
COMMENT

GETTING THEIR DUE (PROCESS): PARENTS AND
LAWYERS IN SPECIAL EDUCATION DUE PROCESS
HEARINGS IN PENNSYLVANIA

KEVIN HOAGLAND-HANSON[†]

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[†] Senior Editor, Volume 163, *University of Pennsylvania Law Review*. J.D. Candidate, 2015, University of Pennsylvania Law School; B.A., 2009, Bowdoin College.

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INTRODUCTION: A SYSTEM IN CRISIS?

In March 2013, the American Association of School Administrators (AASA) released a report¹ to Congress recommending the reauthorization of the Individuals with Disabilities Education Act (IDEA), the primary federal statute regulating the provision of services to disabled children by local school districts.² The report critiqued the special education due process system of IDEA³ in scathing terms, stating that “significant dollars, time, and emotional capitol [sic] . . . continue to be expended on a process that has little, if any, real connection to improving education outcomes.”⁴ Special education due process, the report argues, fails to satisfy the expectations of both parents and school districts, while also hindering the ability of low- and middle-income parents to obtain necessary services for their children.⁵

Why, according to the AASA, is special education due process failing students and schools? The answers in the report are simple: too many lawyers and too much litigation.⁶ The AASA argues that school

¹ SASHA PUDELSKI, AM. ASS’N OF SCH. ADM’RS, RETHINKING SPECIAL EDUCATION DUE PROCESS 2-3 (Apr. 2013), available at http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

² IDEA creates a statutory framework that imposes requirements on local educational agencies receiving funding from federal block grants and covers all students with disabilities, as defined by the statute. See *infra* Section I.B.

³ IDEA requires states to create administrative adjudication processes for parents and students to challenge decisions of the local education agency. These administrative hearings are commonly referred to as “special education due process hearings.” See *infra* Section I.B.

⁴ PUDELSKI, *supra* note 1, at 2.

⁵ *Id.* at 7.

⁶ See *id.* at 3-4 (noting the significant costs of litigation of the current due process system and the future possibility of positive outcomes from transforming such litigation into mediation). The AASA is not the only group to criticize the IDEA due process system. The litigious nature of special education due process has been frequently denounced. See, e.g., 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, 520-23 (2013) (examining due process hearings and noting the challenges that parents face when litigating against school districts); Perry A. Zirkel, Zorka Karanxha & Anastasia D’Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27

administrators agree to unreasonable parental demands in the face of threats of due process complaints or litigation.⁷ Teachers and other school staff are “profoundly affected” by the “degree of stress experienced” during due process hearings.⁸ Districts are compelled to pay the fees both for their own attorneys and for the attorneys of prevailing parents.⁹

Based on this critique, the AASA’s recommendations to Congress center around one simple principle: get lawyers, especially parents’ lawyers, out of special education. The AASA recommends a variety of nonadversarial facilitation and mediation sessions designed to solve disputes without the formalized due process hearings of the current system.¹⁰ Failing this, the AASA recommends a system of independent consultant review prior to litigation.¹¹ Throughout this process, parents (and schools) would not have a lawyer in the room to advocate for them, or even to offer advice.¹²

School policymakers are not alone in showing increasing concern for the litigious nature of special education due process. In one recent case, a district court took the extraordinary step of imposing the school district’s costs and fees on a mother deemed overly vexatious in pursuing her children’s education due process claims.¹³ The court took this extreme step even though the mother won a jury verdict against the district in her section 504 retaliation claim.¹⁴ This case was unusual because of its combination of a particularly aggressive parent and a deteriorating relationship with the school, but the language used in the district court’s order is striking: “Meetings were piled on meetings, conferences on conferences, demands on demands, all of which took teacher and staff time and left district personnel

J. NAT’L ASS’N ADMIN. L. JUDICIARY 27, 46-48 (2007) (noting increasing legalism in IDEA hearings as well as increasing length and complexity).

⁷ PUDELSKI, *supra* note 1, at 3.

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Bethlehem Area Sch. Dist. v. Zhou*, No. 09-3493, 2013 WL 1415843, at *14 (E.D. Pa. Apr. 9, 2013).

¹⁴ Sara K. Satullo, *Bethlehem Area School District Retaliated Against Parent, Jury Finds*, LEHIGH VALLEY LIVE (Aug. 16, 2012), http://www.lehighvalleylive.com/bethlehem/index.ssf/2012/08/bethlehem_area_school_district_75.html, archived at <http://perma.cc/6NRX-9UMC>. Section 504 is a section of the Rehabilitation Act of 1973 that applies to all programs and activities that receive federal financial assistance from the Department of Education. 29 U.S.C. § 794 (2012). See generally *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/504faq.html> (last visited May 12, 2015), archived at <http://perma.cc/T3KB-K295>. Section 504 forbids exclusion from programs, denial of benefits, or discrimination on the basis of disability. 29 U.S.C. § 794.

frustrated.”¹⁵ Media reports focused on the mother’s primary goal of securing placement for her children at an expensive private school at the district’s expense and how she “abused” due process complaints to that end.¹⁶

The AASA report argues that most due process complaints are similar to this case: wealthy, litigious parents and their lawyers making unreasonable demands on school districts, which comply because they fear the costs of litigation in an era of diminishing school budgets.¹⁷ Moreover, the AASA argues, these due process complaints only create deadweight loss; the AASA report cites district success rates in due process hearings and notes that districts win “overwhelmingly” in the most common areas of due process disputes.¹⁸ Finally, the AASA believes that the due process system excludes low-income parents, leading to low rates of due process complaints in poorer districts.¹⁹

A central concern expressed in the AASA report is that the due process system is too backward-looking: hearings focus too much on IDEA’s “compliance requirements” and not enough on whether the education provided by the district will help the child make meaningful progress.²⁰ Hearing officers are too quick to award remedies to parents for “procedural technicalities” instead of examining whether the school’s plan will result in meaningful education progress for the child.²¹ The AASA argues that this emphasis on procedural requirements of the law, combined with lawyer hearing officers and the judicialized nature of the hearing process, has resulted in a system that provides too much retrospective relief without focusing enough on the prospective fate of students with disabilities.²²

This Comment examines the role of lawyers in special education due process hearings in Pennsylvania and disagrees with the narratives presented in the AASA report and the secondary literature that depict

¹⁵ Zhou, 2013 WL 1415843, at *12.

¹⁶ Colin McEvoy, *Diana Zhou Abused Law to Drive up Bethlehem Area School District Costs*, Judge Rules, LEHIGH VALLEY LIVE (Apr. 10, 2013), http://www.lehighvalleylive.com/bethlehem/index.ssf/2013/04/judge_diana_zhou_abused_law_to.html, archived at <http://perma.cc/24YY-E9RU>.

¹⁷ PUDELSKI, *supra* note 1, at 10-11.

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 11; see also Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Educational Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 113-14 (2011) (noting that wealthy parents able to afford representation fared significantly better in due process hearings).

²⁰ PUDELSKI, *supra* note 1, at 21.

²¹ *Id.* Hearing officers are required to be attorneys, but not necessarily experts in special education or disability law. *Id.* at 16.

²² *Id.* at 21.

special education due process as a failed system. Based on a combination of empirical analysis of the outcomes of 512 due process hearings from five years in Pennsylvania (the 2008–2009 academic year through the 2012–2013 academic year) and interviews with members of Pennsylvania’s special education bar, I argue that while IDEA due process is not a perfect system, its adversarial aspects have valuable benefits for parents, especially given the stark disparity in access to information for parents in disputes with school districts. In marked contrast to the AASA’s narrative of due process as a failed system, in practice, Pennsylvania’s current due process system is a valuable safeguard of parents’ rights that does not impose overly burdensome litigation costs. Parents in Pennsylvania have a markedly higher rate of success in IDEA due process than in other states; this is likely due, at least in part, to the availability of experienced, specialized counsel. Existing proposed reforms to IDEA lack discussion of the value added to the system by lawyers, focusing instead on the negative aspects created by an adversarial system. In addition, studies criticizing due process often fail to acknowledge how little litigation there is compared to the total number of students eligible for services under IDEA.

Further, while there is likely significant income disparity in access to the due process system because parents with counsel are much more successful than parents without counsel, this does not mean that we should attempt to level the playing field by limiting parents’ access to lawyers. Instead, we should do more to ensure greater access to counsel for all parents so that meritorious claims are more likely to succeed in due process hearings. Rather than trying to remove lawyers from the system, reforms should focus on leveling the playing field for pro se parents and liberalizing fee-shifting rules to encourage attorneys to take on meritorious cases. This is particularly important because many reform proposals discount the effects of the recent trend of shrinking school budgets on school administrators’ incentives. An adversarial process is necessary to ensure compliance with IDEA’s substantive requirements in a budgetary climate where districts are under pressure to keep per-student spending as low as possible. If additional systems of dispute resolution focused on prospective remedies are created, they should be used to supplement, not supplant, the existing due process hearing system.

I. IDEA IN PENNSYLVANIA

A. Background

The number of students with disabilities in public schools is significant and growing. In 2010, there were approximately 262,000 students with IDEA-qualifying disabilities in Pennsylvania, representing approximately 16% of all enrolled students.²³ In 2012, there were 17,916 students with disabilities in the Philadelphia School District alone, representing 13.83% of the total student body.²⁴ Both of these numbers roughly track the nationwide percentage, which stood at 13.1% in 2009–2010.²⁵ Historically, the number of students with qualifying disabilities has steadily increased, from 8.3% in 1976–1977 to 13.1% in 2009–2010.²⁶

Spending on special education represents an increasing proportion of the budget for many school systems nationwide.²⁷ In one study of nine large urban districts across the United States, special education funding's portion of total school spending increased 17.3% from 1967 to 2005.²⁸ Compensatory education awards for special education are also consuming an increasing proportion of school budgets, with per-pupil adjusted spending on compensatory education awards rising 81% from 1991 to 2005.²⁹ While special education students account for only about 13% of the student body in most districts,³⁰ schools spend a disproportionate amount of their funding on special education students.³¹ In Philadelphia, special education support

²³ DATA DISPLAY: PENNSYLVANIA, U.S. DEPT' EDUC. (2013), available at <http://www2.ed.gov/fund/data/report/idea/partbspap/2013/pa-acc-stateprofile-11-12.pdf>. IDEA defines conditions that constitute a disability for purposes of the Act as "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C. § 1401(3)(A)(i) (2012).

²⁴ *District Schools*, SCH. DIST. PHILA., <http://www.phila.k12.pa.us/about/#schools> (last updated Dec. 2014), archived at <http://perma.cc/SP6P-JXM3>.

²⁵ NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2011, at 61 (2012), available at <http://nces.ed.gov/pubs2012/2012001.pdf>.

²⁶ *Id.*

²⁷ See Juan Diego Alonso & Richard Rothstein, *Where Has The Money Been Going? A Preliminary Update 1* (Econ. Pol'y Inst., Briefing Paper No. 281, 2010), available at <http://www.epi.org/files/page/-/pdf/bp281.pdf>.

²⁸ *Id.* at 5 tbl.7.

²⁹ *Id.* at 7 tbl.9.

³⁰ See NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 25.

