

January 2015

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Recommended Citation

Shaver, Elizabeth, "Every Day Counts: Proposals to Reform the IDEA's Due Process Structure" (2015). *Akron Law Publications*. 240.

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EVERY DAY COUNTS: PROPOSALS TO REFORM THE IDEA'S DUE PROCESS STRUCTURE

*Elizabeth A. Shaver**

Abstract

It is a core principle of special education legislation that the parents of children with disabilities can challenge the child's educational programming through an administrative due process hearing. Yet, for years the special education due process structure has been criticized as inefficient, anti-collaborative, and prohibitively expensive. Those criticisms have given rise to widely varying proposals to reform special education due process, proposals that range from adding certain alternative dispute resolution mechanisms to a wholesale replacement of the due process structure.

This article provides a comprehensive analysis of special education dispute resolution. The article first examines the lively debate among scholars and special interest groups about perceived deficiencies of IDEA due process and various proposals to remedy those deficiencies. The article then sets forth the results of a nationwide survey in which over three hundred and fifty special education attorneys voiced their opinions about the current structure and some proposals for reform. Finally, the article recommends certain structural changes to IDEA due process that are designed to improve the efficiency and reduce the cost of special education dispute resolution.

INTRODUCTION

The ability of parents to challenge the educational programming of a child with a disability is crucial, since every day that a child does not receive an appropriate education is a day of learning that is lost forever. For this reason, it has long been a fixture of special education law that parents are entitled to a due process hearing in which they can advocate for the needs of their child.¹

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¹ See, e.g., *Penna Ass'n. of Retarded Citizens v. Pennsylvania*, 343 F. Supp. 279 (E.D.

A special education dispute should be resolved quickly to ensure that the child receives appropriate educational services at the earliest possible date.² An equally important goal is that special education due process is accessible to all children with disabilities regardless of family wealth. Yet critics argue that special education due process currently does not serve these goals, either because of the lack of “collaborative and non-adversarial”³ means for families and school districts to resolve disputes quickly or the prohibitive costs associated with due process.⁴

In 2004, when Congress last amended the Individuals with Disabilities Education Act (IDEA), Congress found that parents and school districts needed “expanded opportunities to resolve their disagreements in positive and constructive ways.”⁵ To accomplish this goal, Congress added or expanded alternative dispute resolution (ADR) mechanisms that are triggered once a due process complaint is filed. IDEA now requires the parties to attend a “resolution session” that must take place within 15 days after a due process complaint is filed, unless both parties agree to waive the session.⁶ IDEA also provides expanded opportunities to mediate a special education dispute.⁷ Both the resolution session and mediation can delay an adjudicated resolution of the dispute.⁸

Advocacy organizations and scholars contend that, even with these dispute resolution mechanisms in place, special education dispute resolution still is too expensive and time-consuming. School administrators assert that the litigation costs are so high that school districts often agree to provide services not required by IDEA.⁹ Advocates for children and parents contend that due process is too expensive for most parents, who cannot afford to pay the attorneys and expert witnesses whose participation is

Pa. 1972) [hereinafter PARC]; *Mills v. Bd. of Ed. of Dist. of Columbia*, 348 F. Supp. 866, 874-76 (D.D.C. 1972) [hereinafter *Mills*]; 20 U.S.C. §§ 1400-1415 (2012).

² A special education dispute should be resolved through an administrative due process hearing in no more than seventy-five days. *See* 34 C.F.R. § 300.510(b) (2007) (setting 30-day period for resolution session); 34 C.F.R. § 300.515 (2007) (setting 45-day timeline hearing officer to render a decision).

³ Philip Moses & Timothy Heeden, *Collaborating for Our Children’s Future: Mediating Special Education Disputes*, 18 DISP. RESOL. MAG. 4, 5 (Summer 2012).

⁴ Part II., *infra*.

⁵ 20 U.S.C. § 1400(c)(8) (2012).

⁶ 20 U.S.C. § 1415(f)(1)(B) (2012).

⁷ 20 U.S.C. § 1415(e) (2012).

⁸ 20 U.S.C. § 1415(f)(1)(B)(ii) (2012); 34 C.F.R. § 300.510(c)(3) (2012).

⁹ Sasha Pudelski, *Rethinking Special Education Due Process*, AM. ASS’N OF SCH. ADM’RS, 2 (April 2013), http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

essential in a due process hearing.¹⁰

The continued debate over the structure of IDEA due process has yielded widely-varying proposals for reform. Some advocates propose that IDEA should include ADR mechanisms in addition to the resolution session and mediation.¹¹ Others propose increased governmental enforcement of IDEA's provisions or expanded low-cost or *pro bono* legal services for lower income parents.¹² At least one special interest group, the American Association of School Administrators (AASA), has proposed a radical overhaul of due process procedures in which the parties must engage in several mandatory procedures before litigation can be filed.¹³ Still others propose that the due process structure essentially remain the same, with only modest reforms designed to increase efficiency and reduce cost.¹⁴

This article explores the merits of these various proposals to reform special education dispute resolution. As part of this exploration, the article includes the results of a survey that asked special education attorneys about the current structure and certain proposals to modify the structure. Finally, the article recommends certain structural changes designed to reduce the expense and time needed to resolve a special education dispute.

Part I of the article provides historical background on special education due process and a description of IDEA's current due process procedures. Part II of the article describes the ongoing debate about the efficacy and accessibility of due process and the various proposals for change. Part III of the article describes the results of a nationwide survey of special education practitioners regarding the current structure and some of the proposals for change. Part IV of the article recommends certain structural changes to due process procedures.

At the end of the day, regardless whether the parties use ADR mechanisms to settle a dispute or adjudicate the dispute in a due process hearing, the ultimate goal is to resolve special education disputes quickly and efficiently so that the child's education does not suffer. The IDEA

¹⁰ Elisa Hyman, et. al., *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, 112-13 (2011).

¹¹ Tracy C. Mueller, *IEP Facilitation: A Promising Approach to Resolving Conflicts Between Parents and Families*, 41 TEACHING EXCEPTIONAL CHILDREN 60 (Jan/Feb. 2009) (discussing IEP facilitation); S, James Rosenfeld, *It's Time for an Alternative Dispute Resolution Process*, 21 J. NAT'L. ASS'N. ADMIN. L. JUDICIARY 544 (2012) (proposing that IDEA include a process for voluntary, binding arbitration).

¹² See Eloise Pasachoff, *Special Education, Poverty and The Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1430-33 (2011).

¹³ Pudelski, *supra* note 9.

¹⁴ Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495 (2014).

procedures should ensure that, for the child, every day of school counts.

I. IDEA'S DUE PROCESS PROCEDURES.

A. *Early Origins of Special Education Due Process.*

Before 1975, federal law did not provide children with disabilities in the United States with the right to attend public school, although some states did provide special education services.¹⁵ In the early 1970s, advocates for children with disabilities won two key cases¹⁶ by drawing heavily from the Supreme Court's opinion in *Brown v. Board of Education*,¹⁷ in which the Court ruled that racially-segregated education violated the Equal Protection Clause of the Fourteenth Amendment. The two landmark cases, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*¹⁸ and *Mills v. Board of Education of the District of Columbia*,¹⁹ established, among other rights, that parents of a child with a disability would be entitled to "notice" and "an opportunity to be heard" whenever educators made decisions about educational services for the child.

Robust due process rights were a key focus of both the *PARC* and *Mills* cases because then-existing state statutes and school policies allowed school districts to exclude from public school any child deemed "uneducable," without any notice to or input from the child's parents.²⁰ In the *PARC* case, the parties executed a Consent Agreement that set forth very detailed due process provisions. Parents were entitled to receive written notice whenever a school district proposed to initiate or change special education services.²¹ The Consent Agreement provided that the notice would:

- "[D]escribe the proposed action in detail," including, among other things, a "statement of the reasons" for the proposed action and information about any "tests or reports" upon which the proposed action was based;²²

¹⁵ Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355 (1990).

¹⁶ *PARC*, 343 F. Supp. 279; *Mills*, 348 F. Supp. 866.

¹⁷ 347 U.S. 483 (1954).

¹⁸ 343 F. Supp. 279.

¹⁹ 348 F. Supp. 866.

²⁰ See, e.g., *PARC*, 343 F. Supp. at 282 n.3 (quoting Pennsylvania statutes that permitted a school district to exclude a child from school if a school psychologist determined that the child was "uneducable or untrainable").

²¹ *Id.* at 303-05.

²² *Id.* at 304.

- Inform parents of their right to a hearing before any proposed action would take place;²³
- Inform parents of their rights (a) to have counsel (or any other person) at the hearing, (b) to review the child’s school records, including any tests or reports upon which the proposed action was based, (c) to present any evidence at the hearing, including expert medical, psychological and educational testimony, and (d) to call as a witness any school official, employee, or agent of a school district;²⁴ and
- Inform parents of the procedures by which they could pursue a hearing, among other items.²⁵

The *PARC* Consent Agreement further specified how the hearing was to be conducted.²⁶ The hearing was to be scheduled between fifteen and thirty days after receipt of the parents’ request for a hearing.²⁷ The hearing officer was to be “the Secretary of Education,” or a person designated by the Secretary, but could not be “an officer, employee or agent” of the school district.²⁸ The hearing officer’s decision was to be based “solely upon the evidence presented” and the hearing officer must have found that the proposed change was supported by “substantial evidence” presented at the hearing.²⁹ The parents had a right to be represented at the hearing and to present any evidence or testimony, including expert medical, psychological or educational testimony.³⁰ The hearing officer was to render a decision within twenty days after the hearing, and the decision was to contain “written findings of fact and conclusions of law.”³¹ The parents were entitled to a transcript of the hearing record.³² Importantly, the child’s educational status could not change during the notice and hearing process, except in “extraordinary circumstances” after written notice to and approval by a representative of the state board of education.³³

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 304-05.

²⁷ *Id.* at 305.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

B. Congress Enacts Special Education Legislation.

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), which provided federal funding for special education services.³⁴ The EAHCA conditioned the States' receipt of federal funding upon compliance with the statute's requirement that each child with a disability receive a "free appropriate public education," or FAPE.³⁵ Through the EAHCA, Congress leveraged its Spending Clause powers to essentially require all States to provide special education services to children with disabilities.³⁶

The EAHCA represented the culmination of several years of federal legislative activity in the field of special education. Congress first provided federal funds for states to develop special education programs as early as 1965, when Congress passed the Elementary and Secondary Education Act (ESEA).³⁷ In 1966, Congress added Title VI to the ESEA, entitled "Education of the Handicapped Children."³⁸ Among other things, then-Title VI established a Bureau for the Education of the Handicapped and a National Advisory Committee on Handicapped Children.³⁹ In 1970, Congress enacted the Education of the Handicapped Act,⁴⁰ which consolidated prior federal legislation regarding special education initiatives into one piece of legislation.⁴¹

In 1974, after the *PARC* and *Mills* cases were decided, Congress amended the Education of the Handicapped Act to provide due process rights to parents of children with disabilities.⁴² In considering those amendments, Congress reviewed the *PARC* and *Mills* decisions as well as reports and scholarly articles on the topic of due process.⁴³ The due process

³⁴ Pub. L. No. 94-142, 89 Stat. 773 (1975).

³⁵ 20 U.S.C. § 1412(a)(1) (2012).

³⁶ 20 U.S.C. § 1412 (2012) (setting for the requirement that States draft and implement policies and procedures in order to qualify for federal funds).

³⁷ Pub. L. No. 89-10, Section 503(a)(10), 79 Stat. 27 (1965).

³⁸ Pub. L. No. 89-750, 80 Stat. 1191, 1204 (1966); U.S. DEP'T OF EDUC, TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE IDEA, at vi. (2000) (<http://www2.ed.gov/about/reports/annual/osep/2000/preface.pdf>).

³⁹ *Id.*

⁴⁰ Pub. L. No. 91-230, 84 Stat. 121 (1970).

⁴¹ Weber, *supra* note 15, at 357 (describing early federal legislative efforts).

⁴² Pub. L. No. 93-380, 88 Stat. 484 (1974).

⁴³ In March 1973, the Subcommittee on the Handicapped of the Senate's Committee on Labor and Public Welfare held hearings in which a large number of printed materials were reviewed, including the *PARC* and *Mills* decisions, a report entitled "A Continuing Summary of Pending and Completed Litigation Regarding the Education of Handicapped

provisions of the 1974 Education of the Handicapped Act, while not terribly detailed,⁴⁴ borrowed heavily from the due process procedures outlined in the *PARC* and *Mills* cases.⁴⁵ Yet the legislative history reveals no discussion by Congress as to whether those due process procedures were the optimal means to resolve special education disputes.⁴⁶

One year later, Congress amended the Education of the Handicapped Act and created comprehensive special education legislation known as the EAHCA.⁴⁷ In the EAHCA, Congress created a statutory section entitled “Procedural Safeguards” with very detailed due process procedures.⁴⁸ Once again, Congress drew heavily from the due process requirements of the *PARC* and *Mills* decisions.⁴⁹

For example, the EAHCA required the school district to provide written notice to the parents⁵⁰ whenever the district either proposed or refused to “initiate or change ... the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.”⁵¹ If necessary, that notice would have to be in the parents’ native language.⁵² The statute also specified that parents be afforded the opportunity file a complaint and an opportunity for an impartial due process hearing to be conducted either by the school district (labelled the “local educational agency” in the statute) or the state educational

Children” edited by the Council for Exceptional Children, and a Syracuse University law review article entitled “*Appropriate Education for All Handicapped Children: A Growing Issue*” authored by Frederick Weintraub and Alan Abelson. See *Education for the Handicapped, 1973: Hearing Before the Subcomm. on Handicapped of the S. Comm. on Labor and Public Welfare*, 93rd Cong. vii, 39, 155 (1973) (hereinafter “1973 Hearing”).

⁴⁴ Pub. L. No. 93-380, §613(A), 88 Stat. 484, 582 (1974).

⁴⁵ A 1975 Senate Report stated that the 1974 Amendments “incorporated the major principles of the right to education cases.” See S. Rep. No. 94-168, 94th Cong., 1st Sess., 1975 U.S.C.C.A.N. 1425, 1432 (1975).

⁴⁶ The Senate Conference Report that accompanies the 1974 Amendments to the Education of the Handicapped Act only obliquely refers to the due process procedures, noting that the amendments “require[] States to provide procedures for insuring that safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children.” See S. Conf. Rep. No. 93-1026, 93rd Cong., 2d Sess., 1974 U.S.C.C.A.N. 4206, 4257 (1974).

⁴⁷ Pub. L. No. 94-142, 89 Stat. 773 (1975).

⁴⁸ Pub. L. No. 94-142, §615, 89 Stat. 773 (1975).

⁴⁹ Robert T. Stafford, *Education for the Handicapped: A Senator’s Perspective*, 3 VT. L. REV. 71, 76 (1978) (noting that the EAHCA “codified rights already spelled out in earlier court decisions”). Senator Stafford served on the Senate Subcommittee on the Handicapped. See 1973 Hearing, *supra* note 43, at ii.

⁵⁰ A “parent” under both the EAHCA and the current IDEA is defined to mean more than just the child’s biological parents. 20 U.S.C. § 1401(23) (2012).

⁵¹ Pub. L. No. 94-142, §615(b)(1)(C)(ii), 89 Stat. 773 (1975).

⁵² Pub. L. No. 94-142, §615(b)(1)(D), 89 Stat. 773 (1975).

agency.⁵³

As to the manner in which the hearing would be conducted, the statute provided that any party had the right (a) “to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children,”⁵⁴ (b) to “present evidence,”⁵⁵ (c) to compel the attendance of witnesses who could be subject to cross-examination,⁵⁶ (d) to a “written or electronic verbatim record”⁵⁷ of the hearing, and (e) to receive “written findings of fact and decisions.”⁵⁸

The EACHCA gave the States some discretion in designing a due process structure. The statute allowed each State to determine individually whether the impartial due process hearing would be held at the local level or the state agency level.⁵⁹ If the hearing was conducted at the local level, the State could choose to have the parties file an appeal with the state educational agency, a proceeding in which a state agency-appointed review officer would make an “independent decision” on the matter after an impartial review of the hearing.⁶⁰ Thereafter either party could file suit in either state or federal court.⁶¹ Alternatively, the State could choose not to require a state-level administrative appeal before either party could file suit in state or federal court.

These two alternative structures are known as “one-tier” and “two-tier” structures.⁶² In a two-tier system, the impartial due process hearing is conducted at the local level, and the appeal of a hearing officer’s decision is filed with the state educational agency before a party can file suit in court.⁶³ In a one-tier system, following a hearing officer’s decision, a party may file suit directly in federal or state court.⁶⁴

This ability to select either a one-tier or a two-tier system still exists in IDEA today.⁶⁵ However, in the last twenty years, the states increasingly have adopted a one-tier system.⁶⁶ Currently 42 states and the District of

⁵³ Pub. L. No. 94-142, §615(b)(1)(E), 89 Stat. 773 (1975); Pub. L. No. 94-142, §615(b)(2), 89 Stat. 773 (1975).

⁵⁴ Pub. L. No. 94-142, §615(d)(1), 89 Stat. 773 (1975).

⁵⁵ Pub. L. No. 94-142, §615(d)(2), 89 Stat. 773 (1975).

⁵⁶ *Id.*

⁵⁷ Pub. L. No. 94-142, §615(d)(3), 89 Stat. 773 (1975).

⁵⁸ Pub. L. No. 94-142, §615(d)(4), 89 Stat. 773 (1975).

⁵⁹ Pub. L. No. 94-142, §615(c), 89 Stat. 773 (1975).

⁶⁰ *Id.*

⁶¹ Pub. L. No. 94-142, §615(e)(2), 89 Stat. 773 (1975).

⁶² Perry A. Zirkel, et. al., *Due Process Hearings under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD. 3, 4 (2010).

⁶³ *See e.g.*, OHIO ADMIN. CODE 3301-51-05(K)(14) (West 2014).

⁶⁴ *See e.g.*, 1 COLO. CODE REGS. § 301-8:2220-R-6.02 (West 2014).

⁶⁵ 20 U.S.C. § 1415(f)(1)(A) (2012); 20 U.S.C. § 1415(g) (2012).

⁶⁶ Zirkel, *supra* note 62, at 4.

Columbia have a one-tier system.⁶⁷

The due process structure that was first enacted in the EAHCA and is still in effect today depends almost entirely upon private enforcement of children's rights by their parents.⁶⁸ In almost every instance, a child's parent(s) are responsible to advocate for the child at the administrative level and, if necessary, in state or federal court.⁶⁹

C. *The 1990 and 1997 Amendments to IDEA.*

In 1990, when Congress amended and re-authorized the EAHCA, it re-named the statute the Individual with Disabilities Education Act (IDEA).⁷⁰ The IDEA was again reauthorized and amended in both 1997 and 2004.⁷¹

Before the 1997 amendments, IDEA did not provide for any form of ADR, although mediation had been suggested as early as 1976, when the Commissioner of Education issued the implementing regulations for the EAHCA.⁷² In addition, the 1990 Amendments had authorized the Secretary

⁶⁷ *Id.* at 5; 1 COLO. CODE REGS. § 301-8:2220-R-6.02 (West 2014) (Colorado moved from a two-tier structure to a one-tier structure beginning in 2011).

