

“Maximally Defensible” vs. Efficient and Effective School  
Psychological Practice: Can Legally Defensible Become  
Professionally Indefensible?

Joseph French Lecture

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# Joseph L. French, Ph.D.

- Illinois State University
  - Sophomore class president
  - Clown partners for Gamma Phi Circus and stand-up comic at pep rallies.
  - A friend, Rod Abbott, recalls that he and Joe “majored in enjoying college life”?
  - Joe married his beloved Peg Gallagher in 1950.
- Joe earned his doctorate at the University of Nebraska and spent 6 years teaching at the University of Missouri.
- He became a professor at Penn State in 1964.
  - He reorganized and directed the school psychology doctoral program for 33 years and became Emeritus Professor in 1997 to present.
- There would be no school psychology conference at Penn State without Joe.
- He apparently knows quite a bit about parking for the conference too:)

## Quotes from James Ysseldyke (1978)

Broadly speaking, the primary responsibility of the school psychologist always has been and will continue to be one of working with teachers to facilitate learning by children. (p. 373)

Teachers want to know specifically what to do for and with children, both academically and behaviorally. Rather than getting specifics, they report that they typically receive generalities couched in impressive arrays of subtest scaled scores, grade equivalents, and psychological jargon. Rather than receiving clear psychoeducational pictures of children and precise statements regarding specific skills which youngsters have and do not have, they receive statements regarding causes of a child's difficulties ranging from unfulfilled needs and unresolved conflicts to specific perceptual-motor, psycholinguistic, and cognitive deficits. (p. 374)\

School psychologists must now, more than ever, know and be able to communicate the instructional implications of the data they gather on children. (p. 377)

To date, our assessment efforts have been designed to help us make decisions which have institutional payoff. We need to redirect our efforts so that assessment promotes decision-making which has individual payoff. (p. 377)

School psychologists must create their own destiny. We cannot sit still while others call the plays for us. (p. 378)

# Workshop Overview

- Our Perspective
- Legal Background Related to RTI
- Case Example (using RTI data)
- Pressure to Measure Questionable Constructs
- Solutions!

# Our Perspectives

- Aligning our practices with IDEA - defensible AND useful
- We wish to push back against the view that our services should be guided by fear of legal actions.
- Our services are ethical and legally defensible when they are accessible, useful, and evidence-based.
- We have a behavioral/environmental orientation toward our understanding why students may experience academic and/or social-behavioral challenges.
- Haas & Carrieria (2014) - Message is that “focusing on kids obviates case law.”

# Internal and External Factors That Influence Our Professional Practices and Service Delivery

My list of some of these factors follows:

- Compiled from private communications of other trainers
- Discussions with interns and practitioners from around the state
- Discussions with NASP State Delegates and State Presidents in Northeast Region
- Discussions on various listservs of which I am a member.

# Internal and External Factors That Influence Our Professional Practices and Service Delivery

- Legislation mandating the use of evidence-based practices (NCLB, IDEIA)
- Need for ethically sound practices
- Increased disillusionment with typical school psychological services
- Increased emphasis on the rights of children
- Increased role in providing students with disabilities services in the general education setting
- Concerns regarding legal challenges and potential due process
- Increases in the number of students receiving medication
- State and district accountability and professional evaluation initiatives linking student achievement to the evaluation of professional practice
- Increasing student diversity
- District adoption of a multi-tiered system of supports (MTSS) & RtII
- The emerging school mental health movement

# Internal and External Factors That Influence Our Professional Practices and Service Delivery

- Use of technology in assessment, data storage, data analysis, etc.
- Vagueness of IDEIA disability definitions (i.e., ED/OHI/Section 504)
- School psychologists supervised by administrators without school psychology knowledge or experience
- Significant variation in pre-service training
- Administrators viewing eligibility determination and report writing as the school psychologist's primary role
- The ratio of students to school psychologists
- Districts contracting for school psychological services
- The emergence of cyber schools