³¹ Alonso & Rothstein, *supra* note 27, at 9 tbl.12, at 61.

services and classroom instruction cost approximately \$223 million of the \$1.3 billion instructional operating budget in 2012.³²

Meanwhile, school funding has been decreasing or remaining constant in recent years.³³ This is particularly true in urban districts such as Philadelphia, which face increasing pressures from reduced state funding and flat local property tax revenues.³⁴ Pennsylvania exemplifies the strain on school budgets because of its heavy reliance on local funding.³⁵ Pennsylvania has capped special education funding for five years despite an increase in the number of special education students during that period.³⁶

In addition, the floor for federal funding to states for IDEA has remained stable since the mid-2000s despite increasing expenditures on special education services at the school-district level.³⁷ As discussed, IDEA imposes its substantive requirements only on states that accept federal block grants. In 2008, those block grants paid approximately 17% of the “excess cost” of educating children with disabilities.³⁸ In 2014, the federal funds

³² See SCH. DIST. PHILA., FY 2013–14 CONSOLIDATED BUDGET 68 (2013), available at <http://webgui.phila.k12.pa.us/uploads/1A/ad/1AadBw8mAoyvC4FYRwrovG/FY2013-14-Consolidated-Budget.pdf> (noting that \$223 million of the \$1.3 billion instructional operating budget was composed of \$111 million for special education high incidence services and \$112 million for special education low incidence services).

³³ See MICHAEL LEACHMAN & CHRIS MAI, CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION 1 (2014), available at <http://www.cbpp.org/files/9-12-13sfp.pdf> (finding that thirty-five states provided less funding per student in the 2013–2014 school year than before the 2008 economic recession, and that any recent funding increases have not compensated for the cuts made in the years since 2007).

³⁴ See Trip Gabriel, *Budget Cuts Reach Bone for Philadelphia Schools*, N.Y. TIMES, June 17, 2013, at A9 (noting that rising pension costs, debt service, and a block grant formula that disfavors urban districts have resulted in steep cuts to instructional budgets in Philadelphia).

³⁵ See, e.g., EDUC. LAW CTR., FUNDING, FORMULAS, AND FAIRNESS: WHAT PENNSYLVANIA CAN LEARN FROM OTHER STATES’ EDUCATION FUNDING FORMULAS 2 (2013), available at http://www.elc-pa.org/wp-content/uploads/2013/02/ELC_schoolfundingreport.2013.pdf (arguing that Pennsylvania’s school funding formula is one of the most regressive in the nation due to failure to make up for disparities in local tax revenues); Justin DiBerardinis & Michael Churchill, *How Schools Are Funded in Pennsylvania: A Primer*, NOTEBOOK (May 23, 2007), <http://thenotebook.org/summer-2007/07104/how-schools-are-funded-pennsylvania-primer>, archived at <http://perma.cc/5E4S-JY62> (explaining that wealthy suburban districts are able to raise more money at lower local property tax rates than poorer urban districts with higher property tax rates).

³⁶ See Steve Esack, *State Panel: Change Special Education Funding Formula*, MORNING CALL (Dec. 11, 2013), <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-browne-special-education-funding-20131211,0,4624878.story>, archived at <http://perma.cc/NCW9-W3J7> (reporting that Pennsylvania capped special education funding since the 2008–2009 fiscal year despite a 3% increase in special education students during that period).

³⁷ *Individuals with Disabilities Education Act—Funding Distribution*, FED. EDUC. BUDGET PROJECT (Apr. 25, 2014), <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution>, archived at <http://perma.cc/8ENZ-8AN6>.

³⁸ *Id.*

paid only 16%.³⁹ This is significantly less than the 40% federal contribution target set by Congress in the statute,⁴⁰ and imposes a significant financial burden on strained state budgets. The 2014 funding level translated to a shortfall of \$17.17 billion between the statutory targeted funding level and the actual funding.⁴¹

B. Statutory Framework of IDEA

IDEA creates a statutory framework that imposes requirements on all local educational agencies receiving funding from federal block grants. Passed in 1975 as the Education for All Handicapped Children Act, IDEA has been reauthorized and amended several times, significantly in 1997 and most recently in 2004.⁴²

The fundamental requirement of the IDEA is a “free appropriate public education” (FAPE) for all students with qualifying disabilities.⁴³ FAPE is not defined in the statute, but has instead been left open to judicial interpretation. The Supreme Court has interpreted FAPE as an education that is “reasonably calculated” to provide “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”⁴⁴ This is a procedural requirement only. It requires the school district to “adopt *procedures* which would result in individualized consideration of and instruction for each child.”⁴⁵ The Third Circuit has imposed various substantive requirements for FAPE, requiring that the educational plan provide “more than a trivial educational benefit”⁴⁶ and confer a “meaningful benefit”⁴⁷ that is “gauged in relation to the child’s potential.”⁴⁸ FAPE must be provided in the least restrictive environment, requiring that children with disabilities are mainstreamed into regular educational settings to the “maximum extent appropriate.”⁴⁹ The statute

³⁹ *Id.*

⁴⁰ 20 U.S.C. § 1411(a)(2)(A)(ii) (2012).

⁴¹ *Individuals with Disabilities Education Act—Funding Distribution*, *supra* note 37.

⁴² See U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 6, 9 (2010), available at <https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf> (discussing various amendments to the IDEA).

⁴³ 20 U.S.C. § 1412(a)(1)(A) (2012). “Qualifying disabilities” under the statute are broadly defined. *Id.* § 1401(3)(A)(i).

⁴⁴ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 201, 204 (1982) (citations omitted).

⁴⁵ *Id.* at 189.

⁴⁶ Polk v. Cent. Susquehanna Intermediate Unit, 853 F.2d 171, 182 (3d Cir. 1988).

⁴⁷ *Id.* at 184.

⁴⁸ *Id.* at 185.

⁴⁹ 20 U.S.C. § 1412(a)(5)(A) (2012).

also imposes on districts “child find” obligations to identify and evaluate students with disabilities.⁵⁰

School districts are required to provide all students with qualifying disabilities with an individualized education plan (IEP) that provides the child with FAPE.⁵¹ Districts must involve and inform parents about the IEP process so that they can make informed decisions and provide input about their child’s education.⁵² In the event of a dispute between parents and districts, IDEA provides a variety of resolution mechanisms.⁵³ All formal dispute resolutions under IDEA in Pennsylvania are coordinated by and through the Pennsylvania Department of Education’s Office for Dispute Resolution (ODR).⁵⁴

Parents have a right to an impartial due process hearing to resolve alleged IDEA violations.⁵⁵ Due process hearings are adversarial, but have relaxed procedural requirements and evidentiary rules compared to traditional court settings. A due process hearing is only “quasi-judicial,” but incorporates many of the elements of a trial proceeding.⁵⁶ Because “the party who request[s] the hearing bears the initial burden of production of evidence,” parents who bring a complaint must present their case before the district.⁵⁷ The Supreme Court held in 2005 that the burden of proof in an IDEA due process hearing rests on the party seeking relief under the statute, whether that party is the parent or the district.⁵⁸ While the formal rules of evidence do not apply, hearing officers will “rule on any specific objections” to witnesses and questions.⁵⁹ A hearing officer may also admit or deny evidence at his or her discretion if it is not “relevant and material to

⁵⁰ *Id.* § 1412(a)(3).

⁵¹ *Id.* § 1412(a)(4).

⁵² *See id.* § 1415(d) (setting out the requirements for an IEP and the requisite parties for an IEP team).

⁵³ *See id.* § 1415(b) (describing the procedures education agencies must follow to guarantee every eligible child is provided with a FAPE); *see also id.* § 1415(d) (requiring that notice of procedural safeguards be provided to parents).

⁵⁴ *See* 22 PA. CODE § 14.107 (2014) (confirming that “the Department will establish a complaint procedure . . . and disseminate notice of that procedure”); *see also* OFFICE FOR DISPUTE RESOLUTION, PENNSYLVANIA SPECIAL EDUCATION DISPUTE RESOLUTION MANUAL 3 (2013) [hereinafter ODR MANUAL], available at <http://odr-pa.org/wp-content/uploads/pdf/Dispute-Resolution-Manual.pdf> (“The Office for Dispute Resolution (ODR) coordinates the administration of the statewide special education dispute resolution system in Pennsylvania.”).

⁵⁵ 20 U.S.C. § 1415(f)(1)(A).

⁵⁶ *See* ODR MANUAL, *supra* note 54, at 16-18 (explaining that due process hearings include opening statements, the presentation of evidence, and closing statements).

⁵⁷ *Id.* at 18.

⁵⁸ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

⁵⁹ ODR MANUAL, *supra* note 54, at 21.

the issues.”⁶⁰ Over time, due process hearings have become more “judicialized” and have transitioned away from the informal type of proceeding originally envisioned by Congress.⁶¹ Parents or districts can appeal administrative due process hearing decisions in federal district court.⁶² Administrative exhaustion is required before any remedy based on IDEA may be pursued in court.⁶³

Before a due process hearing, a resolution meeting between the parents and the district must occur, in which “the parents of the child discuss their complaint . . . and the local educational agency is provided the opportunity to resolve the complaint.”⁶⁴ At these meetings, a lawyer may represent the district only if the parent also has representation.⁶⁵ If the case settles at this phase, the settlement agreement is enforceable in federal court.⁶⁶ IDEA also requires the state or local educational agency to provide an opportunity for mediation at the state’s cost.⁶⁷ An agreement reached through mediation is enforceable in federal court.⁶⁸ The ODR also offers “IEP facilitation,” a voluntary process in which the parent and district both agree to the presence of a neutral third-party to “facilitate communication and the successful drafting of the student’s IEP.”⁶⁹ IEP facilitators serve in this role only part-time and come from a variety of backgrounds.⁷⁰ Unlike ODR hearing decisions, the IEPs resulting from a facilitated IEP have no greater binding effect than other IEPs; thus, parties must resort to the due process system to enforce their provisions.⁷¹

⁶⁰ *Id.* at 23.

⁶¹ See S. REP. NO. 105-17, at 26 (1997) (expressing the Senate Committee’s “strong preference that mediation become the norm for resolving disputes under IDEA” prior to renewal of IDEA in 1997); Zirkel, Karanxha & D’Angelo, *supra* note 6, at 47-48 (noting increasing legalism, length, and complexity in IDEA hearings).

⁶² 20 U.S.C. § 1415(i)(2)(A) (2012).

⁶³ *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802 (3d Cir. 2007).

⁶⁴ 20 U.S.C. § 1415(f)(1)(B)(i)(IV).

⁶⁵ *Id.* § 1415(f)(1)(B)(i)(III).

⁶⁶ *Id.* § 1415(f)(1)(B)(iii)(II).

⁶⁷ *Id.* § 1415(e).

⁶⁸ *Id.* § 1415(e)(2)(F).

⁶⁹ *IEP Facilitation*, THE OFFICE FOR DISPUTE RESOLUTION, <http://odr-pa.org/alternative-dispute-resolution/iep-facilitation> (last visited May 12, 2015), *archived at* <http://perma.cc/49HK-CHFG>.

⁷⁰ FACILITATORS’ NAMES AND OCCUPATIONS, THE OFFICE FOR DISPUTE RESOLUTION (2014), *available at* <http://odr-pa.org/wp-content/uploads/pdf/iepfac2.pdf>.