⁶⁸ Senate Rep. No. 168, 94th Cong., 1st Sess. 1975, 1975 U.S.C.C.A.N. 1425, 1138 (1975) (the goal of the EAHCA was to "provide and reinforce procedural protections for parents and children.").

⁶⁹ IDEA does provide for a "state complaint procedure" that allows any individual or organization to file a complaint with a state educational agency regarding an alleged violation of IDEA by a local educational agency. See 34 C.F.R. §§300.151, 300.153 (2012). State complaints can involve allegations regarding the services provided to an individual child or a systematic, generalized violation of IDEA. Such a complaint is filed with the state educational agency, which conducts an investigation and issues a decision. See Ruth Colker, *Special Education Complaint Resolution: Ohio*, 29 OHIO ST. J. ON DISP. RESOL. 371, 371-73 (2014) (describing state complaint procedures). While the state complaint procedure is an inexpensive means to seek resolution of a special education dispute, it has significant limitations, including a one-year statute of limitations, the lack of any hearing or other means to assess credibility of witnesses, and limitations on the type of relief that can be ordered. *Id.* In addition, parents do not control the progress of the investigation as they do when a due process complaint is filed.

⁷⁰ Pub. L. No. 101-476, 104 Stat. 1103, 1142 (1990).

⁷¹ Individuals with Disabilities Amendment Act for 1997, Pub. L. No. 105-17, 111 Stat. 37; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2467.

⁷² In issuing regulations relating to procedural safeguards under the EAHCA, the Commissioner of Education included a comment, which stated as follows:

Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification,

of Education to make grants to explore the resolution of special education disputes “in a timely manner through dispute mediation and other methods.”⁷³

In 1997, Congress amended IDEA to require the States to offer mediation to the parties in a special education dispute.⁷⁴ Mediation was required to be voluntary.⁷⁵ It could not be used to delay or deny the right to a due process hearing.⁷⁶ The mediation was to be confidential, and nothing that occurred in mediation could be used as evidence in a subsequent due process or court proceeding.⁷⁷ The mediation had to be conducted by a “qualified and impartial mediator trained in effective mediation techniques.”⁷⁸ The cost of mediation was to be borne by the State.⁷⁹

In enacting these provisions, Congress stated its preference that special education disputes be resolved both quickly and amicably. The Report of the Senate’s Committee on Labor and Human Resources stated the “committee’s strong preference that mediation become the norm for resolving disputes under IDEA.”⁸⁰ Mediation was seen as an attractive method to resolve disputes “amicably” and with “the child’s best interests in mind.”⁸¹ Another goal of the mediation option was to reduce the cost associated with due process.⁸²

The 1997 Amendments strongly encouraged parents to use mediation as

evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of difference between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent’s rights under [Subpart E of the EAHCA].

42 Fed. Reg. 42474, 42495 (Aug. 23, 1977).

⁷³ Pub. Law 101-476, 104 Stat 1103 (1990) (codified at 20 U.S.C. §1441).

⁷⁴ Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified at 20 U.S.C. §1415(e)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ S. Rep. No. 105-17, at 26 (1997).

⁸¹ *Id.*

⁸² See S. Rep. No. 104-275, at 18 (1996). At the time, 31 States had already developed mediation processes to resolve special education disputes. *Id.* Congress also contemplated whether attorneys should be excluded from mediation proceedings, although Congress ultimately left that decision up to the States. See H.R. Rep. No. 104-614, at 16 (1996) (discussion attorney presence in mediation).

a means to resolve disputes. Any written notice to parents from a school district regarding proposed changes (or the refusal to make changes) with regard to special education services had to include information about the availability of mediation.⁸³ If the parents declined to engage in mediation, either the school district or the state educational agency could establish procedures that would require the parents to meet with someone from a “community parent resource center” or similar entity who would “encourage the use, and explain the benefits, of the mediation process.”⁸⁴

At the time of the 1997 Amendments, Congress did hear testimony from those who advocated for mandatory mediation as a prerequisite to any due process proceedings.⁸⁵ However, Congress did not go so far as to require mediation before a due process complaint could be filed.

Following the 1997 Amendments, the Department of Education’s Office of Special Education Programs (OSEP), began to fund a technical assistance center focused on exploring special education dispute resolution.⁸⁶ The Center for Appropriate Dispute Resolution in Special Education (CADRE) is an invaluable resource for statistics and other information about special education dispute resolution.⁸⁷ CADRE has sponsored or authored a number of reports regarding the use of ADR mechanisms to resolve special education disputes.⁸⁸ CADRE also has collected information about various state dispute resolution systems and has highlighted the systems in four states – Wisconsin, Iowa, Oklahoma and Pennsylvania – as “exemplary”

⁸³ Pub. L. No. 105-17, 111 Stat. 37 (1997) (later codified at 20 U.S.C. § 1415(e)).

⁸⁴ Pub. L. No. 105-17, Section 615 (e)(2)(B)(ii), 111 Stat. 37 (1997). This provision of IDEA was later described as “a section ... that essentially allows a school to punish a parent who doesn’t want to go to mediation by forcing them to talk to somebody about all the wonders of mediation.” *Special Education: Is IDEA Working as Congress Intended?: Hearing Before the H. Comm. on Government Reform, 107th Cong. 118-119 (2001)* (remarks of Kevin McDowell, general counsel, from the Indiana Department of Education). That requirement was characterized as both “punitive” and “off-putting.” *Id.* IDEA’s current provisions allow the local school district or state educational agency only to “offer” parents the opportunity to meet with someone who will explain the benefits of mediation. 20 U.S.C. § 1415(e)(2)(B) (2012).

⁸⁵ *The IDEA Improvement Act of 1997: Hearings on H.R. 5 Before the Subcomm. on Early Childhood, Youth, and Families of the H. Comm. on Education and the Workforce, 105th Cong. 224 (1997)*, (statement of Lillian M. Brinkley, on behalf of the National Association of Elementary School Privileges, requesting statutory language that would “require mediation before court action could be initiated”).

⁸⁶ See 73 Fed. Reg. 44235, 44236 (July 30, 2008) (noting that OSEP has funded CADRE since 1998).

⁸⁷ <http://www.directionservice.org/cadre>.

⁸⁸ See, e.g. CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Trends in Dispute Resolution Under the Individuals with Disabilities Education Act (IDEA)*, (December 2013), available at http://www.directionservice.org/cadre/pdf/Trends_DR_IDEA_DEC2013.pdf.

systems.⁸⁹ In CADRE’s view, the qualities of these exemplary systems are “high levels of stakeholder involvement, investment in early upstream dispute resolution processes, use of technical and content expertise, active participation in the CADRE Dispute Resolution Community of Practice, engagement in continuous quality improvement practices and thorough documentation of systems.”⁹⁰ CADRE’s website provides detailed information about these systems.⁹¹

D. The Current Due Process Provisions of IDEA.

Congress’s last amendments of IDEA took place in 2004. At that time, Congress found that parents and school districts needed “expanded opportunities to resolve their disagreements in positive and constructive ways.”⁹² To accomplish this goal, Congress added or expanded several ADR mechanisms.

IDEA now requires the parties to attend a “resolution session” that must take place within 15 days after a due process complaint is filed, unless both parties agree to waive the session or to go to mediation.⁹³ The legislative history indicates Congress’s intent that one of the main goals of the resolution session is to “improve communication between parents and school officials” when there is a dispute about services for a child with a disability.⁹⁴

Attendance at the resolution session is mandatory unless the session is waived.⁹⁵ Attorneys may not be present for either side unless the parent is represented by an attorney; in other words, the school district’s attorney cannot attend unless the parent also has legal representation.⁹⁶ Resolution sessions are not confidential and no impartial mediator or facilitator must be present.⁹⁷ If the parties reach an agreement during a resolution session, the

⁸⁹ CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Exemplar State Profiles*, (last visited Jan. 22, 2015), <http://www.directionservice.org/cadre/exemplar/exemplarprofiles.cfm>.

⁹⁰ *Id.*

⁹¹ CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Four Exemplary Dispute Resolution Systems in Special Education* (June 2010), available at <http://www.directionservice.org/cadre/pdf/Combined%20State%20Profiles.pdf>.

⁹² 20 U.S.C. § 1400(c)(8) (2012).

⁹³ 20 U.S.C. § 1415(f)(1)(b) (2012); see also Mark C. Weber, “Settling Individuals with Disabilities Education Act Cases: Making Up is Hard to Do.” 43 LOY. L.A. L. REV. 641, 647-51 (2010) (describing the resolution session requirements).

⁹⁴ See H.R. Rep. 108-77 at 114 (2003).

⁹⁵ 20 U.S.C. § 1415(f)(1)(B)(i)(IV) (2012).

⁹⁶ 20 U.S.C. § 1415(f)(1)(B)(i)(III) (2012).

⁹⁷ 20 U.S.C. § 1415(f)(1)(B); Andrea Blau, *Available Dispute Resolution Processes within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA)*

parties “shall execute a legally binding agreement,”⁹⁸ but either party can void the agreement within three business days after it has been signed.⁹⁹

In addition to the resolution session, the 2004 Amendments made mediation an option that the parties could use even before a due process complaint was filed.¹⁰⁰ Both the resolution session and mediation extend the timeline for any administrative hearing to take place, thus delaying an adjudicated resolution of the dispute.¹⁰¹

The 2004 Amendments were quite modest in terms of altering the structure of due process. Indeed, the amendments were exceedingly modest when one considers the variety of proposals put forth by legislators, scholars and experts in the field in the early 2000s.

Beginning in 2001, both the executive and the legislative branches undertook extensive reviews of special education due process. In October 2001, President George W. Bush created a Presidential Commission on Excellence in Special Education, which was assigned to review special education practices nationwide.¹⁰² In July 2002, the Commission published a report entitled “*A New Era: Revitalizing Special Education for Children and their Families.*”¹⁰³ On the topic of dispute resolution, the Commission described numerous complaints from parents, teachers and school administrators about an “excessive focus on due process hearings and litigation over special education disputes.”¹⁰⁴ The Commission concluded that IDEA dispute resolution warranted “serious reform.”¹⁰⁵

One of the Commission’s recommendations was to add voluntary binding arbitration as a dispute resolution mechanism.¹⁰⁶ While the Commission’s report did not provide details regarding arbitration, it did quote the testimony of Professor S. James Rosenfeld, who testified that voluntary binding arbitration could be a “fair, impartial and fast” resolution of a special education dispute.¹⁰⁷ In 2012, Professor Rosenfeld published an article in which he set forth some specific proposal for voluntary, binding arbitration, and that proposal is discussed in more detail below.¹⁰⁸

of 2004: *Where Do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65, 73 (2007).

⁹⁸ 20 U.S.C. § 1415(f)(1)(B)(iii) (2012).

⁹⁹ 20 U.S.C. § 1415(f)(1)(B)(iv) (2012).

¹⁰⁰ 20 U.S.C. § 1415(e) (2012).

¹⁰¹ 20 U.S.C. §1415(f)(1)(B)(ii) (2012); 34 C.F.R. §300.510(c)(3) (2012).

¹⁰² Executive Order 13227, 66 Fed. Reg. 51287 (Oct. 2, 2001).

¹⁰³ “*A New Era: Revitalizing Special Education for Children and their Families.*” (hereinafter “*A New Era*”), available at http://www.nectac.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf.

¹⁰⁴ *A New Era*, *supra* note 103, at 40.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 40-41.

¹⁰⁷ *Id.* at 41.

¹⁰⁸ See Part II.C.2., *infra*.

The Commission also recommended the use of early dispute resolution processes such as “expert IEP facilitation,”¹⁰⁹ regarding that proposal. In the early 2000s, IEP facilitation was a relatively new dispute resolution process, and programs for IEP facilitation are discussed in more detail below.¹¹⁰ Both voluntary, binding arbitration and IEP facilitation were discussed in hearings before Congressional committees charged with amending IDEA.¹¹¹

In March 2003, a bill was introduced into the House of Representatives that would have amended the due process provisions in several substantive ways.¹¹² First, H.R. 1350 would have required the States to design a procedure for the parties to voluntarily agree to arbitrate their dispute before a single “arbitrator.”¹¹³ Arbitration would have been an available dispute resolution option after a due process complaint had been filed. The decision of the arbitrator would have been a final resolution of the dispute “in lieu of a due process hearing” with no opportunity for further review or appeal.¹¹⁴ H.R. 1350 also mentioned the use of “individualized educational program facilitators,”¹¹⁵ although no details were given.

Second, H.R. 1350 would have amended IDEA to eliminate the two-tier due process structure.¹¹⁶ Specifically, H.R. 1350 provided that the party who filed a due process complaint would have the opportunity “for an impartial due process hearing, which [would] be conducted by the State educational agency” only, with a right to appeal to state or federal court after the SEA decision.¹¹⁷

¹⁰⁹ *A New Era*, *supra* note 103, at 40.

¹¹⁰ *See* Part II.C.1, *infra*.

¹¹¹ *IDEA: What’s Good for Kids? What Works for Schools?: Hearing Before the S. Comm. on the Health, Education, Labor, and Pensions*, 107th Cong. 65 (2002) (referring to “informal problem resolution” and “binding arbitration” as means to resolve disputes); *IDEA: Focusing on Improvising Results for Children with Disabilities: Hearing Before the Subcomm. On Education Reform of the H. Comm. on Education and the Workforce*, 108th Cong. 23 (2003) (discussing required mediation and binding arbitration); *The President’s Commission on Excellence in Special Education: Hearing before the S. Comm. on Health, Education, Labor, and Pensions*, 107th Cong. 23, 34 (2002) (discussing voluntary binding arbitration).

¹¹² *See* H.R. 1350, 108th Cong., 2nd Sess. (2003), (introduced in the House), *See also* H.R. Rep. No. 108-77, at 113-14 (2003); Statements of John Boehner, 149 Cong. Rec. H3458-01, (Apr. 30, 2003) (discussing voluntary binding arbitration as a means to resolve special education disputes).

¹¹³ H.R. 1350 §205(e).

¹¹⁴ *Id.* The bill specified that arbitration decision would not be final in the event of fraud or misconduct. *Id.*

¹¹⁵ *Id.* at §672(a)(4).

¹¹⁶ *Id.* at §205(f) (proposing to amend 20 U.S.C. 1415(f)(1)(A)).

¹¹⁷ *Id.* at §205(f) and 205(g); *see also* H.R. Conf. Rep. 108-779 at 217 (2004) (noting that the House Bill “does not provide for a State-level appeal system, so eliminates the

Also in March 2003, Senator Rick Santorum introduced a bill entitled the “Teacher Paperwork Reduction Act,” which would have required, among other things, mandatory mediation of special education disputes under IDEA.¹¹⁸ Senate Bill 626 set forth certain proposed findings of Congress, including the finding that, among the causes of “burdensome paperwork”¹¹⁹ for special education teachers was the “litigation and the threat of litigation.”¹²⁰ Another proposed finding was that mediation of special education disputes resolved disputes more quickly, cost less, and generally led to satisfactory results.¹²¹ The bill proposed to amend IDEA to make mediation a mandatory process in any special education dispute.¹²²

In the end, the 2004 Amendments did not include voluntary binding arbitration, IEP facilitation, or mandatory mediation. The Amendments also did not eliminate the two-tier due process structure. The only substantive changes were the addition of the resolution session¹²³ and allowing mediation take place at any time.¹²⁴

II. THE DEBATE CONTINUES.

A. *Current Criticisms of IDEA Due Process.*

Even with the addition of the resolution session and expanded opportunities for mediation, advocates for both families and school districts contend that due process still is expensive, time-consuming, and counterproductive to a collaborative parent-school relationship. These three points of contention have given rise to a number of additional proposals to “reform” special education due process, as described in Part II.C. below.

The litigation cost is a point of contention on both sides of the table. School administrators assert that litigating a special education dispute is so expensive that school districts often agree to provide services that are not

dual-tier language.”).

¹¹⁸ S. 626, 108th Cong., 1st Sess. (2003), available at <https://www.congress.gov/108/bills/s626/BILLS-108s626is.pdf>. A bill entitled the “IDEA Paperwork Reduction Act of 2003” was introduced into the House of Representatives in January 2003, but that bill did not contain any provisions to amend the dispute resolution processes of IDEA. See H.R. 464, 108th Cong., 1st Sess. (2003).

¹¹⁹ S. 626, §2(8).

¹²⁰ S. 626, §2(8)(C).

¹²¹ S. 626, §2(9).

¹²² S. 626, §5.

¹²³ 20 U.S.C. § 1415(f)(1)(B).

¹²⁴ 20 U.S.C. § 1415(e).

required by IDEA¹²⁵ These advocates also contend that, when school districts provide unnecessary services to one child to avoid litigation costs, other children with disabilities suffer. The argument is that, due to limited school budgets, the children who receive unnecessary services as a result of school district capitulation take those services away from other children in need.¹²⁶

While this argument has a certain facial appeal, some scholars challenge the twin assumptions underlying this argument, specifically that parents who file a due process complaint always want expensive services, and that special education funding is a “fixed pot of educational goods”¹²⁷ such that a service provided to one child means less service for another child.¹²⁸ Indeed, there are many inexpensive disputes that could give rise to a special education dispute, including a parent’s desire to have the child educated in a less restrictive, less expensive environment¹²⁹ or a dispute about whether a child’s violation of the school code of conduct was a manifestation of the child’s disability.¹³⁰

Moreover, rather than dealing with a limited, inflexible budget, school districts have many ways of managing the costs of special education services, including litigation costs. School districts have the ability to purchase insurance for special education litigation at attractive rates.¹³¹ School districts also can access state funding for special education services from state education agencies, many of whom have established state risk

¹²⁵ Pudelski, *supra* note 9, at 2.

¹²⁶ *Id.* at 8.