# Some Areas of Concern for the Profession

- As Rtl is articulated as a general education initiative, special education may be left behind with resulting pressure on school psychologists to operate in an archaic and outdated manner.
  - As a result of limited budgets and legal challenges, district administrators may encourage defensive practices.
  - School psychologists may find their role restricted to primarily one of eligibility determination and report writing.
  - School psychologists' more limited involvement in MTSS framework
  - Pressure for assessment efforts directed at making decisions with institutional payoff versus assessment efforts with student payoff
  - Districts placing process over results and regulation compliance over student achievement

# Some Areas of Concern for the Profession

- School psychologists' efforts to lead in prevention and encourage districts toward MTSS and RtII may be hampered by concerns for legal defensibility to the point where these factors become the driving force of professional practice.
- School psychologists pressured to include in their evaluations constructs with limited utility or research support: subtest profile analysis, clinical diagnoses (i.e., dyslexia), use of standardized assessments of cognition and achievement in evaluation reports (thinking these data are more defensible) and use constructs with questionable validity (e.g., Auditory Processing Disorder, Executive Functioning)

# Our “Message”

IDEA focus on student progress and relationships/communication with parents.

“If reports are useful, and accessible, they will be defensible.”

# Legal Background Related to RTI

# IDEA 2004

## Specific Learning Disabilities

- **“... a local education agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.”**  
(§614[b][6][A])

# **IDEA 2004**

## **Specific Learning Disabilities (cont.)**

- **"In determining whether a child has a specific learning disability, a local educational agency may use a process which determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures..." ( §614[b][6][B])**

# IDEA Regulations (Comments Section)

Many commenters recommended adding the concept of psychological processing disorders to the eligibility criteria in §300.309. Several commenters noted that the criteria in § 300.309 do not fully address the definition of SLD in §300.8(c)(10), which includes a processing disorder in one or more of the basic psychological processes. Several commenters stated that, without requiring documentation of a basic psychological processing disorder, the number of children identified with SLD will significantly increase and the use of assessment tools that have the potential to significantly guide instruction will decrease.

Several commenters stated that failure to consider individual differences in cognitive processing skills reverses more than 20 years of progress in cognitive psychology and developmental neuroscience. One commenter stated that identifying a basic psychological processing disorder would help ensure that children identified with an SLD are not simply victims of poor instruction. One commenter stated that the shift away from requiring diagnostic assessments in the area of cognition would make it conceptually impossible to document that a child has a disorder in one or more of the basic psychological processes, as required in the definition of SLD in §300.8(c)(10).

*Discussion:* The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD. Further, in many cases, these assessments have not been used to make appropriate intervention decisions. However, §300.309(a)(2)(ii) permits, but does not require, consideration of a pattern of strengths or weaknesses, or both, relative to intellectual development, if the evaluation group considers that information relevant to an identification of SLD. In many cases, though, assessments of cognitive processes simply add to the testing burden and do not contribute to interventions.

As summarized in the research consensus from the OSEP Learning Disability Summit (Bradley, Danielson, and Hallahan, 2002), “Although processing deficits have been linked to some SLD (e.g., phonological processing and reading), direct links with other processes have not been established. Currently, available methods for measuring many processing difficulties are inadequate. Therefore, systematically measuring processing difficulties and their link to treatment is not yet feasible.

Processing deficits should be eliminated from the criteria for classification .” (p. 797). Concerns about the absence of evidence for relations of cognitive discrepancy and SLD for identification go back to Bijou (1942; 4 see Kavale, 2002). Cronbach (1957) characterized the search for aptitude by treatment interactions as a “hall of mirrors,” a situation that has not improved over the past few years as different approaches to assessment of cognitive processes have emerged (Fletcher *et al.*, 2005; Reschly & Tilly, 1999). *Changes: None.*

## Re the LDA White Paper on Specific Learning Disabilities identification:

... this position is legally flawed in terms of its reliance on the “pattern of strengths and weaknesses” provision, its failure to consider state special education laws, and its overemphasis on the processing component. As a result, the position is justifiable only as advocating revisions, rather than in finding support, in the law. (Zirkel, 2013).

