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A Modest Proposal: Mediating IDEA Disputes without Splitting the Baby

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A Modest Proposal: Mediating IDEA Disputes Without Splitting The Baby*

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Abstract

The 1997 amendments to the Individuals with Disabilities Education Act (IDEA) require State and local education agencies to offer mediation as an alternative mechanism for resolving disputes concerning the education of children with special needs. The traditional due process hearing has been criticized as an ineffective, inefficient, and unfair method of dispute resolution while mediation has been praised as a rapid, inexpensive, and equitable resolver of disputes. This article recognizes the benefits of mediation for easing special education conflicts, but addresses the inconsistencies and ambiguities created by the IDEA language for State and local educational agencies attempting to administer successful alternative dispute resolution programs.

Specifically, this article recommends that State and local education agencies use mediators certified in sophisticated mediation techniques, schooled in special education law, and employed by independent organizations.

I. Introduction

The 1997 amendments to the Individuals with Disabilities Education Act (IDEA) include a provision requiring State and local education agencies to provide an option for mediation whenever a request for a procedural due pro-

* The original "Modest Proposal," penned by Jonathan Swift in the eighteenth-century as "A modest proposal for preventing the children of poor people from being a burden to their parents, or their country, and for making them beneficial to the publick (sic)," presented a peculiar suggestion for resolving public policy disputes involving children, which this article invokes for its satirical rather than practical benefits. JONATHAN SWIFT, A MODEST PROPOSAL (1729).

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cess hearing is made. [1] Congress included mediation in the procedural safeguards section of the reauthorized IDEA to address numerous criticisms levied against due process hearings both by parents and school districts and to "encourage parents and educators to work out their differences by using non-adversarial means." [2]

While mediation may address many of the complaints often directed toward adversarial dispute resolution, mediation under the provisions of the IDEA creates inconsistencies and ambiguities for State and local educational agencies attempting to administer successful alternative dispute resolution programs. The IDEA establishes vague requirements for mediation programs without clear practical guidelines. Mediators must be "trained in effective mediation techniques," [3] for example, but no consensus yet exists as to what mediation techniques are most effective for resolving IDEA disputes.

This paper offers recommendations to State and local education agencies for developing mediation systems that realize the goals of the IDEA mediation amendment without succumbing to its limited practical guidance. Part II reviews the problems of the current procedural due process system for resolving IDEA disputes. Part III presents the promises of mediation for ending special education conflicts effectively, efficiently, and fairly while Part IV addresses concerns surrounding mediation applied to the IDEA context. Part V then suggests methods for developing successful mediation systems by offering possible answers to the critiques of mediation under the IDEA. Finally, Part VI summarizes the analysis into conclusions.

II. Failures of the IDEA Due Process System

The IDEA provides a system of procedural safeguards through which parents [4] may challenge the identification, evaluation, and educational placement of their child to insure free and appropriate educational services for their child. [5] Rather than offering a singular definition of "appropriate" upon which parents and school districts may base their disputes, [6] Congress established a series of detailed procedures to involve and to protect parents lacking educational exper-

1. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e), 111 Stat. 37, 90 (1997). Please see the attached Appendix for the full text of § 615(e).

2. S. REP. NO. 105-17, at 5 (1997).

3. § 615(e)(2)(A)(iii).

4. Throughout this paper, I shall refer to "parents" rather than to "families" to maintain consistency with the language of the IDEA. *See* § 602(19)(A), 111 Stat. at 45 (defining parent as any legal guardian). The reader, however, should note that many children with disabilities are raised by guardians other than their natural parents. Thus, "families" may more accurately represent the potential parties involved in an IDEA dispute.

5. § 615(b), 111 Stat. at 88.

6. The IDEA definition states:

tise. [7] Procedural protections offered the Congressional drafters numerous advantages over specific substantive guarantees. Because the IDEA emphasizes the individual needs of each child, [8] a narrow substantive definition of "appropriate" could easily fail to protect children with needs unforeseen by the legislative drafters. Moreover, the IDEA originated during a jurisprudential era in which the United States Supreme Court demonstrated a preference for protecting welfare claims through formal procedural rights. [9] Procedural due process, presuming a clear distinction between the individual and the State, [10] therefore promised parents with children with special needs participation in a bureaucratic decision-making process that had historically excluded them. [11]

A. Ineffective Dispute Resolution

The promises of procedural due process perversely have prevented the effective resolution of IDEA disputes. Parents disagreeing with the educational placement of their child cannot challenge a school district on substantive grounds; rather, they must identify procedural violations to prove a program legally inappropriate. [12] Consequently, due process hearings concentrate more on procedural questions than on determining the most beneficial educational program for the child. [13] While a procedural focus may aid judicial officers lacking extensive expertise in special education, it forces parents to resolve their dis-

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> The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under § 614(d)) of this title.

