

**NAVIGATING WITHOUT A COMPASS:
INCORPORATING BETTER PARENTAL GUIDANCE
SYSTEMS INTO THE IDEA'S DISPUTE RESOLUTION
PROCESS**

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ABSTRACT

Entitling children with disabilities to timely and appropriate special education services has turned out to be easier said than done in the forty years since the passage of the Individuals with Disabilities Education Act ("IDEA"). While parents can avail themselves of both formal and informal processes to resolve disputes with school districts over the appropriate education of their child with disabilities, a power imbalance still exists because of parents' lack of knowledge. This can make parents' use of the statutory dispute resolution processes less effective. This problem particularly affects lower-income families in states that have not voluntarily adopted additional alternative dispute resolution processes aimed at parental assistance.

Several states have initiated such dispute resolution processes, and have succeeded in reducing the power imbalance between parents and school districts. With increased knowledge of special education and the available dispute resolution processes, parents can more effectively communicate their children's educational needs and have those needs considered by school districts. In turn, establishing a better path for a collaborative relationship between parents and school districts. One promising step is to provide facilitators during individualized education program meetings, mediations, and resolution session meetings. Additionally, providing more parental assistance can help identify the most appropriate education for the child and potentially reduce costs associated with disputes. Incorporating facilitators and parental assistance hotlines into the IDEA will increase lower-income parents' ability to effectively advocate for their children and will improve

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the process of obtaining an appropriate education for children with disabilities.

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INTRODUCTION

Imagine Grace, a bright child recently diagnosed with a learning disability who is beginning to fall behind her fellow classmates at school. Grace’s mother believes Grace needs to be included in a classroom of children without disabilities to help both her education and development, but the school district believes that Grace is best educated in a separate classroom with more focused attention from instructors. Many students in this separate classroom have behavioral problems. This worries Grace’s mother because, although her daughter does not have behavioral problems, she believes her daughter may develop them if educated with other children who do have issues with behavior.

Unable to convince the school on her own, Grace’s mother must turn to the procedural remedies provided to her to resolve the disagreement with the school. As a working mother, she lacks the time and resources to pursue lengthy litigation. The complicated series of dispute resolution processes described on a notice given to her are more intimidating than they are empowering. Like many parents,

especially those of lower income, Grace's mother is without connections to educational experts or specialized attorneys who could guide her through the shoals of these procedures. Her lack of knowledge and resources increases the likelihood that she will be unsuccessful in advocating for her child, who may well not be receiving an appropriate education.

The Individuals with Disabilities Education Act ("IDEA") was enacted in 1974 and developed after years of advocacy by parents and organizations for disabled children's rights to an appropriate education.¹ The IDEA offers a strong set of rights to parents; however, parents in the most vulnerable populations experience a greater burden to take effective advantage of those rights than highly educated and financially stable parents. These most vulnerable populations tend to be of lower income and are greatly outnumbered by their wealthier peers in special education disputes and litigation.² This Note argues that in the next reauthorization of the IDEA, Congress should incorporate additional steps designed to help parents, especially those of lower income and in underperforming states, to be more effective participants in both informal and formal dispute resolution processes.

Part I of this Note discusses the origins of the IDEA, and the two court decisions that led Congress to provide due process hearing rights to parents. It also discusses the issues that formal dispute resolution procedures set forth in the IDEA helped solve. Part II discusses the initial negative view of the due process hearings provided by the IDEA, and mentions the additional alternative dispute resolution processes added to the IDEA in 1997 and 2004. Part III analyzes the alternative dispute resolution processes. It discusses the positives and negatives of the IDEA's informal dispute resolution processes and the continuing need for improvement. Part IV suggests improvements to the special education dispute resolution process and discusses what some states have done to improve upon the required mandates provided in the IDEA. Finally, Part V argues that facilitation should be incorporated into both mediation and res-

1. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2012); see Pub. L. No. 94-142, 89 Stat. 773 (1975); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1809-13 (2008) (discussing the difficulties of parents advocating for the rights of children with disabilities before the 1970s and how through two lawsuits in the 1970s parents were able to finally effect change); see also 20 U.S.C. § 1406(a) (granting the Secretary of the Department of Education authority to issue regulations to ensure compliance with IDEA); 34 C.F.R. 300.1-300.818 (2015) (listing IDEA regulations).

2. See Phillips, *supra* note 1, at 1836-37 (discussing low-income households' greater difficulty advocating for their child).

olution session meetings, and that parental educational services, including parental hotlines, parent-to-parent assistance, and facilitation, should be implemented to help parents of disabled children understand their rights and navigate the procedural safeguards mandated by the IDEA.

If these steps are implemented before Grace's individualized education program ("IEP") meeting, her mother will be able to get help and advice from a facilitator who knows, and may be known by, her school. If the facilitator and the school cannot agree, the facilitator can explain to Grace's mother how she should prepare for the resolution session or mediation to support her arguments regarding the appropriate education of Grace. Most importantly, Grace's mother will not be alone as she steers a course toward a better outcome for Grace.

I. DEVELOPING PROCEDURAL RIGHTS FOR PARENTS IN SPECIAL EDUCATION DISPUTES: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The IDEA conditions federal funds for the education of children who are eligible for special education and related services on the state's commitment to offer every child with a disability a free and appropriate education ("FAPE") in the least restrictive environment.³ FAPE is defined as special education services that:

(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate . . . education in the state involved; and (D) are provided in conformity with the individualized education program required under [the IDEA].⁴

3. See 34 C.F.R. § 300.8(a)-(c) (listing the three necessary prerequisites of eligibility for special education and related services as age, specified disability, and the need for services); 20 U.S.C. §§ 1400(c)(3), 1400(c)(5)(A), 1400(c)(5)(D), 1411, 1412(a)(5)(A); see also U.S. GOV'T ACCOUNTABILITY OFFICE, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION 3 (GAO-14-390, 2014) [hereinafter GAO] (stating all 50 states provided dispute resolution data as part of study conducted on IDEA dispute resolution); Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65, 65 (2007) ("All fifty of our United States . . . have made firm commitments to providing free and appropriate public education to children with special needs.").

4. 20 U.S.C. § 1401(9)(A)-(D).

FAPE is provided through an individualized education program: a written statement that provides how a student's education will be structured and progress.⁵ IEPs include: a statement of the student's present levels of achievement, measurable annual functional and academic goals, how progress toward annual goals will be measured, the special education and related services that will be provided to the student, and how and to what extent the student will participate with non-disabled children.⁶ The IEP is developed by a team convened by the school district; the child's parents act as team members.⁷ States are required to provide an opportunity for parents' involvement in their child's initial evaluation process and in the IEP team.⁸ Procedural remedies to resolve disputes are included in the IDEA's mandates.⁹ Disputes may arise from varying views between parents and school districts over the appropriate education for a child.¹⁰

Parents and school districts can disagree about the appropriate education program or service for a child.¹¹ Before the IDEA, there were few options for parents when a dispute arose between parents and school districts over the appropriate education of a student with a disability.¹² Parents were not always able to take part in school placement decisions, and would have no legal recourse if they disagreed with how their child was educated.¹³ In the 1970s, advocates for students with disabilities argued that disabled students were be-

5. *Id.* § 1414(d)(1)(A).

6. *Id.* § 1414(d)(1)(A)(i)(I)-(V).

7. Debra Chopp, *School Districts and Families under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 430 (2012).

8. *Id.*; see also *id.* at 433 (discussing that IEP teams ideally see parents as experts on their child but that school districts may believe parents lack the emotional distance or education to meaningfully partake in the process of forming their child's education plan).

9. 20 U.S.C. § 1415.

10. See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188 (discussing how, based on the results of a New York study on families navigating the special education system, parents often feel that their own observations or requests receive little weight and decisions on their child's education are made on recommendations of professionals).