¹²⁷ Weber, *supra* note 14, at 505.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ IDEA requires that, if necessary, a school district bear the cost of a child’s placement in a private school or residential facility. 20 U.S.C. § 1412 (a)(10)(B) (2012). Some critics assume parents who file due process are seeking these expensive placements. *See, e.g.*, Pudelski, *supra* note 9, at 8, n.19. In evaluating this argument, one should consider that, as of 2010, just 3.4% of the nation’s 6.4 million children receiving special education services were placed in the “expensive” settings such as a separate school for children with disabilities or a residential facility. *See* Thomas D. Snyder, et. al., U.S. DEP’T OF EDUC., NCES 2014-015, DIGEST OF EDUCATION STATISTICS 2012, at 89 tbl. 48 (2013), available at <http://nces.ed.gov/pubs2014/2014015.pdf> [hereinafter DIGEST OF EDUCATION STATISTICS 2012] (number of children with disabilities receiving services under IDEA); DIGEST OF EDUCATION STATISTICS, at 91 tbl. 50 (placement of children receiving services under IDEA). In contrast, in 2010, nearly 81% of those 6.4 million children were placed in a general education classroom for 40-100% of their school day. *Id.* (second table). Over 60% of the children were in the general education classroom between 80-100% of the school day. *Id.*

¹³¹ Debra Chopp, “School Districts and Families under the IDEA: Collaborative in Theory, Adversarial in Fact,” 32 NAT’L. ASS’N. ADMIN. L. JUDICIARY 423, 454-57 (2012).

pools.¹³² In addition, most state funding mechanisms provide increased funding to districts based on a calculation of the level of service being provided to all children with disabilities in the district.¹³³

On the other side of the table, advocates for families contend that due process is too expensive for most parents because they cannot afford to pay the fees of attorneys and expert witnesses who are needed to litigate a special education dispute.¹³⁴ Indeed, it is a focus of legislative action by parent-child advocacy groups that IDEA be amended to ease the recovery of attorneys' fees and to allow the recovery of expert witness fees.¹³⁵

On this topic of cost, some scholars raise the very real concern that the current structure disproportionately favors wealthier parents whose income allows them to advocate for their child in a due process proceeding, when lower income parents are unable to bear the litigation costs and therefore cannot advocate for their children similarly.¹³⁶ This inequality of access to due process becomes an even more acute problem when one considers that, statistically, children with disabilities are more likely to be a member of a lower-income family¹³⁷

The other main criticism of the current due process system is that, as a form of litigation, it is anti-collaborative and poisons the school-parent relationship, ultimately to the detriment of the child.¹³⁸ Unlike many other disputes, a special education dispute involves two parties who need to maintain a working relationship that will last as long as the child resides in the school district.¹³⁹ In addition, each of the parties has a genuine interest in producing a good educational outcome for the child even as they might differ about the means to accomplish that goal. Given this dynamic, some argue that special education dispute resolution should take a form that is as removed from an adversarial, litigation process as possible.¹⁴⁰

These criticisms of due process have led to widely-varying proposals for change. There are essentially five main proposals, each of which is described below. Before describing these proposals, however, it is helpful to briefly consider issues that commonly give rise to a special education

¹³² Weber, *supra* note 14, at 506.

¹³³ *Id.*

¹³⁴ See, e.g., Hyman, *supra* note 10, at 112-13.

¹³⁵ COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, PUBLIC POLICY, *Individuals with Disabilities Education Act (IDEA) 2004*, <http://www.copaa.org/?page=IDEA> (2012) (advocating for statutory amendments to provide for the payment of expert witness fees and attorneys' fees in special education disputes).

¹³⁶ See, e.g., Pasachoff, *supra* note 12, at 1430-33; Hyman, *supra* note 10.

¹³⁷ Pasachoff, *supra* note 12, at 1432.

¹³⁸ Moses, *supra* note 3, at 4.

¹³⁹ *Id.*

¹⁴⁰ Rosenfeld, *supra* note 11, at 551.

dispute.

B. Common Issues in Special Education Disputes.

The first “decision point” in the process of receiving special education services is a determination by the school district that a child meets IDEA’s definition of a “child with a disability.”¹⁴¹ IDEA defines a child with a disability as a child who fits into at least one of thirteen identified disability categories.¹⁴² In addition, the child’s disability must “adversely affect” the child’s educational performance such that the child needs special education services in order to access the educational curriculum.¹⁴³ Thus, eligibility is one topic that could be the subject of a dispute.

Once a child is deemed eligible for special education, the school district, together with the child’s parents, is required to prepare an individualized educational program (IEP) for the child. The IEP document has been described as the “cornerstone” of the child’s right to an appropriate education.¹⁴⁴ The IEP is a written document that contains very detailed provisions about the child’s levels of educational performance, statements of the projected goals and objectives for the child’s progress in the coming year, the means by which the child’s progress will be measured and reported to the parents, the level and type of services to be provided, and the educational setting, among other details.¹⁴⁵ Given the IEP’s importance, it is not surprising that many disputes involve disagreements about the contents of a child’s IEP.

The child’s educational placement – the setting or classroom where the child will receive services – also can be the subject of a dispute. IDEA provides that a child with a disability should receive services in the least restrictive environment¹⁴⁶ that will allow the child to learn. Special education is to be provided along a “continuum of alternative placements”¹⁴⁷ that can range from placement in the general education classroom to placement in a private school or residential facility at public

¹⁴¹ 20 U.S.C. § 1401(3) (2012).

¹⁴² 20 U.S.C. § 1401(3)(A) (2012).

¹⁴³ 34 C.F.R. § 300.8 (2007) (defining a “child with a disability”).

¹⁴⁴ See, e.g., *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 378 (5th Cir. 2003) (“[t]he cornerstone of the IDEA is the IEP”); *Tenn. Dep’t of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996), citing *Honig v. Doe*, 484 U.S. 305, 311 (1988) (“[t]he development and implementation of the IEP are the cornerstones of the Act”).

¹⁴⁵ 20 U.S.C. § 1414(d)(1)-(4) (2012); 20 U.S.C. § 1414(d)(1)(A)(i)(V)-(VI) (2012).

¹⁴⁶ 20 U.S.C. § 1412(a)(5)(A) (2012).

¹⁴⁷ 34 C.F.R. 300.115 (2006).

expense.¹⁴⁸ Parents often have very strong views about whether their child should or should not be mainstreamed or included in the general education environment.¹⁴⁹ For this reason, appropriate placement frequently is a disputed matter.

There are a myriad of other remaining issues that could be the subject of a dispute.¹⁵⁰ A child with a disability who violates the school code of conduct may be subject to discipline, but only if the school determines that the child's conduct was not a manifestation of the child's disability.¹⁵¹ A parent may file due process to contest a disciplinary matter, arguing that the child's conduct was a manifestation of the child's disability. A parent also may file due process on the ground that the district failed to provide the services that had been agreed upon in the child's IEP.¹⁵² A parent might file due process relating to the child's entitlement to "extended school year" (ESY), or summer, services.¹⁵³

All of these varied potential areas for dispute are important to keep in mind when evaluating the proposals to modify the due process structure.

C. Proposals to Reform Due Process.

1. IEP Facilitation.

¹⁴⁸ 20 U.S.C. §1412(a)(10)(B) (2012) (addressing placement of children in private schools by public agencies).

¹⁴⁹ Ruth A. Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PENN. L. REV. 789, 811-14 (2006) (describing circumstances where parents and school districts are likely to disagree about integration and placement).

¹⁵⁰ 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 (2013); see also Perry A. Zirkel & Cathy A. Skidmore, *National Trends in Frequency and Outcome of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525, 543 (2014) (identifying different categories of issues to be resolved by due process hearing officers).

¹⁵¹ See Cope-Kasten, *supra* note 150, at Appendix A (reporting the results of a review of 210 due process hearings held in Wisconsin and Minnesota from 2000-2011, noting that 38% involved a dispute about evaluation, 6% involved a dispute about disciplinary issues, and 6% involved a dispute about teacher qualifications).

¹⁵² See, e.g., *Damian J. v. Sch. Dist. of Phila.*, 2008 WL 191176 (E.D. Pa., Jan. 22, 2008) (awarding compensatory education because the school district had failed to implement the IEP goals and objectives). Compensatory education has been described as the "poor man's tuition reimbursement" because it is a form of relief that parents can request when the school district failed to provide the child with a FAPE either by implementing an inadequate IEP or by failing to provide the services that were agreed-upon in the IEP. See Terry Jean Seligman and Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies*, 45 URB. LAW. 281, 295 (2013).

¹⁵³ 34 C.F.R. § 300.106 (2007).

In an effort to limit disputes that can arise during the IEP process, approximately twenty-nine states have initiated programs known generally as IEP facilitation.¹⁵⁴ IEP facilitation is not required by IDEA. Rather, it is a voluntary process that the parties may use to resolve disputes about the contents of a child's IEP.

The dynamics of the IEP process are such that it is a common point at which disputes arise.¹⁵⁵ It is the school district's obligation to draft the IEP,¹⁵⁶ and district employees obviously have a great deal of knowledge and experience since they draft IEPs for all eligible children in the district. In contrast, many parents are not experts in writing IEPs.¹⁵⁷ Because it is the district's obligation to draft the IEP and the parent's obligation essentially to "read and approve,"¹⁵⁸ a power imbalance can result.¹⁵⁹ The district's employees naturally have an upper hand in asserting positions in an IEP meeting and, in fact, some educators may resent parent input because of the educators' belief that they are the experts in the field.¹⁶⁰

In addition, given IDEA's requirements for attendance at IEP meetings, when the meeting is held, the child's parent(s) will be in a room with several district employees.¹⁶¹ Parents can begin to feel outnumbered, with the result that they sometimes are reluctant to express their opinions freely.¹⁶² Parents also often perceive that their opinions are discounted. Parents report that district employees often make patronizing comments about parents' affection for their child, with the undertone that the parent's opinions stem from emotion rather than reasoned judgment about appropriate educational services for the child.¹⁶³

¹⁵⁴ CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Process and Practice Information*, (last visited Jan. 24, 2014), <http://www.directionservice.org/cadre/ctu/processdefs14.cfm?thisid=12>; Blau, *supra* note 97, at 78-9.

¹⁵⁵ Chopp, *supra* note 131, at 432-38.

¹⁵⁶ 20 U.S.C. 1412 (a)(4) (2012).

¹⁵⁷ Chopp, *supra* note 131, at 434.

¹⁵⁸ *Id.*

¹⁵⁹ Blau, *supra* note 97, at 79.

¹⁶⁰ Erin Phillips, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1831 (2008); see also Nancy Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 615-17 (2004). For a review of the literature detailing studies of parents' perceptions of the IEP process, see CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Parents' Experiences with the IEP Process: Considerations for Improving Practice* (April 2010) (<http://www.directionservice.org/cadre/pdf/Parent-IEP%20Process.pdf>).

¹⁶¹ 20 U.S.C. 1414(d)(1)(B) (2012) (describing the various school personnel who are part of a child's IEP team).

¹⁶² Chopp, *supra* note 131, at 432.

¹⁶³ *Id.* at 433 ("parents are seen by school districts as lacking emotional distance...").

Given these dynamics and the importance of the IEP in ensuring that the child receives appropriate services, the idea developed that the presence of a neutral third-party in an IEP meeting could help level the playing field between parents and school personnel.¹⁶⁴ Facilitated IEP meetings occur when a neutral third-party assists in the organization and discussion of an IEP meeting, with the goal of ensuring that the parties remained focused on future action, specifically the process of writing a document that will serve the best interests of the child.¹⁶⁵ The parties can agree to use IEP facilitation at any point during the process of drafting a child's IEP and, ideally, IEP facilitation will be used as soon as an "acrimonious climate" begins to develop.¹⁶⁶

The role of the IEP facilitator has been described as "focus[ing] on the dynamics of the meeting"¹⁶⁷ to ensure that all attendees have an opportunity to fully express their views, that attendees listen respectfully to others, and that the attendees direct their efforts to finding common ground as a means to resolve the matter.¹⁶⁸ The facilitator is to "establish ground rules for the meeting, aid participants in developing clarifying questions which often lean to mutual solutions and require members of the team to adhere to timelines for completion of the meeting."¹⁶⁹ The IEP facilitator is not present to offer opinions about the strengths or weaknesses of a particular party's position or to otherwise negotiate the terms of the IEP document.

The use of IEP facilitation has expanded rapidly in the last ten years. In 2005, IEP facilitation programs existed in just eight states.¹⁷⁰ Today twenty-nine states and the District of Columbia have IEP facilitation programs.¹⁷¹

¹⁶⁴ Blau, *supra* note 97, at 78-79 (describing IEP facilitation generally).

¹⁶⁵ See Tracy C. Mueller, "IEP Facilitation: A Promising Approach to Resolving Conflicts Between Parents and Families," 41 *TEACHING Exceptional Children* 61 (Jan/Feb. 2009); It has been reported that some school district personnel are uncomfortable with IEP facilitation because they perceive themselves as more experienced in writing IEP and question the facilitator's knowledge or expertise in the area. Kelly Henderson, "Optional IDEA Alternative Dispute Resolution" 13 (2008) (available at <http://www.nasdse.org/publications-t577/optional-idea-alternative-dispute-resolution.aspx>).

¹⁶⁶ Edward Feinberg, et. al., "Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education," at 23 (available at <http://www.directionservice.org/cadre/pdf/Beyond%20Mediation.pdf>).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Mueller, *supra* note 11, at 64, citing Feinberg, *supra* note 166.

¹⁷⁰ Moses, *supra* note 3, at 8.

¹⁷¹ *Id.*; see also CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Process and Practice Information*, (last visited Jan. 24, 2014), <http://www.directionservice.org/cadre/ctu/processdefs14.cfm?thisid=12> (information on CADRE's website about IEP facilitation programs in various states). Those states are Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia,

CADRE has been an early and strong supporter of IEP Facilitation.¹⁷² CADRE's website contains a great deal of information about IEP facilitation, including results of surveys completed by parties who had participated in IEP facilitation.¹⁷³ These surveys indicate a high level of satisfaction with the process.¹⁷⁴

2. Public Enforcement of IDEA.

Hawaii, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, and Wisconsin.

While there is no statewide program, some local school districts within Kansas offer IEP facilitation. *See, e.g.,* OLATHE PUBLIC SCHOOLS, SPECIAL SERVICES, OLATHE SPECIAL SERVICES SITE COUNCIL 2013-2014 (Mar. 2013), <http://schools.olatheschools.com/buildings/north/files/2012/06/Special-Service-English.pdf>.

In addition, several other states have either had IEP facilitation programs in the past or are contemplating an IEP facilitation program. Indiana had an IEP facilitation project, but funding has ended. CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Co-Facilitation IEP Meeting Project - Indiana* (last visited Jan. 24, 2015), <http://www.directionservice.org/cadre/ctu/practicesA.cfm?id=61>. In June 2014, the New York State Education Department posted a request for applications to participate in an IEP Facilitation pilot program scheduled to begin in 2015. N.Y. STATE EDUC. DEP'T, SPECIAL EDUC., *Request for Applications – Individualized Education Program (IEP) Facilitators*, <http://www.p12.nysed.gov/specialed/applications/IEPfacilitatorrequest.htm> (last updated June 9, 2014). In 2012, the Georgia State Advisory Panel for Special Education apparently explored the idea of having facilitated IEP meetings and tentatively planned to implement a full program by 2015. GA. DEP'T OF EDUC., *Minutes Summary: State Advisory Panel Meeting* (April 26-27, 2012). Florida officials apparently also have discussed IEP facilitation. *See* FLA. DEP'T OF EDUC., *Meeting Report: State Advisory Committee for the Education of Exceptional Students* (Aug. 5-6, 2013) (<http://www.fldoe.org/core/fileparse.php/7571/urlt/0086224-aug2013.pdf>). Missouri is considering IEP facilitation. MO. DEP'T OF ELEMENTARY AND SECONDARY EDUC., *Minutes: Special Education Advisory Panel Meeting* (Mar. 7, 2014), <http://dese.mo.gov/sites/default/files/se-seap-special-education-advisory-panel-minutes3-14.pdf>.

¹⁷² *See* Moses, *supra* note 3, at 6; Feinberg, *supra* note 166, at 23; CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Facilitated IEP Meetings: An Emerging Practice* (published November 2004) (available at <http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf>).

¹⁷³ CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Post IEP Facilitation Facilitator Survey Results 2007-2008*, (November 2008), <http://www.directionservice.org/cadre/exemplar/artifacts/WI-20%20Post%20IEP%20Facilitators%20Survey%20NOV08.pdf>.

¹⁷⁴ *See, e.g.,* <http://www.directionservice.org/cadre/pdf/NC-08-09FacilitationEndYearReport.pdf> (providing results of a survey conducted in Wisconsin).

As stated above, some scholars criticize the due process structure as a system that, due to its reliance on parents as the child's advocate, disproportionately favors wealthier and more educated families who have the means to pursue due process.¹⁷⁵ To counteract this inequality, these scholars recommend several steps to enhance public enforcement of IDEA's requirements.¹⁷⁶ One step is a proposal to increase the government's collection and publication of data relating to special education, with the belief that additional public information may reduce "information asymmetries"¹⁷⁷ that are thought to benefit wealthier families in the "informational game."¹⁷⁸ Examples of data that the government might collect and publish would be more detailed data regarding the special education classification and placement of children disaggregated by income or socioeconomic status.¹⁷⁹

A more ambitious suggestion is to have the government create a database of IEPs that would be cross-referenced with the child's (i.e. family's) income.¹⁸⁰ One suggested benefit of such a database is that it would allow parents without financial resources to obtain information about the type of services received by children of wealthier families.¹⁸¹ Another suggested benefit of this database is that districts might, with the benefit of the data, be "nudged" to avoid making class-based differences in their treatment of children in the district.¹⁸² The recognized impediments to the creation of such a database are the cost involved and the risk that a child's personally identifiable information might be included in the data.¹⁸³

¹⁷⁵ Pasachoff, *supra* note 12; Hyman, *supra* note 10; Alex Hurder, *Left Behind with No "IDEA": Children with Disabilities Without Means*, 34 B.C. J. L. & SOC. JUST. 283 (2014). Indeed, soon after the passage of EAHCA, there were some concerns expressed that the system of private enforcement might be insufficient. Note, *Enforcing the Right to an "Appropriate" Education: the Education for All Handicapped Children Act of 1975*, 92 Harvard L. Rev. 1103 (1979).

¹⁷⁶ Pasachoff, *supra* note 12, at 1461-88; Hyman, *supra* note 10, at 150-55 & 159-62. These scholars also propose a number of other legislative changes, including provisions that ease the recovery of attorneys' fees by parents, explicit authorization to recover expert witness fees, requiring the school district to bear the burden of proof to demonstrate compliance with IDEA's requirements, amending the statutory language regarding procedural inadequacies as a basis for prevailing in a due process matter, among other changes. Hyman, *supra* note 10, at 146-50 (discussing attorneys' fees and expert witness fees, burden of proof); Hurder, *supra* note 175, at 306-09 (discussing attorneys' fees and expert witness fees, relief for procedural violations)

¹⁷⁷ Pasachoff, *supra* note 12, at 1437-40.

¹⁷⁸ *Id.* at 1438.

¹⁷⁹ *Id.* at 1145-46.

¹⁸⁰ *Id.* at 1467-68.

¹⁸¹ *Id.* at 1468.

¹⁸² *Id.*

¹⁸³ *Id.* at 1470-72.