§ 602(8), 111 Stat. at 44.

7. David M. Engel, *Law Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 168, 177 (1991).

8. *See* § 614(d), 111 Stat. at 83 (requiring a joint session between parents and school officials to create an "individual educational plan" (IEP) for each child).

9. The IDEA originated as the Education for All Handicapped Children Act (EHA) of 1975. *See generally* Steven S. Goldberg, *The Failure of Legalization in Education: Alternative Dispute Resolution and The Education for All Handicapped Children Act of 1975*, 18 J. LEGAL EDUC. 441 (1989). Passage of the EHA corresponded with the U.S. Supreme Court's expansion of procedural rights. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970). Even the conservative Rhenquist court has affirmed the importance of procedural due process over substantive outcomes. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1981) (finding that Congress gave equal consideration to concerns of process and to substance in special education legislation).

10. Joel F. Handler, THE CONDITIONS OF DISCRETION, 7 (1986).

11. Steven S. Goldberg & Dixie S. Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703 (1995).

12. *See* Rowley, 458 U.S. 176, 205 (explaining that adequate compliance with procedures would assure satisfying substantive content).

13. *See, e.g.*, Union Sch. Dist. v. Smith, 15 F.3d 1519, 1527 (9th Cir. 1994) (finding for parents because school district failed to offer an appropriate program available at another school within the district).

putes without directly addressing the reason for their claim. Different hearings produce unpredictable precedents by generating inconsistent interpretations of the same substantive language. [14] Ultimately, the IDEA sends an unsatisfying message to parents: "We cannot say exactly what sort of education your child is entitled to, but we can ensure your right to have a say and to challenge important decisions . . . through an elaborate review process." [15]

The privileged position of process in the IDEA dispute resolution system has also encouraged an adversarial culture that contrasts with the inclusion aims of the IDEA. [16] By positioning parents against school districts to achieve "the best interests of the child," due process hearings create an adversarial environment in which parents and school officials are placed in opposition. These adversarial tensions prove the greatest obstacle to the effectiveness of a hearing. [17] Because of the competitive and emotionally charged atmosphere of a due process hearing, parents and their advocates often invoke rights based arguments grounded in the IDEA entitlement that every child receive a free and appropriate education. While proponents of rights suggest that due process protections are meaningless without rights claims, [18] rights offer no value outside their socially situated context. [19] Within the uncomfortable sphere of difference, in which children with disabilities are often placed, [20] an assertion of rights reproduces the social distinctions the IDEA attempts to eliminate. [21]

Reliance upon due process rights also inhibits attempts at collaborative problem-solving. Parents who assert arguments based upon rights rather than interests foreclose opportunities for compromise and cooperation. [22] School districts faced with diminishing budgets are incapable of satisfying claims to an absolute right that requires satisfaction regardless of cost. [23] IDEA assurances of a free and appropriate education for each child with disabilities then engender a

14. *See* Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 MICH. J.L. REF. 331, 353 (1993) (citing the failure of the IDEA to define appropriateness as the leading cause for IDEA litigation).

15. Engel, *supra* note 7, at 179.

16. *Id.* at 202.

17. HANDLER, *supra* note 10, at 70.

18. *See* Engel, *supra* note 7, at 203 (arguing that procedural safeguards prove meaningless to the extent parents are not inclined to perceive their child's special education in terms of rights).

19. *See* Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984) (explaining that rights have little substantive value outside the context in which they are asserted).

20. *See* Engel, *supra* note 7, at 187 (explaining that parents are caught in a "double-bind" of stressing both the similarities and differences of their child with disabilities).

21. *Id.* at 204.

22. I refer to the Dworkinian notion of rights that are inviolable as compared to interests with which individuals may bargain to increase their utility. *See generally* RONALD DWORKIN, PUBLIC AND PRIVATE MORALITY, 114-143 (1978).