11. *Id.*

12. See Phillips, *supra* note 1, at 1809-11.

13. See Marvin Lazerson, *The Origins of Special Education*, in SPECIAL EDUCATION POLICIES 15, 39 (Jay G. Chambers & William T. Hartman eds., 1983) (discussing parent-advocates' fight with policies intending to keep "crippled children" away from "normal" children); Blau, *supra* note 3, at 66 (mentioning the IDEA reauthorization in 1997 first offered mediation processes as an alternative to due process hearings).

ing wrongly excluded from the regular education process.¹⁴ From this movement came two important cases, which determined the unconstitutionality of segregating disabled children from the regular classroom, *Pennsylvania Association for Retarded Children v. Pennsylvania* ("PARC")¹⁵ and *Mills v. Board of Education*.¹⁶

In *PARC*, the United States District Court for the Eastern District of Pennsylvania upheld a settlement agreement stating that school districts could not prevent, postpone, or deny any free public education or training to students with disabilities.¹⁷ This holding gave teeth to the arguments of advocates of disabled students' rights and opened the door for parents to challenge their disabled child's educational placement if it prevented or postponed the child's education. Less than three months later, the United States District Court for the District of Columbia held in *Mills* that the school board's denial of a free public education to a disabled child violated the Due Process Clause of the Fourteenth Amendment.¹⁸ On summary judgment, the court held that disabled children were not to be denied a free public education, and if a school district violated the order, a due process hearing could be requested to determine if the child's rights were violated.¹⁹ Now parents of disabled children had precedential authority to declare that their disabled child's education could not be denied or postponed—otherwise a due process hearing could be requested and granted. These victories of parental advocates began the process, but legislative action and a special education system were critical to continue improving disabled children's access to education.

Based in part on these two district court cases, Congress, in 1975, enacted the Education for All Handicapped Children Act, now known as the IDEA.²⁰ Thus, because of *PARC* and *Mills*, Congress

14. Joshua Andrew Wolfe, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals with Disabilities Education Act*, 55 VAND. L. REV. 1627, 1630 (2002). In 1975, less than half of the children with disabilities in the United States received an appropriate education, and almost two million received no education at all. See S. REP. NO. 94-168, at 8 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1432.

15. *Pa. Ass'n for Retarded Children v. Pennsylvania* ("PARC"), 343 F. Supp. 279, 302-03 (E.D. Pa. 1972).

16. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

17. *PARC*, 343 F. Supp. at 302 (involving class action suit against the Commonwealth, Secretary of Welfare, and State Board of Education).

18. *Mills*, 348 F. Supp. at 876.

19. *Id.* at 880.

20. S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975); see also Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 PENN ST. L. REV. 485, 486

granted parents the right to file a due process complaint and have their arguments heard at a due process hearing.²¹ Under the IDEA, states receiving federal funding must offer certain procedural safeguards for families.²² IDEA gave parents the right to bring a due process complaint regarding any matter related to identifying, evaluating, or educationally placing a child, or providing the child with a FAPE.²³

The IDEA mandates a due process hearing, and the state and local agencies that accept federal funding determine the specific processes.²⁴ This encourages some agencies to strive for improvement while others simply meet the minimum necessary to keep their funding.²⁵ A due process hearing requires a qualified impartial hearing officer who has the knowledge and the ability to understand the IDEA, knowledge of standard legal practice, and the ability to write decisions in accordance with both.²⁶ The IDEA also ensures certain safeguards, including the right to be accompanied and advised by counsel.²⁷ The current authorization of the IDEA more specifically outlines requirements for a due process complaint.²⁸ A due process complaint must be filed within two years of the date the parent or

(2014) (discussing how the IDEA was spurred by *Mills v. Board of Education* and *PARC v. Pennsylvania*).

21. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507 (providing parents the right to an impartial due process hearing "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child"); see Wolfe, *supra* note 14, at 1632 (stating that the importance of *Mills* and *PARC* opening the door for challenges to the practice of segregating children with disabilities cannot be overstated).

22. 20 U.S.C. § 1415(a). Although outside the scope of this note, the IDEA regulations also specify procedures for filing a state written complaint against an education agency. See 34 C.F.R. §§ 300.151-53 (outlining the required complaint procedures that state educational agencies must provide, and describing the required standards and limits of the processes, including timing and what complaints must contain).

23. 20 U.S.C. § 1415(b)(6)(A)-(C); see also 34 C.F.R. § 300.508(b)(1)-(6) (stating that a due process complaint must include: (1) the name of the child; (2) the address of the child's residence; (3) the name of the child's school; (4) available contact information and school if child is homeless; (5) "a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem;" and (6) a proposed resolution of the problem).

24. See 20 U.S.C. § 1415(a)-(b); see also *id.* § 1412(a).

25. See Andria B. Saia, *Meeting Special Education Needs: Special Education Due Process Hearings*, 79 PA. B. ASS'N Q. 1, 7, 9 (2008) (quoting Schaffer *ex rel.* Schaffer v. Weast, 126 S.Ct. 528, 536 (2005)) (discussing requirements of due process, mediation, and resolution sessions under the IDEA and how the IDEA "relies heavily upon the expertise of school districts to meet its goals").

26. 20 U.S.C. § 1415(f)(3)(A)(i)-(iv).

27. *Id.* § 1415(h)(1).

28. *Id.* § 1415(b)(6)-(7).

agency knew, or should have known, about the action that forms the basis of the complaint.²⁹ While the due process complaint gives parents the ability to more effectively advocate for their child, the goal of the IDEA is to provide a path for parents and school districts to work together for the best interest of the child.³⁰ IDEA's goal, however, is not completely met by the right to a due process hearing.

Originally necessary in overcoming parents' sense of futility from lacking a legitimate voice in their child's education, the IDEA due process hearing, is criticized as fueling a litigious environment.³¹ Due process hearings strengthen the parents' ability to advocate for their child, but the parents' relationship with the school district can be greatly affected by lengthy due process disputes.³² Due process hearings are burdensome.³³ Parents, especially those with lower incomes, have difficulty navigating due process complaints, and tend to accept the school districts' placement of their child.³⁴ Parents accept the placement, in part, because they perceive the school dis-

29. *Id.* § 1415(f)(3)(c).

30. Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 221 (2005). *But see* Chopp, *supra* note 7, at 432 n. 37 ("[T]here are parents who make unreasonable demands on school districts, asking for services their children do not need or services that are so extravagant that few would assume that a school district would be responsible for providing them.").

31. *See* S. REP. NO. 108-185, at 6 (2003) (providing the basis for changes added to new reauthorization of IDEA while discussing the view of many that the 1997 IDEA reauthorization provisions of IDEA are too adversarial); Blau, *supra* note 3, at 68 (discussing how the tensions between parents and school districts started over the futility of parents having a legitimate say in placement, and are now fueled by the litigious environment established to voice those concerns); Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, J. DISABILITY POL'Y STUD., Aug. 20, 2014, at 4 (quoting S. REP. NO. 108-185, at 6), available at <http://dps.sagepub.com/content/early/2014/08/19/1044207314533382> (discussing the Senate's statements that they were "discouraged to hear that many parents, teachers, and school officials find that current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere"); Kotler, *supra* note 20, at 517 (describing the public perception of parents utilizing the legal system to redress rights as being greedy); Renae Waterman Groeschel, *Discipline and the Disabled Student: The IDEA Reauthorization Responds*, 1998 WIS. L. REV. 1085, 1096 ("Of all the federal regulatory statutes in the United States, the IDEA ranks fourth in the amount of litigation it generates. According to the Director of Special Education for Montgomery County, Maryland public schools, 'Special Education has become an ambulance — and the lawyers are chasing it.'").

32. Steve Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 337 (2001) (discussing how the relationship between parents and school districts is characterized by disparities in power and access to information).

33. Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 38-44 (1999).

34. Engel, *supra* note 10, at 199 (noting parents' tendency of working toward compromise with school districts whether it fully benefits their child or not).

tricts as the experts in the field of special education, and parents often believe the school district has their child's best educational interest at heart.³⁵ However, school districts may not always be correct in determining what is right for the disabled child's education. Although due process hearings originally presented the only means many parents had at disputing a school district's plan for the disabled student, Congress realized the need for alternative methods to resolve these disputes.

The IDEA's dispute resolution provisions have grown throughout its existence.³⁶ As use of the due process hearing grew, data from surveys and studies found that this formal resolution process was not efficiently resolving all disputes between parents and school districts.³⁷ The failures of the due process hearings led to additional, less formal resolution processes.³⁸ In subsequent reauthorizations of the IDEA, voluntary mediation and mandatory dispute resolution provisions were added to provide alternatives to due process hearings.³⁹ These additions improved parents' ability to contest their child's placement, but an additional, easily-accessible dispute resolution is still needed.⁴⁰ Now, the IDEA provides three important

35. Marchese, *supra* note 32, at 344 ("The perceived difficulty of negotiating the system has discouraged many parents from pressing forward with objections to their child's placements."); see also Chopp, *supra* note 7, at 436 (discussing lack of informed parents on rights to have independent educational evaluation (IEE) at public expense); Julie L. Fitzgerald & Marley W. Watkins, *Parents' Rights in Special Education: The Readability of Procedural Safeguards*, 72 EXCEPTIONAL CHILD. 497, 506 (2006) (finding that only four to eight percent of the documents parents receive regarding special education rights abide by recommended seventh to eighth grade reading level, which decreases average parents' ability to understand these documents).

36. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(1), 111 Stat. 37, 90 (1997); see also 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, 503 (2013) (discussing that reauthorization of the IDEA usually occurs every five years and the most recent reauthorization occurred in 2004). Originally named the Education for All Handicapped Children Act (EAHCA), it was renamed the Individuals with Disabilities Education Act (IDEA) in 1990. *Id.* at 503 n. 3.

37. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1424 (2011) (discussing enforcement disparities stemming from formal due process hearings and the initial victory of private enforcement causing wealthy families to become primary instigators of due process hearings).

38. *Id.* at 1424.

39. See Pub. L. No. 105-17, 111 Stat. at 26; 20 U.S.C. § 1415(e); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004); 20 U.S.C. § 1415(f)(1)(B); Pasachoff, *supra* note 37, at 1424 (discussing that the dispute resolution provisions provide parents "a degree of autonomy and control in the construction of their [children's] educational experience;" however, the system presents unforeseen distributional consequences).

40. See Pasachoff, *supra* note 37, at 1424 (discussing the need for informal due process systems); Erin R. Archerd et al., *The Ohio State University Dispute Resolution in Special Education*

dispute resolution procedures: due process hearings, mediations, and resolution sessions.⁴¹

II. DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES OF THE IDEA

Due process hearings established a way for parents to challenge school districts' handling of a disabled child's education, but many states sought alternative routes to resolving special education disputes.⁴² Common use of alternative dispute resolution ("ADR") processes, and criticisms of the due process hearings by both parents and school districts, led Congress to insert a voluntary mediation provision into the IDEA.⁴³ The voluntary mediation provision was later joined in the 2004 IDEA reauthorization by a mandatory resolution session provision.⁴⁴ As the IDEA has grown, so has the number of ADR processes it provides.

Due process hearings and judicial review were historically the first route established for parents to challenge a school district's educational placement or plan for their child under the IDEA.⁴⁵ States began trying informal alternative dispute resolution processes to

Symposium Panel, 30 OHIO ST. J. ON DISP. RESOL. 89, 94 (2014) (discussing "upstream solutions" before filing of due process complaint including the federally-funded think tank, Center for Appropriate Dispute Resolution in Special Education ("CADRE")).

41. 20 U.S.C. § 1415(e), (f).

42. See 20 U.S.C. §§ 1400-1409; see also Jennifer Adams Mastrofski, *Power Imbalance within the Setting of Special Education Mediation: A View toward Structural and Organizational Factors Influencing Outcome*, 10 SOC. PRAC. 67, 68-69 (1992), available at <http://digitalcommons.wayne.edu/socprac/vol10/iss1/8> (discussing numerous states voluntarily implementing mediation provisions as an alternative to the formal, costly, and lengthy due process hearing); Cope-Kasten, *supra* note 36, at 533 (discussing how mediation costs less for the parties because of an average of less attorney's and expert fees); see also GAO, *supra* note 3, at 9 (mentioning early resolution practices voluntarily adopted by states); SASHA PUDELSKI, *RETHINKING SPECIAL EDUCATION DUE PROCESS*, AASA IDEA RE-AUTHORIZATION PROPOSALS: PART I 3 (2013) (discussing survey findings showing current due process system presents significant consequences for children with disabilities).

43. See Pub. L. No. 105-17, 111 Stat. 37 (1997); 20 U.S.C. § 1415(e); S. REP. NO. 105-17, at 36-37 (1997) (including voluntary mediation provision because of the number of states independently implementing mediation programs and concerns of maintaining workable relationships between parents and schools); see also Demetra Edwards, *New Amendments to Resolving Special Education Disputes: Any Good Ideas?*, 5 PEPP. DISP. RESOL. L.J. 137, 140 (2005) (discussing 1997 reauthorization adding mediation, and its requirement for every state accepting funds to offer an option to mediate prior to an already requested due process hearing); Beyer, *supra* note 33, at 38 ("[C]ongress included mediation in the procedural safeguards section of the reauthorized IDEA to address numerous criticisms levied against due process hearings.").

44. 20 U.S.C. § 1415(e), (f)(1)(B).

45. 20 U.S.C. § 1400.

provide additional means for parents and school districts to settle disputes.⁴⁶ State officials' concerns focused on the adversarial nature of due process hearings.⁴⁷ Through their experiences, state officials noticed that once parents asserted their formal rights, there was less opportunity for compromise and cooperation.⁴⁸ Thus, states found a need for informal alternative dispute processes to help parents and school districts work together to determine the best educational plan for a child.⁴⁹ Responding to the success of some states' use of alternative dispute resolution processes, Congress added a provision for voluntary mediation to the 1997 reauthorization of the IDEA and a mandatory resolution session to the 2004 IDEA reauthorization.⁵⁰ Congress included mediation as a procedural safeguard against criticisms of due process hearings from parents and school districts alike.⁵¹ The inclusion of alternative dispute resolution was intended to improve the complaint process and the relationships of parents and school districts.⁵²

46. See GAO, *supra* note 3, at 9 (discussing states' alternative methods of dispute resolution they voluntarily developed); KELLY HENDERSON, OPTIONAL IDEA ALTERNATIVE DISPUTE RESOLUTION, 1 (inForum, May 2008) ("[S]ome states and localities voluntarily choose to adopt alternative mechanisms for resolving disagreements over the provision of special education services").

47. See GAO, *supra* note 3, at 2 (discussing policy makers and the Department of Education recognized the adversarial nature of special education disputes and due process hearings).

48. See Beyer, *supra* note 33, at 40-41; see generally Chopp, *supra* note 7, at 433-34 n.43 (describing her experience with a parent pushing for the child to be placed in a particular school and attorney responding "this is the district's IEP," which shows sentiment of some school districts to exclude parents from meaningful participation).

49. See Beyer, *supra* note 33, at 40 (discussing the adversarial culture associated with due process hearings and its contrast to inclusion goals of the IDEA).

50. 20 U.S.C. § 1415(e), (f)(1)(B); see Beyer, *supra* note 33, at 44 (discussing thirty-nine states that had success in mediation of special education disputes before Congress added it as a procedural remedy of the IDEA); see also Beyer, *supra* note 33, at 45 ("By uniting disputing parties through relationships rather than dividing them according to claims of right, mediation empowers the disputants to control their conflict so that they may design a creative solution in the best interests of the child—the fundamental goal of both parent and school official."); Edwards, *supra* note 43, at 145 (explaining that, because of state programs' success, Congress determined the need for the alternative dispute resolution process in the IDEA).

51. 20 U.S.C. § 1415(e); see also Edwards, *supra* note 43, at 140 (discussing 1997 reauthorization adding mediation, and its requirement for every state accepting funds to offer an option to mediate prior to an already-requested due process hearing); Beyer, *supra* note 33, at 38 ("While mediation may address many of the complaints often directed toward adversarial dispute resolution, mediation under the provisions of the IDEA creates inconsistencies and ambiguities.").

52. Edwards, *supra* note 43, at 148 ("Congress asserts the first view, claiming that the dispute resolution amendments (including resolution sessions) are proposals intended to improve the complaint processes and parent/school relationships.").

The current authorization of the IDEA maintains mediation as an alternative dispute resolution process,⁵³ and enables parties to mediate before or after the filing of a due process complaint.⁵⁴ The IDEA mandates certain rules governing special education mediation.⁵⁵ Further, the IDEA mandates that states provide an opportunity for mediation.⁵⁶ This opportunity is voluntary; however, if a party declines mediation the state must encourage the declining party to meet with an independent third party to discuss the advantages of mediation.⁵⁷ Congress included third-party counseling in the IDEA to encourage the use of ADR processes in an attempt to prevent the escalation of disputes to litigation and to reduce mistrust and tension that may exist, or develop, between parents and school districts.⁵⁸

Mediation, rather than due process complaints, is more likely to serve the best interest of a child because of an increase in collaboration and cooperative effort.⁵⁹ Mediation, in situations where both sides are willing to cooperate, can be a positive alternative to costly

53. 20 U.S.C. § 1415(b)(5), (e).

54. *Id.*; Pub. L. No. 108-446, § 101, sec. 615(e)(1), 118 Stat. 2647, 2719 (“Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint.”); *see also* GAO, *supra* note 3, at 2 (mentioning early and less costly methods of dispute resolution included in past reauthorizations of IDEA).

55. Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up is Hard to Do*, 43 LOY. L.A. L. REV. 641, 647-48 (2010) (discussing 20 U.S.C. § 1415(e)(2) and its mandates, which states must follow when providing voluntary mediation for special education disputes).

56. 20 U.S.C. § 1415(b)(5).

57. *Id.* § 1415(e)(2)(A)(i)-(B)(ii) (requiring the disinterested party be in contract with a parent training and information center or community parent resource center in the state established under 20 U.S.C. §§ 1471, 1771(d), or an appropriate alternative dispute resolution entity).

58. *See* Blau, *supra* note 3, at 85 (mentioning importance of ADR processes in maintaining relationships between parents and school districts for the continued education of the child with special needs).

59. *See* Edwards, *supra* note 43, at 149 (discussing Senate Committee on Health, Education, Labor, and Pensions’ discouragement resulting from a report from state officials that some IDEA provisions encourage an adversarial, and not cooperative, atmosphere); PUDELSKI, *supra* note 42, at 3 (showing numerous studies and papers on mutual dissatisfaction with the due process complaint procedure); Cope-Kasten, *supra* note 36, at 517 (discussing how due process hearings lead to less cooperation and “[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.”) (quoting Andrea Shemberg, *Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?*, 12 OHIO ST. J. ON DISP. RESOL. 739, 743 (1997)).

litigation and due process hearings.⁶⁰ Studies show mediation can solve disputes faster and with less expense than due process hearings.⁶¹ Mediations are successful if done properly, with both parties engaging in a good faith effort to resolve the conflict in a way that promotes the best interest of the child's education.⁶²

While maintaining voluntary mediation in the 2004 IDEA reauthorization, Congress added a new requirement for a mandatory resolution session prior to a due process hearing.⁶³ Similar to the mediation provision, the resolution session provision is an attempt to avoid due process hearings and promote collaboration; but, unlike mediation, the resolution session is mandatory.⁶⁴ Congress incorporated the resolution session as a means to promote a collaborative effort between the parties in solving the dispute before convening a due process hearing.⁶⁵ The goals of a resolution session include parents discussing their complaint and allowing the parties to clarify any issues the complaint contains.⁶⁶ The resolution session includes time constraints on when the session must occur in order to prevent undue delay; the session must take place within fifteen days of the parents' demand for a due process hearing, and the meeting must include the parents and any relevant members of the IEP team, including a representative from the school district who is capable of binding the school district in an agreement.⁶⁷ The resolution session attempts to address the possible unequal bargaining power of par-

60. See PUDELSKI, *supra* note 42, at 6–8 (explaining numerous reasons why both parents and school administrators prefer mediation over litigation when enforcing a child's educational rights); Nancy A. 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, 581 (2004) ("Parents . . . value the mediation process because they perceive it as more 'procedurally just' than the unsupervised meetings that precede it.").

61. Beyer, *supra* note 33, at 45–46 (discussing demonstrated effectiveness of mediation in numerous state special education disputes).

62. *Id.* at 45.

63. 20 U.S.C. § 1415(e) (voluntary mediation provision); *id.* § 1415(f)(1)(B) (mandatory resolution session).

64. 20 U.S.C. § 1415(f)(1)(B)(i) ("Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint."). *But see id.* § 1415(f)(1)(B)(i)(IV) (resolution session may be avoided if it is waived, in writing, by both parties, or if both parties agree to use the mediation process to solve the dispute).

65. Edwards, *supra* note 43, at 151 ("Congress intends these negotiation conferences to provide parents and schools with a less adversarial, less costly, less time consuming, and more congenial method of resolving disputes.").

66. *Id.* at 148 (discussing Congress's goals of the resolution session).

67. 20 U.S.C. § 1415(f)(1)(B)(i)(I)–(II).

ents,⁶⁸ and limits a school district's right to counsel by only allowing the school district to bring legal representation if the parents bring an attorney.⁶⁹

III. PROS AND CONS OF VOLUNTARY MEDIATION AND MANDATORY RESOLUTION SESSIONS

Mediation and resolution sessions are improvements to dispute resolution, but there are difficulties that should be addressed in the next reauthorization of the IDEA. First, a lack of consistency in goals, methods, and guidelines for mediator skills and qualifications leads to a disparity in mediation results across states. Next, parents' lack of knowledge of special education laws and inability to understand available routes leads to a power imbalance. Finally, this power imbalance between parents and school districts has a strong effect on the fairness of dispute resolution processes under the IDEA.

The most recent reauthorization of the IDEA provides provisions to attempt to minimize disparity in use of mediation, but this disparity still exists because of a lack of "consistency in goals, methods, and guidelines for mediator skills and qualifications."⁷⁰ The IDEA provides that a state must maintain a list of qualified mediators who are knowledgeable in laws and regulations relating to special education.⁷¹ The role of the mediator is crucial to the success of the individual mediations.⁷² An impartial and qualified mediator minimizes the knowledge gap and increases the parties' belief in the fairness of the mediation process.⁷³ Educational agencies mainly supply basic facilitative, evaluative, and transformative mediation models, which

68. See Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179, 188 (2012) ("Unsympathetic courts coupled with the prominence of a power imbalance between the parties results in unfair settlements."); Phillips, *supra* note 1, at 1828-37 (discussing limits on effective parental advocacy).

69. 20 U.S.C. § 1415(f)(1)(B)(i)(III) (stating that the resolution session's preliminary meeting "may not include an attorney of the local educational agency unless the parent is accompanied by an attorney").

70. See Blau, *supra* note 3, at 82 ("The absence of consistency in goals, methods, and guidelines for mediator skills and qualifications reportedly confound special education mediation proposals.").

71. See 20 U.S.C. § 1415(e)(2)(C).

72. Mueller, *supra* note 31, at 2 ("The role of the mediator is pivotal . . . so that both parents and district representatives can participate in thoughtful and productive dialogue.").

73. *Id.*

are quite different and reflect different goals.⁷⁴ Various goals of special education mediation include:

reduction in number of litigated disputes, resolution of substantive and procedural conflicts, development of enforceable agreements, promotion of long-term relationship building, development of trust between parents and schools, neutralization of the playing field, individual empowerment for all participants with or without reaching an agreement, and assurance that the best interests of the child with respect to the receipt of a free and appropriate public education within the least restrictive environment are respected.⁷⁵

The lack of a focused goal for mediations causes disparate choices of mediator qualifications and style, which leads to the continued concern of access to dispute resolution processes in special education.⁷⁶

Lower-income parents do not use dispute resolution processes nearly as often as wealthier parents.⁷⁷ Although, under the IDEA, states are required to bear the costs of dispute resolution meetings, including mediation and resolution sessions, there is still a gap in the use of the ADR processes between middle- and higher-income families and lower-income families.⁷⁸ Lower-income families use these dispute resolution processes less than others, yet most children who receive special education services are from these lower-income families.⁷⁹ The lack of access to legal resources leaves many

74. Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 205 (2003) (discussing three mediation models and their differences).

75. Blau, *supra* note 3, at 82; *see also* Marchese, *supra* note 32, at 349 (discussing the Senate's conversations of decrease in litigation and increase in amicable dispute resolutions stemming from mediations).

76. *See* Blau, *supra* note 3, at 75 (discussing implicit, or intentional, discouragement of parents by procedural issues under the IDEA which may cause parents to file a due process complaint before understanding the benefits of mediation).

77. PUDELSKI, *supra* note 42, at 7-8. One major issue discovered by the United States Government Accountability Office was the lack of public knowledge of the alternative dispute resolution steps, including the mediation and resolution meetings required by the IDEA. *See* GAO, *supra* note 3, at 20, 22.

78. *See* 20 U.S.C. § 1415(e)(2)(D); Blau, *supra* note 3, at 75 (discussing parents' tendencies to accept the school districts' "expert" authority in forming IEPs and stating the continued existence of perceived power imbalances).

79. *See* 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, 113 (2012) (discussing how poor parents cannot afford legal services, and that there are limited resources for free legal aid); *id.* at 113-14 ("Under the IDEA, due process hearings and media-

low-income families incapable of understanding their procedural rights under the current IDEA.⁸⁰ Those parents who effectively use the IDEA's alternative dispute resolution processes tend to be wealthier, and the complexity of the processes and the lack of understanding among parents of lower income can prevent challenges to inappropriate placements.