Another proposal is to have state educational agencies engage in random audits or investigations of districts to assess the quality of IEPs for low-income children.¹⁸⁴ The state investigators could either assess the quality of IEPs in isolation, “without making any comparisons to other IEPs,”¹⁸⁵ or compare the IEPs of “low-income and high-income students in the same district” to determine disparities in treatment and the overall quality of IEPs written for low-income students. If the state found disparities in services or placement that were not “educationally justified,”¹⁸⁶ then the state could order that the IEPs for those students be rewritten and that the district make “systemic changes”¹⁸⁷ to reduce the possibility that disparities would continue to exist.

A third proposal is to have federal agencies be more aggressive in investigating and, when appropriate, enforcing IDEA’s requirements in litigation.¹⁸⁸

A fourth proposal is for Congress to provide funds to states that would take steps to ensure that “poor children are provided with services as good as those provided to wealthier children.”¹⁸⁹ This proposal seeks to offer financial incentives to states that voluntarily examine the relationship between family wealth and special education services and, when inequalities are found, institute reforms to any disparities that are attributable to family income.¹⁹⁰

A final proposal in the realm of “public enforcement” is to increase the availability of *pro bono* attorneys, law school clinics, and community advocates to help low-income families understand and access the existing due process system.¹⁹¹ This includes one proposal that is modeled after a public defender system, in which each child is assigned a special advocate – not necessarily an attorney – as soon as the child is identified as a child who might be in need of special education services.¹⁹²

3. Voluntary, Binding Arbitration.

Since the 2004 Amendments to IDEA, discussion of the use of

¹⁸⁴ *Id.* at 1473-74.

¹⁸⁵ *Id.* at 1473.

¹⁸⁶ *Id.* at 1475.

¹⁸⁷ *Id.*

¹⁸⁸ Hyman, *supra* note 10, at 159-60.

¹⁸⁹ Pasachoff, *supra* note 12, at 1486.

¹⁹⁰ *Id.* at 1486-87.

¹⁹¹ Ruth A. Colker, *DISABLED EDUCATION* 244-45 (2013); Hurder, *supra* note 175, at 306-07; Hyman, *supra* note 10, at 158-59.

¹⁹² Erin Phillips, “*When Parents Aren’t Enough: External Advocacy in Special Education*,” 117 *YALE L.J.* 1802, 1847-48 (2008).

voluntary, binding arbitration has continued.¹⁹³ Some scholars contend that Congress “wisely eschewed”¹⁹⁴ the arbitration model because of the lack of good evidence that arbitration would be less costly or faster than an administrative hearing.¹⁹⁵ Others argue that, given the costs and delay associated with “over-legalization”¹⁹⁶ of due process hearings, special education disputes should be resolved through an arbitration process using “a single-session hearing without judicial appeal,”¹⁹⁷ except in limited circumstances involving “major new legal issues.”¹⁹⁸

In 2012, Professor S. James Rosenfeld published an article on the topic.¹⁹⁹ Professor Rosenfeld contends that arbitration would improve IDEA’s due process structure by providing both “a more balanced ‘access to justice’ and swift and final decisions.”²⁰⁰ Among the stated advantages of voluntary binding arbitration would be “eliminating the need for attorneys”²⁰¹ in order to decrease the “adversarial atmosphere”²⁰² of due process. Another potential benefit would be “a much shorter timeline for decision and implementation.”²⁰³ A third benefit is described as an increased “focus ... on the student’s educational program” as a result of a less-adversarial proceeding.²⁰⁴ Finally, a fourth identified benefit is that the arbitration panel, if composed as described below, would have “greater expertise” in both the legal and teaching/educational issues than the mediators or due process hearing officers who currently hear special education matters.²⁰⁵

Professor Rosenfeld describes his proposal as a “snapshot”²⁰⁶ of a proposed arbitration system rather than a specific proposal which, he states, would be further developed with the input of a variety of stakeholders in the process.²⁰⁷ With that caveat, Professor Rosenfeld proposes that arbitration

¹⁹³ See Rosenfeld, *supra* note 11.

¹⁹⁴ Mark C. Weber, “Reflections on the New Individuals with Disabilities Improvement Act,” 58 FLA. L. REV. 7, 52 (2006)

¹⁹⁵ *Id.*

¹⁹⁶ Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 ED. LAW. REP. 35, 38 (2005).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Rosenfeld, *supra* note 11.

²⁰⁰ *Id.* at 545.

²⁰¹ *Id.* at 551.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 547.

²⁰⁷ *Id.* at 551 (“None of this is meant to be exhaustive; to the contrary, it is set forth in the hope and expectation that others can and will identify oversights and made additional

would involve a three-person panel consisting of an expert in the child's primary disability, an expert in the field of special education (administration or provision of services), and an attorney familiar with special education laws.²⁰⁸ The parties may opt for binding arbitration only after giving "fully informed and completely voluntary"²⁰⁹ consent, which would have to include an explicit understanding that the parties are foregoing any right to appeal the panel's decision.

Professor Rosenfeld also proposes that no attorneys can be present in the proceeding unless the parent also either has an attorney or consents to the presence of the school district's attorney.²¹⁰ The panel would have "complete discretion"²¹¹ to determine both the rules under which the proceeding would be conducted and "the nature and scope of the evidence (witnesses or documents) it will seek or hear."²¹² Indeed, it would be the responsibility of the panel to "assume a controlling role in the process," including calling expert witnesses, questioning other witnesses, seeking evaluations of the child, or reformulating the issues before the panel.²¹³ The record of the proceeding would be confidential and "substantive challenges to the decision" would be heard only by the panel.²¹⁴

To accomplish the goal of providing a quick resolution of the dispute, Professor Rosenfeld proposes that the panel be required to issue its decision within "thirty school days"²¹⁵ from the assignment of the matter to the arbitration panel unless, due to unusual circumstances, the parties agree to an extension of time at the beginning of the proceedings.²¹⁶ Professor Rosenfeld further proposes that the decision should be written as a "quasi-IEP" with a description of goals, programs, and services to be provided.²¹⁷ To ensure that the parties comply with the terms of the arbitration decision, Professor Rosenfeld proposes that the state educational agency be given authority to enforce the terms of the decision, and that the SEA be required

suggestions.").

²⁰⁸ Rosenfeld, *supra* note 11, at 561-563

²⁰⁹ *Id.* at 552.

²¹⁰ *Id.* at 554.

²¹¹ *Id.*

²¹² *Id.* This part of the proposal implies that parents would lose rights currently available under IDEA, including the rights to "present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. §1415(h)(2) (2012).

²¹³ Rosenfeld, *supra* note 11, at 560-61.

²¹⁴ *Id.*

²¹⁵ *Id.* at 557. This timeline thus is essentially the same as the forty-five day period for resolving a due process matter that had been required by IDEA before Congress added the thirty-day resolution session period in 2004. *See* note 2, *supra*. Thirty school days equals forty-two calendar days. (five school days in a week times six weeks).

²¹⁶ *Id.*

²¹⁷ *Id.* at 557.

to “assure compliance” within fifteen days after receiving a complaint, presumably filed by the parent, that the decision is not being implemented properly.²¹⁸

Professor Rosenfeld does not propose that arbitration replace the current due process structure, only that it be added to IDEA as another dispute resolution system that the parties can choose to access.²¹⁹

4. A Radical Overhaul of Special Education Due Process.

In July 2013, the American Association of School Administrators (AASA) published a report proposing “critical changes”²²⁰ to special education due process.²²¹ The AASA contends that, for a number of reasons, the current due process system is not working well. In addition to the criticisms noted above, specifically that due process costs too much,²²² unfairly disadvantages lower-income families, and “breeds hostility”²²³ between parents and school officials, the AASA sets forth several additional reasons why the current due process structure is either obsolete or ineffective.

The AASA first contends that the current due process structure has become obsolete due to changes in federal education legislation, particularly the 2001 No Child Left Behind Act²²⁴ and the 2004 amendments to IDEA. AASA cites the data reporting requirements of NCLB and IDEA as “wield[ing] significant pressure on districts”²²⁵ such that due process “no

²¹⁸ *Id.* at 558.

²¹⁹ *Id.* at 566.

²²⁰ Pudelski, *supra* note 9, at 2.

²²¹ Pudelski, *supra* note 9.

²²² The AASA cites a survey it conducted of 200 school superintendents across the country, in which the survey respondents indicated that school districts may budget between \$12,000 and \$50,000 per year to address potential costs associated with due process or litigation. *Id.* at 13. National data on annual school budgets indicates that, on average, \$50,000 is a modest sum for most school districts in the nation. In the 2009-2010 school year, there were 13,625 “regular” school districts in the United States with total revenues of \$597 billion. DIGEST OF EDUCATION STATISTICS 2012, at 146 tbl. 100 (number of public elementary and secondary education agencies); *Id.* at 315 tbl. 203 (revenue for public elementary and secondary schools). Thus, the average school budget was \$43.8 million dollars. Using that figure, \$50,000 is 0.00114% of the average school budget. \$12,000 is 0.00027% of the average school budget.

The AASA did acknowledge that districts can purchase insurance to cover the litigation costs of special education due process. *Id.* at 14 (citing annual premiums between \$2,500 and \$10,000).

²²³ *Id.* at 9.

²²⁴ Pub. Law. 107-110, 115 Stat. 1425 (2002).

²²⁵ Pudelski, *supra* note 9, at 7.

longer serves as a powerful compliance lever.”²²⁶

The AASA also implies that the current structure is unnecessary because children with disabilities no longer need robust due process protections they might have needed in the past, stating that “[t]he inclusion of people with disabilities in all walks of life is now a given.”²²⁷ This proposition is belied by current events demonstrating that children with disabilities are often the subject of bullying and hatred,²²⁸ sometimes even at the hands of school employees.²²⁹

Another cited reason for overhauling the current structure is the lack of data demonstrating that success in a due process hearing leads to a better educational outcome for the student.²³⁰ This is an argument in the negative; the lack of any data, positive or negative, leads the AASA to conclude that the system does not work.²³¹

In addition, reciting several anecdotal stories, the AASA asserts that due process adversely affects teacher retention in the field of special education.²³² In fact, the retention of special education teachers is subject to a myriad of factors, including salary consideration, school climate, and

²²⁶ Pudelski, *supra* note 9, at 9. The AASA proposal contends that district compliance is driven by the potential for adverse consequences under federal law, including loss of federal funding, “intensive state monitoring,” *id.*, or state-level imposed mandated improvement activities. *Id.*

²²⁷ *Id.* at 16.

²²⁸ See, e.g., Trudi Bird and Joe Kemp, *Family of 13-year-old Autistic Boy Disgusted After Hate-Filled Letter is Slipped Under Their Door Urging Them to ‘Euthanize’ Boy for Being a Neighborhood ‘Nuisance’*, N.Y. DAILY NEWS, Aug. 20, 2013, <http://www.nydailynews.com/news/world/disgusting-father-hate-filled-letter-euthanize-autistic-son-nuisance-article-1.1431505>; Associated Press, *Prosecutors Mull Charges Against Teen Accused in Prank ‘Ice Bucket Challenge’ on Autistic Boy*, HUFFINGTON POST, Sept. 17, 2014, http://www.huffingtonpost.com/2014/09/17/ice-bucket-prank-autism-n_5834882.html.

²²⁹ Associated Press, *Olympia Bus Driver Accused of Bullying Disabled Girl*, KOMONEWS.COM, Apr. 23, 2014, <http://www.komonews.com/news/local/Olympia-school-bus-driver-accused-of-bullying-girl-256352061.html>; *Koehler v. Juniata Cty. Sch. Dist.*, 2008 WL 1787632 (M.D. Pa., April 17, 2008) (teachers placed a non-verbal autistic child in a thermally insulated, camouflage jumpsuit, sealed the jumpsuit with duct tape, raised the temperature in the room, and locked the child in the room alone; the court held that the parent, on behalf of the child, could pursue claims under both federal and state law against the school district and individual employees).

²³⁰ Pudelski, *supra* note 9, at 7.

²³¹ *Id.* at 21 (criticizing the lack of any follow-up after a due process decision to determine whether the outcome of due process “positively or negatively affected student performance.”). Professor Mark Weber notes that the data demanded by AASA would be very difficult to obtain, noting that “a researcher would be hard put to design a controlled experiment that would be consistent with ethical practices that would test that hypothesis.” Weber, *supra* note 14, at 511.

²³² Pudelski, *supra* note 9, at 12-13.

administrative support, among others.²³³ Although “paperwork” has been identified as one cause leading to special education teacher attrition, neither due process nor litigation is specifically cited as a reason why a special education teacher might leave the field.²³⁴

What does the AASA propose? The AASA describes its proposal as “two-pronged approach”²³⁵ designed to make it “more difficult for litigation to occur.”²³⁶ Indeed, the AASA acknowledges an overall goal to “creat[e] a ‘lawyer-free system’ [in which] ‘costs for districts will be significantly reduced.’”²³⁷

The AASA proposal requires the parties to engage in IEP facilitation with state-provided, trained facilitator before any form of due process or litigation could be pursued.²³⁸ No lawyers or advocates may be present in the IEP facilitation meeting.²³⁹ The AASA proposal does not describe procedures to be used if the special education dispute did not involve an issue relating to a child’s IEP.

If IEP facilitation fails to resolve the dispute, then the parties must engage in mediation.²⁴⁰ Again, no lawyers may be present and, for some reason, no legally binding agreement could be created.²⁴¹

If mediation fails, the AASA proposal would then require the joint selection of an “independent, neutral, special education consultant designated by the state to...advise the parties on how to devise a suitable compromise IEP.”²⁴² The consultant, once notified of the request for his or her services, would have fifteen days to hold an initial meeting with the parties.²⁴³ Following that meeting, the consultant would have an additional twenty-one²⁴⁴ days to make observations, review records, and write an IEP.²⁴⁵ The parties then “would be obligated to follow the consultant-designed IEP for a mutually agreed upon period of time”²⁴⁶ that is not

²³³ See Bonnie S. Billingsley, *Special Education Teacher Retention and Attrition: A Critical Analysis of the Literature*, at 37 (April 2003) (available at <http://copsse.education.ufl.edu/docs/RS-2/1/RS-2.pdf>).

²³⁴ *Id.* at 23.

²³⁵ Pudelski, *supra* note 9, at 17.

²³⁶ *Id.*

²³⁷ *Id.* at 22.

²³⁸ *Id.* at 18.

²³⁹ *Id.*

²⁴⁰ *Id.* at 19.

²⁴¹ *Id.*

²⁴² *Id.* at 4, 20.

²⁴³ *Id.* at 20.

²⁴⁴ The AASA proposal in one section refers to a twenty-one day period, *Id.* at 20, but, in another section, refers to a thirty-day period. *Id.* at 21, n.70.

²⁴⁵ *Id.* at 20-21.

²⁴⁶ *Id.* at 4.

specified. Again, this is a step in the process where lawyers would not be involved.²⁴⁷

If, after all of the procedures described above – IEP Facilitation, voluntary mediation, implementation of a consultant-written IEP – have been satisfied, any party who wishes to pursue the matter further may file a “lawsuit in federal court.”²⁴⁸ Thus, the AASA proposal would “abolish[] the [due process] hearing system”²⁴⁹ entirely.²⁵⁰

The AASA’s proposal has been recognized by scholars,²⁵¹ advocacy groups²⁵² and practitioners²⁵³ as an attempt to weaken the procedural protections IDEA currently grants to children and their parents. Indeed, although the AASA report cited Professor Rosenfeld’s proposal for voluntary, binding arbitration with approval, Professor Rosenfeld himself has disavowed any association with the AASA proposal.²⁵⁴

5. Defending the Current Structure.

The fifth main proposal to modify the special education due process is actually labelled as a “defense” of due process.²⁵⁵ In a recent article, Professor Mark Weber contends that the criticisms of the system are “badly

²⁴⁷ *Id.* at 22 (describing the consultancy system as a “lawyer-free system” that would “level the playing field between low-income families and districts in IDEA disputes”).

²⁴⁸ *Id.* at 20.

²⁴⁹ *Id.* at 21.

²⁵⁰ *Id.* at 23 (noting that the proposal would “replac[e] the due process system”).

²⁵¹ Weber, *supra* note 14; See Yael Cannon, et. al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Children with Social, Emotional and Behavioral Challenges*, 41 FORDHAM URBAN L.J. 403, 490 (2013).

²⁵² See, e.g., COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, NEWS & PRESS: POLICY, *AASA Document Nothing More Than A Shameful Attack on Parent and Student Civil Rights*, <http://www.copaa.org/news/121292/AASA-Documents-Nothing-More-Than-A-Shameful-Attack-on-Parent-and-Student-Civil-Rights-.html>, (Apr. 4, 2013).

²⁵³ Gregory Branch, *Orange County Special Education Attorney Opposes AASA Proposal*, THE LAW OFFICE OF GREGORY R. BRANCH L. BLOG (Apr. 28, 2013), <http://www.ocspecialeducationattorney.com/orange-county-special-education-attorney-opposes-aasa-proposal/> (describing the AASA proposal as “unfairly tilting the balance of power” in favor of school districts, which would be represented by a “highly-trained district office administrator, many of whom hold doctorate degrees in education or more specifically special education....”); see also Mary Richard, *AASA, the Emperor’s New Clothes, Special Education Mediations and Due Process Hearings*, SPECIAL EDUC. L. IN IOWA BLOG, <http://specialeducationlawmmr.blogspot.com/2013/04/aasa-emperors-new-clothes-special.html>.

²⁵⁴ S. James Rosenfeld, *Director’s Statement on AASA Report on Due Process*, NAT’L ACAD. FOR IDEA ADMIN. JUDGES AND HEARING OFFICERS, <http://www.law.seattleu.edu/continuing-legal-education/upcoming-programs/idea-aljho-academy>.

²⁵⁵ Weber, *supra* note 14.

overblown”²⁵⁶ and that the system generally is cost-effective and yields good results for parents, particularly when compared to litigation outcomes in other contexts.²⁵⁷ He proposes that, with only “a few modest reforms,”²⁵⁸ the current structure would meet the parties’ expectations and fulfill IDEA’s goals.

Professor Weber acknowledges that income inequality affect parents’ abilities to pursue due process, but notes that such inequality exists throughout our legal and economic systems.²⁵⁹ He argues that income inequality is not a reason to radically overhaul the system, noting that there is a “ripple effect of successful due process hearings”²⁶⁰ under which litigation funded by higher income families has some benefit to other children in the system by creating good law, leading to statutory amendments and the like.²⁶¹ He also notes that due process decisions awarding tuition reimbursement to wealthier parents for private placements can lead school districts to improve or create programs within the public school system that benefit additional children.²⁶²

As noted above,²⁶³ Professor Weber also takes issue with the notion that successful due process pursued by wealthier families leaves other children with fewer services. Among the reasons he gives are that often parents may not be asking for more expensive services (citing the example where parents want a child to be educated in the least restrictive environment) and the fact that states often allocate more money to districts that serve students with greater needs.²⁶⁴

Professor Weber also challenges the belief that due process structure is too costly for school districts.²⁶⁵ He cites a 2003 study by the Government Accounting Office, which found that the number of formal special education disputes was relatively low and a 2013 CADRE report indicating

²⁵⁶ *Id.* at 495

²⁵⁷ *Id.* at 510.