23. *See* HANDLER, *supra* note 10, at 75 (defining legal rights as those claims with benefits equally divisible by the number of claimants).

zero-sum game for special education resources, in which parents are poised to compete for public resources to obtain more educational services for their child. Yet, when resourceful parents succeed in obtaining a desired substantive result, they do so through bargaining power and not by realizing a legal right. [24] These successful parents also receive their outcome subject to agency discretion and therefore not as an absolute right. [25] Parents would better be served by collaborating and developing relationships with the school district to achieve reasonable rewards. [26] Because most parents and school districts will become repeat players in an IDEA dispute, [27] emphasis on social cooperation rather than autonomous isolation may provide the foundation for the effective resolution of future disputes. [28]

B. Inefficient Dispute Resolution

Even when due process settles IDEA disputes, the participants suffer from the tremendous transaction costs associated with an adversarial conflict resolution system. Parents face both financial and emotional pressures when deciding to challenge school districts. The cost of hiring an attorney, while ultimately offset for prevailing parents, [29] poses a significant financial barrier to initiating a complaint. Sustaining a due process attack several weeks to several years exacts severe financial demands upon parents despite the IDEA attorney fee reimbursement provision. [30] Consequently, parents with higher incomes and educational backgrounds may more effectively engage the due process system. [31] Regardless of income, parents who challenge school districts in due process suffer tremendous emotional costs. [32] The adversarial nature of due

24. *Id.*

25. *See id.* (stating that legal rights exist only if discretion is minimal).

26. *See* Engel, *supra* note 7, at 196 (explaining that an emphasis on rights for children with disabilities undermines a sense of connectedness integral to placing a child with disabilities into the community). This is not to suggest, however, that parents submit unconditionally to educational agencies.

27. If the child remains in the school district for her educational career, the opportunity for future disputes may naturally increase.

28. *See* Engel, *supra* note 7, at 167 (explaining that the IDEA is premised upon establishing a collaborative relationship between parents and educators rather than a particularized set of substantive educational rights).

29. "[T]he court in its discretion may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(i)(3)(B), 111 Stat. 37, 92 (1997).

30. *See* JUDY A. SCHRAG, OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC. MEDIATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION PROCEDURES IN SPECIAL EDUCATION 21 (1996) (explaining that due process can last from weeks to years).

31. *See* HANDLER, *supra* note 10, at 69 (finding that parents who dispute are more likely to be financially and educationally advantaged).

32. Goldberg & Huefner, *supra* note 11, at 706; *see* SCHRAG, *supra* note 30, at 5 (explaining how due process hearings are unresponsive to parents' emotional costs).

process hearings often requires parents to attack familiar service providers and educators who may have previously helped their child. Thus, even successful parents may find the emotional costs of a hearing too expensive. [33]

Due process hearings also pose substantial costs for school districts. With each new due process claim, school administrators must commit more resources to hiring attorneys and experts to defend their practices and placements. [34] Educating a student with disabilities already costs more than twice the average of educating a student without special needs, [35] but the fiscal demands of due process have necessitated increases in local and state budgets for special education in order to defray procedural rather than substantive costs. [36] Hearings may extend for weeks, months, and years only to return to a different stage of due process before ever achieving closure. [37] In a climate of expanding services for children and diminishing fiscal resources for educational agencies, [38] school districts can ill afford to pay the price of due process with the resources required to educate children with disabilities. [39]

The transaction costs of resolving IDEA conflicts through due process impose future as well as present burdens on the parties. Adversarial hearings inhibit the development of cooperative relationships between parents and schools that could prevent later disputes from reaching due process. [40] Rehearing each conflict between a parent and a school district would exponentially increase the costs associated with educating a child with disabilities. [41] Furthermore, each case lost by a school district threatens to create dangerous precedents for special education expenditures. Once a parent is successful in obtaining an expen-

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33. Goldberg & Huefner, *supra* note 11, at 706.

34. *See* Perry Zirkel, *Over-Due Process Revisions for the IDEA*, 55 MONT. L. REV. 403, 405 (1994) (citing that due process hearings are requiring greater use of experts).

35. Leslie Collins & Perry Zirkel, *To What Extent, If Any, May Cost Be a Factor in Special Education Cases?* 71 EDUC. L. RPT. 11, 11 (1992). Current estimated costs for educating a child with special needs average $22,000 each year with State and local governments responsible for 90% of the funding. Telephone Interview with Edward Feinberg, Ph.D., Program Manager, Ann Arundel County Infants and Young Toddlers Program, MD (Dec. 16, 1997).