⁷¹ See ALLIANCE/CADRE, FACILITATED IEP MEETINGS: AN EMERGING PRACTICE 7 (2004), *available at* <http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf> (noting that if parents believe that a facilitated IEP was not satisfactory, they do not forfeit any rights to other forms of dispute resolution).

There are a variety of equitable remedies available to parents if the hearing officer determines that the school district violated IDEA.⁷² Money damages, however, are not available.⁷³ The five most common categories of IDEA injunctive remedies are tuition reimbursement for private school placements, compensatory education, prospective revisions of IEPs, changes in student placement, and independent educational evaluations.⁷⁴ While the latter three remedies prospectively order the district to change its behavior in the future, the former two are compensatory. Tuition reimbursement is ordered when the hearing officer determines that the district was unable to provide the necessary services to the student; therefore the district must pay to place the child in a private school that can provide the student with FAPE.⁷⁵ Compensatory education requires the district to provide additional hours of instructional time to compensate for the previous denial of FAPE.⁷⁶

Throughout all of these procedures, including a due process hearing, a parent does not need to be represented by counsel. Moreover, the Supreme Court ruled in 2007 that IDEA allows parents to proceed pro se in an appeal from a due process decision in federal court.⁷⁷ In Pennsylvania, parents are explicitly barred from bringing counsel to mediation.⁷⁸

⁷² See generally Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 [hereinafter Zirkel, *Remedial Authority*] (examining types of equitable relief available under IDEA, such as tuition reimbursement, compensatory education, and prospective placement). The statute itself is silent on what relief a hearing officer may grant, but authorizes a district court reviewing a hearing officer decision to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

⁷³ See *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802-03 (3d Cir. 2007) (rejecting a Section 1983 claim for damages based on IDEA violations and limiting remedies to those delineated in the statute); see also Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 219-20 (2013) [hereinafter Zirkel, *Adjudicative Remedies*] (noting "the prevailing judicial view that monetary damages are not available under the IDEA" (citations omitted)).

⁷⁴ Zirkel, *Adjudicative Remedies*, *supra* note 73, at 219 (citing Zirkel, *Remedial Authority*, *supra* note 72, at 15-24).

⁷⁵ See Zirkel, *Remedial Authority*, *supra* note 72, at 18-21 (discussing the three-part test for awarding tuition reimbursement).

⁷⁶ *Id.* at 21-26; see also *Octavia P. ex rel. Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) (holding that in IDEA, "Congress empowered the courts to grant a compensatory remedy," encouraging courts to fashion that remedy to the individual circumstances of the student).

⁷⁷ See *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526 (2007) ("The parents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court."). It is unclear whether parents' rights in the *Winkelman* framework encompass all of the same rights of the student. See Sonja Kerr, *Winkelman: Pro Se Parents of Children with Disabilities in the Courts (Or Not?)*, 26

This does not mean that proceeding pro se is the optimal route in a due process hearing. On the opposing side, school districts are required by law to be represented by counsel at an IEP due process hearing.⁷⁹ This means that a parent proceeding pro se is always against an attorney. In addition, the due process hearing system requires a significant amount of legal sophistication. A due process complaint may be dismissed if it fails to adequately set forth with specificity the violations identified and the desired relief.⁸⁰ Further, because the complainant has the burden of production, he or she will be required to present his or her case and examine witnesses before the district presents its case.⁸¹

For parents represented by counsel, IDEA allows the recovery of attorneys' fees, at the court's discretion, from the local or state education agency.⁸² Several Supreme Court decisions have construed this provision not to include other litigation costs such as expert fees⁸³ and restricted the definition of "prevailing party."⁸⁴

The Supreme Court's invalidation of the "catalyst" theory for the award of attorneys' fees in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources* and the Court's adoption of a more limited definition of "prevailing party" for civil rights cases has significantly impacted IDEA fee-shifting.⁸⁵ Under the catalyst theory, a plaintiff may be considered a prevailing party for the purpose of a fee-shifting statute if it can "prove that the existence of the lawsuit accomplished the original objectives of the lawsuit without a formal judgment."⁸⁶ In *Buckhannon*, the Supreme Court held that a party could

ALASKA L. REV. 271, 283-85 (2009) (examining post-*Winkelman* decisions and finding that courts carefully distinguish between parents' own rights and those of their children).

⁷⁸ OFFICE FOR DISPUTE RESOLUTION, YOUR GUIDE TO MEDIATION 2 (n.d.), available at <http://odr-pa.org/wp-content/uploads/pdf/medguide.pdf> [hereinafter PA. MEDIATION GUIDE].

⁷⁹ ODR MANUAL, *supra* note 54, at 12. However, an attorney cannot represent the district at the pre-hearing resolution meeting if the parent is not accompanied by an attorney. *Id.* at 26.

⁸⁰ *Id.* at 24-26.

⁸¹ *Id.* at 18.

⁸² 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2012).

⁸³ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006) (holding that 20 U.S.C. § 1415(i)(3)(B) "does not even hint [that a State is responsible] for reimbursing prevailing parents for services rendered by experts").

⁸⁴ See *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) ("Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties."), *partially superseded by statute*, 5 U.S.C. § 552(a)(4)(E)(ii) (2012), *as recognized in* *Warren v. Colvin*, 744 F.3d 841, 845 (2d Cir. 2014).

⁸⁵ *Id.*

⁸⁶ *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 544 (3d Cir. 1994), *overruled by* *Buckhannon*, 532 U.S. at 602-05.

recover fees only if it obtained a “judgment on the merits” or a court-enforceable consent decree.⁸⁷ Post-*Buckhannon*, fees are recoverable only following a favorable hearing officer decision.⁸⁸ The alternative is to reach a settlement including fees, but this is usually possible only after a due process complaint has been filed and a resolution meeting held.⁸⁹

Settlement itself poses special problems in IDEA cases, both for pro se parents and those with counsel.⁹⁰ Settlements reached at mediation or resolution meetings are theoretically enforceable in court, provided they are signed by both the parent and a school district with binding authority.⁹¹ But this poses pitfalls for unrepresented parents, who may inadvertently give up important rights provided by the statute in a settlement agreement.⁹² For represented parents, the aforementioned fees dilemma can become problematic.⁹³ Further complicating the process, an unsettled question remains whether it is necessary to exhaust IDEA due process prior to the enforcement of settlement agreements in court.⁹⁴

The rates of IDEA due process use vary widely from state to state. Pennsylvania has one of the highest rates of IDEA due process use in the country.⁹⁵ Four states (New York, California, New Jersey, and Pennsylvania)

⁸⁷ *Buckhannon*, 532 U.S. at 605 (citations omitted).

⁸⁸ John T. *ex rel.* Paul T. v. Del. Cnty. Intermediate Unit, 318 F.3d 545, 556-58 (3d Cir. 2003).

⁸⁹ See *infra* Part III (discussing the districts’ reluctance to settle claims prior to resolution meetings); see also Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys’ Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 546 (“[A]fter *Buckhannon*, plaintiffs must either make the matter of attorneys’ fees a negotiating issue in the settlement discussions or choose to appear *pro se* . . .”); Roberta Walker, *Attorney’s Fees Under IDEA 2004: Who Will Take the Case?*, 35 ADVOC. (TEX.) 64, 69 (2004) (“Because *Buckhannon* leaves parents who settle before the initiation of formal procedures no fee recovery at all, early settlement is actually discouraged by its application.”).

⁹⁰ See Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard to Do*, 43 LOY. L.A. L. REV. 641, 647-49 (2010) (discussing how IDEA’s complicated hearing process, including the requirement of the availability of mediation and ambiguous interpretations of the enforceability of settlements, makes settling IDEA cases particularly difficult).

⁹¹ *Id.* at 648.

⁹² See *id.* at 652 (noting that although parties can challenge the enforcement of settlement agreements on the basis of public policy, courts have been unwilling to overturn settlement agreements when parents inadvertently bargained away basic protections IDEA provides).

⁹³ See *supra* text accompanying notes 82-89 (discussing the attendant problems attorneys’ fees can pose for parents represented by counsel).

⁹⁴ Weber, *supra* note 90, at 654-56 (distinguishing cases in courts that have required such exhaustion of due process before enforcing settlement agreements from those that have not).

⁹⁵ See Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD., 2010, at 3, 4-5 (noting that in 2008-2009, only three states and the District of Columbia had more due process hearings reach a final decision than Pennsylvania).

and the District of Columbia account for approximately 85% of due process hearings nationwide.⁹⁶ Across the country, as the use of due process has increased, special education due process appeals have come to represent an increasing percentage of the education-related litigation in federal court.⁹⁷ Despite the overall increase in the number of cases, only a relatively low number of appeals reach the district courts.⁹⁸ Indeed, the number of special education cases reaching the federal courts is miniscule compared to the number of students eligible for special education under IDEA. While an average of 6.6 million students were covered by the statute each year from 2000 to 2007, only approximately 400 IDEA appeals per year were even *filed* in district court during this period.⁹⁹

II. EMPIRICAL EXAMINATION OF THE EFFECT OF COUNSEL IN PENNSYLVANIA DUE PROCESS HEARINGS

A. *Previous Empirical Studies of the Effect of Counsel in Pennsylvania and Other Jurisdictions*

At least one study has previously examined the effect of counsel on IDEA due process hearings in Pennsylvania. In the 1980s, Dr. Peter Kuriloff studied the first four years of hearings under IDEA just after it went into effect in 1975.¹⁰⁰ In the study, Dr. Kuriloff examined 168 cases from that period that went to a hearing, finding that parents won and received some relief in 35% of the decisions.¹⁰¹ The study looked at the role of counsel and found that while having an attorney strongly correlated with the perceived quality of the parents' presentation, the mere presence of an attorney did not have a statistically significant effect on the outcome.¹⁰² However, the number of witnesses put on by parents in a particular case did have a significant effect on the outcome.¹⁰³ As Dr. Kuriloff noted, "effective hearing

⁹⁶ *Id.* at 5.

⁹⁷ See Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 3, 5 tbl.2 (2011) (finding that special education litigation in federal courts almost doubled from the 1990s to the 2000s).

⁹⁸ See *id.* (explaining that there were still less than one hundred reported cases per year nationwide in the last decade).

⁹⁹ Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121, 127-28 (Joshua M. Dunn & Martin R. West eds., 2009).

¹⁰⁰ Peter J. Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 LAW & CONTEMP. PROBS., Winter 1985, at 89, 96-97.

¹⁰¹ *Id.* at 99.

¹⁰² *Id.* at 107-08.

¹⁰³ *Id.* at 108-09.

behavior for parents required use of the full panoply of adversary skills.”¹⁰⁴ This study suggests that even in the early years of the IDEA, when the system was less judicialized and the legal standards less developed, the ability to deftly navigate the procedural aspects of a due process hearing was critical.

