the First Circuit's approach, supplies some clues.[208] If one reads *Rowley* as seriously concerned with actual positive academic results under the IDEA, then evidence of progress might answer the question in a way evidence of lack of progress does not. Hence, the Eighth Circuit has concluded that if there is progress made, then the IDEA's aspiration to provide an adequate education has been roughly accomplished; on the other hand, evidence of lack of progress might lead to further inquiry into what was reasonable for that student.[209] The nature of the IEP team's specialized knowledge might also underpin these asymmetric results.[210] While positive academic results might confirm the "'efficacy of educators' policy choices,'" crediting negative results would ask courts to second-guess (with potentially biased hindsight review) the special expertise of those educators.[211] Under *Rowley*, those choices of educational methodology never belonged to the courts.[212]

Still, the conjoining invocations of hindsight bias and deference in this strange asymmetric standard actually reveal strong arguments *against* discounting evidence of lack of progress, and against a hindsight bias justification in general. Before asking whether a rule needs to be adopted to correct for hindsight bias, courts may want to inquire to what extent hindsight bias has already been corrected. Indeed, *Rowley*'s deference command can be viewed as a built-in correction for hindsight bias.[213] By protecting matters of educational policy from hindsight judicial review, *Rowley* effectively held that for a range of IEP decisions what happened

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208. See CJN v. Minneapolis Pub. Sch., 323 F.3d 630, 638–39 (8th Cir. 2003) (weighing evidence of progress and evidence of lack of progress differently).

209. See id. (finding IDEA satisfied when progress is shown because "[s]pecific results are not required," but courts must "ascertain exactly how reasonable his IEPs were at the time of their adoption" when there is lack of progress); supra notes 98–100 and accompanying text (discussing one reading of *Rowley* as focused on actual results).

210. *CJN*, 323 F.3d at 638 ("[T]his difficulty is precisely why we have recognized that '[a]s long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology.'" (quoting Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 614 (8th Cir. 1997))). But see K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 809 (8th Cir. 2011) (finding subsequent progress does not *necessarily* mean FAPE was granted, especially in particular situations).

211. *Lessard*, 518 F.3d at 29 (quoting *Roland M.*, 910 F.2d at 991); see also *CJN*, 323 F.3d at 638 ("When a disabled student has failed to achieve some major goals, it is difficult to look back at the many roads not taken and ascertain exactly how reasonable his IEPs were at the time of their adoption.").

212. Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 208 (1982) ("[C]ourts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973))).

213. See supra notes 74–77 and accompanying text (describing judicial deference under *Rowley*).

afterward could not even be *relevant*.[214] Partially insulating school districts on specialized-knowledge grounds therefore prevents parents from pushing lack of progress too far and may render an asymmetric correction unnecessary. Of course, the asymmetry reveals a broader lesson that will be next addressed: Perhaps the case for a rule against retrospective evidence has been grossly overstated.

After revisiting the First Circuit's approach, the exploration of retrospective evidence comes full circle. What began as the First Circuit's rather innocuous language in *Roland M.* evolved into a broad rule against retrospective evidence through interpretations of the Third Circuit and then others. The newest formulation is now the Second Circuit's materiality standard. Yet the First and Third Circuits have always allowed retrospective evidence to varying extents. At best, courts have derived their rules from a disjointed assortment of factual bases, legal justifications, and (mis)understandings of cases from other circuits. Part III seeks to add some clarity to the discussion and to resolve the question of retrospective evidence.

III. AN IDEA FOR WHAT THE FUTURE HOLDS: RESOLVING THE RETROSPECTIVE EVIDENCE DILEMMA

Approaches to retrospective evidence are haphazard, with no clear majority of circuits adopting any particular rule or reasoning.[215] And, ironically, First and Third Circuit decisions used by other circuits adopting an exclusionary approach never stood for exclusion in the original circuits.[216] The most glaring error was this viral misinterpretation: From a partial reading of *Roland M.* emerged a rule against retrospective evidence, although the case's language countenanced just the opposite, both to the First Circuit and to its immediate follow-ons in the Third

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214. An analogy can be drawn between the *Rowley* standard and the "business judgment rule" in corporate law, which, as a correction for hindsight bias, holds that officers and directors using their best business judgment cannot be held liable for decisions that seem "foolish in hindsight." Jeffrey J. Rachlinski, Heuristics and Biases in the Courts: Ignorance or Adaptation?, 79 Or. L. Rev. 61, 94–96 (2000); see Rachlinski, Judging in Hindsight, supra note 124, at 619–20 (defining business-judgment rule); see also Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1529 (1998) (arguing courts can correct for hindsight bias by amending standard of reviewing record).