²⁵⁸ *Id.* at 495.

²⁵⁹ *Id.* at 503, citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

²⁶⁰ *Id.* at 505.

²⁶¹ *Id.* at 505-06;

²⁶² *Id.*; see also Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 181 (2005) (“[O]utspoken parents may serve the interests of all children in the school district and, by informational spillover, of the nation. In this light, the distribution of resources among children with disabilities may not be a zero-sum game. ... The advocacy work of some parents may pay dividends for everyone; it raises the standards of appropriate special education and augments the rights of all children.”).

²⁶³ Part II.A., *supra*.

²⁶⁴ Weber, *supra* note 14, at 505-07.

²⁶⁵ *Id.* at 508-09.

that due process hearing requests and hearings have been declining.²⁶⁶

Indeed, statistics contained within the AASA's own proposal support Professor Weber's opinion. The AASA's survey of school administrators indicates that the number of disputes is low.²⁶⁷ More than one-half (51%) of the school superintendents who responded to the AASA survey had not "been involved in special education litigation or due process in the past five years."²⁶⁸ Ninety percent of the survey respondents had had fewer than five due process hearings in the last five years.²⁶⁹

Professor Weber proposes that due process could be improved with "modest procedural changes"²⁷⁰ designed to streamline the due process proceedings and, in some cases, strengthen parents' positions in due process.²⁷¹ He proposes (a) amending IDEA to allow parents who prevail in due process to recover expert witness fees; (b) relaxing the rules about exhaustion of administrative proceedings; (c) streamlining due process proceedings by, among other things, minimizing pre-hearing motion practice; (e) enhancing the training of IHOs; and (e) clarifying the means to enforce a settlement reached in a special education dispute.²⁷²

III. THE SURVEY

In 2014, I decided to survey special education attorneys regarding the current due process structure and facets of some of the proposals described above. The idea to conduct a survey came from anecdotal conversations with special education attorneys in Ohio about due process.²⁷³ These attorneys opined that the resolution session usually was a waste of the parties' time. They also expressed the view that the hearing officer system in Ohio was deficient in many respects, a view that Professor Ruth Colker

²⁶⁶ *Id.*

²⁶⁷ Pudelski, *supra* note 9, at 9-10.

²⁶⁸ *Id.* at 10.

²⁶⁹ *Id.* at 9-10. The AASA report reports that just seven percent of districts had six to ten due process hearings within the last five years and three percent of districts had eleven or more hearings over the same period.

²⁷⁰ Weber, *supra* note 14, at 520.

²⁷¹ *Id.*

²⁷² *Id.* at 520-23.

²⁷³ I teach a course in Special Education law and, during the semester, I invite area attorneys who practice special education law to come and speak with my class. For several years, I and my students have been lucky enough to have two highly experienced attorneys come to share their views. Kerry Agins is a well-respected attorney in the Cleveland area who represents parents and their children in special education disputes. See <http://www.siegelaginsandgilman.com/About-Kerry-Agins.html>. Kathryn Perrico is another excellent special education attorney whose clients are school districts and personnel. See <http://www.ohioedlaw.com/kathryn-i-perrico>.

outlined in a recent article.²⁷⁴ These conversations piqued my interest in ascertaining what practitioners thought about the current structure and proposals to change the structure.

Once I decided to create a survey, I considered the topics that might be covered. I was very interested in obtaining practitioners' views about the effectiveness of the resolution session. I also was very interested in hearing practitioners' views about IEP facilitation. Finally, I wanted to get feedback on both the voluntary, binding arbitration model and aspects of the AASA proposal.

To those topics, I added a topic that has not received a great deal of in-depth attention in the scholarship, namely the relative benefits or costs of a one-tier due process structure, as opposed to a two-tier due process.²⁷⁵ Again, it was my Ohio-based focus that caused me to be interested in this topic. Ohio is one of just eight states with a two-tier structure.²⁷⁶

For two reasons, I omitted any questions about the use of mediation to settle special education disputes. First, the use of mediation as a means to resolve special education disputes is so widely accepted that any further amendments to IDEA likely would not address mediation.²⁷⁷ Second, given all of the other topics to be covered and a concern that the survey would become excessively long, I decided to omit mediation as a topic.

My target audience was attorneys who are actively engaged in the practice of special education law.²⁷⁸ I did not quantify the target population of special education attorneys nationwide. Rather, I attempted to reach as many special education attorneys as I could through a variety of efforts.

First, I contacted non-profit organizations, including the Education Law

²⁷⁴ Colker, *supra* note 69..

²⁷⁵ *Id.* at 406.

²⁷⁶ The survey did also ask a number of questions about quality and training of hearing officers, however, that topic will be the subject of a later article.

²⁷⁷ See e.g., Feinberg, *supra* note 169, at 8 (indicating high levels of satisfaction with the use of mediation to resolve special education disputes).

²⁷⁸ There are special education "lay advocates," who assist parents in seeking special education services but may not handle due process matters or litigation. For information about the use of law advocates, see Eileen M. Ahern, THE INVOLVEMENT OF LAW ADVOCATES IN DUE PROCESS HEARINGS (October 2001), available at http://www.directionservice.org/cadre/The_Involv4449.cfm; see also Kay Hennessy Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow*, 9 GEO. J. ON POVERTY L. & POL'Y 193 (2002).

I recognize that lay advocates can provide invaluable services to parents. *Id.* at 212-14 (discussing the value of lay advocates in the field of special education). However, because lay advocates may include individuals who do not handle due process or otherwise make strategic legal decisions in a dispute, I sought to limit their involvement in the survey by asking the survey respondents whether they were "an attorney with an active practice in Education Law" and filtering responses based on the answer.

Association,²⁷⁹ The National School Boards Association,²⁸⁰ and the Council of Parent Attorneys and Advocates.²⁸¹ I asked those organizations to distribute the survey to their members, and they agreed to do so, for which I thank them.²⁸² Second, I contacted individual attorneys whose names and email addresses I obtained by searching websites with lists of special education practitioners.²⁸³ Third, I searched on the Internet to find attorneys who advertised their expertise in special education law.²⁸⁴ I also reviewed the publicly-available special education due process decisions to find the names and contact information for counsel who had represented parties in due process hearings.²⁸⁵

The survey was an anonymous and voluntary one that respondents completed online.²⁸⁶ The survey respondents were able to exit the survey at any time. The survey was designed to obtain both quantitative and qualitative information through the use of both Likert-type questions and open-ended questions with space for the respondents to provide narrative answers.

Responses were collected between June 23, 2014 and November 18, 2014. Three hundred and ninety-three individuals completed the survey.²⁸⁷ Of that number, 355 respondents had an active practice in education law. One hundred and sixty-six of respondents indicated that he or she had an

²⁷⁹ www.educationlaw.org.

²⁸⁰ www.nsba.org.

²⁸¹ www.copaa.org

²⁸² Emails from Cate Smith, Executive Director of ELA, Sonja Trainor, Director, Council of School Attorneys of NASB, and Denise Marshall, Executive Director of COPAA are on file with the author.

²⁸³ See, e.g., <http://www.yellowpagesforkids.com>; <http://www.autismspeaks.org/resource-guide/by-state/81/Attorneys/OH>; <http://www.quakerschool.org/resources/special-education-attorneys>; <http://advocatesforspecialeducation.com/index.html>; <http://www.mnmsba.org/Resources/COSA>;

²⁸⁴ See, e.g., <http://www.specialneedsnewyork.com/attorneys>; <http://www.specialeducationattorneyatlaw.com>; <http://www.wefight4you.com/california-attorneys/hans-gillinger>.

²⁸⁵ See, e.g., <http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Due-Process-Hearing-Decisions-.aspx>; <http://www.edresourcesohio.org/due-process-decisions>. In some states, the attorney-identifying information is redacted.

²⁸⁶ The survey was designed using Qualtrics software licensed to the University of Akron. The survey was exempt from IRB review by the University of Akron's Institutional Review Board. A letter to that effect is on file with the author. The survey questions also are on file with the author.

²⁸⁷ Five hundred and eighty-one individuals began the survey, yielding a dropout rate of thirty-two percent. I solicited responses from practitioners in the fifty U.S. states and the District of Columbia.

active practice representing school districts, boards of education or school personnel, of which ninety-four of those individuals (57%) indicated that 100% of their clients were school-related personnel or entities.²⁸⁸ Two hundred and forty-three of respondents indicated that his or her clients were parents and/or children seeking rights under IDEA; one hundred and sixteen of those attorneys (48%) indicated that 100% of the clients were parents and children.²⁸⁹

A. IEP Facilitation.

The survey first asked whether the respondents had any experience with IEP facilitation. One hundred and seventeen of the school district attorneys indicated that they had experience with IEP facilitation. One hundred and forty of the parent-child attorneys indicated that they had experience with IEP facilitation.²⁹⁰

Broken into those subgroups, the school district attorneys were more positive about the use of IEP facilitation as a means to resolve disputes. When asked whether IEP facilitation was a “valuable vehicle to resolve disagreements quickly,” and provided with a Likert-type scale,²⁹¹ twelve school district attorneys (11%) strongly agreed with that proposition, and fifty-two (49%) agreed with the proposition.²⁹² Twelve school district attorneys (11%) disagreed with the proposition, and four (4%) strongly disagreed with the proposition.

Of the parent-child attorneys who responded to the same question, just five (4%) strongly agreed with the proposition, while thirty-three individuals (29%) agreed with the proposition. Thirty-three parent-child attorneys (29%) disagreed with the proposition, and another ten (9%) strongly disagreed with the proposition.

Twenty-six school district attorneys (25%) and thirty-four of the parent-

²⁸⁸ Ninety-four respondents (57%) indicated that 100% of clients were school-related personnel or entities. Fifty-seven respondents (34%) indicated that 76-99% of clients were school-related personnel or entities, and another fifteen respondents (9%) indicates that between 51-75% of clients were school-related personnel or entities.

²⁸⁹ One hundred and sixteen respondents (48%) indicated that 100% of clients were parents/children. Ninety-six respondents (40%) indicated that 76-99% of clients were parents/children, and another thirty-one respondents (13%) indicates that between 51-75% of clients were parents/children.

²⁹⁰ The term “school district attorney” refers to survey respondents who represent school districts or school personnel. The term “parent-child attorney” refers to survey respondents parents and children.

²⁹¹ The survey gave five possible responses: strongly disagree, disagree, neither agree nor disagree, agree, or strongly agree.

²⁹² Because the survey respondents were allowed to skip questions in the survey, the number of respondents changes slightly from question to question.

child attorneys (30%) neither agreed nor disagreed with the proposition, taking essentially a neutral stance on the value of IEP facilitation.

The use of IEP facilitation as a means to avoid due process received mixed results. Of the school district attorneys, just seven respondents (7%) strongly agreed that IEP facilitation “often resolves disagreements, thereby avoiding the filing of a due process complaint.” Thirty-eight school district attorneys (37%) agreed with the proposition. Thirty school district attorneys (29%) neither agreed nor disagreed, twenty-six school district attorneys (25%) disagreed with the proposition, and three (3%) strongly disagreed with the proposition.

The parent-child attorneys were more negative about the use of IEP facilitation as a means to resolve disagreements and avoid the filing of a due process complaint. Just five parent-child attorneys (4%) strongly agreed with the proposition. Twenty-six parent-child attorneys (23%) agreed with the proposition; twenty-four (21%) neither agreed nor disagreed, forty-eight (43%) disagreed, and nine (8%) strongly disagreed with the proposition.

The narrative comments provided by the survey respondents were most revealing about their views. Overall, the respondents indicated that IEP facilitation – in concept – could be an effective means to resolve disputes, as noted by the following comments:

- “I think it is an excellent way to resolve disputes. Unfortunately, it is not always enough to resolve the parties['] differences, but when it is, it saves the District money and generally results in a better program for the students. Also, it fosters relationship building, rather than breaking relationships down.”
- “IEP facilitation is an excellent way to keep the IEP process on track in terms of coverage of topics, management of time and management of conflicting personalities.”
- “IEP facilitation provides a means for parents and school officials to retain some control over educational issues on a local basis, which is where the decisions should be made. It is much less costly than due process hearing litigation and less arbitrary than the agency complaint process.”
- “It is particularly useful for those cases where there have been multiple IEP team meetings and personalities have stood in the way in terms of meaningful discussion.”

However, attorneys on both sides of the table agreed that the success

of IEP facilitation was highly dependent on the facilitator's skill and training. One parent-child attorney noted: "The idea is a good one and has the potential to work but it is entirely dependent on the individual characteristics of the facilitator." A school district attorney similarly stated: "I strongly believe that IEP facilitation is valuable if the facilitator is trained using a practical, usable approach and knows IDEA requirements well."²⁹³

Yet there seemed to be agreement that training of IEP facilitators currently is a barrier to effective use of the procedure. One survey respondent stated: "I do not believe that IEP facilitation is being conducted by highly qualified individuals. The facilitators have not been effective in resolving contentious matters. Their function appeared to be nothing more than conducting the meeting." Another comment was: "I have never encountered any facilitator who has specific training and experience in facilitating IEP meetings. They are 'borrowed' from other disciplines in the hope that their presence will somehow add value to the process. Usually they are superfluous to the process." One individual succinctly stated: "Facilitators need far more training to make the experience valuable."²⁹⁴

Interestingly, there were a few comments from attorneys on both sides of the table indicating that the facilitators demonstrated bias towards one party or the other. A school district attorney stated: "I do not discourage my clients from agreeing to IEP facilitation. However, the majority of reports I receive after the fact is that the facilitator spent most of the meeting trying to convince the District to provide what the family was requested. My clients often feel that the process is one-sided." A parent-child attorney stated: "Unfortunately, the facilitators I have worked with are often biased, favoring the schools and school districts. Parents sense that bias and then doubt the opinions of the facilitator."

In addition, both school district attorneys and parent-child attorneys recognized that IEP facilitation could not resolve all disputes, in particular those disputes where the parties have clearly communicated their positions and simply disagree as to the appropriate course of action for the child. Representative comments included:

- I only find IEP facilitation helpful when Districts and Parents are having trouble communicating, but not when there is a

²⁹³ Another similar comment was: "I think that the facilitation process is theoretically desirable, but a huge amount depends on the neutrality, knowledge and skill of the facilitator, as well as the sophistication of the parents."

²⁹⁴ A more barbed comment from a school district attorney was: "The facilitators I have worked with are spectacularly ill-informed about the law and about special education generally. They frequently suggest "compromises" that will address parental concerns but that do not appropriately serve the child or that totally ignore IDEA requirements like RTI, LRE and the like."

substantive issue regarding the appropriateness of placement or services.

- I believe it is a valuable means to solve disputes arising out of miscommunication. I have not found it is a helpful means to resolve disputes arising out of disagreement with assessment results[,] current levels of performance and best practice with service delivery[,] times[,] amounts and different types of providers.
- It can be beneficial, but when parents are lawyered up following unilateral placement and the only issues remaining are a monetary demand, there is no need for attention to an IEP; it's all about money.
- Facilitation is a tool to assist parties to find common ground and reach agreement. When one party approaches the IEP meeting with a fixed goal / outcome and is unable / unwilling to consider alternatives, facilitation may help to highlight the differences but not facilitate a resolution.

The survey also asked if IEP facilitation should be mandated under IDEA as a prerequisite that must be satisfied before a due process complaint can be filed. An overwhelming majority of the parent-child attorneys (88%) answered “No.”²⁹⁵ A majority of the school district attorneys (57%) also answered “No.”²⁹⁶

When asked to explain their answers, those survey respondents who favored mandatory IEP facilitation generally focused on the cost of due process. For example, one survey respondent stated: “[D]ue process is very expensive and the parties should be forced through several different procedures prior to going to ‘court.’” Another point in favor of mandatory IEP facilitation was that the mandatory meeting would make clear to all parties that a dispute is on the horizon. In particular, one school district attorney commented: “Too many times, due process hearings are filed without any attempts to engage the school district in meaningful communication about the pending issues. This results in fractured feelings between the school personnel and the family.”

Those respondents not in favor of mandating IEP facilitation focused on two main issues. First, many respondents commented on the low probability of success in mandating a meeting in which the focus is

²⁹⁵ Four percent of parent-child attorneys had no opinion, and 7% answered “Yes.”

²⁹⁶ Six percent of school district attorneys had no opinion, and 38% answered “Yes.”

collaboration: “It should never be required. If the parties do no[t] wish to do it on their own, it will not be successful.” Another similar comment was: “The fact that this is a voluntary process aid[s] the parties in reaching resolution because they already have to be predisposed to it. Forcing the facilitation where the parties are not willing to resolve their differences will likely prove futile and frustrating and delay the process of getting to hearing and reaching resolution.”²⁹⁷

The second main issue was the burden that would result by adding another layer to the process. One school district attorney stated: “There are already resolution meetings or mediation requirements. No need to add a redundant layer of ADR.” A parent-child attorney similarly commented: “It would require an additional procedural step that might delay the parents’ right to a speedy hearing.”²⁹⁸ Yet another survey respondent stated: “Resolution sessions are already fruitless in 98% of cases. Adding another layer will not help at all.”²⁹⁹

B. Voluntary Binding Arbitration.

The survey next asked whether the respondent would support a procedure for voluntary, binding arbitration of special education disputes.³⁰⁰ Again, the response was largely negative. One hundred and thirty-nine parent-child attorneys (67%) answered “No.” Seventy-seven school district attorneys (57%) also answered “No.” Forty-seven parent-child attorneys (23%) attorneys answered “Yes,” while forty-six school district attorneys (33%) answered “Yes.” The remainder of both groups had no opinion.³⁰¹

The survey allowed the respondents to choose among a series of reasons why voluntary, binding arbitration might, or might not be, a

²⁹⁷ A parent-child attorney stated: “There are too many variables that can result in a poor relationship between parents and school district personnel -- on both sides. I have seen situations where forcing a facilitated IEP meeting would only serve to increase the trauma for the parents and further polarize the parties.”

²⁹⁸ Another similar comment was: “At times litigation is necessary and mandating facilitation could be used as a delay tactic by school.”

²⁹⁹ A school district attorney noted: “A resolution session is already mandatory. Unless there is to be absolutely stellar training for facilitators, it should not be required.”

³⁰⁰ The question read: “Should IDEA include voluntary, binding arbitration as a dispute resolution mechanism? Assume that the arbitration panel would consist of a (non-lawyer) expert in the child’s suspected disability, a special educator with experience administering IDEA’s provisions, and a lawyer familiar with special education law, including dispute resolution. Also assume that the arbitration decision would be binding with no right of appeal. Both parties would have to agree to arbitration. The costs would be borne by the state.”