More recent studies in other states have found that having an attorney is crucial to parental success in due process hearings. In a study of 343 IDEA due process hearings in Illinois over a five-year period, parents prevailed in only 38.3% of the cases they brought against school districts.¹⁰⁵ In that sample, attorneys represented the parents in only 44% of hearings.¹⁰⁶ Attorney representation was critical to success: parents who were represented succeeded in obtaining relief 50.4% of the time, while parents proceeding pro se succeeded only 16.8% of the time.¹⁰⁷

A recent examination of 210 due process hearings in Wisconsin and Minnesota over a ten-year period also found a great disparity between parents represented by counsel and unrepresented parents.¹⁰⁸ In that sample, 26% of hearings involved unrepresented parents and none of those hearings resulted in a victory for the parents.¹⁰⁹ Even where parents were represented, they succeeded in obtaining relief in less than 15% of hearings.¹¹⁰

B. Sample Characteristics

For this Comment, I examined 526 decisions from Pennsylvania ODR issued between February 2008 and September 2013.¹¹¹ I coded decisions according to whether the parents and student or the district prevailed.¹¹²

¹⁰⁴ *Id.* at 108.

¹⁰⁵ Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997–2002*, at 6 (Dec. 2002) (unpublished manuscript), available at <http://www.dueprocessillinois.org/Access.pdf>.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.*

¹⁰⁸ Cope-Kasten, *supra* note 6, at 528.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Hearing officer decisions are publicly available on ODR’s website. Decisions are redacted to remove identifying information about minor students and their parents. See *Hearing Officer Decisions*, OFFICE FOR DISP. RESOL., <http://odr-pa.org/due-process/hearing-officer-decision> (last visited May 12, 2015), archived at <http://perma.cc/FT6K-7NXM> (providing a listing of all hearing officer decisions, beginning with the 2006–2007 fiscal year).

¹¹² I coded a decision for the parents if there was a compensatory education award for the student; the parents received tuition, transportation, or independent educational evaluation reimbursement; or the parents were successful in blocking the district’s chosen placement. I coded a decision for the district if it provided no relief for the parents or only an order for a new IEP

The hearing officer decisions provide the name and affiliation of parents' counsel, if present, and the number of hearing sessions held in a case.

C. Results

Of the 512 coded decisions within the designated period, 252 hearings (49.22%) resulted in a favorable outcome for the district, and 247 (48.24%) resulted in a favorable outcome for the student.¹¹³ Table 1 presents due process hearing results by year. These overall numbers reflect a higher level of parental success than previous studies of IDEA due process hearings in Pennsylvania and elsewhere.¹¹⁴

Table 1: Due Process Hearing Results by Year¹¹⁵

| | 2012– 2013 | 2011– 2012 | 2010– 2011 | 2009– 2010 | 2008– 2009 | Total |
|-----------------|---------------|---------------|---------------|---------------|---------------|--------|
| Total Decisions | 74 | 113 | 105 | 122 | 112 | 512 |
| For District | 38 | 56 | 51 | 67 | 40 | 252 |
| For Student | 32 | 48 | 50 | 51 | 66 | 247 |
| For Student % | 43.24% | 42.48% | 47.62% | 41.80% | 58.93% | 48.24% |

Analyzing these numbers according to the presence of counsel reveals some interesting trends. Counsel represented parents in roughly three-quarters of all hearings (383 of 512 hearings, or 74.80%). In those hearings, parents prevailed 58.75% of the time. Pro se parents, involved in the remaining one-quarter of hearings (129 hearings, or 25.20%), had a much lower rate of success, prevailing only 16.28% of the time. The presence of

meeting. I excluded from both the student and district categories decisions lacking codeable determinations. These instances included cases where the due process hearing was a dispute between parents, where the court awarded relief to both parties, or where the court awarded a different remedy than that sought by either party. Coding IDEA decisions always requires an element of discretion because of the equitable nature of the relief awarded. *See Cope-Kasten, supra* note 6, at 520 (reviewing due process decisions in Minnesota and coding parent victories into the four categories of (1) compensatory education awards, (2) reversed manifestation determinations, (3) changes in placement, and (4) specific course of action); Archer, *supra* note 105, at 3 (coding decisions where the parent “substantially prevailed on at least one, but not necessarily all, of the major issues” as parent successes).

¹¹³ This total encompasses all cases, including those not categorized as student or district victories. The number of cases not categorized, however, is negligible, totaling only thirteen cases over the studied period.

¹¹⁴ *See supra* Section II.A.

¹¹⁵ Totals in Table 1 include cases that were not coded as district or parent victories. Therefore, the sum of each column does not match the total. *See supra* note 112.

counsel was also correlated with the number of hearing sessions, with represented parents having more hearing sessions on average than pro se parents.¹¹⁶ Success rates for parents varied each year, but the gap between the success rate of parents with counsel and that of pro se parents remained consistent.¹¹⁷ Table 2 shows results of due process hearings, separated by presence of counsel and by year.

Table 2: Due Process Hearings with Counsel and Pro Se¹¹⁸

| | 2012– 2013 | 2011– 2012 | 2010– 2011 | 2009– 2010 | 2008– 2009 | Total |
|------------------------|---------------|---------------|---------------|---------------|---------------|--------|
| Total Decisions | 74 | 113 | 105 | 122 | 112 | 512 |
| With Counsel | 51 | 77 | 75 | 96 | 84 | 383 |
| For District | 21 | 35 | 26 | 45 | 25 | 225 |
| For Student | 29 | 39 | 48 | 50 | 59 | 152 |
| For Student % | 56.86% | 50.65% | 64.00% | 52.08% | 70.24% | 58.75% |
| Pro Se | 22 | 30 | 28 | 23 | 26 | 129 |
| For District | 17 | 21 | 25 | 20 | 15 | 21 |
| For Student | 3 | 8 | 2 | 1 | 7 | 98 |
| For Student % | 13.64% | 26.67% | 7.14% | 4.35% | 26.92% | 16.28% |

Despite the clear advantage counsel representation provides, some parents with viable claims still proceeded pro se.¹¹⁹ These cases represent a small percentage of the overall sample, about 4%. The twenty-one cases in which parents proceeding pro se prevailed included awards of significant amounts of compensatory education, tuition reimbursement for private school tuition, compensation for independent educational evaluations, and orders barring district recommended placements.

¹¹⁶ In the overall sample, the mean number of hearings was 2.96 and the median was 2. Counsel affected the number of hearings: hearings involving represented parents took a mean of 3.5 sessions to complete (median 3), while pro se parents completed their cases on average in 1.5 sessions (median 1).

¹¹⁷ Differences in the rate of success between parents with counsel and pro se parents ranged from 23.9 percentage points in 2011–2012, to 56.86 percentage points in 2010–2011. Success rates for parents overall varied from a high of 58.93% in 2008–2009 to a low of 41.80% in 2009–2010.

¹¹⁸ Totals in Table 2 include cases that were not coded as victories for district or parent. Therefore, the sum of each column does not match the total. *See supra* note 112.

¹¹⁹ It is impossible to determine why these parents ended up in due process hearings without counsel (perhaps they believed they could be successful without an attorney). Relatedly, it is also impossible to determine whether this group consists of parents who consulted a lawyer and decided they could not afford or did not want counsel.

Hearing outcomes for parents represented by counsel were fairly stable regardless of the number of times a particular attorney appeared in due process hearings in the overall sample.¹²⁰ In addition, the average number of hearing sessions was relatively constant across attorneys, with the more frequent players using approximately the same number of hearing sessions to present their cases as the attorneys appearing only one time in five years.¹²¹ The number of hearings seemed to have only a small effect on the success rate for parents.¹²²

The vast majority of parents with counsel were represented by members of the private bar. Less than twenty-five of the 383 cases where parents were represented by counsel involved attorneys from nonprofit or legal aid groups. While it is unclear whether parents were represented by paid counsel or pro bono counsel, the overwhelming presence of repeat player lawyers (mostly members of the specialized special education bar) suggests that most private counsel were paid.

The types of relief granted varied, with compensatory education and tuition reimbursement being the most common. In the most recent school year studied, 2012–2013, in cases where the parents prevailed, more than two-thirds of hearing officer orders mandated either compensatory education, tuition reimbursement, or both.¹²³ Only about one-third of cases where parents prevailed resulted in orders that granted some kind of prospective relief or substantive IEP change for the student.¹²⁴ Even where prospective relief was granted, however, few hearing officer orders included

¹²⁰ I analyzed the sample based on the number of times particular attorneys appeared in court in the five-year period. I classified counsel who appeared ten or more times as “super repeaters,” five to nine times as “repeaters,” and two to four times as “infrequent.” I also included single appearances. Success rates for parents were similar across these categories (60.39% for super-repeaters, 55.91% for repeaters, and 64.29% for counsel in the “infrequent” category, with a small dip to 48.28% for single appearances). There was more variation between individual attorneys, but the spread on the entire range was only about thirty percentage points. The largest sample size for the most frequent appearing attorney was quite small, at just twenty-four hearings.

¹²¹ Super repeaters actually used slightly fewer hearing sessions on average (mean 3.38) than repeat attorneys (mean 3.64) and infrequent attorneys (mean 3.45). Attorneys who appeared only once in the sample again lagged slightly (mean 2.61).

¹²² In hearings where parents were represented by counsel that went for five or more sessions (ninety-eight total hearings), parents prevailed 65% of the time. In hearings with counsel for parents that went for four or fewer sessions (279 total hearings), parents prevailed 57% of the time. Only eighteen total hearings involving pro se parents exceeded two sessions.

¹²³ In 2012–2013, of the thirty-one cases with resolutions favorable to the parents, twenty-two cases involved grants of either compensatory education, tuition reimbursement, or both to remedy prior violations of the statute by the school district.

¹²⁴ In 2012–2013, twelve decisions coded as favorable to the parents included prospective relief. Six decisions coded as favorable to the district also involved prospective orders in the form of setting new dates for IEP meetings.

detailed changes to the IEP itself, and the substance of the new IEP was usually left to future meetings between the parents and the district.¹²⁵

III. INTERVIEWS WITH PENNSYLVANIA'S SPECIAL EDUCATION BAR

Because the vast majority of parents with counsel are represented by members of the private bar rather than pro bono or legal services attorneys, the enforcement of IDEA in Pennsylvania relies to a great extent on the private bar. The attitudes and motivations of private attorneys, as well as the practical aspects of representation, are areas that have gone largely unexplored in the literature.¹²⁶ To fill this gap, I interviewed special education attorneys across Pennsylvania.¹²⁷

While all the attorneys interviewed seek attorneys' fees through the IDEA fee-shifting provision in cases where they are the prevailing party, policies regarding retainers and client fees vary. At least one attorney takes all of his cases on a purely contingent basis and recovers all of his fees from districts.¹²⁸ Some attorneys operate on a purely fee-for-service basis, requiring a combination of an up-front retainer and per-hour charges to parents.¹²⁹ Others are somewhere between the two, with several attorneys requiring a retainer fee up-front, but later not charging a fee-for-service beyond the retainer and choosing to recover fees from the district instead.¹³⁰ None of the lawyers interviewed took a contingent percentage of compensatory education awards.

All of the attorneys interviewed reported that they screen clients heavily for viable claims, and often refer parents to routes other than due process.¹³¹

¹²⁵ Only seven decisions from 2012–2013 included specific IEP changes in the order.

¹²⁶ See, e.g., Cope-Kasten, *supra* note 6, at 507-08 (using interviews with special education administrative law judges to shed light on an empirical study and the “fairness” of due process hearings); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1422 (2011) (examining the theoretical role of private attorneys in IDEA enforcement).

