

# Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?

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## I. INTRODUCTION

The Individuals with Disabilities Education Act<sup>1</sup> (IDEA or the Act) was designed to ensure that an appropriate public education was provided for all children with disabilities.<sup>2</sup> First adopted in 1975, the Act was passed as a legislative response to congressional studies that found that less than half of the students with disabilities in the United States were receiving an appropriate education.<sup>3</sup> In fact, the study found that almost two million children with disabilities were receiving no educational services at all.<sup>4</sup> The Act now mandates that all children with disabilities are to be provided with a free, appropriate public education (FAPE).<sup>5</sup> Within the Act are procedural

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<sup>1</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1990).

<sup>2</sup> See Timothy M. Huskey, Note, *Teaching the Children "Appropriately:" Publicly Financed Private Education Under the Individuals with Disabilities Education Act*, 60 MO. L. REV. 167, 168-169 (1995). The IDEA was an extension of the civil rights movement. During the late 1960s, the civil rights movement and President Lyndon Johnson's War on Poverty brought light to the egregious special education services being given to children with disabilities. Concerned citizens and parents of these mistreated children brought a change in the existing policies of discrimination towards children with disabilities. See Philip T.K. Daniel & Karen Bond Coriell, *Traversing the Sisyphean Trails of the Education for All Handicapped Children's Act: An Overview*, 18 OHIO N.U. L. REV. 571, 572-573 (1992).

<sup>3</sup> See Huskey, *supra* note 2, at 168 n.3 (noting that the IDEA was originally passed as the Education for All Handicapped Children Act ("EAHCA")).

<sup>4</sup> See *id.* at 169; see also Nathanya G. Simon & David L. Rosenberg, *The Substantive and Procedural Aspects of Special Education Litigation*, 154-JUL N.J. LAW. 31, 31 (1993) (explaining that the IDEA protects children with myriad disabilities such as: children with mental retardation, visual or hearing impairments, speech or language impairments, orthopedic impairments, autism, serious emotional disturbances, pre-school handicapped children and children with other health impairments).

The scope of the services guaranteed by the IDEA are not fully known. Case law provides only conflicting hints as to the services encompassed within the Act, and these services may differ among jurisdictions. See, e.g., *Doe v. Anrig*, 651 F. Supp. 424 (D.Mass. 1987) (finding that psychotherapy is a service provided under the Act in order for the child to benefit from education). *But see* *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983) (holding that psychiatric services are medical services and thus not provided for under the EAHCA).

<sup>5</sup> See 20 U.S.C. § 1401(18) (1990). Section 1401 states:

safeguards to ensure that children with disabilities receive a FAPE and to allow parents an opportunity to challenge school actions that are allegedly not in conformity with the Act.<sup>6</sup>

Recently, Congress proposed an amendment to the current procedural requirements of the IDEA: the school and the parent, unless the parent opts out, must enter into mediation before bringing a claim in front of a hearing officer or court.<sup>7</sup> Both the House and Senate versions of the Bill call for this one-sided mandatory mediation as an added step in challenging a school district's actions. Although the titles of the Bills claim that the amendment will "improve" the IDEA, it is dubious that the proposed mediation is an amendment that will help more children receive a FAPE.<sup>8</sup> The congressionally proposed mediation will not foster better educational services for children with disabilities; on the contrary, the amendment will create a slower process for resolving grievances, more obstacles for parental challenges and inequitable mediated settlements.<sup>9</sup>

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The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the [s]tate educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the [s]tate involved, and (D) are provided in conformity with the individualized education program required under [§] 1414(a)(5) of this title.

*Id.*

<sup>6</sup> See 20 U.S.C. § 1415 (1990).

<sup>7</sup> See H.R. 1986, 104th Cong. § 205 (1995); S. 1075, 104th Cong. § 205 (1995).

<sup>8</sup> Both H.R. 1986 and S. 1075 state: "A BILL To reauthorize and *improve* the Individuals with Disabilities Education Act." H.R. 1986, § 205; S. 1075, § 205 (emphasis added).

<sup>9</sup> Opinions greatly differ as to what role society should play in providing education for children with disabilities. However, the practice of excluding children with disabilities from public education became an important target of the civil rights movement. See Daniel & Coriell, *supra* note 2, at 572 n.7 (noting that even the language of the EAHCA incorporates language directly from the decision rendered in *Brown v. Board of Education*, 347 U.S. 483 (1954)). "*Brown* established that black children had the right to equal educational opportunities and that segregated schooling denied them this right." *Id.* Children with disabilities, advocates argued, are also entitled to equal public school access, either by implementation of special programs that are at least equal, or by integration into regular classrooms. See *id.* See also David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 747-751 (1973).

The Act itself is controversial in that it demands seemingly unlimited local money for the education of disabled children, although appearing to ignore that many school districts struggle with paying for the majority of children's regular education expenses. Is a "beneficial" amendment one that improves special educational services to children with

Although mediating grievances in some instances can offer equitable conflict resolution in an efficient manner, while preserving a cooperative relationship between the disputants,<sup>10</sup> the proposed mediation in the IDEA setting will not produce such results. Assuredly, more efficient dispute resolution will foster improved educational services to children with disabilities; however, it does not follow that adding a first step of mediation is an equitable method of improving dispute resolution within the IDEA.