# Current Litigation re RTI

Zirkel (2009) in *LD Quarterly*

- “... there have been 10 ... published decisions, and RTI was mentioned in only one case, where the hearing officer displayed confusion about it and in any event where its role was of no consequence.” (pp. 51-52)

Zirkel (2012) in *Principal*

“...all of the reported decisions specific to RTI have been only at the hearing officer level. The only court-level cases reported either have concerned more general education interventions, such as school-based, problem-solving teams without RTI, or peripheral mention of RTI.”  
(p. 55)

# Provisions Intended to Minimize Due Process Conflicts in IDEA 2004

- Required for all SLD evaluations:
  - Instruction and intervention by qualified personnel
  - Required “repeated assessments”
  - Information from repeated assessments communicated to parents
- Required if using RTI
  - Assessment of student progress in response to scientific, research-based intervention

# Provisions Intended to Minimize Due Process Conflicts in IDEA 2004

A child must not be determined to be a child with a disability under this part—

(1) If the determinant factor for that determination is—

- (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
- (ii) Lack of appropriate instruction in math, or
- (iii) Limited English proficiency; (§300.306[b])

# NCLB §1208(3)

## (3) ESSENTIAL COMPONENTS OF READING INSTRUCTION.—

The term ‘essential components of reading instruction’ means explicit and systematic instruction in—

- (A) phonemic awareness;
- (B) phonics;
- (C) vocabulary development;
- (D) reading fluency, including oral reading skills; and
- (E) reading comprehension strategies.

# Case Example

## Using RTI Data

# A Relevant Case Example

## Background

- 11 year old boy in 5th grade
- Identified as SLI & SLD primarily using RtI methodology
- Receives part-time services in a special education class
  - Reading, math and written expression
- Functions on a 2nd to 3rd grade level

# Parent Due Process Issues

- The district failed to conduct an adequate evaluation.
- The district failed to develop an adequate IEP.
- The student showed a lack of meaningful progress.

## Parents requested

- Compensatory education
- An independent educational evaluation (IEE)

# Legal Issues: FAPE

- Procedural compliance
- IEP is reasonably calculated to enable the child to received nontrivial educational benefit.
- Least restrictive environment
- Burden of proof is on the party seeking relief.

## Pertinent Legal Issues: FAPE

- FAPE is satisfied when a child's IEP is designed to allow the child to "benefit educationally" (Rowley, 458 U.S. at 203).
- The benefit of the IEP must be "meaningful," and not merely "trivial". (*Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 172, 182 [3rd Cir. 1988], cert. denied sub nom. *Cent. Columbia Sch. Dist. v. Polk*, 488 U.S. 1030 [1989])

## Pertinent Legal Issues: FAPE

- The Fourth Circuit Court has expressed a reluctance to second-guess professional educators. *M.M.*, 303 F.3d at 531.

# The Case

- Conflicting data
  - Parent advocates highlighted discrepancies between past cognitive test data and standardized tests of educational achievement (e.g., WJ-III Test of Achievement, DAS-II Cognitive Ability Test).
  - Lower standard scores on some subtests from the WJ-III administered approximately 12 months apart

- The District's Case:
  - The reevaluation was appropriate
  - The IEP was calculated to allow for meaningful progress
- District Assessment Data
  - Student's mastery of IEP objectives
  - Data showing improvement in the number of successful completions out of a specific number of trials
  - Progress on percent accuracy on a monthly phonics inventory
  - CBM wrc/min. over time graph
  - Quarterly administrations of a criterion-referenced test
  - Monthly administration of the DRA to show level gains
  - Rtl tracking data used to show that the district intensified reading interventions based on data trends they observed

# Hearing Officer Decision

- CBM data links closer to the actual curriculum the child experiences.
- Standardized test data are subject to random fluctuations and were administered on only two occasions.
- Deference given to professional educators who work day to day with the child.
- The preponderance of evidence in this case indicated either student progress or district reflection on data and efforts to intensify interventions.
- Weight given to data from CBM, criterion-referenced tests, and Rtl process.