¹²⁷ I selected attorneys to contact for interviews based on the frequency with which they appeared in the sample. I contacted the eight attorneys with the most appearances in the sample and four responded. I conducted interviews with an understanding that names and identifying information would be kept confidential; therefore, I use pseudonyms to conceal the identity of the attorneys.

¹²⁸ This attorney reported that the retainer “before the recession” was comparable with the market rate, but found that lowering the retainer after 2008 attracted more business while not detrimentally affecting the practice’s finances. Telephone Interview with A.B., Pa. attorney (Nov. 4, 2013) (on file with author).

¹²⁹ Telephone Interview with C.D., Pa. attorney (Nov. 4, 2013) (on file with author).

¹³⁰ Telephone Interview with E.F., Pa. attorney (Nov. 4, 2013) (on file with author).

¹³¹ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129; Telephone Interview with E.F., *supra* note 130.

Specifically, attorneys estimated that 40% to 60% of parents are turned away at this screening stage because their problems are not likely to be resolved through due process.¹³² This suggests that a significant number of parents are directed to alternative routes when they first consult an attorney. Heavy screening of due process claims is further supported by anecdotal evidence of attorneys' participation in IEP meetings prior to filing due process claims.¹³³

Settlement rates in IDEA cases are high. Attorneys' estimates of the percentage of cases that are settled before a due process hearing varied from 70% to over 90%.¹³⁴ However, these settlement rates may be inflated as a function of strategic posturing. Several attorneys interviewed noted that because a due process complaint must be filed to obtain a judicially enforceable settlement, many cases require that the attorney file a due process complaint to get school districts to negotiate and settle.¹³⁵ Districts usually acquiesce to a provision in the settlement agreement agreeing to pay the parents' attorneys' fees when a settlement is reached following a resolution meeting.¹³⁶

Several attorneys reported receiving remedies in settlements that would rarely have been ordered by a hearing officer after due process, most importantly specific prospective placements.¹³⁷ While these remedies are not available under IDEA, awards have not been unusual in settlement. One tactic mentioned was bargaining a possible compensatory education award in exchange for a guaranteed placement from the district.¹³⁸

Several attorneys described the IDEA due process hearings as highly procedural and more technical than many parents expect.¹³⁹ One attorney noted that his clients sometimes refer to a due process hearing as a "meeting" and are unaware of the formal and adversarial nature of the

¹³² Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129; Telephone Interview with E.F., *supra* note 130.

¹³³ Email from G.H., Pa. attorney, to Kevin Hoagland-Hanson (Nov. 4, 2013) (on file with author).

¹³⁴ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129; Telephone Interview with E.F., *supra* note 130.

¹³⁵ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129.

¹³⁶ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129; Telephone Interview with E.F., *supra* note 130; E-mail Interview with G.H., *supra* note 133.

¹³⁷ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129.

¹³⁸ Telephone Interview with C.D., *supra* note 129.

¹³⁹ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129; Telephone Interview with E.F., *supra* note 130.

proceeding.¹⁴⁰ As a result, several attorneys doubted whether a pro se parent, even one knowledgeable about the IDEA, would be able to navigate the legalized setting of a due process hearing.¹⁴¹ These concerns relate particularly to tasks such as putting hostile school district personnel or experts on the stand. While several attorneys noted that the burden-shifting required by *Shaffer v. Weast*, under which parents must put forth their case first,¹⁴² probably hurt a pro se parent unfamiliar with the process, one attorney believed the opportunity to act as a traditional plaintiff and present the case to the hearing officer first was beneficial for parents represented by counsel.¹⁴³

When asked about district compliance with IDEA and why the number of due process hearings remains significant thirty years after the enactment of the statute, one attorney noted that increased incidences of noncompliance were an inevitable result of the tension between the procedural and substantive IDEA requirements and the budget and staffing situation of districts.¹⁴⁴ As one attorney put it, there is a “natural tension” between districts that want to do as little as possible while complying with the law and parents who want as much as possible for their children.¹⁴⁵ Several attorneys, however, also noted that systematic failures were rare.¹⁴⁶

For parents who do have counsel, many commentators have speculated that the due process system harms the ongoing relationship between schools and students.¹⁴⁷ Unlike many other areas of civil rights law, IDEA due process and other education litigation usually implicate a long-term ongoing relationship between the specific individuals involved. For example, while parties to an employment suit may never interact again after the judgment, the two parties in many IDEA cases must in many instances continue to work together for years after due process ends as the student continues in school after the dispute. School districts argue that private enforcement of IDEA as currently constructed creates too much stress for the school staff

¹⁴⁰ Telephone Interview with E.F., *supra* note 130.

¹⁴¹ Telephone Interview with C.D., *supra* note 129; Telephone Interview with E.F., *supra* note 130.

¹⁴² See 546 U.S. 49, 62 (2005) (“The burden of proof in an administrative hearing challenging an IEP is properly placed on the [parent].”).

¹⁴³ Telephone Interview with A.B., *supra* note 128; Telephone Interview with C.D., *supra* note 129.

¹⁴⁴ Telephone Interview with C.D., *supra* note 129.

¹⁴⁵ *Id.*

¹⁴⁶ Telephone Interview with A.B., *supra* note 128; E-mail Interview with G.H., *supra* note 133.

¹⁴⁷ See, e.g., Cope-Kasten, *supra* note 6, at 506 (noting that when parents are represented by counsel, attorneys can “contribute to the delays in the process and heighten the tense, adversarial nature of the proceedings” (citations omitted)).

members dragged into due process hearings.¹⁴⁸ The structure of IDEA itself creates inherent tension because due process provides an avenue for parents to question the job performance of teachers and staff.¹⁴⁹ Even when parents are successful, some studies have found that parents and school officials feel traumatized and drained by the hearing process.¹⁵⁰

Perhaps unsurprisingly, the attorneys dismissed any concerns about poisoned relationships between parents and school districts following due process. As one attorney put it, “the squeaky wheel gets the grease.”¹⁵¹ That is, any school district is more likely to treat a student represented by counsel more carefully in the future because “they know [the child’s parents] have a lawyer’s number in their pocket.”¹⁵² Attorneys also seemed to recognize their responsibility to avoid damage to the student–teacher relationship. As one attorney stated, “there is a difference between forcefully pointing out what’s wrong and going for the humiliation [of school staff].”¹⁵³ All of the attorneys rejected the suggestion that due process caused irreparable damage to the relationships between parents and school districts.

Attorney awareness of the student–teacher relationship is supported by the fact that almost all of the attorneys interviewed had a personal or professional connection to education advocacy. Several attorneys were originally parent advocates who became involved in IDEA work because they had children who were disabled students. Others were former members of government or public interest organizations advocating for the rights of children. The frequent players in the special education due process system often have personal experience and a stake in the process and are not simply operating as entrepreneurs.

¹⁴⁸ See PUDELSKI, *supra* note 1, at 12–13 (providing anecdotal evidence of instructor and administrator stress following due process hearings).

¹⁴⁹ See 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, 433–34 (2012) (explaining that “[u]nsurprisingly, there is ‘strong resentment by educators of the parental right and power under the Act to challenge the educators’ professional judgment’” (citations omitted)).

¹⁵⁰ 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, 40–41 (1997) (noting that both parents and administrators frequently reflect negatively on due process hearings, regardless of their outcome).

¹⁵¹ Telephone Interview with A.B., *supra* note 128.

¹⁵² *Id.*

¹⁵³ Telephone Interview with C.D., *supra* note 129.

IV. PRO SE PARENTS AND ACCESS TO COUNSEL ISSUES IN PENNSYLVANIA

A. *Continuing Presence of Pro Se Parents in IDEA Due Process*

Despite the presence of a visible and active private special education bar willing to take cases across Pennsylvania, parents continue to proceed pro se in roughly one in four IDEA due process hearings.¹⁵⁴ Parents proceeding pro se are significantly less likely to obtain meaningful relief. One explanation for this discrepancy is that these cases lack merit. Pro se parents, however, obtain significant relief in 16% of cases.¹⁵⁵ Thus, the disadvantages of pro se representation cannot be explained by lack of merit alone. Another, perhaps more plausible, explanation is that parents are unaware that certain lawyers will agree to take cases on a reduced fee or contingent fee basis. Therefore, these statistics regarding pro se cases are not explained merely by the number of available attorneys.

B. *Unavailability of Counsel for Low-Income Parents*

The most likely explanations for why parents proceed pro se are that they choose to do so or that they are unable to pay for a lawyer. In 2012, 37.9% of Philadelphia public school students were below the federal poverty line.¹⁵⁶ The parents of these students generally cannot afford to pay a retainer for private counsel. Enrollment in special education in the Philadelphia School District is lower than the statewide average.¹⁵⁷ Anecdotal evidence from previous studies suggests that utilization of due process is higher in wealthier districts.¹⁵⁸ In addition, IDEA's framework may make enforcement of the statute in major violations more difficult in poorer districts.¹⁵⁹ Because IDEA centers around an IEP and the

¹⁵⁴ *Supra* Table 2.

¹⁵⁵ *Supra* Table 2.

¹⁵⁶ REVENUES, EXPENDITURES, POVERTY RATE, AND TITLE I ALLOCATIONS OF PUBLIC SCHOOL DISTRICTS ENROLLING MORE THAN 15,000 STUDENTS: 2010-11 AND FISCAL YEAR 2013, DIGEST OF EDUC. STATS., NAT'L CTR. FOR EDUC. STAT., *available at* http://nces.ed.gov/programs/digest/d13/tables/dt13_215.20.asp (last visited May 12, 2015).

¹⁵⁷ In the Philadelphia School District, only 13.7% of children receive special education services, compared to 15.4% of students statewide. SPECIAL EDUCATION DATA REPORT SCHOOL YEAR 2013-2014, PA. ST. DATA CTR. (2014), *available at* http://penndata.hbg.psu.edu/BSEReports/Data%20Preview/2013_2014/PDF_Documents/Speced_Quick_Report_Final.pdf.

¹⁵⁸ *See* Pasachoff, *supra* note 126, at 1426-27 (noting that anecdotal studies in Maine and other states suggest that wealthier parents pursue due process more often than low-income parents).

¹⁵⁹ *See* Hyman, Rivkin & Rosenbaum, *supra* note 19, at 118-21 (arguing that the procedural framework and remedies available through due process favor parents with counsel in districts where compliance with the statute is high and harm parents in districts where compliance is poor).

procedures used to implement the IEP, districts that are wholly out of compliance with the law are more difficult to challenge in court because failure to comply creates less of a record for due process.¹⁶⁰ Due process hearings also favor parents who can afford to pay for an independent educational evaluation conducted by an expert to challenge the district's evaluation.¹⁶¹ This cost is prohibitive for most low-income families.¹⁶² Further, the parents who are most likely to proceed pro se are also more likely to have less education and familiarity with litigation.¹⁶³

Several of the attorneys I interviewed believed that parents overestimate the cost of a lawyer.¹⁶⁴ However, at least one of the attorneys who charged a retainer noted that economic issues have driven more parents to decline to move forward with a due process complaint in recent years.¹⁶⁵ It is likely that many parents are simply unable to afford a lawyer requiring any retainer, no matter how small. While some attorneys take cases purely on contingency, these attorneys also confirmed they would be more likely to take cases where parents had already sought an independent educational evaluation on their own.¹⁶⁶ As discussed above, the expense of this type of evaluation is likely beyond the means of low income parents.