215. See supra Part II.B (describing differences in reasoning between exclusionary jurisdictions and Second Circuit); see also supra Part II.C (describing nearly separate approaches of nonexclusionary jurisdictions).

216. See supra Part II.B.1, II.C (describing approaches of First and Third Circuits and their successors).

Circuit.[217] To make matters worse, no courts have kept an eye toward the particularities of different kinds of retrospective evidence when formulating and reasoning through generalizable rules.[218]

Part III.A recommends adopting the nonexclusionary approach that evidence, including retrospective evidence, should be permissible if it is relevant to answering the question of whether the IEP was reasonably calculated to enable the child to receive educational benefit. Part III.B then recommends that even under a general nonexclusionary rule, courts should adopt specialized exceptions barring some uses of retrospective evidence. As Part III.B suggests, disparate policy concerns demand varying levels of caution, ranging from some caution for actual-progress evidence, to more caution for subsequent IEPs, to total exclusion of actual-implementation evidence.

A. *Adhering to Nonexclusion: If It Is Relevant, Let It In*

Courts should adopt a rule allowing retrospective evidence as articulated by the Third Circuit.[219] That rule is best stated as a relevance rule, permitting adjudicators to "admit evidence dating from a time after . . . the school district . . . made [its] decisions, but only in determining the reasonableness of the school district's original decision."[220] Under this rule, while it would be acceptable to introduce retrospective evidence for the limited inference that the IEP's appropriateness was more or less probable, it would be unacceptable to claim that the school district should have known what it could not have been (temporally) aware of.[221]

As a preliminary matter, adopting the alternative rule against retrospective evidence carries risks of making proceedings overly focused on the IEP. Presently, courts adopting an exclusionary approach are apt to confound *Rowley*'s prospective, forward-looking IEP-based standard with the question of what sorts of evidence are useful or helpful for discerning whether that standard has been met. This inability to consider events

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217. See supra Part II.B–C (recounting history of *Roland M.* opinion in exclusionary-approach circuits, later in the Second Circuit, and in first circuits to consider retrospective evidence, the First and Third Circuits).

218. For instance, the Second Circuit has not articulated how its reliance reasoning applies to evidence of actual progress. See supra Part II.B.2 (discussing Second Circuit approach).

219. Several circuits have not yet explicitly adopted a particular retrospective evidence rule, including the Sixth and D.C. Circuits. See supra note 153 and accompanying text (discussing district courts in circuits that have adopted rule against retrospective evidence).

220. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3d Cir. 1995).

221. See supra Part II.A (describing possibly relevant uses of retrospective evidence).

following the IEP is a quintessential example of IEP-centric reasoning.[222] But eventual results and methodology are not always distinct.[223] For instance, permitting actual-progress evidence recognizes that an IEP once reasonably or unreasonably calculated has correlative aftereffects;[224] and those aftereffects, if unlikely to occur without an appropriate or inappropriate IEP, can be indicative of reasonableness.[225] More generally, each of the categories of retrospective evidence discussed can be relevant to the *Rowley* inquiry, even if not previously known to the IEP team.[226]

A rule allowing retrospective evidence must be positioned in the unique context of judicial review of IDEA cases and the challenges that review presents.[227] Federal judges are asked to earnestly review IEPs but are equipped with few evidentiary tools to do so. While federal judges can examine objective evidence, mere evidence of the previous year's grades or evaluations lends little comfort to judges seeking to make complex decisions in shifting educational climates.[228] In an IEP-centric system, a paucity of objective evidence can turn an IDEA case into a proverbial battle of the experts, with each hawking her preferred educational methodology.[229] Allowing *more* evidence relevant to the *Rowley* inquiry, not *less*, improves judicial review and prevents the judicial opinion from becoming a sort of "rubber stamp" for school district choices.[230] As an added benefit, none of the categories of retrospective evidence

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222. See supra Part I.D (describing developments that led to evidentiary focus on IEP); supra notes 167–169 and accompanying text (discussing how Second Circuit justified exclusion with discussion of IEP's centrality).