³⁰¹ Twenty parent-child attorneys (10%) had no opinion, while eighteen school district attorneys (13%) had no opinion.

valuable ADR mechanism. One hundred and forty-five parent-child attorneys (73%) cited the lack of an appeal right as a reason not to support voluntary, binding arbitration; the lack of an appeal right was cited by sixty-two school district attorneys (48%) as a potential reason not to support voluntary, binding arbitration. Sixty-eight school district attorneys (53%) indicated that, so long as arbitration was an option that the parties could choose voluntarily, it could be included in IDEA. Seventy parent-child attorneys (35%) also agreed with that proposition.

C. The Resolution Session

The survey also asked about the respondents' experiences with the resolution session. When asked whether the resolution session was a valuable vehicle to resolve special education disputes quickly, attorneys on both sides of the table essentially said "No." Just eight school district attorneys (6%) strongly agreed with the proposition; another forty-five school district attorneys (35%) agreed with the proposition. Over one-third of school district attorneys either disagreed or strongly disagreed with the proposition, while nearly one-quarter of the school district attorneys essentially took no position.³⁰²

The parent-child attorneys were even more negative about the use of the resolution session as a means to resolve disputes. Just five parent-child attorneys (3%) strongly agreed that the resolution session was a valuable vehicle to resolve disputes quickly. Another twenty-eight individuals (15%) agreed with the proposition. However, over sixty percent of the parent-child attorneys disagreed or strongly disagreed with the proposition, while the remainder had no opinion.³⁰³

When asked whether, based on experience, the respondents had "substantial success" in resolving special education disputes at the resolution session, the survey respondents generally answered in the negative. One-half of the school district attorneys indicated that, in their experience, the resolution session had not resulted in substantial success.³⁰⁴

³⁰² Twenty-eight school district attorneys (22%) neither agreed nor disagreed with the proposition. Thirty-two school district attorneys (25%) disagreed with the proposition, and sixteen others (12%) strongly disagreed with the proposition.

³⁰³ Forty parent-child attorneys (21%) neither agreed nor disagreed with the proposition. Fifty-eight parent-child attorneys (30%) disagreed with the proposition and another sixty individuals (31%) strongly disagreed with the proposition.

³⁰⁴ The question was a Likert-type question that asked the respondents to agree with the proposition. Just four school district attorneys (3%) strongly agreed with the proposition. Twenty-seven individuals (21%) agreed with the proposition, and another thirty-three individuals (26%) neither agreed nor disagreed with the proposition. Forty-four school district attorneys (35%) disagreed with the proposition, and an additional

Two-thirds of the parent-child attorneys indicated that the resolution session had not been substantially successful in resolving disputes.³⁰⁵

The results were very similar in response to a question whether the parties “most often” do not resolve a special education dispute at the resolution session. Again, over one-half of the school district attorneys indicated that, in their experience, the parties did not often resolve a special education dispute during the resolution session.³⁰⁶ Nearly three-quarters of the parent-child attorneys indicated that, in their experiences, the resolution session often did not resolve a special education dispute.³⁰⁷

Again, the narrative comments of the survey respondents were telling. One school district attorney stated: “Many school districts do not agree to it because they see it as an unproductive step which only incurs extra costs for them.” Another school district attorney stated: “It’s a waste of time. We almost always waive the resolution session and proceed directly to mediation. The presence of a mediator usually goes a long way toward helping the parties reach an agreement.” Similarly, a parent-child attorney stated: “Resolution sessions are ineffective because most often it consists of the same individuals arguing over the same issues they couldn’t resolve at an IEP meeting. There is no one new involved in the process. It just unnecessarily delays resolution [of] the matter.”

Parent-child attorneys expressed concerns that school districts use the resolution session to gain “free discovery” about the other side’s case in advance of a due process hearing. One parent-child attorney stated: “The resolution session/period simply causes delays. School District[s] do not use it to resolve matters, but instead use it as a means of intimidating the parent, delaying the proceedings, and/or a form of discovery in preparation for the hearing.” This use of the resolution session as a litigation strategy by school district was reflected in several comments of parent-child attorneys.

nineteen individuals (15%) strongly disagreed with the proposition.

³⁰⁵ Four parent-child attorneys (2%) strongly agreed with the proposition. Twenty-five individuals (13%) agreed with the proposition, and another thirty-five individuals (18%) neither agreed nor disagreed with the proposition. Forty-six parent-child attorneys (24%) disagreed with the proposition, and an additional eighty parent-child attorneys (42%) strongly disagreed with the proposition.

³⁰⁶ Eighteen school district attorneys (14%) strongly agreed with the proposition. Forty-nine individuals (38%) agreed with the proposition, and another twenty-eight individuals (22%) neither agreed nor disagreed with the proposition. Twenty-nine school district attorneys (23%) disagreed with the proposition, and an additional four school district attorneys (3%) strongly disagreed with the proposition.

³⁰⁷ Seventy-six parent-child attorneys (40%) strongly agreed with the proposition. Twenty-seven individuals (33%) agreed with the proposition, and another twenty-eight individuals (15%) neither agreed nor disagreed with the proposition. Twenty parent-child attorneys (11%) disagreed with the proposition, and just four individuals (2%) strongly disagreed with the proposition.

For example, one individual stated: “In my view, the resolution session never focuses on resolution of the parents' claims, but instead focuses on the district's attempt to take discovery and to strengthen its litigation position.”³⁰⁸

And at least one school district attorney approached this issue with a slightly different focus, stating: “From a school attorney's perspective, voluntary mediation tends to be far more effective if used in that both parties seem to take comfort in and benefit from the facilitation of a neutral third-party. If the parties couldn't work out their issues at an IEP meeting or otherwise, sitting together again at a resolution session is usually not helpful to resolve the case. It can, however, be useful in creating a record of what a district tried to do to resolve a case since the documentation is admissible at a due process hearing (unlike mediation documentation).”

Several survey respondents also noted that the resolution session is poorly placed in the dispute resolution system to be effective. One survey respondent stated: “As to an actual resolution session conducted by the school district, I find them to be lar[ge]ly unhelpful because there is no neutral party to help rebuild the trust and open the lines of communication between the parties, they have low rates of success in my experience, and simply unnecessarily delay the due process case.” A school district attorney noted:

Although it has been effective, that is rare. Typically, it takes formal mediation for true resolution to occur. The resolution session is usually a rehashing of the issues included in the due process hearing request. I think it also occurs too early--if the parents filed for due process, then they are still really angry and ready to litigate, and the school is very defensive at having been sued. After a little time passes and litigation becomes more involved and time-consuming, the parties are usually ready to resolve it and be done the whole process.³⁰⁹

³⁰⁸ Another parent-child attorney similarly commented: “Resolution sessions are used by school districts to repeat their last offer, try to bully parents, and try to obtain early discovery of whatever information parent might have to use against them when they don't settle the case.”

³⁰⁹ Echoing similar thoughts, one parent-child attorney commented: “I think that the resolution session is generally a waste of time for parents, is confusing for them, because the school does little of significance to change their position, and the school uses it as free discovery and to maneuver the parent into a weaker position. As there is no outside actor, e.g., a mediator, I don't think there is anything about the resolution session that could not be resolved by the district in direct discussions with the parents at an IEP meeting.”

Finally, another concern was the complicating factor about payment of attorneys' fees for represented parents. One school district attorney stated: "Often, in the district I represent, the parent's attorneys refuse to allow them to attend resolution for fear they will settle without addressing attorney's fees." A parent-child attorney stated: "It's just another meeting with the same parties to the disagreement. Unlikely to resolve anything and you can't get attorney fees."

D. One-Tier v. Two-Tier Structure.

The survey then inquired about the one-tier and two-tier due process structures. Seventy-seven survey respondents indicated that they had experience litigating in a jurisdiction with a two-tier system.³¹⁰ Of those seventy-seven respondents, forty-six (60%) indicated that they would prefer a one-tier structure over a two-tier structure. Nine respondents (12%) had no opinion, and twenty-two (29%) indicated that they preferred the two-tier structure.³¹¹

Using Likert-type questions, the survey posited reasons why a two-tier administrative structure might or might not be advantageous. The survey asked whether a two-tier structure was preferable because the second level of review would issue a decision faster than if the case were directly appealed to state or federal court. Just one respondent (2%) strongly agreed with that proposition. An additional thirteen respondents (20%) agreed with the proposition; however, nearly two-thirds of the respondents either disagreed or strongly disagreed with the proposition.³¹²

The survey also asked the respondents whether the second level of review decreased the likelihood that a party would file suit in federal or state court. The purpose of the question was to determine the practitioners' opinions whether a two-tier structure reduced court filings. Not a single survey respondent strongly agreed with this proposition. Nineteen respondents (29%) agreed with the proposition. Twenty-six individuals (40%) disagreed with the proposition that the second level of review would decrease appeals to state or federal court, and eight individuals (12%)

³¹⁰ Those jurisdictions are: Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, Oklahoma and South Carolina. North Carolina has a "modified one-tier" system in which both administrative levels are conducted by the State. *See O.M. v. Orange Cnty. (N.C.) Bd. of Educ.*, 2013 WL 664900, at *11 (M.D.N.C., Feb. 23, 2013).

³¹¹ Because only seventy-seven individuals indicated that they had experience with a two-tier structure, I did not divide the total into subgroups by client representation.

³¹² Nine respondents (14%) had no opinion. Twenty-three respondents (35%) disagreed with the proposition, and nineteen respondents (29%) strongly disagreed with the proposition.

strongly disagreed with the proposition.³¹³ Thus, just over one-half of the survey respondents indicated that, in their opinion, the second level of review does not decrease further appeals to state or federal court.

The survey then asked the respondents whether the second level of review increased the overall costs of IDEA due process. Seventeen survey respondents (27%) strongly agreed with this proposition and an additional twenty-three respondents (37%) agreed with the proposition. Just eleven survey respondents (17%) disagreed with the proposition, and three (5%) strongly disagreed with the proposition.³¹⁴

The survey respondents again were given the opportunity to provide comments on the issue. Those who supported a two-tier structure indicated that one advantage of a two-tier structure was the opportunity to correct errors made at the hearing officer level quickly and inexpensively. For example, one survey respondent noted: “The impartial hearing officer does not always apply the law. The two-tier process allows for a review of the legal issues involved.” Another individual commented: “State-level review corrects the often hasty and overworked hearing officers, whose decisions run the gamut in terms of how bad they can be.” Yet another opinion was: “The second tier really is an appeal but is much less expensive. It gives clarity to the issues and has helped avoid costly appeals in court.”

Those survey respondents who would rather litigate in a one-tier structure essentially cited three interrelated reasons to prefer a one-tier structure: efficiency, expense, and time. Many survey respondents concisely stated: “speed and simplicity” or “less expense for clients” or “[f]aster resolutions.” Other comments included: “[T]wo tier systems require much more manpower, thus a one tier is more efficient for the SEA and the families.”³¹⁵

In addition, several comments reflected the survey respondents’ strong belief that, for those disputes in which a due process hearing is held, the case is not over until it had been heard in federal court. Several respondents made reference to federal court as the final decision maker, stating, for example: “If the result is unsatisfactory, we would prefer getting that appeal into the Courts.” Another comment was: “No reason for 2 tier! Get through administrative process and go straight to court where we want to be anyway!” Still a third comment was: “I worked in a state with a one-tier structure and felt like it was helpful. If the parents are intent on getting to

³¹³ Twelve individuals (18%) had no opinion.

³¹⁴ Nine individuals (14%) had no opinion.

³¹⁵ Comments included the following: (a) “A second tier is inefficient, and costly, and results in additional delays;” (b) “[t]he process is slow and burdensome;” and (c) “[l]ess costly. The second tier is often a “rubber stamp” of the first level and creates a barrier to parents getting into court in a timely manner.”

court for their attorney fees no matter what, it gets it done more quickly.” And a fourth comment: “The first truly neutral forum in special ed is federal court, and the sooner parties get there the quicker disputes will be resol[v]ed.”

Some survey respondents also stated a belief that the second level of review was “political” or that the second level of review was unnecessary because the second level was simply a “rubber stamp” of the hearing officer’s decision.³¹⁶

Three hundred and four survey respondents indicated that they had experience litigating in a one-tier structure. One hundred and eight-six respondents (61%) indicated that they preferred the one-tier structure. Eighty-eight respondents (29%) had no opinion, and just twenty-nine respondents (10%) indicated a preference for a two-tier structure.

As with those survey respondents with experience litigating in a two-tier structure, the reasons for a particular preference were essentially the same. Those who preferred a two-tier structure cited the ability to get a quicker review of the first-level decision. One such comment was: “The two-tier structure provided a faster review of the decision and, in my opinion, resulted in fewer federal court appeals. Now, it seems that every due process decision is re-litigated in federal court, which often takes years.” Similarly, those respondents who preferred a one-tier structure cited issues of cost and delay. One individual stated: “Efficiency, as it permits the court to directly review the findings and conclusions of the IHO.” Another comment was: “Two tier is too lengthy and expensive; would rather head to court directly.”

Of particular interest were the comments from survey respondents who had experience in a state that had moved from a two-tier to a one-tier system. Examples of such comments included:

- “I have litigated under BOTH systems as Arizona used to be a two tier process. The two tier process simply adds another layer

³¹⁶ For example, one respondent stated: “In Nevada the second tier has been a waste of time. A rubber stamp of the decision.” Another similar comment was: “The SLRO level in Ohio is not[h]ing more than a rubber stamping of the IHO level. Also, if Ohio were a one-tier system with costs borne by the state, filings would likely decrease and/or settlement would increase.”

The issue of bias or politics was a recurring theme from practitioners with experience in New York. One representative comment was: “It reduces the machinations of political manipulation. Here in NYC the Department often appeals (Albany SRO) and the IHO decision often is reversed, those parents that proceed to federal court often result in the IHO decision being re-instated at either the District / appellate Circuit level. The politics in NYS (Albany) are ‘intricate’ to say the least. A one tier system in NYS would remove a layer of manipulation (political) often to the detriment of the handicapped child.”

for district attorneys to bill or for parents to be burdened. I find that the hearing officer's decisions in Arizona are very thorough and only one has ever been appealed by the district. When we used a two tier system, the decisions were not as thorough and many more were appealed.”

- “We had a two-tier system in Illinois until 1997 and it was often utilized, thus prolonging the litigation and final outcome of a case.”
- “Disputes are resolved more quickly, and I believe that parents have a better chance of prevailing in a face to face hearing than on a cold record. (I practice in Pennsylvania, which used to have a 2-tier system.)”
- “Pennsylvania was previously a two-tier jurisdiction which provided inconsistent decisions among the appellate panels and costing parents more resources to litigate the issue.”
- “Virginia used to have a two tiered system and changed to a one tier. I prefer the one tier as we can get to court more quickly if we do not settle. When we had a 2-tier system, final resolution was delayed.”

In addition, there were multiple comments that indicated that, for these practitioners, disputes almost invariably include an appeal to federal court. One respondent stated: “It's often better to get the matter to court so that we can get a resolution.” Another similar comment was: “Being able to go right to federal court gets us swifter and fairer relief in our cases.”³¹⁷ Other comments reflected the opinion that federal court was the preferred venue because of the quality of decision making. One comment was: “Because better decisions are often rendered at the federal court level.” Yet another survey respondent stated: “The federal court can review the decision of the hearing officer who actually heard the case, assessed credibility, considered the factual and legal claims, and then issued the final decision and not another adjudicator who simply reviewed the transcripts and exhibits. A second tier system contributes to unnecessary delays. I do not think a second tier adjudicator is better qualified to determine whether a hearing

³¹⁷ Another similar comment was: “Because I believe justice is better served when the parties litigate through the administrative process and then resort to the courts instead of belaboring the process to the point where it is so expensive and time-consuming that each side is exhausted before an article 3 judge ever gets to see the case.”

officer was correct or not.” Another similar comment was: “We have a full opportunity to establish a record and present arguments at the administrative hearing. I see no reason to include an additional forum before appeals may be made to court. I do not support any dispute resolution session that delays decisions for children in special education matters.”

IV. RECOMMENDATIONS

This Part sets forth a series of recommendations with regard to the structure of IDEA due process. These recommendations do not address proposals for change within the existing structure, although I do support several of these intra-system changes.³¹⁸ The following recommendations, however, focus on the structure – the meeting, hearings or procedures that do, or should, take place in a special education dispute.

A. Offer IEP Facilitation, But Do Not Mandate Its Use

Based on a review of the literature and the survey results, IEP facilitation appears to be an effective ADR mechanism, particularly if the parties quickly recognize the need for a neutral third-party’s involvement early in the process.³¹⁹ As a form of ADR that occurs “upstream,”³²⁰ before either party has filed a due process complaint, IEP facilitation is particularly helpful in resolving disputes at an early stage. For this reason, any amendments to IDEA should require every state to develop a program of IEP facilitation. Since twenty-nine states currently have such a program in place, with several other states beginning to consider or develop programs,³²¹ it seems worthwhile to “nationalize” the practice. Indeed, it is worth noting that four of the most active jurisdictions for special education due process filings – California, Illinois, New Jersey, and New York – do

³¹⁸ In particular, I support Professor Weber’s proposal to ease the exhaustion requirement and the call for additional low-cost or pro bono legal services for low-income parents seeking special education services for their children. See Parts II.C.2. and II.C.5., *supra*.

³¹⁹ See Henderson, *supra* note 165, at 9-10.

³²⁰ Erin R. Archerd, et. al., *The Ohio State University Dispute Resolution in Special Education Symposium Panel*, 30 OHIO ST. J. ON DISP.. RESOL. 89, 94 (2014); CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Four Exemplary Dispute Resolution Systems in Special Education 2* (June 2010) (<http://www.directionservice.org/cadre/pdf/Combined%20State%20Profiles.pdf>) (noting that exemplary systems have “early upstream dispute resolution processes”).

³²¹ See Part II.C.1., *supra*.

not have a statewide program of IEP facilitation.³²²

If Congress does add a requirement that IEP facilitation be available in all states, Congress also should provide the states with minimum requirements for IEP facilitation programs. Guidance is necessary to avoid the “considerable variability”³²³ among the states that exists both with regard to the mechanics of IEP facilitation and “those who serve as facilitators.”³²⁴

First, the federal government should develop guidelines for the training of IEP facilitators. While a facilitator should neither judge the parties’ various proposals nor draft an IEP, to effectively facilitate an IEP meeting, the facilitator must understand the underlying legal and educational issues. Therefore, facilitators need to understand special education laws including, at a minimum, IDEA’s LRE requirement,³²⁵ behavioral interventions and strategies,³²⁶ the use of RTI,³²⁷ IDEA’s discipline provisions,³²⁸ availability of ESY,³²⁹ availability of related services and transition services,³³⁰ and compensatory education,³³¹ among others. Facilitators also should be familiar with best practices for writing IEPs. Finally, facilitators also need to understand various teaching methodologies for educating children with disabilities and the range of education placements for children with disabilities.