C. *Alternatives to Due Process for IDEA Dispute Resolution*

Many proposals have been advanced to change or supplement the special education due process system with alternative forms of dispute resolution.¹⁶⁷ These alternative mechanisms are designed to mitigate the perceived weaknesses of due process, such as that it is too slow, too technical, and too costly in comparison to its benefits. As discussed below, however, many of the proposed alternatives achieve their purported improvements in efficiency by removing parents' attorneys. This means that many of the proposed alternatives are likely to magnify the advantages held by district

¹⁶⁰ See *id.* at 114 (explaining that IDEA due process relies on records created by the school and therefore presumes some degree of compliance with the statute).

¹⁶¹ See *id.* at 126-28 (noting that the inability to obtain timely independent educational evaluations negatively affects the remedies available to low-income families).

¹⁶² See *id.* at 127 (“[I]t is very difficult for a parent without financial resources to exercise this [due process] right.”)

¹⁶³ See Chopp, *supra* note 149, at 452-53 (citing empirical evidence that parents of students eligible under IDEA who have minimal education themselves are more likely to be unaware of resources available to aid them in due process).

¹⁶⁴ Telephone Interview with C.D., *supra* note 129; Email from G.H., *supra* note 133.

¹⁶⁵ Telephone Interview with C.D., *supra* note 129.

¹⁶⁶ Telephone Interview with A.B., *supra* note 128; Telephone Interview with E.F., *supra* note 130.

¹⁶⁷ See *infra* subsections IV.C.1-3.

repeat players over parents in determining what services to provide for students.

1. Mediation

Mediation is a frequently proposed alternative to due process.¹⁶⁸ The 1997 amendments to IDEA added a provision requiring states to offer mediation as part of their IDEA administrative regimes; at that time Congress expressed its intent that mediation be the primary means of resolving special education disputes.¹⁶⁹ Mediation allows the district and parents to resolve disputes with the assistance of an impartial third party.¹⁷⁰ Mediation can take less time than a due process hearing, since more than one session is rarely needed and there is no witness or evidence preparation required.¹⁷¹ The result of a successful mediation is a written agreement signed by both parties,¹⁷² which is legally binding.¹⁷³

There is, however, no requirement of a binding result of mediation, and the parents and student are free to refuse to sign any such resulting agreement. If the mediation fails, the parents are still able to pursue a formal due process complaint.¹⁷⁴ This is one of the principal critiques of the mediation process as currently constructed; in many cases mediation is just

¹⁶⁸ See, e.g., Cope-Kasten, *supra* note 6, at 532 (suggesting that “mandatory mediation [could] effectively serve as the final dispute resolution option in special education conflicts”); Kuriloff & Goldberg, *supra* note 150, at 42-43 (arguing that mediation is appropriate in the special education context).

¹⁶⁹ See S. REP. NO. 105-17, at 26 (1997) (expressing the Senate Committee’s “strong preference that mediation become the norm for resolving disputes under IDEA”); see also EDWARD FEINBERG ET AL., BEYOND MEDIATION: STRATEGIES FOR APPROPRIATE EARLY DISPUTE RESOLUTION IN SPECIAL EDUCATION 8 (2002) [hereinafter BEYOND MEDIATION], available at <http://www.directionservice.org/cadre/pdf/Beyond%20Mediation.pdf> (discussing the legislative history of the IDEA amendments indicating “clear congressional intent that mediation become the primary, albeit not the exclusive, process for resolving disputes arising under IDEA”).

¹⁷⁰ See BEYOND MEDIATION, *supra* note 169, at 25 (explaining that mediation allows all parties to work with outside counsel to learn more about the merits of the parties’ positions).

¹⁷¹ See PA. MEDIATION GUIDE, *supra* note 78, at 3.

¹⁷² *Id.* at 5.

¹⁷³ See M.R. & B.R. *ex rel.* D.R. v. E. Brunswick Bd. of Educ., 109 F.3d 896, 901 (3d Cir. 1997) (“[R]eaching a settlement agreement during mediation, rather than during litigation, does not lessen the binding nature of the agreement on the parties.”).

¹⁷⁴ However, some courts have ruled that if the parents and district agree *ex ante* to make mediation binding, such an agreement will preclude later due process complaints. See *Amy S. v. Danbury Local Sch. Dist.*, 174 F. App’x 896, 901 (6th Cir. 2006) (“[A]ll of the Parents’ claims in the lawsuit . . . are covered by the unambiguous language of the mediation agreements. Because the Defendants did not breach the mediation agreements, the Parents’ claims are barred by the fact that they were settled.”).

a step on the road to a due process hearing.¹⁷⁵ Thus, some have proposed that mandatory binding arbitration (with the consent of all parties) can be a way of capturing the efficiency gains of mediation and the binding effect of a final decision.¹⁷⁶

In theory, the benefits of mediation seem to make it an attractive alternative to due process. In practice, however, mediation in Pennsylvania leaves parents without the benefit of counsel and at a distinct disadvantage to district officials. However, allowing counsel to participate in mediation would not necessarily solve these problems, as no fee recovery provision exists for attorneys who resolve disputes at mediation, making counsel available only to parents who could afford an attorney.

ODR does not allow parents to be represented by counsel in mediation.¹⁷⁷ This poses significant problems for parents opposed by district officials who are repeat players.¹⁷⁸ As one private attorney observed, it is “insane to think that districts don’t have lawyers and aren’t talking to them,” and that even if the district does not have lawyers in the room, they “aren’t talking to them on the phone in the hallway.”¹⁷⁹ The advantages of having a lawyer in a due process proceeding apply equally in mediation.¹⁸⁰ Further, mediation does not offer even the limited access to school documents and personnel provided in a due process hearing. Districts would have little, if any, incentive to disclose information harmful to their position in mediation.

While some studies have found that parents are generally satisfied with mediation, the studies do not examine whether parents actually obtained

¹⁷⁵ See S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 544, 548-49 (2012) (“[M]ediation is often perceived as a ‘poor man’s’ alternative to a due process hearing, a settlement for the best that can be obtained in the absence of legal representation.”).

¹⁷⁶ See *id.* at 555 (proposing binding arbitration as an alternative dispute resolution mechanism and noting “the importance of the finality of a special education arbitration proceeding is difficult to understate”).

¹⁷⁷ PA. MEDIATION GUIDE, *supra* note 78, at 2.

¹⁷⁸ See Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179, 181-82 (2012) (arguing that mediation significantly disadvantages parents because of ODR’s prohibition of counsel); 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, 750 (1997) (explaining that most parents are “not skilled at presenting grievances to experienced professionals” and therefore are at a disadvantage against district repeat players, even with the presence of a mediator); see also Kuriloff & Goldberg, *supra* note 150, at 55 (finding that parents represented by counsel were more satisfied with the results of mediation than parents without counsel).

¹⁷⁹ Phone Interview with C.D., *supra* note 129.

¹⁸⁰ See *supra* Part III.

more relief.¹⁸¹ It is unlikely that parents would be able to obtain more relief in a less formal proceeding without counsel than they are able to in the current system, where they frequently achieve significant redress through due process (and even more do so through settlement). Without counsel, much of the flexibility of the remedies allowed by settlement (i.e., the availability of prospective relief) is lost. Unrepresented parents are unlikely to fully understand the remedies available under the complicated IDEA remedial scheme¹⁸² or how to bargain for a potential award of compensatory education in exchange for a prospective remedy.¹⁸³ Unless opposed by counsel and negotiating in the shadow of a potentially large compensatory claim, districts would be less likely to offer such expensive relief. Moreover, mediation settlements are drafted by non-lawyers, often resulting in unenforceable agreements.¹⁸⁴

If attorneys are unable to recover fees in mediation, they are either less likely to take cases or more likely to charge higher retainers, reducing parents' access to counsel. In addition, some attorneys noted that when they deal with cases from parents who have already proceeded through mediation, the lack of legal knowledge of both parties results in agreements that are not legally intelligible in terms of the IDEA's statutory requirements.¹⁸⁵

Even if parents have representation by counsel, mediation would become at best a prelude to due process hearings. Pennsylvania special education attorneys have advocated for changes to the rules, such as allowing attorneys at mediation and permitting the recovery of fees for mediation settlements for parents who obtain significant relief from the district through the settlement.¹⁸⁶ Yet, with attorneys present, the "non-confrontational" advantages of mediation would be reduced. Resolution

¹⁸¹ See Kuriloff & Goldberg, *supra* note 150, at 63-66 (identifying correlations between parents' and school officials' perceptions of fairness).

¹⁸² The thicket of complicated equitable remedies developed by courts for the IDEA is very difficult for parents to navigate. See *supra* notes 72-76 and accompanying text. See generally *Parental Rights Under IDEA*, CENTER FOR PARENT INFO. & RES. (Jan. 2014), <http://www.parentcenterhub.org/repository/parental-rights>, archived at <http://perma.cc/BW6T-DMPF> (providing an overview of the procedural and substantive safeguards in IDEA).

¹⁸³ See *supra* Part III (discussing tactics used by parents' attorneys in due process settlement negotiations).

¹⁸⁴ See *supra* Part III; see also Rosenfeld, *supra* note 175, at 548 n.12 ("In reviewing requests for *pro bono* representation by our law school clinic over a period of four years, I was amazed at how many applicants submitted mediation settlement agreements that were so imprecise as to be rendered unenforceable.").

¹⁸⁵ Telephone Interview with C.D., *supra* note 129.

¹⁸⁶ See Kerr & St. Hill, *supra* note 178, at 196 ("Congress should . . . encourage mediation by permitting attorneys' fees for resolving cases through mediation.").

meetings are already required by statute before parties can proceed to due process.¹⁸⁷ Districts would certainly not have a greater incentive to settle at mediation than they would in the face of a hearing officer order.

The presence of a third-party mediator, no matter how independent and skilled in conflict resolution, can do little to mitigate the information asymmetry inherent in the dynamics of students and parents versus school administrators. Further, mediation encourages parties to seek compromise, assuming the parties' positions are equally, or at least partially, valid. Such an arrangement is of less utility where the incentives for districts are influenced by budgetary constraints; there is little room for districts to give ground when doing so will result in increased expenditures.

2. Facilitated IEPs

Another alternative to the due process system is an expansion of the existing system of facilitated IEPs. Frequently mentioned with mediation as an alternate dispute resolution setting for IDEA, IEP facilitation involves a neutral third-party during IEP meetings between parents and the school's IEP team.¹⁸⁸ While not as formal as mediation, this process has the same goal of encouraging parties to focus on the substantive issues relating to service provision for the child. IEP facilitation is a service offered by ODR in Pennsylvania, but it is not required by statute or ODR rule.¹⁸⁹ Facilitated IEP meetings involve the same general process as a regular IEP meeting, but the third-party facilitator is intended to ensure open communication and focus on the needs of the student.¹⁹⁰ The facilitator does not "chair the meeting," instead "tak[ing] a secondary role."¹⁹¹

The AASA report recommends the expansion of the facilitated IEP process as a solution to the perceived problems of the due process system.¹⁹² The AASA proposes replacing the current system of optional mediation and resolution sessions followed by due process hearings with facilitated IEPs

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

¹⁸⁸ See Cope-Kasten, *supra* note 6, at 505 (noting that facilitated IEP meetings may help "the parties stay focused on material, rather than personal, issues"). See generally BEYOND MEDIATION, *supra* note 169, at 31-34 (examining a variety of non-adversarial conflict resolution strategies for IDEA disputes, including IEP facilitation and third-party mediation).