Both parents' lack of knowledge and their lack of access to legal resources cause an imbalance of power between parents and school districts in mediations and resolution sessions.⁸¹ The internet helps minimize this gap by allowing education agencies to provide free guides for parents that may help them navigate mediation and resolution sessions.⁸² There is now increased availability of information for both parents and school districts facing special education disputes under the IDEA, but a problem of public knowledge of the means available to parents when a dispute arises is still looming.⁸³ In rural and urban areas, state officials complain of parental lack of knowledge.⁸⁴ Many parents or guardians of children with disabilities who reside in these areas are poor and have multiple obstacles to overcome to advocate for an appropriate education for their

tion are underutilized and are used mostly by wealthy families with financial means for a private school funding remedy. . . . As can be expected families with attorneys prevail more frequently in due process hearings than those who proceed pro se."); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2005), available at <http://www.lsc.gov/justicegap.pdf>; Phillips, *supra* note 1, at 1836-37 (discussing low-income parents' lack of knowledge of educational options and inability to comprehend all laws, statutes, and regulations surrounding special education leads to ineffective advocacy for their children).

80. See Hyman, *supra* note 79, at 131-32 ("It is not equitable for [parents] . . . to have different rights depending on the whims of state legislatures, particularly when states have significant financial interest in limiting parents' abilities to redress violations. Shortened limitations periods protect districts and states that fail to offer FAPE, and provide a way for districts to receive and maintain IDEA funding with little risk of parent challenge.").

81. See Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 35-42 (1997) (discussing critics of mediation and the effects the imbalance of power may have on mediations); see also Kerr & Hill, *supra* note 68, at 181-82 (stating the power imbalance between low-income families and school districts is too large an obstacle to overcome).

82. See GAO, *supra* note 3, at 23 (explaining how the internet allows better access to information, which helps parents understand their rights under the IDEA, but those without access have a more difficult time understanding procedural remedies); see generally CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., IDEA SPECIAL EDUCATION RESOLUTION MEETINGS: A GUIDE FOR PARENTS OF CHILDREN AND YOUTH (2014) (guiding parents through the resolution meetings).

83. GAO, *supra* note 3, at 22-23 (discussing state officials' finding that rural and urban communities tend to know less about the options available to them).

84. *Id.*

child.⁸⁵ These obstacles, for low-income families, include the inability to obtain professional assistance in the evaluation of the child, the creation of the IEPs, and the highly technical nature of many IDEA provisions and procedures.⁸⁶ Low-income families have a difficult time obtaining knowledge, which wealthier families usually already maintain, because many low-income parents do not have high education levels or the ability to take time off of work to schedule and attend meetings with the school district.⁸⁷ Low-income parents are more likely to defer to the perceived expert opinions of school districts.⁸⁸ These obstacles, most felt by low-income families, inhibit the parental enforcement of IDEA to the potential infringement of their children's rights to appropriate special education.⁸⁹ The success in mediation comes from both the parents and school districts participating in thoughtful and productive dialogue.⁹⁰

Productive dialogue will not occur if either side believes the process is unfair. To further incorporate fairness between the parties, states must schedule the mediation at a convenient time and place for both parties, and pay for the costs of mediation.⁹¹

A. Voluntary Mediation

When first incorporated into the IDEA, voluntary mediation provided a faster and fairer way to resolve disputes in special education than a due process hearing. Supporters of its incorporation believed that impartial mediators presiding over a mediation would produce a result that would be fair for both sides.⁹² However, an increasing analysis of data on mediation resolution results does not show whether that result is the best option for a child's education, and the

85. Hyman, *supra* note 79, at 111.

86. *See id.* ("The obstacles that families without resources face in the IDEA are compounded by the increasingly technical nature of the IDEA and the inability of these families to retain professionals to assist in navigating the intricacies of disability definitions, evaluation processes, the development of IEPs, the complex of procedural safeguards, among other provisions in the statute.").

87. *See id.*

88. *Id.*; *see also* Chopp, *supra* note 7, at 447 (discussing that school districts having finite resources will allocate what they have to those who advocate most forcefully, which is usually wealthier parents).

89. *See* GAO, *supra* note 3, at 20 (discussing issues of lower-income parents, which lead to improper utilization of the IDEA's procedural safeguards).

90. *See id.* at 31 (discussing how collaboration helps improve the success of mediations).

91. 20 U.S.C. § 1415(e)(2)(D)-(E).

92. *See* Kuriloff & Goldberg, *supra* note 81, at 41-43 (discussing arguments regarding the use of mediation in special education disputes).

initial focus on the results of impartial mediators is flawed.⁹³ Results data should be supplemented with data regarding how the parties cooperate and how the parties interpret the fairness of the process.⁹⁴ The process itself contributes to the success of mediation, and this is lost when focusing only on results. The mediator and the relative wealth of the parties affect parents' and school districts' perceptions of fairness in the mediation process.⁹⁵ Mediation's fairness coincides with the same indicators as those of parties who judge due process fairness.⁹⁶ Mediation, as set up under the IDEA, is more similar to due process hearings than many think. Although a less costly avenue of dispute resolution, mediation contains similar problems as those associated with due process hearings, including parents' perceived lack of fairness.

The success of a particular mediation session depends on the mediation model used. Three mediation models consistently used in IDEA disputes are the facilitative model, the evaluative model, and the transformative model.⁹⁷ In the facilitative model, a mediator focuses on guiding the parties in self-understanding and voicing their underlying interests.⁹⁸ Through guidance of the facilitating mediator, this model presents the ability for parties to be able to understand the dispute and possible results that are in the best interest of the child.

The evaluative model takes a narrower approach in which the mediator focuses on what the outcome at trial might be and evaluates the strengths and weaknesses of each party's argument.⁹⁹ Under the evaluative model, the parties are charged with making arguments and the mediator is present as a referee rather than as someone to help guide the parties in the dispute.¹⁰⁰

93. *Id.*; see also S. REP. NO. 108-185, at 6 (2003), available at <https://www.congress.gov/108/crpt/srpt185/CRPT-108srpt185.pdf> (mentioning the beliefs of many parents, policy analysts, and school representatives that the accountability provisions of the IDEA focus on state compliance with legal process rather than evaluating student performance).

94. See Kuriloff & Goldberg, *supra* note 81, at 43.

95. See *id.*

96. Welsh, *supra* note 60, at 575 (pointing out that the same results data provided by mediation matches indicators of due process hearing results data).

97. D'Alo, *supra* note 74, at 205 (discussing three mediation models that mediation practitioners refer to and their purposes).

98. *Id.*

99. *Id.*

100. See Welsh, *supra* note 60, at 581-82.

The transformative model focuses on the mediator guiding the parties' self-understanding of the dispute.¹⁰¹ In this model, the mediator's role is to help each party understand the opposing party's arguments, in hopes that it will allow the parties to work together toward a better solution for the child.¹⁰² Although these three models provide methods a mediator can use to conduct an IDEA mediation session, the IDEA itself is silent on a preferred method.¹⁰³

B. Mandatory Resolution Session Meetings

The IDEA provides for a mandatory resolution session meeting before a due process hearing is commenced. The meeting is intended to provide an opportunity for the parents' claims to be discussed, and for potential solutions to be determined before a formal due process hearing begins.¹⁰⁴ Resolution sessions are seen as last-ditch efforts to obtain an agreement from adversaries who plan to endure the due process hearing.¹⁰⁵ The 30-day window to resolve complaints before the due process hearing is sometimes helpful and other times wasteful.¹⁰⁶ First, the resolution session is seen as providing an opportunity for parents and school districts to discuss concerns, clarify grievances, and reach a settlement agreement.¹⁰⁷ However, some commentators see the resolution session as a delay and pressure tactic, in which school districts wind-down a two-year statute of limitations.¹⁰⁸ This critical view is supported by data collected from results of resolution sessions compared to mediations: resolution sessions are utilized more frequently than mediations and are more likely to end without agreements.¹⁰⁹ The possibility that states will delay or improperly implement resolution sessions demon-

101. D'Alo, *supra* note 74, at 205.

102. *Id.*

103. *See generally* 20 U.S.C. § 1415(f)(1)(B).

104. *Id.*

105. *See id.*

106. Edwards, *supra* note 43, at 148–49 (discussing advocate groups' opposition to the resolution session, including one group's petition to vote "No" to its inclusion in the IDEA because it is providing an extra meeting and burden on parents in special education disputes).

107. *Id.*

108. *Id.*; *see also* GAO, *supra* note 3, at 21 (discussing the view of many that the resolution session is a waste, and that when parents file due process complaints they usually have representation, are entrenched in their arguments, and prefer to waive the meeting).