223. Cf. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (finding "conclusions and methodology are not entirely distinct from one another" in context of reliably calculated expert opinions).

224. Indeed, it is the very purpose of the IDEA to generate particular aftereffects, notably educational benefit. See 20 U.S.C. § 1400(d)(1)(A) (2012) (explaining purpose as "ensur[ing] that all children with disabilities have available to them a free appropriate public education").

225. Take, for instance, a simple analogy: If you place popcorn in the microwave and two minutes later smell smoke, that smoke is retrospective evidence of the reasonableness of your microwave operation.

226. See supra Part II.A (enumerating manners in which retrospective evidence may be relevant).

227. See supra notes 101–107 and accompanying text (discussing difficulty of reviewing IEPs because IEPs inherently involve questions of educational methodology).

228. See supra notes 78–79 and accompanying text (describing forms of objective evidence).

229. See supra notes 61–62 and accompanying text (noting length of due process hearings, especially in light of need to present expert testimony on IEP appropriateness).

230. Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 (2d Cir. 1998) ("[F]ederal courts [must] not simply rubber stamp administrative decisions.").

requires specialized knowledge for judges to understand, and the logic of relevance is familiar and accessible.[231]

Retrospective evidence also recognizes a sort of realism in education. IEPs often present an incomplete picture of a student's education, both in practice and by design.[232] Though the IEP might be the "centerpiece" of the *Rowley* inquiry,[233] evidence demands a broader question of what a judge would want to know in order to make a fair, effectual decision. The Supreme Court may never reimagine FAPE as an "ongoing, dynamic activity,"[234] but a more complete picture of a child's educational landscape would promote more grounded and sensible judicial decisionmaking.[235]

Permitting retrospective evidence can defuse many of the risks attached to an IEP-centric dispute-resolution system, including risks of diminishing judicial review and judicial detachment from educational realities. Most of all, that evidence can be relevant and helpful. Part III.B considers how the various categories of retrospective evidence should be treated under this rule.

B. *Parsing the Categories of Retrospective Evidence: Varying Levels of Caution*

Not all retrospective evidence is created equal. While this Note suggests a broad relevance rule, a particular category's unique challenges and benefits may justify a specialized exception. In this manner, this

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231. See supra Part II.A (describing relevance of three categories of retrospective evidence); see also Fed. R. Evid. 401 (making clear federal standard for relevance); Clark, supra note 81, at 840 (advocating for Federal Rules of Evidence as "starting point" in context of additional evidence).

232. See supra notes 96–97 and accompanying text (discussing how IEPs are often drafted vaguely and without sufficient information to guide implementation).

233. Honig v. Doe, 484 U.S. 305, 311 (1988).

234. O'Toole ex rel. O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 702 (10th Cir. 1998). While the Tenth Circuit's approach is unique in its conceptualization of what constitutes FAPE, see supra Part II.C.1, the manner in which the Supreme Court has defined FAPE is much narrower. See Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 203 (1982) (holding FAPE only requires instruction that "provid[es] personalized instruction with sufficient support services to permit the child to benefit educationally . . . at public expense, [that] meet[s] the State's educational standards, [that] approximate[s] the grade levels used in the State's regular education, and [that] comport[s] with the child's IEP").

235. Courts have, in other situations and in thinking about a child's needs, found it useful to consider more information, not less. See, e.g., Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984) ("We also recognize that in many instances experts who have testified at the administrative hearing will be bringing the court up to date on the child's progress from the time of the hearing to the trial."), aff'd sub nom. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985). And, the IDEA, with its provisions for regular review of the IEP, at least recognizes that education "is not static, but rather is constantly changing." Craparo, supra note 23, at 516–17.