¹⁸⁹ See *supra* notes 70-71 and accompanying text.

¹⁹⁰ See *IEP Facilitation—Pennsylvania*, NAT'L CENTER ON DISP. RESOL. IN SPECIAL EDUC., <http://www.directionservice.org/cadre/ctu/practicesB.cfm?id=120> (last visited May 12, 2015), archived at <http://perma.cc/7MRN-ZSWY> ("The IEP Facilitator assists in creating an atmosphere for fair communication and the successful drafting of an IEP for the student.").

¹⁹¹ *Id.*

¹⁹² See PUDELSKI, *supra* note 1, at 17-23 (proposing a two-prong approach to replace the due process system that includes creating a mandatory facilitated IEP meeting).

followed by “consultant IEPs.”¹⁹³ If facilitated IEPs fail, the parties would then select an independent “IEP consultant” from a state education agency list.¹⁹⁴ The consultant will review the child’s record and create a new IEP.¹⁹⁵ Any appeal would occur in federal court.¹⁹⁶

Facilitated IEPs have several benefits. First, unlike the due process system that addresses past violations, facilitated IEPs inherently focus on the child’s future education.¹⁹⁷ Presumably an independent facilitator will better inform parents of their child’s rights under the statute. The presence of a facilitator might result in better IEPs in terms of their substantive content, organization, and quality, because the facilitator would be an expert in IEP drafting. Parents and teachers, the primary members of the IEP team today, are not as familiar with an IEP’s requirements. Finally, IEP facilitators might reduce tension between parents and schools by keeping discussions away from personal disputes.

IEP facilitation has some benefits over mediation. For example, it occurs earlier and may keep disputes from reaching the point where mediation is required. In addition, a truly independent facilitator might mitigate the information asymmetry between parents and schools by ensuring that parents fully understand their rights. Research suggests that IEP facilitation, like mediation, results in participants feeling more satisfied with the process.¹⁹⁸

IEP facilitation has some of the same drawbacks as mediation. Depending on the nature of the meeting, IEP facilitators may not be able to fully inform parents of their rights under the statute in the same way that an attorney would. The information asymmetry between the parties may continue to result in school districts outmaneuvering or pressuring parents. In addition, the IEP facilitation system does nothing to provide remedies for parents or disincentives for districts. A system of IEP consultation as proposed by the AASA report similarly does not provide any solution to past violations of the statute. Therefore, IEP facilitation alone does not serve all of the roles that the due process system does because it removes

¹⁹³ *Id.* at 17-18.

¹⁹⁴ *Id.* at 20.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 21.

¹⁹⁷ This also contrasts with IDEA in practice, which usually results in compensatory education or tuition reimbursement, both retrospective remedies. *See supra* notes 123-125 and accompanying text; *see also* Zirkel, *Adjudicative Remedies*, *supra* note 73, at 228 (noting that in a sample of district court rulings, tuition reimbursement and compensatory education represented 36% and 30% of all remedies, respectively).

¹⁹⁸ *See* PUDELSKI, *supra* note 1, at 19 (providing examples of “solid evidence” demonstrating the effectiveness of IEP facilitation in various states).

the compensatory remedies that courts have held are essential to the statute.¹⁹⁹

3. Public Enforcement

Instead of seeking to limit the flaws of the existing due process framework, as mediation attempts to do, another option to mitigate the problems of the due process system is to increase public enforcement of the statute.²⁰⁰ Public enforcement could utilize existing agencies, such as the Department of Education's Office of Special Education Programs.²⁰¹ Such a regime would involve either increasing regulation and oversight of school districts by an administrative agency or attaching performance targets to federal funds, or some combination of both. Public enforcement would be particularly well-suited to mitigate the access problems posed by the private enforcement regime of due process by putting students on equal footing regardless of their ability to hire a private attorney.²⁰²

Increased public enforcement of IDEA, like most civil rights statutes, is almost certainly desirable. However, public enforcement would be expensive.²⁰³ Federal and state governments are highly unlikely to assume the burden currently shouldered by private enforcement. The new enforcement regime would also be dependent on continued legislative support. Perhaps more troublingly, public enforcement in other areas of special education is already weak.²⁰⁴ Because of the scope of national

¹⁹⁹ See Octavia P. *ex rel.* Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990) (holding that IDEA both creates a right to FAPE and requires courts to "provide relief which remedies the deprivation of that right" (citations omitted)).

²⁰⁰ See Pasachoff, *supra* note 126, at 1461-88 (proposing a regime of public enforcement of IDEA through federal mandates for increased district disclosure, investigation of noncompliance, and changes in funding levels based on compliance); cf. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 453-55 (2007) (suggesting possible benefits of public enforcement to supplement private enforcement in the ADA context).

²⁰¹ The Office of Special Education Programs administers IDEA formula grants to states and also implements programs designed to ensure compliance with the statute. *Office of Special Education Programs Mission Statement*, DEPARTMENT EDUC., <http://www2.ed.gov/about/offices/list/osers/osep/mission.html> (last visited May 12, 2015), archived at <http://perma.cc/AN5T-H8MN>.

²⁰² Pasachoff, *supra* note 126, at 1462 ("Where a statute is enacted to effectuate a particular public policy and private enforcement is inefficient to effectuate that policy, it is reasonable to suggest that public enforcement is necessary if the statute is to be properly administered.").

²⁰³ See *id.* at 1482 (estimating costs of increased monitoring and "intradistrict comparison" investigations to be \$2.8 billion per year).

²⁰⁴ See Theresa Glennon, *Evaluating the Office for Civil Rights' Minority and Special Education Project* (examining the effectiveness of the Department of Education Office for Civil Rights' efforts to reduce the disproportionate representation of minority students in special education and finding that a lack of resources, an overly broad mission, and limited scope of powers delegated by

enforcement, even relatively small numbers of complaints can dwarf the resources allocated to the enforcing agency.²⁰⁵ Enforcement rates of other disability statutes that are administered by the Department of Justice or disability advocacy organizations, such as the accessibility provisions of the Fair Housing Act, are very low.²⁰⁶

Moreover, systemic violations are likely not the cause of most IDEA violations. Many individual situations resolved through due process are likely to be the result of good faith disagreements between parents and districts about the services required for a particular student. In addition, most attorneys interviewed in Pennsylvania for this study reported that they saw little evidence of widespread systemic violations.²⁰⁷

CONCLUSION: COMPETING NARRATIVES OF THE ROLE OF COUNSEL IN IDEA DUE PROCESS

The IDEA due process system as currently constructed does achieve results for parents. During the five-year period studied in this Comment, Pennsylvania parents won some relief in almost half of all due process hearings that reached a final decision, many of which resulted in significant awards to students.²⁰⁸ As many as four or five times that number settled before a due process hearing, achieving substantive relief for students.²⁰⁹ Contrary to the AASA's assertions that due process is a "small and, at times, hollow means for parents to ensure district [sic] are complying with IDEA,"²¹⁰ the empirical results in Pennsylvania and the experience of

Congress hampered public enforcement), in *RACIAL INEQUITY IN SPECIAL EDUCATION* 195, 201-03 (Daniel J. Losen & Gary Orfield eds., 2002).

²⁰⁵ See *id.* at 206-07 (discussing how an agency that had jurisdiction over only a small section of the disabled student population spent almost 60% of staff time investigating received complaints).

²⁰⁶ See, e.g., CAROLINE PEATTIE & JESSICA TANKERSLEY, *MARIN COUNTY ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE* 28-30 (2011), available at http://www.marincounty.org/~media/files/departments/cd/federal-grants/analysis_of_impediments_to_fair_housing_choice.pdf (noting that a lack of federal and local funding consistently hampered community organization and enforcement of the Fair Housing Act).

²⁰⁷ See *supra* Part III. This is not to say that systemic violations of IDEA are unheard of, even in states with active private enforcement such as Pennsylvania. See *Disproportionality: Segregation Through Special Education*, PUB. INT. L. CENTER PHILA., <http://www.pilcop.org/lower-merion-school-district-segregation-through-special-education/#more-847> (last visited May 12, 2015), archived at <http://perma.cc/NS73-92EW> (discussing ongoing litigation against Lower Merion School District alleging systemic excessive characterization of minority students as needing special education outside of mainstream classrooms).

²⁰⁸ See *supra* Section II.C.

²⁰⁹ This figure is based on the estimates provided by private attorneys. See *supra* Part III.

²¹⁰ PUDELSKI, *supra* note 1, at 7.

special education lawyers based in Pennsylvania is that IDEA is a powerful tool to ensure continued compliance by districts.²¹¹ This success rate is significantly higher than what it was in the early years of the due process system in Pennsylvania.²¹² The development of an aggressive and experienced private bar likely contributed to this increased success.

Districts and schools dislike the due process system because it is expensive and burdensome. But the system is expensive and burdensome because districts are often not in compliance with federal law. The AASA report claims that 40% of surveyed school administrators consented to “unreasonable, unnecessary, or inappropriate requests by parents” if the cost of compliance with federal law was “less than 20% of the cost to move forward with due process.”²¹³ The 70–90% settlement rate estimated by members of the private bar in Pennsylvania might tend to support an assertion that districts are settling rather than taking chances on due process hearings. But when hearings do reach a decision, the near 60% success rate of parents represented by counsel, combined with the fact that parents proceeding pro se receive substantive relief, suggests that there is surplus capacity for litigation in the system.

Although due process litigation is expensive, there is not a substantial amount of special education litigation; in fact, the amount is low relative to the number of disabled students.²¹⁴ It is now significantly more difficult to enforce IDEA through private actions due to the Supreme Court’s increasingly skeptical view of private rights of action.²¹⁵ Moreover, Pennsylvania has already streamlined the process once in recent years, with the removal of administrative appeals panels from the IDEA process in 2009.²¹⁶ Estimates of the cost of special education litigation vary, but the

²¹¹ See *supra* Part II.

²¹² See Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 WEST’S EDUC. L. REP. 491, 495 (1988) (explaining that parents in Pennsylvania prevailed significantly less often than districts at the due process stage and that parents reported dissatisfaction with the hearing process); see also Kuriloff, *supra* note 100, at 109 (finding that the presence of counsel did not affect the success rates of parents during the first four years of due process hearings in the 1970s).

²¹³ PUDELSKI, *supra* note 1, at 12.

²¹⁴ See Bagenstos, *supra* note 99, at 127–29 (citing two studies that found an annual average of approximately fifty-eight due process hearings for every 10,000 special education students).

²¹⁵ J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1170–72 (2012) (noting that the heightened post-*Twombly* and *Iqbal* pleading standard and the Supreme Court’s decisions limiting class actions have made private enforcement of law—especially civil rights law—much more difficult).