This Note will first evaluate whether the IDEA, in its current form, provides parents and schools with an equitable system of resolving grievances. Next, it will examine the proposed form of mediation in light of the specified goals: improving the educational services that children with disabilities receive.<sup>11</sup> Finally, this Note will expose the dangers of adopting the proposed amendment to the IDEA.

## II. THE CURRENT FORM OF THE IDEA

Currently, the IDEA requires states to provide the parents of disabled children with certain procedural safeguards in order to ensure that the child receives a free, appropriate public education.<sup>12</sup> These safeguards provide procedures for parents to challenge school districts that are not complying with the Act. These procedural safeguards include requiring the school to allow the parents to attend meetings to plan the child's Individual Educational Plan (IEP).<sup>13</sup> These meetings are called IEP meetings, and the

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disabilities regardless of its impact on the entire school population? This question becomes more important as school funds become more scarce and federal mandates continue to be unfunded. Without attempting to resolve the question above, this Note takes the position that a beneficial amendment to the IDEA will accomplish the congressionally stated goal: improving the educational services being received by children with disabilities.

<sup>10</sup> See Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 56, 93 n.11 (documenting numerous studies that illustrate mediation's ability to reduce cost and improve cooperation between disputants). The IDEA currently creates an antagonistic method of resolving disputes—parents and school boards are usually on opposing sides when problems arise with the child's educational plan. The proposed amendment attempts to create a cooperative model that could ultimately change how schools and parents frame their role under the Act. This Note takes the position that a beneficial amendment will improve the cooperation and ongoing relationship between parents and schools without exploiting this relationship.

<sup>11</sup> See S. 1075, 104th Cong. § 3(a)(5) (1995) ("Based on 20 years of research and experience, we have learned that the education of children with disabilities can be made more effective . . .").

<sup>12</sup> See 20 U.S.C. §§ 1400-1485 (1990).

<sup>13</sup> See *id.* at § 1415.

Act requires that parents participate in designing and approving the child's IEP.<sup>14</sup> Parents must also be notified according to certain guidelines when the child is suspended, expelled or is subject to a change in the IEP.<sup>15</sup>

Parents are further afforded certain procedures to ensure that the school district is providing their child a FAPE. The due process procedures set out in the IDEA grant parents an unprecedented right to challenge any aspect of a child's current or proposed special education program.<sup>16</sup> The IDEA also provides for certain rights at a due process hearing. Both the school district and the parents have a right to legal counsel or other advocates.<sup>17</sup> Among the other rights afforded to the parties is the right to appeal adverse decisions to the state department of education, the state courts or federal courts.<sup>18</sup>

Most significantly, the IDEA provides for the shifting of attorney fees if the parents are the prevailing party at either the due process hearing or at trial level.<sup>19</sup> The language of the statute has been liberally construed to allow an award of attorney fees, together with other legal costs, in cases in which the parents can demonstrate that they were the "prevailing party."<sup>20</sup>

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<sup>14</sup> See *id.* For an in-depth discussion of the IEP process, see Bruce G. Sheffler, Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81 (1981). As many commentators have noted, the IEP process, although purporting to include the parent, may not actually provide a participatory process:

The average parent, especially in lower socio-economic classes, does not have the ability to participate. In addition to the psychological burdens of coping with a handicapped child, most parents lack the information and the resources to deal with the school bureaucracy. Both participation in the meetings and consent to the placement are usually formalities only . . . . Parents are outgunned: they are strangers confronting a group of people who have worked together and struck a bargain . . . .

Joel F. Handler, *Dependent People, The State, and the Modern/Postmodern Search for the Dialog Community*, 35 UCLA L. REV. 999, 1010 (1988).

<sup>15</sup> See 20 U.S.C. § 1415 (1990).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See 20 U.S.C. §§ 1412, 1415 (1990); 34 C.F.R. §§ 300.500-300.514 (1984). For an overview of procedural safeguards of the IDEA, see Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 EDUC. L. REP. 491, 492-493 (1988).

<sup>19</sup> See 20 U.S.C. § 1415(e)(4)(B) (1990).

<sup>20</sup> See *id.* (noting extreme liberality of courts in granting attorney fees—not even a "substantial" amount of the relief requested must be obtained in order to be granted attorney fees).

The prevailing party language usually means that a parent need only demonstrate that, either in the administrative hearing or in court, some aspect of the requested relief was granted.<sup>21</sup> Thus, the IDEA inherently creates an antagonistic framework for dispute resolution because parents are rewarded for prevailing over the school district. If the parents are not the prevailing party, then they lose the opportunity to ask for attorney fee reimbursement.

The attorney fee provision also has the effect of allowing parents who cannot afford to retain an attorney to gain access to attorneys. This provision allows attorneys (while relying on the fee-shifting provision and the strength of the client's case) to take cases of parents who cannot pay attorney fees on their own.<sup>22</sup> The Act's current model of dispute resolution is productive in that it allows parents without resources to gain legal advocacy, but it may be counterproductive because the model encourages antagonism between schools and parents.

A less cooperative relationship between parent and school can cause subsequent problems with development of IEPs and conflict resolution with respect to changing educational placements. Hearing participants have reported that they feel that the due process hearing is an inappropriate forum for resolving educational disputes because of the antagonism it creates.<sup>23</sup> Thus, if mediation provides a more cooperative relationship, while providing an equitable method of dispute resolution, then it will be a beneficial addition to the IDEA.