It seems that a good understanding of special education law and educational methodologies is missing from some current IEP facilitation training materials. Training materials largely focus on general conflict resolution skills such as setting ground rules for the parties, effective communication techniques, dealing with emotional parties and the like.³³²

³²² *Id.*

³²³ See document entitled “IEP Facilitation Background and Context” (available at <http://www.directionservice.org/cadre/pdf/IEPFacilitationBackgroundContextJobDescription.pdf>).

³²⁴ *Id.*

³²⁵ 20 U.S.C. § 1412(a)(5) (2012).

³²⁶ For an in-depth discussion of behavioral interventions, see Elizabeth A. Shaver, *Should the States Ban the Use of Non-Positive Interventions in Special Education? Re-Examining Positive Behavior Supports Under the IDEA*, ___ STETSON L. REV. __ (2015).

³²⁷ 20 U.S.C. § 1414(b)(6)(B) (2012). For a critical analysis of the use of RTI, see Colker, *supra* note 191, at 227-29).

³²⁸ 20 U.S.C. § 1415(k)(E) (2012).

³²⁹ 34 C.F.R. § 300.106 (2007).

³³⁰ 20 U.S.C. § 1401(9) & (26) & (34) (2012).

³³¹ See note 152, *supra*.

³³² CADRE’s description of current IEP facilitation practices indicates that, while experience as a “facilitator or mediator is usually required” to be an IEP facilitator, a “background in special education or knowledge about special education programs or law is sometimes considered desirable.” CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *Job Description: IEP/IFSP Facilitator, available at*

Indeed, that omission might be deliberate, guard against overreach by the facilitator who otherwise might judge the content of the parties' proposals or, even worse, act as an advocate for one party or the other.³³³ Whatever the reasons, it seems that IEP facilitators currently receive only "a thumbnail familiarity with the IEP environment" as part of their training.³³⁴

Those concerns are valid. However, it seems intuitive – and the comments of survey respondents confirm – that an effective facilitator should have a good working knowledge of the substantive topics being discussed. This is particularly true if one goal of IEP facilitation is to level the playing field between school officials and unsophisticated parents.³³⁵ The facilitator, while not providing legal advice, should have enough working knowledge to discern whether the substantive discussion comports with IDEA's requirements.

In addition, facilitators need to understand the limits of the IEP facilitation process. A good facilitator should be able to identify a dispute that cannot be resolved via IEP facilitation and engage in a frank discussion with the parties about the limits of the process. An example of such a

<http://www.directionservice.org/cadre/pdf/IEPFacilitationBackgroundContextJobDescription.pdf>; see also Presentation by Julie Armbrust, Mediation Northwest, *IEP Facilitation: Tips of the Trade*, at 2 (Oct. 1, 2010), available at <http://www.ode.state.or.us/wma/teachlearn/conferencematerials/sped/2010/iepfacilitationtraining.pdf> (training materials prepared for school administrators in Oregon de-emphasizes knowledge of the law as a skill in a pyramidal visual where "conflict resolution" and "facilitation" skills appear at the wider parts of the pyramid and "knowledge of special education law" at the narrow top of the pyramid); Webinar presented by Trisha Bergin-Lytton, *IEP/IFSP Facilitation Techniques for Success* (July 10, 2012), available at http://www.directionservice.org/cadre/pdf/7.10.12_IEPIFSPFacilitationTechforSuccess-Webinar.pdf (PDF of a PowerPoint presentation of Trisha Bergin-Lytton regarding IEP facilitation techniques for success addresses mediation and facilitation techniques such as "consensus-as-you-go" and "counter proposal"); see also The OFFICE FOR DISPUTE RESOLUTION, IEP FACILITATION BROCHURE, available at <http://odr-pa.org/wp-content/uploads/pdf/IEP-Facilitation-Brochure-English.pdf>; Presentation by the Conflict Resolution Ctr. of Baltimore Cnty., *Independent IEP Facilitators: What Do They Do? What's in it for YOU?* (2012), available at <http://crcbaltimorecounty.org/newsite/wp-content/uploads/2012/05/CRC-IEP-Presentation-in-pdf2.pdf>.

³³³ Trisha Bergin-Lytton, *What an IEP/IFSP Facilitator Is and Is Not* (Sept. 2011), available at [http://www.directionservice.org/cadre/pdf/Facilitator%20Is%20Is%20Not-FIEP%20\(TBL\).pdf](http://www.directionservice.org/cadre/pdf/Facilitator%20Is%20Is%20Not-FIEP%20(TBL).pdf); Nicholas R.M. Martin, SUPPORTING THE IEP PROCESS: A FACILITATOR'S GUIDE 142 (2010) (noting that facilitators may be barred by state educational agencies from discussing the substantive law).

³³⁴ Martin, *supra* note 333, at 142. This recent text, which is designed to be a facilitator's guide, greatly downplays the notion that IEP facilitators should obtain "content knowledge" regarding IDEA provisions, stating that "being familiar enough with the terminology to keep up with the discussion is helpful, but not essential, because if the facilitator is lost, there is a good chance that others are lost as well." *Id.*

³³⁵ Mueller, *supra* note 64, at 66.

dispute might involve an issue regarding a child's placement, such as when the parents are seeking a private placement that could be expensive for the district. In that circumstance, or any others where the parties are entrenched in their positions, the facilitator should recognize that the dispute likely cannot be resolved in a facilitated IEP meeting.

A good program of IEP facilitation also should involve oversight. States should develop materials to gauge the effectiveness of facilitators and the parties' satisfaction with the process, including their opinion of the particular facilitator. With benefit of the parties' feedback, the facilitator can further refine his or her facilitation skills or legal background. Another benefit of oversight is that the states could determine that a particular individual simply is not an effective IEP facilitator and can remove that person from the list of available facilitators.

Some states currently do provide an opportunity for participants in a facilitated IEP meeting to provide feedback about the experience.³³⁶ In particular, CADRE has collaborated with staff from six educational agencies, to create an "IEP Facilitation Intensive TA Workgroup," whose mission is to "identify[] and develop[] resources, model policies and procedures relating to IEP facilitation."³³⁷ This workgroup has made available documents to evaluate the success of a facilitated IEP meeting from the perspectives of the parties and the facilitator.³³⁸ If IDEA is amended to include a program of IEP facilitation, Congress should require the states to use such evaluative tools to assess the IEP facilitation program on an ongoing basis.

Finally, IEP facilitation should be a *voluntary* ADR that the parties may choose to use; under no circumstances should the parties be required to engage in IEP facilitation. Specifically, Congress should not adopt the AASA proposal that IEP facilitation be a mandatory prerequisite to the filing of a special education due process complaint.³³⁹

There are several reasons to reject mandatory IEP facilitation as a layer in the due process structure. First, IEP facilitation simply is not an

³³⁶ See CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *IEP Facilitation Training Video Resources* (Mar. 2013), available at <http://www.directionservice.org/cadre/fieptrainingvideos.cfm>; Presentation by Julie Armbrust, *supra* note 332; ALLIANCE/CADRE, *Facilitated IEP Meetings: An Emerging Practice* (Nov. 2004), available at <http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf>.

³³⁷ CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *IEP Facilitation Intensive Workgroup Page* (last visited Feb. 15, 2015), <http://www.directionservice.org/cadre/FIEPWorkgroup.cfm>.

³³⁸ *Id.*

³³⁹ See Part II.C.4, *supra*.

appropriate vehicle to resolve every dispute. Some special education disputes do not involve an issue about the child's IEP. For example, if a school district determined that a child was not eligible for special education services, the district would not proceed to write an IEP. In that circumstance, a facilitated IEP meeting is nonsensical. Other disputes, while technically involving the contents of the child's IEP, also are not capable of being resolved in a facilitated IEP meeting. When parents have unilaterally placed their child in private school, the parents cannot obtain tuition reimbursement in a facilitated IEP meeting. If IEP facilitation cannot apply to all special education disputes, then it should not be a prerequisite to the filing of every special education dispute.

In addition, mandating IEP facilitation runs counter to its core principles. One core principle is the concept of "self-determination, which is a "voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome."³⁴⁰ Other core principles are that open communication and a collaborative environment are keys to success.³⁴¹ If IEP facilitation were mandatory, the parties would not perceive the process as one in which they have jointly agreed to make their best effort to resolve a dispute. They would not feel in control of the process. Rather, mandatory IEP facilitation will be viewed as just another pre-hearing obstacle. Indeed, given the goals of IEP facilitation, "mandating attendance may be the worst method of encouraging cooperation between the school and parents."³⁴²

This point is particularly important when one considers the long-term relationship between parents and their local school district. *Voluntary* IEP facilitation can foster a collaborative relationship, improve communication between the parties, and establish and keep trust that is necessary to serve the child. *Mandatory* IEP facilitation will cause all participants, regardless of their point of view, to perceive the process as something imposed upon them by an external force – the law – not as a vehicle they choose to repair or maintain an important relationship.

In that regard, the views of survey respondents are quite telling. Regardless of client base, a proposal for mandatory IEP facilitation failed to

³⁴⁰ See Model Expectations of IEP Facilitator Conduct, available at <http://www.directionservice.org/cadre/exemplar/artifacts/ModelExpectationsIEPFacilitatorConduct.pdf>; see also Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Ordered Mediation*, 15 Geo. Mason L. Rev. 863, 871 n.41 (2008) (quoting the Model Standards of Conduct for Mediators).

³⁴¹ Mueller, *supra* note 11, at 63.

³⁴² Andrea Shernberg, *Mediation as an Alternative Dispute Resolution Mechanism for the Individuals with Disabilities Education Act*, 12 OHIO ST. J. ON DISP. RESOL. 739, 746 (1997) (discussing proposals for mandatory mediation).

gain widespread support.³⁴³ The survey respondents recognize that IEP facilitation works because it is a voluntary process in which the parties are predisposed to reach resolution. The voluntary nature of the process is critical, and it should not be changed.

B. Eliminate the Resolution Session in Favor of IEP Facilitation

If IDEA is amended to require the states to offer IEP facilitation, Congress should eliminate the requirement of a resolution session. IEP facilitation, if done correctly, is a more effective tool to have the parties meet and discuss their differences productively. If the states offer IEP facilitation conducted by well-trained facilitators, then the resolution session, which essentially is an IEP meeting held after a due process complaint is filed, should not be necessary.

Some might assert that the resolution session should remain in the due process structure on the theory that it is always beneficial for the parties to meet and discuss their differences. I disagree. Each layer in the system causes additional cost and delay. The resolution session in particular causes delay since it adds an additional thirty days to the time allotted from the filing of a due process complaint until a hearing officer is required to render a decision.³⁴⁴

In addition, the resolution session has not been a “widely used or particularly effective” vehicle for resolving disputes.³⁴⁵ In addition, a review of data collected by OSEP for the 2011-2012 school year indicates that the resolution session has not been effective. In that time period, 17,118 due process complaints were filed in the United States and other applicable jurisdictions.³⁴⁶ Resolution sessions were held in 54% of the matters; thus in nearly one-half of the disputes, the parties jointly agreed to waive the resolution session.³⁴⁷ Of the total due process complaints filed,

³⁴³ See Part III.A, *supra*.

³⁴⁴ See note 2, *supra*. I recognize that, in practice, many due process matters are not resolved within the 75-day window allotted for the resolution session and the hearing. See Colker, *supra* note 69, at 396-97 (noting long delays in resolution of due process hearings in Ohio). The fact that the deadlines may not be adhered to strictly in practice, however, is no reason to keep an ineffective procedure like the resolution session in the system when it has a defined time delay.

³⁴⁵ See e.g., Gregory, *supra* note 253, at 419, n.61 (“In our anecdotal experience, the resolution session is not a widely used or particularly effective dispute resolution mechanism in Massachusetts”).

³⁴⁶ Data in includes territories, the Bureau of Indian Education, “outlying areas” and “freely associating states.”

³⁴⁷ See INVENTORY.DATA.GOV, 2011-2012 IDEA Part B Dispute Resolution, <https://inventory.data.gov/dataset/7c6916d1-c375-4c4c-9de0-f2b07aac4fc2/resource/5c23f855-4f83-4173-9a08-6928920dd1a6> (last updated July 3,

just 11.6% of the disputes were settled during the resolution session.³⁴⁸

In the most active jurisdictions, the resolution session is only marginally successful in resolving a fair number of disputes.³⁴⁹ In the nine jurisdictions with the most due process complaints filed (California, District of Columbia, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Puerto Rico, and Texas), the highest settlement rate as a result of the resolution session was Puerto Rico, a jurisdiction that only recently has seen increased activity in the field of special education disputes.³⁵⁰ In Puerto Rico, the resolution sessions resulted in settlements for just under one-quarter (25%) of all due process complaints filed.³⁵¹ In the District of Columbia, the settlement rate was 20%.³⁵² Three jurisdictions, Pennsylvania, Texas and Illinois, had settlement rates of 15.6%, 12.5% and 10.8% respectively.³⁵³ The remaining four jurisdictions, New York, Massachusetts, New Jersey and California, had settlement rates of 7.8%, 3.8%, 2.1% and 1.8% respectively.³⁵⁴ Thus, one-third of the most active jurisdictions had settlement rates of less than 5%. Over one-half of the most active jurisdictions had settlement rates of approximately 10% or less.

The data also indicates that practice varies widely by jurisdiction. In New York, for example, the percentage of due process matters in which a resolution session was held was quite high. Of the 6,116 due process complaints filed in New York, a resolution session was held in 5,469

[2014\).](#)

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ See Perry A. Zirkel, “Trends in Impartial Hearings under the IDEA: A Follow-up Analysis,” 303 WEST’S ED. LAW. REP. 1 (2014).

³⁵¹ In Puerto Rico, there were 1781 due process complaints filed; of those matters, a resolution session was held in 785 matters, or 44.1% of the total. The resolution session settled 439 matters, or 55.7% of the matters in which a resolution session was held, or 24.6% of the total filings. See INVENTORY.DATA.GOV, *supra* note 347.

³⁵² In the District of Columbia, there were 1009 due process complaints filed; of those matters, a resolution session was held in 773 matters, or 76.6% of the total. The resolution session settled 208 matters, or 27.0% of the matters in which a resolution session was held and 20.6% of the total filings. *Id.*

³⁵³ In Pennsylvania, there were 838 due process complaints filed. Resolution sessions were held 374 matters, or 44.6% of the total. The resolution session settled 131 matters, or 35.0% of the matters in which a resolution session was held and 15.6% of the total filings. In Texas, there were 359 due process complaints filed. Resolution sessions were held in 142 matters, or 39.6% of the total. The resolution session settled 45 matters, or 31.7% of the matters in which a resolution session was held and 12.5% of the total filings. In Illinois, 333 due process complaints were filed. Resolution sessions were held in 94 matters, 28% of the total. The resolution session settled 36 disputes, or 10.8% of the due process complaints that were filed and 38% of the matters in which a resolution session was held. *Id.*

³⁵⁴ Data for these four states is set forth in text and footnotes 359 and 359, *infra*.

matters, or 89.4% of the total number of complaints. That percentage greatly exceeded the national average of 54%. Yet, in New York, the resolution session resulted in a settlement in just 7.8% of the due process filings, a percentage lower than the national average of 11.6%. Thus, the parties in New York largely attend the resolution session, but have little success settling the matter.³⁵⁵ It may be that New York is one of those jurisdictions where the resolution session is being used as a litigation strategy, either as a means to obtain free discovery or create a record for the due process hearing.

In New Jersey, the resolution session appears to be ineffective for a different reason. In New Jersey, there were 801 due process complaints filed in the same time period. Of that total, resolution sessions were held in just 20 due process matters, or 2.5% of the total number of complaints. In other words, the parties in New Jersey agreed to waive the resolution session for 97.5% of the due process filings. Of the 20 matters in which a resolution session was held, a settlement was reached in 17 matters, or 85% of the disputes in which a resolution session was held. Thus, in New Jersey, it appears that the parties largely agree to forego the resolution session – a sign that practitioners believe it is ineffective – and agree to meet only when it is highly likely that the dispute can be settled at the resolution session.³⁵⁶

While this data is just a “snapshot,” it bolsters the opinions articulated by survey respondents and others³⁵⁷ that the resolution session is ineffective. In New York, the resolution session apparently is ineffective to settle matters even when the session takes place. In New Jersey, the resolution session is ineffective as an ADR mechanism simply because the parties largely choose not to attend.

At the time that the resolution session was added to IDEA,

³⁵⁵ The data for California shows a similar trend. In California, 3114 due process complaints were filed in the 2011-2012 school year. Resolution sessions were held in 457 matters, approximately 14.6% of the total complaints filed. The resolution session resolved 56 disputes – a 1.8% of the total due process complaints filed and just 12.3% of the matters in which a resolution session was held. *See* INVENTORY.DATA.GOV, *supra* note 347.

³⁵⁶ Data from Massachusetts is somewhat similar. In Massachusetts, 582 due process complaints were filed, but resolution sessions were held in just 48 matters, 8.2% of the total filings for the period. The resolution session settled 22 disputes, 46% of the total cases in which a resolution session was held, but just 3.8% of the total filings.

See INVENTORY.DATA.GOV, *supra* note 347.

³⁵⁷ *See* Archerd, *supra* note 320, at 92 (noting that Professor Mark Weber, a panelist, indicates that mediation is more popular in Illinois than resolution meetings; Professor Robert Dinerstein, another panelist, notes that ADR efforts are largely unsuccessful in the District of Columbia); *Id.* at 140 (Erin Archerd states: “I was really interested in how negative a reaction it sounded like most people were having to resolution sessions, which are a relatively recent innovation under the IDEA2004 authorization. They added in this resolution session. It sounded pretty universally unpopular on this panel.”).

commentators and advocacy groups noted a number of concerns.³⁵⁸ One concern was that the resolution session was an unnecessarily duplicative meeting that would take place only after a dispute had ripened between the parties.³⁵⁹ Another concern was that the resolution session, with its thirty day timeline, would delay resolution of a dispute.³⁶⁰ A third concern was that the resolution session would be used as a “pressure tactic” by school districts to pressure parents to settle the matter quickly.³⁶¹

While the concerns about duplication and delay remain valid,³⁶² additional concerns have arisen over the years. There is the question whether the session is used to gain “free discovery” as noted by practitioners³⁶³ and others.³⁶⁴ A school district that is not interested in resolving a dispute nonetheless can compel the parents to meet with school officials and provide information about “the facts that form the basis of the [due process] complaint.”³⁶⁵ An additional concern is that any agreement reached in the resolution session can be voided in the days following the meeting.³⁶⁶ A third concern is that, because the resolution session takes place after a due process complaint is filed, the parties have the complicating issue of payment of attorneys’ fees if the parents have retained

³⁵⁸ Demetra Edwards, *New Amendments to Resolving Special Education Disputes: Any New IDEAs?* 5 PEPP. DISP. RESOL. L.J. 137 147-53 (2005) (detailing the concerns and objections of various organizations).