Note's recommendation tracks the structure of the Federal Rules of Evidence.[236] Significant policy concerns suggest that courts should be cautious when considering evidence of actual progress. Courts should be even more cautious when permitting subsequent IEPs, and at times exclude them. And courts should exclude altogether evidence of actual implementation.

1. *Actual-Progress Evidence.* — Under a relevance rule, actual-progress evidence would be admitted as relevant,[237] but judges should be cautious to not treat it as dispositive. Evidence of actual progress does have distinct benefits. Courts allowing such evidence can draw from Supreme Court precedent in *Rowley*, which itself considered evidence of later progress.[238] Introducing evidence of actual progress can also ameliorate the usual resource and efficiency concerns of introducing more evidence.[239] Allowing testimony about progress may in fact incentivize school districts to correct failing IEPs before the yearly deadline.[240] If lack of progress can be used against the school district in a potentially costly proceeding, the school district's rational calculus may tip toward a mutually beneficial early revision, obviating the need for litigation.[241] Such revision would not only allow the state to avoid costly tuition-reimbursement litigation, satisfy the demands of parents, and thereby lessen the burden on the federal judiciary, but it would also benefit children by proactively amending IEPs suspected of causing inadequate progress.[242]

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236. See Fed. R. Evid. art. IV (introducing relevance rule followed by exceptions to rule).

237. See supra Part II.A.1 (discussing relevance of actual-progress evidence).

238. See supra notes 98–100 and accompanying text (discussing *Rowley*'s focus on actual results).

239. See supra notes 108–111 and accompanying text (discussing economy concerns of interested parties).

240. Scholars have at times suggested that if a student is clearly failing, the school district should revise the IEP or develop a new one. See, e.g., Huefner, supra note 27, at 508 ("[I]n the face of failure, courts should not allow a school to be intransigent and refuse to alter an IEP."); Theresa Kraft, Missing the Forest for the Trees: *Forest Grove School District v. T.A.*, 8 Pierce L. Rev. 271, 296 (2010) ("A less costly strategy [than tuition reimbursement] to all would have been for the district to develop an appropriate IEP that would provide T.A. with educational benefit."). However, without a proper incentive, trusting the school district to revise the IEP simply because a student is not progressing may be wishful thinking.

241. See Huefner, supra note 27, at 510 (arguing holding school district to IEP goals "would also thereby create an incentive for the education system to increase its accountability, while leaving it to the schools to determine what technologies to implement"); cf. Weast v. Schaffer ex rel. Schaffer, 377 F.3d 449, 454 (4th Cir. 2004) (considering no inequities inhered in burden-of-proof standard when parents and school district were able to litigate on full information), aff'd, 546 U.S. 59 (2005).

242. In fact, the Finnish education system is credited for consistently "adjusting the [student's individualized education] plan as experience suggests." Charles Sabel, AnnaLee

This Note advocates—as does almost every circuit—that, because of residual hindsight bias concerns, evidence of progress or lack thereof cannot be *dispositive* of an IEP's appropriateness.[243] With evidence of progress comes a teleological inference that progress must have resulted from an appropriate IEP, and lack of progress from an inappropriate IEP.[244] For that same reason, courts should not follow the First Circuit's asymmetric approach to evidence of actual progress.[245] The risk of bias remains very much the same. More significantly, to allow actual-progress evidence to be dispositive goes too far by removing the IEP from the picture entirely, an unpalatable result in a system where the IEP's contents play a real (and legal) role.[246]

2. *Subsequent IEPs.* — In contrast, a subsequent IEP should be excluded unless its introduction serves a narrow set of uses. For one, *revised* subsequent IEPs should be disallowed despite their relevance.[247] Often, such evidence may be cumulative, disincentivize IEP revisions, and import risks of hindsight bias.

Consider this scenario: If parents introduce evidence that a subsequent IEP added more services—say, more speech-therapy sessions—to support an inference that the presently litigated IEP was not reasonably calculated, a court would naturally want to know *why* the IEP was revised. Perhaps in a significant number of cases, there will have

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Saxenian, Reijo Miettinen, Peer Hull Kristensen & Jarkko Hautamäki, Individualized Service Provision in the New Welfare State: Lessons from Special Education in Finland 36 (2011), available at http://sitra.fi/julkaisut/Selvityksi%C3%A4-sarja/Selvityksia62.pdf (on file with the *Columbia Law Review*).