In addition to not fostering a cooperative relationship between disputants, the current form of the IDEA may not produce just dispute resolution. Research on the IDEA, including the Pennsylvania Due Process Studies, suggests that the current model of dispute resolution (due process model) may not provide a sense of subjective justice for school administrators or parents.<sup>24</sup> According to Congress, the due process model

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<sup>21</sup> See *id.*

<sup>22</sup> See DIVISION OF HUMAN RESOURCES, GENERAL ACCOUNTING OFFICE, SPECIAL EDUCATION: THE ATTORNEY FEES PROVISION OF PUBLIC LAW 99-372 BRIEFING REPORT TO CONGRESSIONAL REQUESTERS, GENERAL ACCOUNTING OFFICE 26 (1989) [hereinafter GAO REPORT] (noting that incomplete data concerning the award of attorney fees suggests a significant increase in amount of attorney fees awarded since 1986).

<sup>23</sup> See Goldberg & Kuriloff, *supra* note 18, at 492.

<sup>24</sup> See *id.* Subjective justice is used here to signify the feeling by the participants that the outcomes of the IDEA's dispute resolution methods foster fairness and equity. See generally Peter J. Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 LAW & CONTEMP. PROBS. 89 (Winter 1985).

must promote a sense of fairness for its participants in order to promote justice.<sup>25</sup>

In the Pennsylvania Due Process Studies, the researchers sought to determine if justice is promoted by the IDEA's due process model. Researchers concluded that objective justice<sup>26</sup>—the feeling that the process itself is equitable—can be promoted if a person has the ability to influence administrative hearings by effectively using the due process procedures.<sup>27</sup> However, if parents are unable to use the hearing process to their advantage because they are unable to afford counsel, lack financial support or obtain poor legal advocacy, due process was found not to promote objective justice.<sup>28</sup>

It is not surprising, then, that a large majority of parents reported being dissatisfied with the overall due process experience.<sup>29</sup> According to the Pennsylvania study, at the hearing level, only a bare majority of parents felt that they had been accorded their rights.<sup>30</sup> Few thought that the hearings were fair or the results accurate.<sup>31</sup>

School officials reported perceiving the hearings as more fair or more satisfactory than the parents did on every variable.<sup>32</sup> School officials also won more often than parents.<sup>33</sup> The study concluded that hearings promote objective justice because the procedures are followed; however, subjective justice—a sense of fair outcome—is not promoted in the due process

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<sup>25</sup> See Goldberg & Kuriloff, *supra* note 18, at 492.

<sup>26</sup> The term "objective justice," in contrast with subjective justice, means that the process itself is fair, rather than the feeling of the parties that they have been treated fairly.

<sup>27</sup> See Goldberg & Kuriloff, *supra* note 18, at 494–495.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 495. This result may be explained by the fact that during the years of the Pennsylvania Due Process Studies less than half of parents had the advantage of attorney representation. See GAO REPORT, *supra* note 22, at 84 (documenting that between the years 1984 and 1988 the percentage of parents represented by attorneys was very low—ranging from 40.8% in 1984 to a high of 53.7% in 1988).

<sup>30</sup> See Goldberg & Kuriloff, *supra* note 18, at 495.

<sup>31</sup> See *id.*; see also GAO REPORT, *supra* note 22, at 84. From 1985 through 1988, parents who were represented by an attorney were consistently more likely to prevail. For example, in 1985, 65.1% of the parents represented by an attorney prevailed at the administrative hearing, although only 34.9% of the parents without an attorney prevailed at the administrative hearing. See GAO REPORT, *supra* note 22, at 84.

<sup>32</sup> See Goldberg & Kuriloff, *supra* note 18, at 495.

<sup>33</sup> See *id.*; see also GAO REPORT, *supra* note 22, at 84 (illustrating that in data gathered by the GAO, school districts prevail significantly more often in administrative hearings in three of five issue categories, and that in the last two categories, schools prevail in 50% and 45% of the hearings, respectively).

designed by Congress.<sup>34</sup> Therefore, the current Act's method of resolving disputes falls short of providing parties with satisfactory results.

In addition to the perceived lack of justice resulting from administrative proceedings, litigation has also fallen short of providing parties with subjective justice. The extremely unpredictable nature of litigation under the Act has gained considerable attention and criticism.<sup>35</sup> In order to test the Act's limits and the Act's direct impact on their children, hundreds of parents have filed suit in state and federal courts since the enactment of the IDEA.<sup>36</sup> The major problem emerging as a result of this frequent litigation is the inconsistent interpretation of the IDEA's substantive language.<sup>37</sup> Inarguably, there is room for improvement in the due process of the IDEA. Both parents and school officials perceive some inequality in the due process designed by Congress, and litigation has proven to be unpredictable even on the most substantive issues of the Act.<sup>38</sup>

Researchers in the Pennsylvania study concluded that alternative forms of dispute resolution would be a successful addition to the IDEA if they promoted subjective as well as objective justice. Mediation may promote subjective justice—a sense of fair outcome—by allowing disputants to escape hard-to-predict litigation, and by giving disputants a chance to have some control over the outcome of the mediation. In addition, using mediation to solve special educational disputes may promote objective justice by allowing the participants to both choose mediation and to control the negotiations. Further, mediation will be a successful addition to the IDEA if it promotes a cooperative and productive long-term relationship between the school and the parents of the child—in contrast to the adversarial model now in place.