# Hearing Officer Decision

- The parents did not prove that the district failed to conduct an adequate evaluation.
- The parents did not prove that the district's IEP was inadequate.
- Request for compensatory education was denied.
- Request for an IEE was denied.

# Pressure to Measure Questionable Constructs

# Pressure to Measure Questionable Constructs

- Assessment should always lead to intervention.
- Use multiple sources of data.
- Direct (low inference, observable) vs. indirect (high inference) measures

# Activity: Direct vs. Indirect

- 6 Groups (Each report on a construct)
- Fill in sheet - Will be available on Google Doc after the session
- Email [caitlinflinn@gmail.com](mailto:caitlinflinn@gmail.com) for the link or go to...
- [https://docs.google.com/document/d/1EfQG0hNN53JLM54U3\\_pZNmpZFv0p4dNbRxvaKMhP\\_rc/edit?usp=sharing](https://docs.google.com/document/d/1EfQG0hNN53JLM54U3_pZNmpZFv0p4dNbRxvaKMhP_rc/edit?usp=sharing)

# Activity: Low Inference vs. High Inference

<b>CONSTRUCT</b>	<b>Low Inference, Direct, Observable</b>	<b>High Inference, Indirect</b>
Organization	<i>Observe student's desk/locker Review student's agenda</i>	<i>Teacher, parent, and/or student complete rating scales</i>
Self Esteem		
Inhibition		
Reading Comprehension		
Working Memory		
Dyslexia		
Adaptive Behavior		

# Cognitive Processes vs. Skill-Based Assessment

## Excitement about Executive Functioning (EF)

- Executive *Functioning* vs. Executive *Skills*
- Functioning inherent (diagnosis) within student vs. skills that can be taught/learned
- Circular logic, explanatory fictions
- Moment in time vs. measurement over time

# Example Solution to Request for EF Testing

- Parent request for evaluation for EF deficits
- Met with parent; operationally defined problem.  
Reframed concerns into observable behaviors
  - Doesn't remember her homework (Organization)
  - Does poorly on tests (Planning)
  - Forgets to complete tasks (Working memory)
- Issued Permission to Evaluate for OHI and SLD
- Evaluation procedures?

# Example Solution to Request for EF Testing

- Direct, systematic classroom-based observations
- In-depth student interview (study skills, long-term projects, use of agenda for assignments)
- CBM and standardized assessments of achievement
- Intellectual ability (still use discrepancy at secondary in my district)

VERSUS

- Rating scales, reliance on cognitive assessment including “processing” subtests

# Example Solution to Request for EF Testing

## Outcome:

- Did not meet criteria for SLD or OHI
- Skill deficits, but hadn't been taught
- Met with student to set up schedule to teach her study skills, how to use an agenda for assignments, and managing long-term projects

*Should other instruments be administered?*

## Consider treatment validity.

*The selection of any assessment instrument or procedure should be solely dependent on its ability to provide specific information about scientifically validated instructional strategies that have a high probability of producing meaningful change in the student's academic or social-emotional skills.*

## Required Foci of SLD Identification: Direct Assessment

- oral expression
- listening comprehension
- written expression
- basic reading skill
- reading fluency skill
- reading comprehension
- mathematics calculation
- mathematics problem solving

## Theorized “Causes” of SLD: Indirect Assessment

- Auditory processing disorder
- Visual-motor processing disorder
- Working memory problems
- **Phonological/phonemic awareness difficulties**

**Solutions!**

# What Should We Do?

- Keep our focus on student results - not process.
- Focus on prevention efforts.
- Consider student with disabilities as general education students first.
- Use the School Psychologist Rubric evaluation tool to
  - a) educate about what school psychologist can and should be doing and
  - b) as a mechanism for self-improvement.
- Work to increase parental involvement and understanding.

# What Should We Do?

- Develop innovative practices that achieve results for students.
- Use an Evaluation Report Checklist (Example Provided).
- If the ER is defensible, districts should consider defending it.
- Budget for IEEs
- Put IEE Procedures in the Special Education Plan.