243. This proposition obtains for the circuits adopting an exclusionary approach, which do not allow retrospective evidence in the first place. The nonexclusionary approach also agrees generally with that rule. See, e.g., M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 327 (4th Cir. 2009) ("To be sure, however, progress, or the lack thereof, while important, is not dispositive."); Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040–41 (3d Cir. 1993) ("[T]he district court's refusal to find this comparative evidence dispositive or give it significant weight is consistent with the Supreme Court's decision in *Rowley*."); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) ("But, appellants confuse what is *relevant* with what is *dispositive*.").

244. See supra Part II.A.1 (discussing risk of hindsight bias with evidence of actual progress).

245. See supra Part II.C.2 (describing First Circuit's approach to retrospective evidence).

246. See supra notes 84–93 and accompanying text (discussing system designed around IEP). The First Circuit's approach would similarly pervert the *Rowley* standard, which was concerned with both educational results and a reasonably calculated IEP. See Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 207 n.28 (1982) ("When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be *one important factor* in determining educational benefit." (emphasis added)).

247. See supra Part II.A.2 (describing relevance of subsequent IEPs).

been insufficient progress under the present IEP.[248] Then introducing subsequent IEPs would be doubly cumulative.[249] First, parents could (under this Note's relevance rule) introduce evidence that there was lack of progress in the first place, a result of which was a revised IEP. Second, the school district presumably already considered that lack of progress in revising the subsequent IEP; reviewing subsequent IEPs then essentially asks the judiciary to play the role of a second IEP team that reviews the reasons for forming that subsequent IEP when it is not even being litigated.[250] Beyond concerns of cumulativeness, allowing such evidence might disincentivize IEP changes.[251] School districts would likely be hesitant to change failing IEPs if they knew those changes could be utilized against them.

At the same time, a subsequent IEP that does *not* change should be admissible, as it does not carry the same risks. An IEP that does not change, in conjunction with inappropriately consistent present and past IEPs,[252] is uniquely positioned to show that there has been a pattern of carelessness, and thus a failure to reasonably calculate the IEP for educational benefit.[253] Indeed, if an unchanged IEP can be used against the state, it would incentivize school districts to *update* IEPs when necessary.[254] Because of the great risks that subsequent IEPs normally carry, courts should limit admission of subsequent IEPs to these particular situations where subsequent unrevised IEPs are especially helpful in demonstrating systematic neglect.

3. *Actual-Implementation Evidence.* — While actual-implementation evidence might be relevant,[255] courts should exclude it. Admittedly, allowing actual-implementation evidence embraces the nuances of edu-

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248. IEPs might also be revised because of changed medical or educational circumstances. But because changed circumstances are inherently unpredictable, the subsequent IEP here would tell us nothing about whether the previous IEP was, at the time of drafting, inappropriate. Introduction of that revised IEP would merely confuse the issues. Cf. Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues . . . .").

249. See Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 161 (3d Cir. 1994) (affirming district court decision holding "testimony would be cumulative and would improperly embellish testimony previously given at the administrative hearing").

250. See supra notes 44–45 and accompanying text (discussing how evidence of lack of progress becomes incorporated into subsequently revised IEP).

251. Cf. Fed. R. Evid. 407 (disallowing evidence of subsequent remedial measures).

252. Lack of progress under an IEP would be further relevant here in solidifying that any pattern of school district failures occurred.