### III. MEDIATION AS AN EQUITABLE ADDITION TO THE IDEA

Now we turn to the model of mediation proposed by Congress to evaluate whether it does promote justice and does improve the working relationship of parents and schools. Both the Senate and House Bills propose the following: "MEDIATION.—(1) Whenever a hearing has been requested on any matter in dispute under this section and the dispute has not been finally resolved, the parents shall be offered an opportunity for

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<sup>34</sup> See Goldberg & Kuriloff, *supra* note 18, at 498.

<sup>35</sup> See sources cited *supra* note 4.

<sup>36</sup> See Daniel & Coriell, *supra* note 2, at 578; see also Perry A. Zirkel & Sharon N. Richardson, *The "Explosion" in Education Litigation*, 53 EDUC. L. REP. 767, 778-781 (1989).

<sup>37</sup> See Daniel & Coriell, *supra* note 2, at 579.

<sup>38</sup> *Id.*

mediation to resolve the dispute."<sup>39</sup> In addition, mediation may be ended by the parents at any time, or by the participating agency at any time after the first mediation session.<sup>40</sup>

### A. Mandatory Mediation as an Inappropriate Model

Mediation is "the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."<sup>41</sup> An essential character of mediation is that it is totally voluntary.<sup>42</sup>

Thus, a congressional mandate that schools attend at least one mediation session inherently creates an inappropriate forum—one where the school does not voluntarily attend. Mandating attendance may be the worst method of encouraging cooperation between the school and parents. At least one commentary on mandatory mediation has stated that mediation should never be coerced by statute or court order.<sup>43</sup> Mediation should always be voluntary because parties cannot be forced to agree when they do not want to agree.<sup>44</sup>

It may be counterproductive to mandate that a school attend mediation. This would create extra work for parents in preparing for the session and could give the schools a way to hinder the timeliness of reaching a resolution.

Mediation is a series of compromises; it is not appropriate when both disputants do not wish to cooperate.

Mandatory mediation may be a bad idea; however, this concern will lessen beyond the first meeting because both parties have the power to end mediation at this point. Beyond the first mediation session, the effectiveness of mediating special education disputes will be revealed by examining the actual mediation process.

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<sup>39</sup> See H.R. 1986, 104th Cong. § 101(c)(5) (1995); S. 1075, 104th Cong. § 101(c)(5) (1995).

<sup>40</sup> See H.R. 1986, § 205; S. 1075, § 205.

<sup>41</sup> Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 566 (1995) (citing CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 14 (1986)).

<sup>42</sup> See Roger M. Deitz, *Mediation of Securities Disputes: A Practical Introduction*, in *SECURITIES ARBITRATION* 1995, at 38 (PLI Corporate Law and Practice Course Handbook Series No. 899-900, 1995).

<sup>43</sup> See D. Milton Moore III, *ADR: The Future is Now*, 43 LA. B.J. 148, 151 (1995).

<sup>44</sup> See *id.*



## B. *The Mediation Process*

Mediated conferences are usually informal. However, the individual mediator will dictate the actual style of any session.<sup>45</sup> Generally, mediation begins with an opening session in which all parties and lawyers, if retained, participate and discuss interests and objectives with the goal of identifying the issues to be resolved by negotiation.<sup>46</sup> Next, the mediator typically separates the parties and engages in confidential sessions with each party and their lawyer (if retained).<sup>47</sup> Thereafter, the mediator may continue a series of sessions in private or in the group setting.<sup>48</sup>

The first job of the mediator is to identify issues of mutual concern by asking neutral, open-ended questions and clarifying or summarizing each party's response.<sup>49</sup> Mediation, therefore, is premised on the existence of issues of mutual concern between the disputants.<sup>50</sup> This premise may not always hold true in special education disputes.

## C. *Obstacles to Equitable Mediation*

The school district is undoubtedly interested in the financial aspects of the child's education.<sup>51</sup> The parents are interested primarily in obtaining the best possible education for the child.<sup>52</sup> Thus, in special education disputes there may be no issue of common interest.<sup>53</sup>

Schools come to mediation sessions with the pressures of maintaining special programs for disabled children against the onslaught of cost-

<sup>45</sup> See Capers G. Barr III, *Prepare for the Peacemakers*, 7-AUG S.C. LAW 21, 24 (1995).

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> School board officials undoubtedly fear draining resources to accommodate children with disabilities at the expense of the remainder of the population. See RICHARD A. WEATHERLEY, *REFORMING SPECIAL EDUCATION: POLICY IMPLEMENTATION FROM STATE LEVEL TO STREET LEVEL* 73 (1979) (analyzing the tension between providing services for each child's individual needs and educating large numbers of children).

<sup>52</sup> See Daniel & Coriell, *supra* note 2, at 573-574.