# Agency Criteria

- Agency criteria. (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (IDEA Regulations, §300.502[e][1])

# Recommended Components of Agency Criteria

- Qualifications of examiner(s)
- Qualifications of interveners
- Location of evaluation
  - Evaluation in school (cf. observation requirement)?
  - Opportunity to consult with teachers?
- Evaluation procedures
  - 4 components including RTI

# A District IEE Contract Specifying Requirements for an IEE

- Example -  
[www.venturacountyselpa.com/Portals/45/usersdata/Admin%20Docs/Independent%20Ed%20Evals.pdf](http://www.venturacountyselpa.com/Portals/45/usersdata/Admin%20Docs/Independent%20Ed%20Evals.pdf)
- Example 2 -  
[www.nscselpa.org/pdfs/SELPA\\_handbook\\_ch15\\_2.pdf](http://www.nscselpa.org/pdfs/SELPA_handbook_ch15_2.pdf)
- Zirkel Article -  
[www.nscselpa.org/pdfs/SELPA\\_handbook\\_ch15\\_2.pdf](http://www.nscselpa.org/pdfs/SELPA_handbook_ch15_2.pdf)

# The ER

- “I can defend a report to the extent it provides the necessary information to appropriately develop an IEP that meets a student’s unique needs.” (Jeffrey Riel, Attorney for Anaheim Union High School District)
- Effective reports are useful and accessible to the consumers.
- &
- Effective reports are legally defensible.

# The ER

## THE REFERRAL-BASED CONSULTATIVE ASSESSMENT (BATSCHE, 1983)

- Identify the reason for referral (questions) through a consultative process with the referring person.
- Create the assessment plan in a collective process between the school psychologist, parent, teacher, and other educational professionals.
- Chose appropriate assessment and data collection tools to answer the specific questions.

# Examples of Referral Questions

- How do social-emotional factors influence Mark's academic achievement and educational performance?
- What are Jose's academic reading skills relative to the grade level standards?
- How do Sarah's strengths and weaknesses affect her learning?
- Does Anthony have a Specific Learning Disability that is negatively impacting his academic achievement?
- What accommodations or modifications to the curriculum does Harmony need in order to make progress in general education?

# The ER

- Trend toward writing longer often less comprehensible reports in the name of legal defensibility
  - Less useful
  - Less legally defensible
  - Lacks focus
  - Lacks cohesiveness
  - Little actual interpretation
  - No useful recommendations
  - Not unique to the student who was evaluated

(Hass & Carriere, 2014)

# READABILITY EXAMPLE:

“ It is my contention that any statement found in psychological reports could be made comprehensible to any literate individual of at least average intelligence”

Klopfer, 1960 *Flesch-Kincaid Reading Level 17.8*

VS

“I think a psychological report can be written so most people can understand it.”  
Carriere, 2010 *Flesch-Kincaid Reading Level 9.2*

**Carriere & Hass, NASP 2011**

# The ER

- What must be **included** is essentially in the Pennsylvania ER format.
- What must be **true**?
  - Comprehensive
  - Variety of tools and approaches
  - Fair
  - Evaluator is competent
  - Procedures are valid and reliable

# Comprehensive

- “Evaluates all areas of suspected disability and need” - This in no way implies a need to assess irrelevant areas just to cover your bases.
- Needs identified may or may not be linked to a disability.
- Engaging with the student’s parents and teachers prior to referral prevents evaluation from becoming “fishing expeditions.”

# Variety of Tools and Approaches

- RIOT (Records, Interviews, Observations, Tests)
- Rule of Two (2 settings, 2 informants, 2 assessment methods)

# Fair

- Tool should not be biased.
- Tool should take into account language and cultural.
- Consider MODEL (Multiple sources, Observation, Data-driven, English language development and Language assessment).

# Evaluator is Competent

- Professional experience
- Scope of practice
- Training

# Procedures are valid and reliable.

- It's our responsibility to identify and use reliable and valid measures in our evaluations.
- Do projective measures meet the standards of reliability and validity?