109. GAO, *supra* note 3, at 16 (stating that in 2011–12, sixty-nine percent of mediations resulted in agreements, compared to only twenty-two percent of resolution session meetings).

strates the need for improvement on this aspect of the dispute resolution process.

The formal and informal processes already provided by the IDEA help govern disputes over the adequacy and appropriateness of an IEP for a child with disabilities, but remain inadequate to provide parents a balanced and fair opportunity to advocate for their children's education.

IV. STATE EFFORTS: FACILITATION, PARENT-TO-PARENT ASSISTANCE, AND DISPUTE RESOLUTION HELPLINES

In theory, both voluntary mediations and mandatory resolution sessions provide less adversarial approaches to conflict resolution than due process hearings, but fall short of ensuring that every disabled student receives a free and appropriate public education. Since the implementation of the IDEA, states have developed additional methods to accomplish the goal of providing a free and appropriate public education to children with disabilities.¹¹⁰ By way of these voluntary improvements, some states provide more effective access and information for parents than others. These dispute resolution experiments by states have resulted in numerous suggestions by commentators for improvement on the provisions of the IDEA.¹¹¹ Suggestions include improved access to information prior to the existence of a dispute, as well as the improvement and addition of alternative dispute resolution processes to equalize the power of parents and school districts, while minimizing the cost and time of disputes. Common to these suggestions are the goals of neutralizing power imbalances and improving information access, while also improving evaluation techniques and existing data to better prepare for inevitable future improvements.¹¹²

A recent study conducted by the United States Government Accountability Office ("GAO") focuses on the perceptions by state officials of alternative dispute resolution processes and their use in various states.¹¹³ In the study, state officials described numerous addi-

110. *Id.* at 19-23.

111. *See generally* HENDERSON, *supra* note 46.

112. *See id.* at 11.

113. GAO, *supra* note 3; *see e.g.*, U.S. OFF. SPECIAL EDUC. PROGRAMS, PART B: STATE PERFORMANCE PLAN/ANNUAL PERFORMANCE REPORT 2013 INDICATOR ANALYSIS (2013), available at <http://leadership-2013.events.tadnet.org/pages/660> [hereinafter USOSEP] (results of surveys conducted each year to determine how states are performing on numerous defined metrics); U.S. Off. Special Educ. Programs, PART B: STATE PERFORMANCE PLAN/ ANNUAL PERFORMANCE RE-

tional methods and strategies, above those currently required by the IDEA, as helping the individual states improve relationships between parents and school districts and prevent the time and cost of due process hearings and litigation.¹¹⁴ Among the most common methods reported were dispute resolution helplines, facilitated IEP meetings, facilitated resolution meetings, parent-to-parent assistance, and conflict resolution skills training.¹¹⁵ Thirty-three of fifty-one responding states and territories reported using three or more such approaches.¹¹⁶ From the responses, the GAO found that a large majority of state officials determined that IDEA-required mediation and resolution meetings are important to resolving disputes. It also found that the alternative dispute resolution systems some states and territories have voluntarily implemented are important as well.¹¹⁷ States continue to voluntarily implement additional strategies to help resolve or minimize disputes.¹¹⁸

Voluntarily implemented dispute resolution strategies share common features, including an increased perception of neutrality,

PORT 2012 INDICATOR ANALYSIS (2012) available at http://ectacenter.org/~pdfs/sec619/part-b_sppapr_12.pdf [hereinafter USOSEP II].

114. GAO, *supra* note 3, at 9; see generally USOSEP & USOSEP II, *supra* note 113.

115. GAO, *supra* note 3, at 16; see EDWARD FEINBERG ET AL., BEYOND MEDIATION: STRATEGIES FOR APPROPRIATE EARLY DISPUTE RESOLUTION IN SPECIAL EDUCATION: A BRIEFING PAPER FROM THE CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION (CADRE) 20-21, 31-33 (2002) (discussing numerous states' implementations of processes to provide parents assistance from other parents involved in special education and IDEA dispute resolution).

116. GAO, *supra* note 3, at 16; see also USOSEP II, *supra* note 113, at 207 (discussing commonalities of voluntary dispute resolution processes represented by the responses of states in the survey, including: presence of a facilitator to assist in mediation and resolution session meetings; mediation offered at the time of filing of a due process complaint; and training on resolution session meetings and processes provided to educators, parents, and families).

117. GAO, *supra* note 3, at 19.

118. See *id.* at 9 (mentioning alternative methods states voluntarily developed, including educator training in conflict resolution and facilitated IEP meetings); see also Kerr & Hill, *supra* note 68, at 194-95 (advocating for attorneys being allowed in Pennsylvania IDEA mediation); S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 544, 551-63 (2012) (discussing systematic objectives of arbitration); Weber, *supra* note 55, at 650-51 (discussing the 2002 *Report of the President's Commission on Excellence in Special Education* suggesting adding voluntary binding arbitration before arbitrators specially trained in IDEA conflict resolution); Beyer, *supra* note 33, at 59 (discussing separating state and local education agencies from selection of mediators and employing experienced, trained, and sophisticated mediators); Edwards, *supra* note 43, at 156-58 (discussing issues with voluntary binding arbitration including the inability to enforce that the agreement was entered into "voluntarily and knowingly" (quoting H.R. 1350, 108th Cong. § 205(e)(2)(i)(I) (2003)).

the use of advisory groups, and improved use of evaluation data.¹¹⁹ States that are considered “high performers” in special education dispute resolution commonly offer additional alternative dispute resolution processes beyond those mandated by the IDEA.¹²⁰ States considered “low performers” commonly had financial constraints and budgeting issues, making them more hesitant to agree to settlement techniques that would result in additional costs.¹²¹ A goal in providing additional dispute resolution training and techniques is to allow parents and school districts to collaborate, which can decrease the demand for mediation through earlier and simpler solutions of disputes.¹²² Parties are more willing to negotiate in good faith when the process incorporates neutral third parties who conduct or manage the negotiations.¹²³ Third parties can include advisory groups that help promote the effectiveness and use of alternative dispute processes through their diverse membership and their ability to help build support for the procedures.¹²⁴ By providing numerous viewpoints and beliefs, more options to help solve disputes and resolve issues are accessible and may help improve collaboration between parents and school districts. Finally, use of evaluation data is extremely important when a state needs to improve its programs.¹²⁵ Without the knowledge of what is currently working or failing, states cannot improve their processes.¹²⁶ A state needs data to understand how its processes are functioning and how they can be improved. Therefore, suggestions by scholars and special education

119. See HENDERSON, *supra* note 46, at 11 (discussing factors that support alternative dispute resolution processes).

120. States with a higher performance rate commonly provided facilitation during the resolution meeting at no charge; mediation offered at time of due process complaint filing; training on resolution meetings and resolution process provided to educators and parents; active tracking, monitoring, reviewing of resolution periods, meetings, and settlement agreements; and review of data with system improvements implemented accordingly. See USOSEP II, *supra* note 113, at 207.

121. *Id.* at 209.

122. *Id.* at 210.

123. *Id.*; HENDERSON, *supra* note 46, at 9.

124. USOSEP II, *supra* note 113, at 210.

125. *Id.*

126. This also applies to the mandatory procedures provided by the IDEA. The suggestions provided by the GAO after concluding their interviews and research were to improve the quality and timeliness of data from states on their use and results of IDEA mandated procedural remedies. “Without more transparent timeliness data and comparable parental involvement data, Education cannot effectively target its oversight of states’ dispute resolution activities.” See GAO, *supra* note 3.

professionals include improving neutrality, incorporating third parties like advisory groups, and obtaining better evaluation data.¹²⁷

To help address parents' lack of knowledge of special education laws and the availability of alternative dispute resolution processes, numerous states implement easier ways for parents to obtain guidance and information.¹²⁸ Parents' involvement with their children's education is part of preventing or mitigating disputes with school districts.¹²⁹ Many of the suggestions from states to improve dispute resolution involve the inclusion of parents in the processes.¹³⁰ First, implementation of parent-to-parent assistance provides parents an option to speak with someone neutral who is knowledgeable about special education and dispute resolution.¹³¹ This third party option provides parents, who may be skeptical of the motives of state or local agencies, with the ability to learn from someone who is not employed by either state or local agencies. States also implement dispute resolution helplines to provide a state-sponsored or state-run avenue for parents to obtain information or have questions answered.¹³² The helplines involve state education agency staff that respond to public calls or e-mails regarding the processes available to parents in special education disputes.¹³³ Helplines allow parents and school staff to learn about the procedures from those who govern their implementation, which improves the available procedures' utilization and the resulting agreements for the disabled child's education. By educating parents and helping them navigate potentially complicated dispute resolution steps, it is likely that disabled children's access to appropriate education will improve.