<sup>53</sup> See JO ANN SILVERSTEIN, *SERVING HANDICAPPED CHILDREN: A SPECIAL REPORT. NUMBER ONE* 5-18 (1988) (statistically evaluating the pressures for school districts in providing the myriad special education services, and statistically illustrating the parents' position in bringing special education claims against the schools).

containment pressures now facing school districts.<sup>54</sup> This pressure undoubtedly adds to the school districts' hidden economic agenda.<sup>55</sup> Educating a child with disabilities requires 2.1 times the amount of money it requires to educate a non-disabled child.<sup>56</sup> Administrators are concerned with controlling this cost.<sup>57</sup> In addition, federal monies under the Act have consistently fallen short of providing incentives for schools to provide the best educational services available for children with disabilities. Federal expenditures for special education never have exceeded twelve percent of the full cost of special education.<sup>58</sup> Increasingly, school administrators fear the IDEA because it mandates that no child can be denied educational services, no matter how severe the disability.<sup>59</sup> This mandate is a possible obstacle to successful mediation in the IDEA.<sup>60</sup> As parents enter mediation looking to serve their child's best interests, the school enters primarily wanting to protect its fiscal responsibility.

The possibility of successful mediation is not precluded simply because fiscal prudence is the school board's major concern. Mediation sessions, specifically tailored to promote honest discussion, can help foster understanding between disputants by providing insight into the other's perspective. Parties in mediation can often gain a greater understanding of the issues involved in their opponents' actions through facilitated discussion.<sup>61</sup> If mediation can provide a fuller respect for each party's position, perhaps it will help future school-parent negotiations, such as those regarding the child's IEP.

Even if both parties enter mediation in good faith and are able to identify mutual interests toward which to work, at least two serious

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<sup>54</sup> See *id.* at 4.

<sup>55</sup> See Joseph R. McKinney, *Special Education and Parental Choice: An Oxymoron in the Making*, 76 EDUC. L. REP. 667, 670 (1992).

<sup>56</sup> See *id.*

<sup>57</sup> See SILVERSTEIN, *supra* note 53, at 5.

<sup>58</sup> See MARY T. MOORE, *FINETUNING SPECIAL EDUCATION FINANCE: A GUIDE FOR STATE POLICYMAKERS* 59 (1982).

<sup>59</sup> See Daniel & Coriell, *supra* note 2, at 580. For a discussion of the variety of services available under the IDEA, see *id.* at 581-586. For an evaluation of how different districts have ruled on various services, see generally Leslie A. Collins & Perry A. Zirkel, *To What Extent, if any, May Cost be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11 (1992).

<sup>60</sup> See 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, 360-361 (1990).

<sup>61</sup> See Dane A. Gaschen, Note, *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469, 482-483 (1995) (noting various subjective advantages to mediation).

obstacles to successful mediation remain. The first obstacle is the inherent power imbalance between parent and school district in preventing equitable mediated settlements. The second obstacle is the lack of regulation and consistency in mediation.

The power imbalance may provide the gravest challenge to equitable mediation of IDEA disputes. Like divorce mediation, there will be instances when mediation to settle an IDEA claim is inappropriate.<sup>62</sup> Although most commentators agree that there is great uncertainty in identifying when mediation is inappropriate, it is well-settled that when there is an obvious and severe power imbalance between the parties, mediation will not provide an effective forum for dispute resolution.<sup>63</sup> Therefore, if one party in IDEA disputes is at a severe disadvantage, mediation is not an equitable dispute resolution method.

Although Congress proposes mediation as an almost mandatory step,<sup>64</sup> the amendment seems to ignore the reality of the frequent, severe power imbalance between parents and schools.<sup>65</sup> In conflicts involving the IDEA, the parent is so severely and so frequently disadvantaged that mediation would not be an appropriate alternative to the due process hearing without some controls to mitigate the power imbalance.<sup>66</sup> The Congressional proposals do not account for situations of serious power imbalances, nor do they attempt to provide any mitigating regulations.

The power imbalance between parents and school personnel is evident from parent behavior under the current form of the Act. Parents, without help from a legal advocate, generally have neither the understanding nor the inclination to invoke the due process remedies provided in the IDEA.<sup>67</sup> In contrast, “[t]he school district personnel are more confident [in dealings with parents], usually wielding superior political power—the capacity to define the problem, to dictate the language used to discuss the child, to intimidate, to retaliate, or to ignore.”<sup>68</sup>

<sup>62</sup> See Weber, *supra* note 60, at 360.

<sup>63</sup> See Hughes, *supra* note 41, at 570.

<sup>64</sup> See *supra* note 8 and accompanying text.

<sup>65</sup> See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 203 (1991).

<sup>66</sup> See Hughes, *supra* note 41, at 570; see also *supra* text accompanying notes 72–74.

<sup>67</sup> See Engel, *supra* note 65, at 203. Given that many parents are intimidated by the formal due process procedures, perhaps more parents would favor the less formal mediation alternative. This alternative would then encourage a larger number of parents to act on their dissatisfaction because the parents would know that they can solve the problem in a nonadversarial forum.

<sup>68</sup> Hughes, *supra* note 41, at 574 (citing MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 323 (1954) (explaining that “power” represents the ability of “imposing one’s will upon the

As has been true in divorce mediation, one party's perception that she lacks power can decrease or eliminate her negotiating strength.<sup>69</sup> As research indicates, parents often feel that they lack power in their relationship with school personnel.<sup>70</sup> Thus, this perception might lead to an inability to exert equal power in mediation and negotiation.