# Parent-initiated Evaluations

- Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--
- (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; (IDEA §300.502[c])

“[It] is important to recognize that there is a difference between, on the one hand, ignoring data, and on the other hand, considering data but finding it unpersuasive or outweighed by other evidence. The District and the hearing officer took Parents’ scores and so forth into account but disagreed with Parents for sound reasons.” (Timothy F. v. Antietam Sch. Dist., 2014)

“The mere fact that a subsequent evaluation ... yielded a different result... does not necessarily render the earlier testing inadequate.” (D.K. v. Abington Sch. Dist., 2012)

Cited in Zirkel (2014)

# School Psych Rubric - Ethical Implications

- Educate administrators and supervisors
  - Multiple roles we serve as child advocates, employees, family/teacher advocates
    - Role of employee is important but child/vulnerable party comes first.
  - Commitment to being PROactive vs. reactive
    - Participation/facilitation in proactive roles allows us to anticipate problems before causing “harm.”
- Improve professional relationships

# School Psych Rubric - Ethical Implications

Major difference between Proficient and Distinguished?

Component	Proficient	Distinguished
1e	Is a member of a data analysis team...	Facilitates a data analysis team...
2c	Uses assessment protocols and adheres to policies related to threats...	Helps to create the school district policy on threats...

# School Psych Rubric

Example criteria - artifacts and evidence of meeting proficiency w/ rubric:

<https://docs.google.com/spreadsheets/d/1W3MGFg4mTGSow3zyhkJukAAIOMzSXcd6CV9aJmrWtLU/edit?usp=sharing>

Email [caitlinflinn@gmail.com](mailto:caitlinflinn@gmail.com) for the link.

# A Defendable Evaluation Program for SLD in PA

- School/district establishes a robust and sustainable RtII model.
- School/district applies to BSE for approval for using RtI for SLD.
- BSE approves district application.
- School/district implements RTI for SLD, adhering to best practices in assessment and intervention.
- District publishes board-approved policy on agency criteria for evaluations.

1.  
Failure to meet age- or grade-level State standards in one of eight areas:

- oral expression
- listening comprehension
- written expression
- basic reading skill
- reading fluency skill
- reading comprehension
- mathematics calculation
- mathematics problem solving



2.  
Discrepancy: Pattern of strengths & weaknesses, relative to intellectual ability as defined by a severe discrepancy between intellectual ability and achievement, or relative to age or grade.  
  
OR  
RTI: Lack of progress in response to scientifically based instruction



3.  
Rule out:

- vision, hearing, or motor problems
- intellectual disability
- emotional disturbance
- cultural and/or environmental issues
- limited English proficiency



4.  
Rule out lack of instruction by documenting:

- Appropriate instruction by qualified personnel
- Repeated assessments



Specific Learning Disability

# Best Evidence for SLD

- Direct assessment of level of performance
- Ongoing progress monitoring using evidence-based measure for sufficient length of time
- Documentation of intervention fidelity
  - Report of teacher
  - Observation by knowledgeable personnel

# Tactics to Minimize Due Process Conflicts in IDEA 2004

- Required for all SLD evaluations:
  - Instruction and intervention by qualified personnel
  - Required “repeated assessments”
  - Information from repeated assessments communicated to parents
- Required if using RTI
  - Assessment of student progress in response to scientific, research-based intervention

# Resources

- NCLD Toolkit:
- <http://rtinetwork.org/getstarted/sld-identification-toolkit>
- Kovalleski, VanDerHeyden & Shapiro (2013) Text  
[http://www.amazon.com/s/ref=nb\\_sb\\_noss?url=search-alias%3Daps&field-keywords=Kovalleski](http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Daps&field-keywords=Kovalleski)

# Advocacy of Role Expansion Using NASP Materials

NASP Practice Model -

<http://www.nasponline.org/standards/practice-model/>

NASP Advocacy Resources -

<http://www.nasponline.org/advocacy/advocacyresources.aspx>

NASP Self-Assessment -

[http://www.nasponline.org/standards/survey/survey\\_launch.aspx](http://www.nasponline.org/standards/survey/survey_launch.aspx)

# NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS

## Model for Services by School Psychologists



HELPING STUDENTS AND SCHOOLS ACHIEVE THEIR BEST

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