Currently, if a school district opposes a parent's suggestions for an appropriate IEP, parents may need to obtain the services of psychologists, behavior specialists, physicians, or other experts to advo-

127. See generally HENDERSON, *supra* note 46.

128. GAO, *supra* note 3, at 27-31.

129. *Id.* at 11.

130. See generally GAO, *supra* note 3.

131. GAO, *supra* note 3, at 17-18 (mentioning that eighteen states and territories provide parent-to-parent assistance including Maryland, which provides family support specialists who will work informally with families and school systems to resolve special education disputes).

132. *Id.* at 17 (stating that forty states and territories provide dispute resolution hotlines, including California's toll free number for parents and school staff and New York's six regional offices that provide parents and other parties with technical assistance and information on dispute resolutions).

133. *Id.*

cate that their position is appropriate.¹³⁴ The necessary time, resources, and knowledge needed for parents, especially those with lower incomes, to accomplish this task causes many parents to yield to the school district's suggestion.¹³⁵ Even with improved knowledge before disputes and easier access to guidance, there are difficulties in parents navigating the procedural remedies of the IDEA.¹³⁶ The inclusion of facilitators before or early in disputes is successful and a good option to promote the cooperative problem solving needed to advance the best interests of children.¹³⁷

Requiring the use of facilitators allows the advantages of facilitation to be accessed during IDEA disputes. A facilitation involves an impartial person, guiding the parties through the alternative resolution processes, especially when an adversarial climate exists.¹³⁸ Facilitation encourages parties to resolve disputes before it costs both sides more time and money. The presence of a neutral facilitator may also yield a more effective and successful meeting.¹³⁹

Facilitation of IEP meetings has proven successful to bridge the gap between parents and school districts in special education disputes.¹⁴⁰ State and local education agencies recognize the need for appropriate dispute resolution options, such as IEP facilitation, as

134. Michelle Diament, *Senator Looks to Ease Burden for Parents in IDEA Disputes*, DISABILITYSCOOP (Sept. 12, 2014), <http://www.disabilityscoop.com/2014/09/12/senator-burden-idea-disputes/19667/>.

135. See GAO, *supra* note 3, at 22–23 (discussing state officials' findings that parents in urban and rural areas lack knowledge of available IDEA procedures); see also Blau, *supra* note 3, at 79 ("Given the perceived power imbalance between parents and schools, a facilitator might prove useful the first time parents attend an IEP meeting that is either due to their child's new classification or a transition of IEP team members. Acting as a third-party neutral, the IEP facilitator assists team members in communicating and effectuating an IEP that is in the best interest of the student.").

136. See HENDERSON, *supra* note 46, at 1–2 (discussing numerous trainings and access to information provided to parents, but also including the suggestion to add facilitation to the processes); GAO, *supra* note 3, at 17–18 (discussing voluntarily implemented dispute resolution processes of states, which include facilitated IEP meetings and resolution meetings).

137. PUDELSKI, *supra* note 42, at 3–4 (discussing the School Superintendents Association's suggested new framework of dispute resolution which would include facilitated IEP meetings and the use of a consultant in a failed mediation).

138. GAO, *supra* note 3, at 17; see also FACILITATION, BLACK'S LAW DICTIONARY 709 (10th ed. 2014) ("The act or an instance of aiding or helping."); *Resolution Meeting Facilitation*, OFFICE OF DISPUTE RESOLUTION, <http://odr-pa.org/alternative-dispute-resolution/resolution-meeting-facilitation/> (last visited Oct. 26, 2015) [hereinafter *ODR Facilitation*].

139. *ODR Facilitation*, *supra* note 138.

140. See HENDERSON, *supra* note 46, at 7 (discussing that twenty-four states reported using IEP facilitation and eight other states planning to implement IEP facilitation); see also *ODR Facilitation*, *supra* note 138 (suggesting a consultant spend time to advise the parties of where they think an agreement can be made and offer a suggestion for a resolution).

prevention practices prior to the option of formal IDEA dispute resolution.¹⁴¹ The states who provide IEP facilitation see agreements occur more frequently through the use of expert facilitators, which has led to a drop in requests for mediation in some states.¹⁴² Local facilitation provides focused services to help guide disputes between parents and school districts.¹⁴³ IEP facilitation alone is promising, but parent training and building partnerships through education improves relationships and the success of IEP facilitation.¹⁴⁴ IEP facilitation also needs support throughout the rest of the dispute resolution process under the IDEA to help provide for a better, more collaborative, working environment for parents and school districts to develop the best educational plan for a disabled child.

Facilitated mediation and resolution meetings can improve dispute resolution under the IDEA.¹⁴⁵ Dispute resolution facilitators are a positive addition to mediation and resolution sessions.¹⁴⁶ In potentially adversarial mediations and resolution sessions, the facilitator can help the parties focus on the needs of the student.¹⁴⁷ The facilitation itself will help rebuild and improve potentially damaged relationships between parents and school districts.¹⁴⁸ Through the use of facilitation, disputes can be resolved in the best interest of a disabled child's education, and the parents' and school district's relationship can be mended.¹⁴⁹

The voluntary mediation provision and mandatory resolution session are seen as very valuable processes by state officials that help parents and school districts resolve conflicts.¹⁵⁰ Although very important, there are still issues of perceived unfairness and disparity

141. Mueller, *supra* note 31, at 5.

142. *Id.* at 6.

143. *See id.* at 5.

144. *Id.* at 5-6.

145. *See* GAO, *supra* note 3, at 19-21 (discussing comments from parents and state officials that third-party facilitation is helpful to bringing about a result without a hearing); PUDELSKI, *supra* note 42, at 4 (proposing the suggestion of adding a provision in the next reauthorization of the IDEA to provide facilitation as an option in IEPs, mediations, and resolution sessions).

146. Blau, *supra* note 3, at 84 (discussing how using a facilitator as co-chair at the resolution meeting with the district representative improved the process).

147. PA. OFFICE OF DISPUTE RESOLUTION, RESOLUTION MEETING FACILITATION PROCEDURES/FACT SHEET, at 1-2 (2010) available at http://odr-pa.org/wp-content/uploads/pdf/RMF_Fact_Sheet.pdf.

148. *Id.*

149. Beyer, *supra* note 33, at 41 ("Because most parents and school districts will become repeat players in an IDEA dispute, emphasis on social cooperation rather than autonomous isolation may provide the foundation for the effective resolution of future disputes.").

150. GAO, *supra* note 3, at 19.

between the uses of dispute resolution by wealthy parents compared to low-income parents.¹⁵¹ The continued disparity in use between wealthy and low-income families, and the voluntary use of numerous other programs and dispute resolution processes by states, demonstrates that the IDEA is not achieving its goal and the mandate needs to be updated.¹⁵²

V. MANDATING PARENTAL ASSISTANCE IN THE NEXT IDEA

Children with disabilities were once secluded from school activities without services to help them achieve appropriate education.¹⁵³ The IDEA currently provides parents with the ability to advocate for their children and pursue an array of extensive procedural steps to resolve disputes.¹⁵⁴ However, when such remedies are costly and time-consuming, parents' inability to pursue them surfaces.¹⁵⁵ Alternative dispute resolution processes provide less expensive ways to attempt to resolve, or even prevent, disputes. Unfortunately, many parents still lack information and, even more importantly, the knowledge and expertise to make effective use of these processes. The United States Department of Education determined that a lack of resources causes a large number of states to provide inadequate dispute resolution processes.¹⁵⁶ Requiring additional, but less costly,

151. See Cope-Kasten, *supra* note 36, at 535 (discussing that without knowledge of special education law parents may be unaware of what a school district must legally provide a student, which gives school "districts an opportunity to appear cooperative [in mediation] while actually shortchanging the parents and student"); Pasachoff, *supra* note 37, at 1426 (discussing that wealthier parents still continue to enforce IDEA provisions more than low-income families suggesting that families with more financial resources are better able to pursue their rights under the IDEA).

152. Pasachoff, *supra* note 37, at 1431-32 (describing that results data from study show that the "IDEA's enforcement regime is at cross-purposes with [the] rest of the statute" and the way federal mandates are implemented and enforced are critically important); see also PUDELSKI, *supra* note 42, at 2 (discussing the need for cheaper alternative dispute resolution processes because school districts spend valuable resources "fighting the legal actions of a single parent").