Most parents in the school-parent relationship operate at a disadvantage. Parents are usually not skilled at presenting grievances to experienced professionals, nor are they confident in their ability to identify problems with their child's education.<sup>71</sup> Research on special education shows that more than one-third of special education parents are poor.<sup>72</sup> Additionally, more than one-third of the mothers of children with disabilities have not completed high school.<sup>73</sup> These disadvantages exacerbate the already inherent power inequality between parents and schools.

Parents' feelings and performance at IEP meetings provide evidence of this power imbalance and its effects on the parent-school relationship. During IEP meetings, "[m]ost parents describe themselves as terrified and inarticulate. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decision making as well as their feelings of vulnerability and disempowerment."<sup>74</sup> The parents' close relationship with the child is viewed by school personnel as a liability rather than as an asset—a liability that renders parents' judgments inherently suspect.<sup>75</sup> Parents' insecurity, and the administrators' perception of parents, lead to the parents' inability to either influence the child's IEP or to challenge the child's IEP through the IDEA procedures. The administrators know that they can manipulate the parents into approving a less-than-adequate IEP, and the parents feel unprepared to challenge the administrators' proposal. The non-attendance of many parents at the IEP meetings after the first few

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behavior of other persons"). "Power is a property of the social relation; it is not an attribute of the actor." *Id.* See also Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31, 32 (1962) (stating that power is an economic, intellectual, physical, emotional or procedural power). For a discussion of the five types of power, see Hughes, *supra* note 41, at 575-577 .

<sup>69</sup> See Hughes, *supra* note 41, at 576.

<sup>70</sup> See Engel, *supra* note 65, at 188.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See SILVERSTEIN, *supra* note 53, at 3.

<sup>74</sup> Engel, *supra* note 65, at 188.

<sup>75</sup> See *id.*

years is evidence of the common feeling of ineffectiveness among parents.<sup>76</sup> Normally, less than half of the parents of disabled children actually attend their child's IEP meeting.<sup>77</sup>

The stress, frustration and anger parents feel may lead to an inability to negotiate effectively in mediation.<sup>78</sup> Often, parents feel that they do not know what is best for the child, and accordingly, they wish for the professional to make the decisions in IEP meetings. Undoubtedly, this behavior will carry over to mediation sessions. Therefore, parents will be in a position that will force them too easily to make concessions in mediation in order to end the uncomfortable ordeal.<sup>79</sup> Mediation is not an equitable forum for dispute resolution if one party is not an equal participant because of severe insecurity.<sup>80</sup>

A parent of a seven year-old boy classified as "multiply handicapped" described her feelings about impacting her son's education this way:

I don't know if I have a choice [about my kid's program], but then—to be honest with you—I'm kind of glad I don't, because I don't want to make the wrong one anyway. I'd rather have the choice left to somebody else . . . . I'm so unschooled as far as the therapies and the teaching and whatnot. I don't think I'm in a place to judge whether or not he's receiving the right thing . . . . Getting him up, getting him dressed, and sending him to school. That's my job.<sup>81</sup>

From this evidence two conclusions can be drawn. First, parents feel insecure about expressing their opinions about what type of educational services their child should receive. Second, parents are intimidated to interact even in a cooperative environment with school personnel. Thus, parents cannot be expected to be effective participants in mediation sessions, without a legal or other advocate, where they must challenge the very institution that intimidates them.

Because parents are at a disadvantage in terms of negotiating skill, mediation between schools and parents is not an equitable method of resolving grievances. "Power imbalances can produce skewed agreements

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<sup>76</sup> See *id.*

<sup>77</sup> See SILVERSTEIN, *supra* note 53, at 5.

<sup>78</sup> See Engel, *supra* note 65, at 189.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> *Id.* at 190.

[in mediation] because, with few exceptions, a mediated settlement reflects the pre-existing inequalities between disputants."<sup>82</sup>

Although mediation is not totally ineffective at mitigating some effects of power inequalities, there are tools that a mediator can use to reduce certain classes of power imbalances. In addition, certain forms of mediation can help mitigate power differences.<sup>83</sup> However, in IDEA circumstances, some of the mitigating tools are not available; moreover, mediation can never magically transform the parties on all occasions to equal power. There may be severe differences in power—as with minority, single mothers without a high school education—that cannot be made equal even with a mediator's most equalizing tools.<sup>84</sup>

#### D. *Methods of Overcoming the Obstacles and their Likelihood for Success in IDEA Disputes*

According to some commentators, one form of mediation can effectively balance inequalities in bargaining power. This form includes the

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<sup>82</sup> Hughes, *supra* note 41, at 578 (citing Gary L. Welton, *Parties in Conflict: Their Characteristics and Perceptions*, in COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS 105, 107 (Karen G. Duffy et al. eds., 1991)). *See also id.* at 581 (explaining that the replication of pre-existing inequalities by mediation is not a modern phenomenon. Studies of the Nuer societies of Ethiopia and the Sudan have shown that mediated settlements between disputants of unequal power are themselves unequal. Thus, with few exceptions, mediation reflects the status inequalities between disputants.).

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* For a thorough examination of how the existence of severe power imbalances, such as in the case of abuse, impacts the divorcing parties' ability to mediate, see Craig A. McEwen & Nancy H. Rogers, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1323-1340 (1995).