²¹⁶ Prior to amending rules in 2008, Pennsylvania had a two-tier system, with administrative hearing officer decisions being appealed to a three-officer panel prior to an appeal to federal court.

cost of any estimate is an extremely small proportion of the school district budgets, particularly given the number of cases that actually proceed to due process hearings.²¹⁷

The above estimates all refer to cases that make it to a district court on appeal. The vast majority of due process cases terminate at ODR. Even at the administrative level in Pennsylvania, the proportion of cases decided to the number of students eligible under IDEA is extraordinarily small. In 2009–2010—the school year with the most hearing officer decisions during the studied period—only 122 due process complaints made it all the way to a hearing officer decision.²¹⁸ That same year, 270,150 students in Pennsylvania schools qualified for special education under IDEA.²¹⁹ Due process complaints reaching a final hearing officer decision represented *only* .0004% of enrolled special education students. Even assuming that 90% of all cases are settled prior to a hearing, multiplying the number of decisions by ten would result in an estimate of a mere 1200 due process complaints each year. In the most extreme estimates, the direct administrative costs of the due process system are miniscule compared with school district budgets.²²⁰

Due process also has several important ancillary benefits that serve to complement, rather than detract from, alternative dispute resolution systems such as mediation. ODR hearing officer decisions, despite being redacted prior to dissemination, constitute an important body of precedent and a resource for both parents and advocates to understand the available rights and remedies under IDEA. These decisions also provide a baseline for settlement negotiations between parents and districts. This resource would be lost if even more disputes were handled informally or off the record through mediation or settlements, where the resulting agreements are kept secret.

In addition, parent and student success in IDEA hearings likely has secondary effects that improve future district compliance with the law.

OFFICE FOR DISPUTE RESOLUTION, ANNUAL REPORT 2008–2009, at 16, *available at* <http://odr-pa.org/wp-content/uploads/pdf/ODR0809ar.pdf>.

²¹⁷ See PUDELSKI, *supra* note 1, at 13–14 (estimating that the total cost of a due process case could be as much as \$50,000 if the parent prevailed and the district was compelled to pay both a judgment and the parent's attorneys' fees); Bagenstos, *supra* note 99, at 129 (citing estimates that the annual expenditure per open litigation *in federal court* was roughly \$100,000).

²¹⁸ See *supra* Table 1.

²¹⁹ SPECIAL EDUCATION DATA REPORT SCHOOL YEAR 2009–2010, PA. ST. DATA CENTER (2010), http://penndata.hbg.psu.edu/BSEReports/Data%20Preview/2009_2010/PDF_Documents/Speced_Quick_Report_State_Final.pdf, *archived at* <http://perma.cc/M2PJ-YLFF>.

²²⁰ See, e.g., SCH. DIST. OF PHILA. FY 2013–14 CONSOLIDATED BUDGET, *supra* note 32, at 315 (recording the 2012 fiscal year budget for the School District of Philadelphia's General Counsel's office alone as approximately \$8 million).

First, due process reminds school and district staff of the substantive requirements of IDEA. Second, costly compensatory education awards are powerful motivators for districts to ensure staff are adequately trained and provide necessary services. Further, the procedural requirements of IDEA, which are often maligned by teachers as unduly burdensome and overly focused on potential due process claims,²²¹ force districts and teachers to create records and rationalize their decisions regarding the education of disabled children. These records can later be used to evaluate the programming provided.

Critics correctly attack the IDEA's due process system for its emphasis on providing retroactive relief through hearing officer decisions rather than providing for the future educational needs of the child.²²² But to critique the necessarily *ex post* nature of due process neglects the benefits of the current system discussed above. The system, as currently constructed, results in meaningful relief for a significant percentage of parents and students. Due process decisions have valuable secondary effects, both in terms of cases that settle favorably for parents prior to a hearing and for increased compliance by school districts following a due process complaint. But perhaps more importantly, any system that eliminates retroactive relief, or that requires parents to pursue such relief only in expensive federal court proceedings, risks leaving disabled students with rights but without practical remedies for violations of those rights.

If dispute resolution mechanisms prior to due process are desired, these developments ought to be encouraged *in addition* to the current due process regime. Facilitated IEP meetings, in particular, have the valuable promise of putting an informed person in the room to better assist parents and school district personnel in understanding the requirements of the law. Because the IEP itself ends up being the key document in most IDEA disputes, drafting better IEPs may go a long way in reducing disputes later in the process. This promise is particularly true where parents enter meetings at an information disadvantage and only discover their rights once the provision of services under an IEP begins. At that point, the parents' only option in many cases is to pursue retroactive relief in the form of compensatory education because the violation has already occurred.

Underlying much of the debate about IDEA due process is a disagreement about the value lawyers bring to the process. While critiques of due process are framed in terms of the "adversarial" or "litigious" nature of the process, this critique is essentially aimed at parents' lawyers and the

²²¹ PUDELSKI, *supra* note 1, at 23-24.

²²² See *supra* notes 20-22 and accompanying text.

procedural apparatus that provides parents represented by lawyers leverage over school districts. In this narrative, parents' lawyers are responsible for interfering with the professional judgment of teachers and school administrators and for using the procedural protections of due process to secure unneeded or undeserved services from schools. Consequently, due process complaints are unnecessary: many are frivolous, and the meritorious complaints would be best resolved through an informal (and, implicitly, more amicable) dispute resolution process, such as mediation.

Left undiscussed in this narrative is the inevitability of lawyers representing school districts. As a starting point, school districts already have an advantage over parents simply by maintaining control of information and school records about the student's education. In addition, as repeat players, school administrators are already at least somewhat familiar with the IDEA process. School district experts who prepare reports and create a record are employees of the district and available as needed. Further, a school administrator would be foolish, perhaps even negligent, to approach *any* conflict resolution session, no matter how informal, without first consulting legal counsel in some capacity. By contrast, only affluent parents have the resources to consult a lawyer for advice on their position before participating in an informal dispute resolution setting.

There is an alternative narrative, however: lawyers in special education due process cases serve a crucial role in leveling the playing field between parents and districts. This narrative does not doubt the good intentions of teachers or administrators, or impute to them any malice against students with disabilities. Instead, it recognizes that the incentives for school districts are not always in perfect alignment with the interests of students with disabilities. Particularly where school budgets represent a constant or shrinking pie, it is not cynical to think that districts might legitimately struggle to ensure that every student is receiving the services IDEA requires.

This narrative is validated in light of the results of the Pennsylvania ODR decisions examined in this Comment. Not only were a significant number of claims meritorious—as almost half of all due process hearings resulted in a remedy for the parents and student—but when parents were represented by counsel, a majority of cases resulted favorably for the parents and student. If a significant (or overwhelming) majority of cases settle before reaching a hearing,²²³ compliance with IDEA's requirements must be far from perfect.

²²³ See generally *supra* Part III.

Quite strikingly, the number of prior appearances by the lawyer, as a very rough proxy for experience, has little effect on the success rates of parents.²²⁴ It appears that simply having a lawyer is a significant advantage. This finding is likely due, in part, to the technical nature of the due process hearing. It is also almost certainly the result of applying the critical eye of someone knowledgeable about IDEA to the case *from the perspective of the parent and student*, with the aim of achieving the best possible outcome for the student. No third-party neutral facilitator would be able to replicate this adversarial position (setting aside issues of capture of mediators by school districts who are the frequent players in disputes).

There is a critical role for lawyers in the IDEA system, particularly given the complicated nature of the statute.²²⁵ While encouraging alternative dispute resolution systems might have value, it is unclear that these alternative systems would be pursued by parents. Given the relatively low use of the procedural safeguards in IDEA compared to the number of students covered by the statute today,²²⁶ there is little to suggest that mediation or facilitated IEPs would result in more enforcement of the substantive requirements of the statute. On the other hand, encouraging more lawyers to become involved in the due process system might result in a more rigorous pursuit of some of the meritorious due process claims of pro se parents,²²⁷ in turn resulting in more cases brought to ensure compliance with the statute.

One change to the due process system that would both encourage more attorneys to become involved in the system and help to create access for low income parents is to implement a statutory fee-shifting provision to apply to parents' costs for hiring experts for due process hearings.²²⁸ Currently, after the Supreme Court's decision in *Arlington Central School District Board of Education v. Murphy*,²²⁹ parents cannot recover the fees for expert witnesses through the IDEA's fee-shifting provision.²³⁰ Therefore, parents face the possibility of outlaying significant costs to hire an expert witness to prove that the school district misidentified or failed to provide adequate

²²⁴ See *supra* note 120 and accompanying text.

²²⁵ See Hyman, Rivkin & Rosenbaum, *supra* note 19, at 141 (noting that lawyers are particularly important because they understand what remedies are available under the statute and how they can be applied to a case).

²²⁶ See *supra* note 99 and accompanying text.

²²⁷ See *supra* Section IV.A.

²²⁸ See Hyman, Rivkin & Rosenbaum, *supra* note 19, at 142 (singling out the expense of hiring experts as one of the primary barriers to parents pursuing due process complaints).

²²⁹ 548 U.S. 291 (2006).

²³⁰ See *supra* note 84-89 and accompanying text.

services for their child without any possibility of reimbursement, even if they prevail and demonstrate that the school district failed to comply with the statute.

Revisiting the oft-criticized *Buckhannon*²³¹ ruling, which limited the ability to recover fees for settlements lacking a judicial imprimatur, is also a possible next step.²³² This step would require congressional action to expressly allow recovery of fees under the catalyst theory in IDEA cases. Allowing the recovery of fees for settlements reached prior to due process would both encourage enforcement and reduce some of the stress cited by districts in the AASA report.²³³ Many of the attorneys with whom I spoke noted that they always filed a due process claim to reach a resolution meeting where the settlement would both be judicially enforceable and allow them to collect fees. Allowing attorneys at least a possibility of collecting fees prior to the filing of a due process claim might actually reduce administrative costs and the stress on district personnel who would not be dragged into due process.

Of course, the counterpoint to the narrative of the positive contribution of lawyers to the system is one that focuses on the zero-sum game of school budgets in an era where there is shrinking funding from all sources. If special education due process is simply a process of taking money from general education funds to apply it to special education students, then the argument made by the AASA and others is that this simply results in the benefit of a fortunate few against the needs of the many. But to adopt this attitude is essentially to give up on IDEA's promise and purpose. After all, IDEA does not require the best possible education for children with disabilities; rather, it simply requires a free, appropriate public education "reasonably calculated" to achieve "meaningful educational benefit."²³⁴ It is difficult to argue that we cannot, as a society, afford to guarantee that this minimum standard is available for all students.

After all, the due process system comprises a relatively small overhead cost compared to the scope of school budgets overall.²³⁵ The ability of parents and students to use the due process system and an attorney to

²³¹ 532 U.S. 598 (2001); see also *supra* note 85 and accompanying text.

²³² See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1118-20 (2007) (examining the ways in which the elimination of the catalyst theory for attorneys' fees has made it significantly more difficult for public interest attorneys to enforce civil rights statutes through private actions).

²³³ PUDELSKI, *supra* note 1 and accompanying text.

²³⁴ See *supra* note 44 and accompanying text.

²³⁵ See *supra* notes 217-220 and accompanying text.

ensure their substantive rights is a valuable safeguard, particularly in an era when budget constraints force districts to make tough choices. Replacing or limiting the due process system would effectively remove this valuable check on the authority of school districts.