153. Wolfe, *supra* note 14, at 1630 (discussing origins of the IDEA and advocacy for students with disabilities that led to parents receiving the right to file due process complaints regarding the appropriateness of their child's education); see also *supra* Part I (explaining the background of the IDEA).

154. Wolfe, *supra* note 14, at 1632 (discussing how two cases "opened the door for challenges to the practice of segregating . . . disabled children").

155. See Cope-Kasten, *supra* note 36, at 533 (mentioning that the cost of attorney and expert fees can be a burden on parents in disputes over special education).

156. See U.S. DEP'T OF EDUC., DETERMINATION LETTERS ON STATE IMPLEMENTATION OF IDEA (2014) (discussing compliance and results data in determining whether states meet the requirements of the IDEA, need assistance, need intervention, or need substantial intervention).

educational and dispute resolution practices in the next reauthorization of the IDEA can improve lower-performing states' ability to provide appropriate education to students with disabilities. All states should be required to provide parent-to-parent assistance.¹⁵⁷ States should also be required to provide toll free helplines for parents and school officials to receive information and guidance on the available processes and how they work.¹⁵⁸ Finally, and most importantly, to provide a fair and reasonable means of preventing and solving disputes in the best interest of a disabled child's education, the IDEA should require that facilitators be made available in IEPs, mediations, and resolution session meetings. There is no perfect answer, and the goal of delivering a timely, free, appropriate education to every child with a disability may never be fully achieved.¹⁵⁹ However, there can be improvement, and Congress can get the IDEA on the right course through implementing these steps, which better equip the private enforcement of children's rights through parental participation.

By mandating parent-to-parent assistance and dispute resolution helplines, the IDEA can help parents, who currently yield to school districts, become more informed about the options that are available to advocate for their child to the best of their ability. By adding to the current IDEA mandates, states who only strive to achieve the minimum will be able to solve disputes earlier and more often, which will allow for more money to be spent on the education of disabled children. Increasing the standards will also provide an increase of parental knowledge of dispute resolution processes and special education generally, which will allow them to collaborate

157. National Center of Dispute Resolution in Special Education ("CADRE") is an example of a national agency aimed at providing information and aiding the successful resolution of special education disputes. Their website provides access to literature and resources to help parents and school districts understand and navigate the special education dispute processes. See NATIONAL CENTER OF DISPUTE RESOLUTION IN SPECIAL EDUCATION, <http://www.directionservice.org/cadre> (last visited Jan. 1, 2016); see also GAO, *supra* note 3, at 22 ("A majority of states and territories reported that the guidance and assistance provided by CADRE--which serves as [U.S. Department of] Education's technical advisor and resource on special education dispute resolution--was extremely, very or moderately useful to their efforts to successfully implement and expand their early dispute resolution methods.").

158. See GAO, *supra* note 3, at 17 (discussing how California and New York provide such helplines).

159. See generally *Va. Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (overturning the Secretary of Education's only decision to withhold funds from a state for failing to adhere to the mandates of the IDEA).

more effectively with school districts.¹⁶⁰ When the IDEA is next reauthorized, Congress should follow the states once again and include parent-to-parent assistance and dispute resolution hotlines.¹⁶¹

States are laboratories for potential IDEA provisions, and many already use some form of facilitation for IDEA disputes.¹⁶² Just as states voluntarily used mediation to resolve special education disputes before the IDEA required it in 1997, states are finding success with the use of facilitation.¹⁶³ States' use of facilitation in IEP, mediation, and resolution session meetings is valuable to ensuring an appropriate outcome for the disabled child.¹⁶⁴ Requiring use of a facilitator in mediations and resolution sessions may help guide collaboration when possible. By guiding collaboration, parents, whose voices can be discredited or silenced by school districts on the other side of the table, will provide more guidance for what the child may need, or how they may react. Providing more guidance to parents will allow them to express their expertise of their child's personality and needs to the school district's special education representative, and establish a better system for the child to achieve their most appropriate education.¹⁶⁵

160. See Mueller, *supra* note 31, at 5 (discussing how increasing parents' knowledge of dispute resolution processes and special education generally will allow for more meaningful participation in IEPs, which will allow for better collaboration in the best interest of the child's education).

161. See USOSEP II, *supra* note 113, at 214-15 (discussing state officials findings that additional voluntarily provided options of education and dispute resolution avoid more complicated disagreements between parents and school districts); HENDERSON, *supra* note 46, at 2-10 (reviewing findings from surveys and research regarding numerous voluntary processes used by states including: conflict resolution skills training, stakeholder and school district management or oversight councils, parent-to-parent assistance, dispute resolution case managers, telephone intermediaries, IEP facilitation, non-IDEA mediation, third-party opinion or consultation processes, early complaint resolution, and resolution meeting facilitation).

162. See GAO, *supra* note 3, at 17 fig. 5 (listing number of states and territories which offer facilitated resolution meetings).

163. *Id.* at 17-18 (graphing and discussing dispute resolution helplines, facilitated IEP meetings, facilitated resolution meetings, parent-to-parent assistance, and conflict resolution skills training which range in use from seventeen states to forty states).

164. See PUDELSKI, *supra* note 42, at 18-20 (proposing facilitation beginning in the IEP process and continued through mediation and the resolution session meeting).

165. Collaboration between parents and school districts is considered an important factor in accomplishing the best result for a child's education. See generally Heather Renee Griffin, *The Importance of Collaboration Between Parents and School in Special Education: Perceptions from the Field* (Dec. 2014) (unpublished Ph.D. dissertation, University of North Florida), available at <http://digitalcommons.unf.edu/etd/530> (determining from existing research and surveys that collaboration between parents and school districts is necessary for the best possible education for the child); Chopp, *supra* note 7, at 433 (discussing parents ideally should be seen as experts of their children, but are often discredited by school districts); GAO, *supra* note 3, at 31 ("Having parents who are appropriately informed and involved in decision-making

Requiring parent-to-parent assistance, dispute resolution help-lines, and facilitation as part of the IDEA will allow national incorporation of these successful state efforts.

CONCLUSION

Many states have developed additional, and sometimes superior, ways of resolving special education disputes than are currently mandated by the IDEA.¹⁶⁶ These additions are great navigational tools for Congress to use the next time the IDEA is reauthorized.¹⁶⁷ Implementing alternative dispute processes may reduce the amount of resources used in due process hearings.¹⁶⁸ This will allow states to provide better support to disabled children, by providing better, more appropriate educational plans.

The enactment of IDEA in 1974 provided parents strong legal tools to advocate for their children's educational rights. Amendments have incorporated mediation and resolution sessions to address the obstacles posed by more formal processes and to prompt fair resolutions of disputes. However, more can be done.

Many parents, like Grace's mother, still face the obstacles to effective participation and advocacy for their children. Amending the IDEA to help these parents gain better access to information, as well as third-party advice and expertise, will help more children obtain the free and appropriate special education IDEA requires. Furthermore, Congress can do so in a way that ultimately reduces the cost to school districts of the current dispute resolution system.¹⁶⁹ Incorporating

regarding the education of students with disabilities can lead to the resolution of disputes in a more collaborative manner without the use of formal dispute resolution methods and may result in greater trust between parents and school districts, and earlier, less adversarial dispute resolution.”).

166. See GAO, *supra* note 3, at 9.

167. See, e.g., *id.* at 17 (discussing California's dispute resolution helpline, which provides a toll free method for parents and school districts to contact the State Education Agency for advice); HENDERSON, *supra* note 46, at 6 (discussing Pennsylvania's hotline called “Consult Line” designed as a parent and advocate helpline that provides regulatory information and options available to parties in a dispute); see also GAO, *supra* note 3, at 2 (discussing that their August, 2014 letter was written in preparation for the next reauthorization of IDEA).

168. See Edwards, *supra* note 43, at 141.

169. See Mueller, *supra* note 31, at 7 (discussing the evolution of litigation and special education over the past four decades, as well as the collective view from Congress, researchers, and educators that there is a dilemma in parent participation and how best to increase participation and find appropriate dispute resolution processes); GAO, *supra* note 3, at 31 (concluding that having parents who are appropriately informed and also involved in decision-making can lead to resolution of disputes in a more collaborative manner, which can result in greater trust and ultimately greater results for the disabled child's education).

porating parent-to-parent assistance, a toll free helpline, and facilitation into the terms of the IDEA will raise the standard amongst all states to help educate and guide parents of children with disabilities, thereby providing them with the most appropriate education.