Although it seems apparent that mediation itself cannot equalize inherent power imbalances, this should not be of concern when parties voluntarily enter into mediation. However, unsophisticated parents of disabled children may not fully understand the consequences of opting for mediation instead of pursuing a legal administrative hearing with a legal advocate. The proposed amendment to the IDEA does not specify that parents must try mediation. However, there is a strong suggestion that mediation should be the first method of conflict resolution, especially the provision forcing schools to at least attend the first mediation conference.

lawyer as a participant.<sup>85</sup> In addition to lawyer participation, regulation can serve as a partial safety net of fairness in mediation.<sup>86</sup>

Research has indicated that lawyers are fully aware of the precarious pursuit of cases through the formal courtroom process, causing lawyers to generally be adept negotiators for pragmatism's sake.<sup>87</sup> In addition, lawyers seem to adapt their negotiating behavior to the mediation process—i.e., they become less adversarial and more cooperative.<sup>88</sup> At least one study proposes that lawyers and mediation can be a good combination—especially when power imbalance is a concern.<sup>89</sup> Thus, in divorce mediation, fairness can be protected by adding lawyers to the list of participants in the mediation. It may follow, then, that lawyers would be the best solution to ensuring fairness in IDEA mediation.

If lawyer participation and regulation are keys to mediation fairness in instances of power imbalances, then these two keys must be present in IDEA mediation. However, neither lawyer participation nor regulation are guaranteed in the proposed amendment to the IDEA.

The IDEA only assists parents in obtaining legal assistance (by providing for fee shifting) in cases where there will be a prevailing party.<sup>90</sup> Mediation, by design, will not produce such a party. Lawyer participation is therefore not available to the most powerless of parents—those without financial resources to hire an attorney. The amendment effectively eliminates one way in which parents can obtain legal advocacy because parents without resources, who normally could rely on the attorney-fee provision, will lose this option if mediation is the method of dispute resolution.

Support from an attorney who is knowledgeable about the IDEA is what enables some parents to effectively challenge a school district.<sup>91</sup> As a

<sup>85</sup> See generally McEwen & Rogers, *supra* note 84 (arguing that lawyer participation in mediation can effectively help to balance some of the inequalities between disputants and that regulation and lawyer participation are two keys to fairness in mediation).

<sup>86</sup> See *id.* at 1320.

<sup>87</sup> See *id.* at 1366.

<sup>88</sup> See *id.* at 1367.

<sup>89</sup> See *id.*

<sup>90</sup> See 20 U.S.C. § 1415 (1990).

<sup>91</sup> Although attorneys are desperately needed to help a parent bring a due process claim, many parents of children with disabilities are poor. Therefore, parents count on attorneys either giving free services or working with the understanding that attorney fees are available for "prevailing" over the school. If mediation settles the dispute, an attorney has no chance of ever being paid for her services—so it is less likely that parents will be able to retain an attorney for mediation. For parents that can afford attorneys, mediation may provide a less inequitable alternative; however, the proposed amendment should not be written with only the

result of the proposed legislation, using mediation to resolve IDEA disputes would leave the majority of parents without their strongest asset—a knowledgeable attorney. Therefore, in cases when the parents are at a severe power imbalance, the proposed amendment to the IDEA seems to benefit the powerful party—the school, rather than help to provide a beneficial alternative to due process for all parents of disabled children.

As one commentator has stated for divorce mediation, in cases of less severe power inequities, regulatory measures may maintain the integrity of the mediation process.<sup>92</sup> Unfortunately, uniform and effective regulation also is lacking in mediation, as well as in the congressional proposals for the IDEA. First, no coherent guidelines exist that provide a uniform set of ethical standards for mediators in their dealings with power imbalances.<sup>93</sup> In addition, the proposed amendment to the IDEA is vague, proposing no ethical standards. Recently, representatives of the American Bar Association, the Society of Professionals in Dispute Resolution (SPIDR) and the American Arbitration Association formed a committee and released a set of ethical standards for all types of mediation.<sup>94</sup> However, none of these promulgated guidelines specifically deal with power imbalances, nor do any of these rules deal with special educational disputes.<sup>95</sup>

Most statutes and rules for mediators are so general that the mediator receives no real guidance as to his proper role concerning power imbalances. For example, Delaware defines a mediator as one who shall assist and facilitate two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy.<sup>96</sup> The statutes fail to consider any potential power imbalances and place few other constraints, besides confidentiality, upon the mediator.<sup>97</sup> Thus, it is fair to conclude that IDEA mediation will likely preserve the power imbalance between disputants; moreover, parents involved in IDEA disputes likely will be bound to their weak position.<sup>98</sup>

As is true with mediation, mediators are not uniformly regulated. There is no uniform certification or licensing process for mediators.<sup>99</sup> Although

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most affluent parents in mind. See GAO REPORT, *supra* note 22, at 26 (reporting that 59% of parents who were successful at the administrative hearing level had attorneys).

<sup>92</sup> See Hughes, *supra* note 41, at 585.

<sup>93</sup> See *id.* at 584–585.

<sup>94</sup> See JOINT COMMITTEE ON STANDARDS OF CONDUCT, STANDARDS OF CONDUCT (American Arbitration Ass'n et al. eds., 1994).

<sup>95</sup> See Hughes, *supra* note 41, at 584–585.

<sup>96</sup> See *id.* at 591.

<sup>97</sup> See *id.* at 592.