253. See supra note 198 and accompanying text (discussing Tenth Circuit's supporting reasoning).

254. See supra notes 240–242 and accompanying text (describing benefits of incentivizing updates).

255. See supra Part II.A.3 (discussing with greater detail the relevance of actual-implementation evidence).

cating children with disabilities.[256] From that perspective, judges should more willingly step into the shoes of educators, who likely think about broader educational dynamics and other aspects of the school environment in drafting the IEP.[257]

However, as outlined by the Second Circuit, there are significant policy reasons for disallowing evidence that a student would have received services not on the IEP. Allowing actual-implementation evidence to amend a deficient IEP ex post may incentivize school districts to draft a student's IEP in the vaguest of terms—thereby making it less *individualized*—in hopes of supplementing the IEP at a future hearing.[258] Yet parents have significant reliance interests in the IEP as written.[259] If parents suspect the IEP to be deficient, they must make a costly decision to withdraw their student from public school. All told, a culture of incomplete information would only promote more needless litigation over unclear IEPs.[260]

Finally, the Second Circuit's materiality standard is likely not a workable alternative.[261] The Second Circuit has applied the standard only with difficulty, and critiques of an analogous Ninth Circuit standard in the context of failure-to-implement-IEP claims are helpful. The Ninth Circuit has ruled that a school district does not violate the IDEA unless it provided services "*materially different* from what was required by the IEP."[262] However, without the sort of specialized knowledge that judges are presumed to lack, discerning what is *materially* different may be difficult.[263] As a Ninth Circuit judge criticizing the materiality standard asked,

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256. See supra notes 96–97 and accompanying text (describing how IEPs cannot capture full complexities of special education programming).

257. See supra note 56 (discussing role of implementation in conceptualization of educational program).

258. See Romberg, supra note 10, at 449 (describing individualization as core value of IDEA).

259. See R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012) ("At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents."). That reliance is made real by the IDEA's command that the parents must be reasonably involved in the IEP process. See supra notes 40–43 and accompanying text (discussing parental involvement in IEP team).

260. See Cali Cope-Kasten, Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution, 42 J.L. & Educ. 501, 501 (2013) (describing failure to communicate as cause of some IDEA litigation).

261. See supra notes 156–163 and accompanying text (analyzing application of Second Circuit's standard).

262. Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 826 (9th Cir. 2007) (emphasis added).

263. See id. at 827 (Ferguson, J., dissenting) ("Judges are not in a position to determine which parts of an agreed-upon IEP are or are not material."); Knight, supra

"If an IEP requires ten hours per week of math tutoring, would the provision of only nine hours be . . . a [material] discrepancy? Eight hours? Seven hours?"[264] Because of mandatory judicial deference on matters of educational policy and the difficulty of determining materiality, a materiality standard risks becoming the exception that swallows the rule.

Many courts have made decisions of admissibility or inadmissibility based on a simple temporal criterion. This Part put forth two simple propositions. To begin, even retrospective evidence can be relevant. Additionally, courts should not compare apples to oranges: Even when retrospective evidence is relevant, the actual admissibility choice must be made on a retail (not wholesale) basis and cognizant of risks inherent in each type of retrospective evidence.

CONCLUSION

Through a running misinterpretation of the First Circuit's *Roland M.* opinion, a number of circuits developed a rule against retrospective evidence in IDEA proceedings adjudicating substantive denials of FAPE. Amid the ensuing judicial disarray, no one court painted a complete picture of how a potential rule would affect various types of retrospective evidence. This Note suggests first that a nonexclusionary approach that permits relevant retrospective evidence should prevail. Allowing retrospective evidence can produce widespread benefits in a dispute-resolution system where the evidentiary focus has traditionally been on the IEP.

However, disparate policy concerns justify treating each category of retrospective evidence differently, and warrant even the exclusion of some types of evidence. At a minimum, judges should not treat all retrospective evidence with one coarse approach. Evidence of progress or lack thereof should be admitted but never found to be dispositive. Subsequent IEPs provide benefits when introduced for limited purposes. And actual-implementation evidence should never be acceptable. There are yet more types of evidence out there that remain unaddressed. In these cases, the key to unlocking the retrospective evidence dilemma will likewise require shrewd, and careful, judicial parsing.

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note 11, at 409 ("The ability of courts to leave educational decision-making to schools—and more specifically, the IEP team—is paramount. By engaging in a debate over whether a provision of an IEP is material, the court necessarily adds judges to the list of members of the IEP team.").

264. *Van Duyn*, 502 F.3d at 828 (internal quotation marks omitted).