³⁵⁹ *Id.* at 150 (quoting an online petition circulated by the League of Special Education Voters, which stated the group’s position that, by the type the resolution session is held, parents “have had countless meetings with the school, making little or no progress. Families must not be further burdened with extra meetings.”).

³⁶⁰ *Id.* at 149-50 (quoting an analysis of the statutory amendments published by the Council for Exceptional Children (CEC), in which the CEC stated that the resolution session “could deny or delay a parent’s right to a hearing”).

³⁶¹ *Id.* at 148.

³⁶² In 2008, CADRE and Project Forum, conducted a survey of special education unit of state educational agencies. Henderson, *supra* note 165. The survey responses indicated a perception that the resolution session adversely affects the timing of dispute resolution, and that “[p]arties who are seeking a more speedy resolution are likely to waive the resolution meeting in favor of moving to mediation or a due process hearing immediately.” *Id.* at 13.

³⁶³ See Part III.C., *supra*.

³⁶⁴ Henderson, *supra* note 165, at 13; note 358, *supra*.

³⁶⁵ 20 U.S.C. § 1415(f)(B)(i)(IV) (2012). Some school districts apparently do believe that pre-hearing meetings or settlement conferences are an opportunity to “receive feedback on the merits of their position and then somehow convince the opponent to back down or even withdraw their hearing request once they have heard how strong the case is for the other side.” Gregory, *supra* note 253, at 441.

³⁶⁶ See Comments of Esther Canty-Barnes, *The Ohio State University Dispute Resolution in Special Education Symposium Panel*, 29 OHIO ST. J. ON DISP. RESOL. 89, 98 (2014) (noting that, in New Jersey, resolution session are “rarely held” perhaps because of the ability to void any agreements within three days after the meeting).

counsel.³⁶⁷

Finally, the resolution session takes place too late in the process to enable the parties to openly discuss their disagreements and resolve the matter. By the time the resolution session is held, one party or another – but most often parents³⁶⁸ – shifted their focus from negotiation to litigation.³⁶⁹ In addition, some parents have retained counsel, a complicating factor in terms of both the litigious nature of the meeting and the payment of attorneys' fees.

For these reasons, the resolution session should be scrapped in favor of a system of IEP facilitation. A facilitated IEP meeting essentially is a “resolution session” with certain advantages. First, a facilitated IEP meeting will occur before the dispute has ripened to the point where one party has filed a due process complaint. Ideally it will take place at an early stage of the parties' interactions with one another, before there have been too many fruitless and contentious meetings. Second, the presence of the facilitator, if that individual is well-trained, should ensure that the lines of communication remain open. With an orderly, facilitated IEP meeting, the parents may be more confident that the school district will conscientiously implement any agreed-upon IEP. Third, pre-due process filing of IEP facilitation will reduce the need to retain counsel and file due process, thereby eliminating the current issue of payment of attorneys' fees for work done by parents' counsel up to the resolution session.

Finally, eliminating the resolution session also will shorten the timeline for resolving a filed due process complaint by thirty days. This is an advantage because allows for a quicker resolution of those disputes that require an adjudicated decision. Not every special education dispute can be resolved by informal means, and the use of informal means should not be allowed to be used to delay a due process hearing when one is necessary to resolve the matter.

³⁶⁷ *Id.* at 103 (comments of Professor Dinerstein to the effect that attorneys representing parents and children in the District of Columbia believe that the District of Columbia Public School System uses the resolution session to “buy more time” in the process).

³⁶⁸ Gregory, *supra* note 253, at 440 (“School districts are most often on the receiving end of due process hearing requests filed by parents who are dissatisfied with special education services and/or placements....”).

³⁶⁹ As one practitioner noted: “[O]nce a case moves to mediation or due process, it is necessarily adversarial at that point and it is difficult to get the parents and the District “back on the same page” for the remainder of the student's time in the District.” Another practitioner stated: “Rarely have I had a client come to me that just did not understand what the District was offering and just could not get his/her views heard due to misunderstanding. By the time they get to me - a parent attorney - they have given up on the collaborative process.”

C. Eliminate the Two-Tier Administrative Structure

Eliminating the option for a two-tier system is another structural change that would both increase the efficiency of due process and decrease costs. At the time that the EAHCA was passed, the second level of appeal was criticized by some as unnecessary.³⁷⁰ The two-tiered process was justified on several grounds. First, it was argued that the two-tier system allowed the state educational agency to enforce the statutory provisions for which it was responsible.³⁷¹ In addition, members of Congress apparently believed that the “state administrative appeals process ... afford[ed] a timely, fair system for resolving conflicts.”³⁷² In the view of Congress, this administrative appeal process actually would reduce “the number of cases going to court,” thus relieving parents of the “heavy financial burden of going to court.”³⁷³

But perhaps the primary reason for including a two-tier system in the EAHCA was simply that several states, notably Pennsylvania, had created a two-tier structure even before passage of the EAHCA.³⁷⁴ As it had with the mechanics of due process notice and hearing, Congress copied a structure that already existed.

A two-tier system, however, clearly increases costs and delay for the parties. In two-tier jurisdictions, the second level of review could take sixty to seventy-five days to be completed.³⁷⁵ In addition to the time delay, the process is complex and onerous. Take the process in New York as an example. When a parent appeals a hearing officer’s decision to the second tier, the parent must prepare and serve a “Notice of Intention to Seek Review” upon the school district within twenty-five days of the hearing

³⁷⁰ Stafford, *supra* note 49, at 78.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ Of the seven two-tier states in addition to New York, the time for the second level of appeal ranges from sixty to seventy-five days. *See* N.C. GEN. STAT. §115C-109.9 (2006) (appeal to be filed within thirty days of the hearing officer decision; state review to be completed in thirty days); OHIO ADMIN. CODE 3301-51-05(K)(14)(b)(i) (2014) (appeal to be filed within forty-five days of the hearing officer decision; state review to be completed in thirty days); Nev. Adm. Code § 388.315 (appeal to be filed within thirty days, and state review to be completed thirty days later, although extensions of time may be granted); KAN. ADMIN. REGS. §91-40-51 (2008) () (http://www.ksde.org/Portals/0/SES/forms/KSDE_IDEA_Part_B_ProcSafeguardsKansas.pdf); 707 K.A.R. 1:340 (2007) (thirty days to file appeal, with additional thirty days for decision). S.C. CODE ANN. REGS. 43-243 (2015) () (<http://www.acs.k12.sc.us/cms/lib3/SC01001719/Centricity/Domain/31/Procedural%20Safeguards.pdf>).

officer decision.³⁷⁶ Not less than ten days later, but within thirty-five days of the hearing officer's decision, the parent must prepare and serve a "Petition for Review" on the school district.³⁷⁷ The Petition for Review also must be filed with the Office of State Review of the State Education Department, along with a copy of the notice described above and proof of service upon the opposing party.³⁷⁸ The opposing party then has ten days to file an answer to the petition.³⁷⁹ Both the petition and the answer may be up to twenty pages in length and must conform to certain pleading standards, including specific requirements for citation to the record.³⁸⁰ The state level review officer has thirty days to issue a decision, although extensions of time may be granted.³⁸¹ As part of its review, the State Review Officer might seek additional evidence or testimony or direct that the parties appear for oral argument.³⁸²

The comments of the survey respondents make clear that a great majority of special education disputes (in which a due process hearing is held) will not be fully resolved until after the case has been heard in federal court. If it is truly the practice that the majority of cases will in any event be filed in federal court, then the second level of review in a two-tier structure does not serve as a meaningful filter to reduce filings in federal court. Without that benefit, the second level of review serves only to increase cost and cause delay.

Perhaps it is the burden and delay that has caused the states to increasingly prefer a one-tier structure. In 1988, twenty-four states and the District of Columbia had two-tier systems.³⁸³ Since that time, the states overwhelmingly have moved from a two-tier system a one-tier system. Today, just eight states still retain a two-tier system. Pennsylvania, an early architect of the two-tier structure, moved to a one-tier system in July 2008.³⁸⁴

³⁷⁶ N.Y. COMP. CODES R. & REGS. tit. 8, § 279.2 (2008). The notice is provided to the school district in order that it can prepare a written transcript of the hearing and forward to the Office of State Review of the New York State Education Department the transcript, the hearing officer's decision, and all exhibits used as evidence in the hearing. *Id.*

³⁷⁷ *Id.*

³⁷⁸ N.Y. COMP. CODES R. & REGS. tit. 8, § 279.4(a).

³⁷⁹ 8 N.Y. COMP. CODES R. & REGS. tit. 8, § 279.5. The petition for review and answer may be up to twenty pages in length. N.Y. COMP. CODES R. & REGS. tit. 8, § 279.8. The New York regulations contain detailed requirements for the form of these documents, including the manner of citations to the record. *Id.*

³⁸⁰ *Id.*

³⁸¹ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(k) (2014).

³⁸² N.Y. COMP. CODES R. & REGS. tit. 8, § 279.10; NYSED, OFFICE OF STATE REVIEW, *Filing an Appeal*, <http://www.sro.nysed.gov/filing.html> (last updated July 12, 2011).

³⁸³ Zirkel, *supra* note 62, at 4.

³⁸⁴ *Id.* at 7.

Indeed, eliminating the second tier would ease the burden on state educational agencies in two-tier states which, under the current system, must (a) promulgate rules for procedure, (b) provide parents with information and forms about the second level, (c) receive and process appeals that have been filed, and (d) hire, train, and pay second level review officers. If the second tier were eliminated, those state educational agencies could shift resources away from managing the second tier to improving the quality of service provided in the first tier, an improvement in quality that appears to be needed in some current two-tier jurisdictions.³⁸⁵ Indeed, the quality of hearing decisions at the first level of review might improve greatly if the “backstop” of a second level of review was eliminated.

Eliminating the two-tier structure thus could have multiple benefits both to the parties in a special education dispute and the state educational agencies responsible for managing the due process system.

D. Do Not Create Additional Layers in the Structure

I also recommend that no additional ADR proceedings be “layered” into the due process structure. Additional layers increase cost and delay, reduce trust in the process, and divert the resources of state agencies. A streamlined, well-managed system will produce better results than a fractured, multi-option system.

In particular, the arbitration proposal is an unnecessary addition to due process. Both arbitration and due process are adjudication models in which an impartial decision maker determines the merits of the parties’ positions and, if necessary, a future course of conduct. Thus, arbitration is not a mechanism that would resolve a category of special education disputes that could not be resolved in a due process proceeding. The essential differences between the two forms are (a) the ability to appeal to state or federal court; and (b) the benefit (offset by the cost) of having the case

³⁸⁵ Colker, *supra* note 69, at 373 (noting lack of professionalism and poor quality in IHO decisions in Ohio). The survey yielded comments from practitioners with experience in New York about lack of timeliness and professionalism with the second level of review in New York. One such comment was: “[I]n the two tier system in NY, the NYS Education Department’s Office of State Review considers appeals of decisions issued by impartial hearing officers. They typically have no more experience or expertise than the impartial hearing officer, yet freely overturn decisions without the benefit of actually seeing the testimony when making credibility determinations, and they are deemed to have “superior expertise in the field of education” so the federal courts defer to the decisions of the state review office - decisions issued by individuals with less experience than most of the impartial hearing officers, and certainly less than a federal judge. Moreover, the decisions of the NYS Office of State Review are late - we have cases nearing two years over due [sic].”

heard before a three-person panel rather than a single hearing officer.³⁸⁶

There is little utility in requiring the states to design and maintain two separate adjudication tracks, particularly if Congress were to streamline due process by eliminating the second level of review. The volume of due process hearings generally has been low.³⁸⁷ In the 2011-2012 school year, thirty-five states held five or fewer due process hearings.³⁸⁸ If IDEA required the states to offer arbitration, those thirty-five states would have been required to design and maintain two adjudicatory structures to handle a very small number of disputes.

In addition, the arbitration proposal outlined by Professor Rosenfeld could adversely affect unrepresented parents. By proposing that no attorneys be present in the arbitration proceeding, Professor Rosenfeld's proposal could seriously tilt the balance of power in favor of school districts over unrepresented parents.³⁸⁹ School districts surely will rely on counsel to prepare for an arbitration even if counsel cannot be present at the proceeding itself. Over time, school officials also will develop expertise in conducting arbitrations. Thus, parents who mistakenly believe that the absence of attorneys somehow levels the playing field will in fact be facing a very prepared opponent. That scenario exacerbates, not redresses, the inequities of the current system in terms of the ability of unrepresented parents to effectively advocate for their child. Those inequities would be even further exacerbated if unrepresented parents consented to the presence of the school district's counsel at the proceeding.³⁹⁰

This arbitration proposal also could increase the inequities that exist between those parents who cannot afford attorneys and those parents who can. Parents who can afford attorneys will not choose arbitration because they can "purchase" two important items: (a) the benefit of their counsel's advice during an adjudicated proceeding, and (b) the right to appeal an adverse decision. Represented parents will opt for a traditional due process hearing. Only those parents who cannot afford attorneys will opt for arbitration, a proceeding that will be presented to them as one that is cheap and fast. Unrepresented parents thus will severely limit their appeal rights and appear without representation before a panel vested with "complete

³⁸⁶ I recognize that Professor Rosenfeld's proposal indicates the arbitration panel would take a more active role in examining witnesses and reviewing material than a due process hearing officer would do. Rosenfeld, *supra* note 11, at 560-61. However, at the end of the proceeding, the arbitration panel functions as a due process hearing officer in terms of granting relief that would be "final and binding." *Id.* at 554.

³⁸⁷ Weber, *supra* note 14, at 508-09.

³⁸⁸ INVENTORY.DATA.GOV, *supra* note 347.

³⁸⁹ The prohibition on the presence of attorneys is meant to "redress the inherent inequity of unrepresented parents." Rosenfeld, *supra* note 11, at 559.

³⁹⁰ *Id.* at 554.

discretion”³⁹¹ on important topics such as the use and scope of witness testimony or documents,³⁹² all the while facing a very prepared opponent.

Finally, the arbitration model almost surely will give rise to collateral proceedings, particularly on the issue whether unrepresented parents truly gave knowing and voluntary consent to opt for a proceeding from which they had no right of appeal. Professor Rosenfeld himself acknowledges that it will be a “difficult question”³⁹³ to determine whether consent to arbitration was truly informed and voluntary. That collateral issue itself could seriously undermine the ability of an arbitration model to bring about a quick resolution of a dispute.

The AASA proposal for a mandatory IEP consultant is another form of special education dispute resolution that should not be adopted. First, it must be noted that the AASA does not propose to add this consultancy model as an additional dispute resolution mechanism; rather, the AASA proposes a wholesale replacement of the due process system of which the consultancy model is one aspect.³⁹⁴ To the extent, however, that one would be inclined to pull that piece out of the AASA proposal and add it to IDEA as an additional ADR mechanism, I recommend against it.

The AASA says that its consultancy proposal is “similar to” a dispute resolution program available in Massachusetts called the “SpedEx” program.³⁹⁵ The differences between SpedEx and the AASA proposal, however, are huge. The SpedEx program is a voluntary program that the parties may agree to use or abandon at any time after an IEP has been rejected by the parents.³⁹⁶ Parents do not lose any right to proceed with due process at any point.³⁹⁷ In addition, the parties are not required to accept the consultant’s proposal, although the proposal must be implemented if the parties do accept it.³⁹⁸ Perhaps most importantly, the Massachusetts SpedEx program is a little-used “ongoing experimental project.”³⁹⁹ In the 2013-2014 school year, there was funding for just eight cases.⁴⁰⁰

Unlike the voluntary SpedEx program, the AASA proposal would mandate the use of an IEP consultant. Requiring that the parties implement a consultant-imposed IEP as a prerequisite to litigation suffers from several defects. First, not every dispute involves the IEP or issues that can be

³⁹¹ *Id.*

³⁹² *Id.* at 559-60.

³⁹³ *Id.* at 552.

³⁹⁴ Pudelski, *supra* note 9, at 23.

³⁹⁵ *Id.*

³⁹⁶ Pudelski, *supra* note 9, at 23; Gregory, *supra* note 253, at 425-26.

³⁹⁷ Pudelski, *supra* note 9, at 23.

³⁹⁸ Gregory, *supra* note 253, at 426.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

addressed by an IEP consultant. Second, given the limited funding available in Massachusetts for this mechanism, one wonders about the cost to state educational agencies in hiring and paying private psychologists, educators or behavior analysts the consultancy fees necessary to implement this proposal for every special education dispute that involves a child's IEP. For these reasons, no such mandatory program should be added to IDEA.

Finally, Congress should resist proposals to add dispute resolution mechanisms that "eliminate the need for attorneys"⁴⁰¹ or are "lawyer-free."⁴⁰² While it is popular to blame lawyers for a variety of evils, this call to eliminate them from special education dispute resolution is misguided. First, school districts almost invariably will have the ability to consult with their counsel. Parents with financial means also likely will seek legal counsel and, in most cases, will opt for the dispute resolution mechanism that allows them to rely on counsel. Thus, encouraging a "lawyer-free system"⁴⁰³ only harms the most unsophisticated and least-resourced parents who really need the help.

More importantly, however, good attorneys can help to resolve disputes quickly. In the survey, one parent-child attorney commented: "It has been my experience and the experience of other attorneys in the state, that the involvement of attorneys increases the probability that the case will be resolved." School district attorneys also attest to the value of having attorneys in the process, as noted by the comment of one survey respondent: "The resolution sessions in most cases I have handled, when they were successful at resolving the dispute, had the lawyers in attendance. In my experience, lawyers for parents will not allow their clients to reach agreement at a resolution meeting unless and until the lawyer has approved the agreement (and the agreement includes a provision for payment of the attorney's fees). It is more efficient if the case is going to get resolved to have the lawyers attend. That's not how the IDEA was intended to work, in my view, but it is the practical reality."

Special education law involves complex legal questions, and the competent legal representation is anyone involved in the process. To ensure both equity and efficiency, Congress should not choose a dispute resolution mechanism that would exclude good advisors from the process.

CONCLUSION

The essential goal of special education dispute resolution is to resolve the matter quickly so that the child receives the proper education as

⁴⁰¹ Rosenfeld, *supra* note 11, at 551.

⁴⁰² Pudelski, *supra* note 9, at 22.

⁴⁰³ *Id.*

soon as possible. To fulfill this goal, structure matters. A fractured system with multiple avenues and options can cause delay, increase cost, and reduce trust in the process. A streamlined, well-managed structure will produce sensible decisions at low cost and without delay, ensuring that, for the child with a disability, every day of school will count.