<sup>98</sup> See *id.*

<sup>99</sup> See McEwen & Rogers, *supra* note 84, at 1343–1344.



the proposed IDEA amendment does set out some vague guidelines as to who can mediate a dispute, the schools ultimately control who is on the list of possible mediators.<sup>100</sup>

Selection of the mediator is the most important decision in the process, after the decision to mediate.<sup>101</sup> The mediator affects the tone and method of mediation, which can greatly affect the outcome. The proposed amendment leaves this decision largely to the school. The proposed amendment states that the educational agency shall compile a list of individuals who are trained in mediation, knowledgeable about the educational needs of children with disabilities and are knowledgeable about statutes and regulations relating to the educational rights of those children.<sup>102</sup> The mediators are then to be chosen from this list by the parents. In effect, parents have little control over who mediates the educational dispute; moreover, the stronger party—the school—controls who may serve to mediate disputes.

The proposed amendment also lacks any form of assurance that the mediators on the school-created list will be effective and equitable. Educational qualifications of mediators have not been highly correlated with a mediator's success in terms of satisfying the disputants or settling a high number of cases.<sup>103</sup> One reason might be that the educational requirements for mediators are sometimes irrelevant to developing good mediator skills. Thus, mediators for IDEA disputes, although conforming to the statutory guidelines, may lack qualitative skills such as fairness, empathy, understanding of power imbalances and tolerance and sensitivity to diverse values. These qualities cannot be learned in formal education.<sup>104</sup> Therefore, requiring that the mediators whom the school places on the list have certain knowledge does nothing to ensure fairness in the mediation process.<sup>105</sup>

### E. Preserving the Parent-School Relationship Through Mediation

The proposal to use mediation as a first step to resolving educational disputes will not, as currently written, provide a better sense of subjective

<sup>100</sup> See S. 1075, 104th Cong. § 205 (1995).

<sup>101</sup> See Deitz, *supra* note 42, at 39.

<sup>102</sup> See S. 1075, § 205.

<sup>103</sup> See McEwen & Rogers, *supra* note 84, at 1344.

<sup>104</sup> See *id.*

<sup>105</sup> In addition to mediation's lack of regulation regarding power imbalances and parents' inability to control who serves to mediate the dispute, questions also remain regarding the type of mediation that will be employed to settle IDEA disputes. Although various approaches to mediation exist, no specific approach was mandated or discussed in Congress' proposals for the IDEA. A mediator's approach to the mediation process has a major impact on the outcome of the mediation sessions. See Hughes, *supra* note 41, at 571.

or objective justice for the participants. However, some argue that mediation should be favored over litigation because mediation is beneficial to maintaining the long-term relationship between schools and parents.<sup>106</sup> Although this appears logical, at least one researcher has found that when parents exercise their rights against schools—even through the current due process methods—the relationship between the disputants improves.<sup>107</sup>

Parents distress over conflict with school personnel because of the emotional price they have already paid during numerous encounters. They also distress over such conflict because this relationship necessarily lasts for many years. However, some families have found that enforcing their legal rights through the existing methods under the IDEA had a positive impact on the relationship with the school, because the family was able to make it clear to the school that they intended to enforce the legal rights of the child.<sup>108</sup> Thus, although mediation arguably may enhance the school-parent relationship, the current due process procedures may serve that function as well.

In conclusion, it is not clear that mediation will do more to enhance the school-parent relationship than the existing due process procedures. Further, improving the parent-school relationship through mediation may only come at the enormous price of parents unknowingly conceding away rights that are guaranteed by the Act.

#### IV. CONCLUSION

With so many unanswered questions regarding mediation as a method for resolving special educational disputes, it seems unlikely that the amendment to the IDEA designed to “improve” the educational services that children with disabilities receive will actually do anything to ensure that children are receiving a FAPE. This amendment, if passed, will have a negative impact on parents’ ability to effectively challenge a school

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<sup>106</sup> See *id.*

<sup>107</sup> See Engel, *supra* note 65, at 199–200.

<sup>108</sup> See *id.* at 199–200.

Generally, the[ ] parents were enthusiastic about the results of their strong assertion of rights in situations where they felt the [school personnel] had acted inappropriately. In some instances, these parents sought and obtained moral vindication: Their child was treated unfairly, and rights analysis demonstrated to the [school personnel] that its behavior was improper. In other instances, however, parents extolled the assertion of rights not because it ultimately vindicated their position but because it improved the relationship between the disputants.

*Id.*

district's actions. This proposal will decrease the likelihood of parents obtaining help from an advocate by discouraging actions that would produce a "prevailing party." Further, the proposal provides a forum that furtively exploits the power imbalance between disputants and leaves parents in peril of conceding away rights guaranteed by the IDEA. Instead of offering a forum that fosters a long-term cooperative and egalitarian relationship, the proposed amendment offers a superficially non-adversarial forum while undermining the parents' power source—a knowledgeable attorney. Moreover, it has not been proven that a mediation forum will enhance the long-term relationship between parents and schools. Thus, the Bill will do nothing to empower parents' ability to ensure that their children are receiving what the IDEA has promised.<sup>109</sup>

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<sup>109</sup> At the very least, adding mandatory mediation to the IDEA should be included as part of the due process procedure so that parents could recover attorney fees when any one of their demands is awarded through the mediation. Including mediation within due process allows a lawyer to be present and will help to mitigate the inherent power imbalance in the negotiation process.