36. Collins & Zirkel, *supra* note 35, at 11.

37. Zirkel, *supra* note 34, at 404.

38. *See id.* at 405 (citing the excessive costs of due process especially when school districts are faced with diminishing resources).

39. *See* Goldberg & Huefner, *supra* note 11, at 706 (describing the disadvantages of due process hearings to include wasting valuable staff time and financial resources of all participants).

40. *See* Engel, *supra* note 7, at 167 (describing IDEA as based on continuing relationship between parents and schools).

41. Due process hearings average thousands of dollars in costs. For example, the Texas Education Agency approximates its costs for a single hearing at $60,000. EILEEN AHEARN, OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., MEDIATION AND DUE PROCESS PROCEDURES IN SPECIAL EDUCATION: AN ANALYSIS OF STATE POLICIES 18 (1996). Multiplying this figure by the number of disputes over a child's educational career would raise due process costs in excess of $100,000.

sive educational therapy, school districts may find themselves inundated with requests for programs they can afford neither to provide nor to challenge in due process. [42]

C. Unfair Dispute Resolution

IDEA due process hearings are characterized not by their original goal of fair participation between parents and school officials, but by a sense of unfairness and manipulation. [43] In the well-documented Pennsylvania Due Process Studies, [44] Kuriloff found that parents able to use the due process system effectively may have achieved a "just result," but that even prevailing parents viewed the process as unfair. [45] Several reasons may account for the feelings of unfairness experienced by parents. First, less than half of the parents involved in a due process hearing employ an attorney. [46] Without counsel, parents may suffer from a dramatic power imbalance leaving them unprepared, [47] intimidated, [48] and inarticulate. [49] Second, bureaucratic habits and professional self-interests in administrative hearings do not invite parent participation. [50] The attempts of parents to express their opinions using narrative explanations and observations are marginalized by a process based predominantly upon professional expertise and assessment. [51] Not surprisingly, therefore, school districts win hearings and perceive them as fair processes more often than do parents. [52] As a means of achieving parental participation in the educational plan-

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42. *See* Edward Feinberg & Jonathan Beyer, *Creating Public Policy in a Climate of Clinical Indeterminacy: Lovaas as the Case Example Du Jour*, 10 INFANTS AND YOUNG CHILDREN 54, 56 (1998) (describing the impact on State and local educational agencies of a new therapy for children with autism).

43. *See* Steven S. Goldberg & Peter Kuriloff, *Doing Away with Due Process: Seeking ADR in Special Education*, 18 EDUC. L. RPT. 491, 494 (1988) (contending that justice in due process is the ability to influence outcomes because no standards exist for an accurately decided hearing, i.e. substantively correct outcome).

44. *See* Peter Kuriloff, *Is Justice Being Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 LAW & CONTEMP. PROBS. 89, 91 (1995) (demonstrating that parents who used due process system effectively promoted a sense of justice).

45. Objective justice suggests an inherently fair process while subjective justice implies a feeling of fairness felt by the participants of due process. Goldberg & Kuriloff, *supra* note 43, at 494.

46. Andrea Shemberg, Note, *Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?* 12 OHIO ST. J. ON DISP. RESOL. 739, 743 (1997).

47. Engel, *supra* note 7, at 203.

48. Schemberg, *supra* note 46, at 751.

49. Engel, *supra* note 7, at 188.

50. Handler, *supra* note 10, at 69.

51. Engel, *supra* note 7, at 188.

52. Goldberg & Kuriloff, *supra* note 43, at 495; Zirkel, *supra* note 34, at 407.

ning of children, due process provides formal guidelines that divide rather than unite parents and school districts. [53]

III. Promises of IDEA Mediation

To address the ineffectiveness, inefficiency, and unfairness associated with due process hearings, the United States Congress amended the IDEA to require State and local agencies to provide mediation services and counseling whenever parents request a due process hearing. [54] By preempting a formal due process hearing with an informal mediation session, Congress intended to resolve IDEA conflicts early, so as to avoid due process and litigation entirely. [55] The text of the IDEA mediation amendment, supported by evidence of mediation success in the States, suggests a rare legislative confidence in the effectiveness, efficiency, and fairness of a state-sponsored form of alternative dispute resolution. [56]

A. Effective Dispute Resolution

Congress illustrates its presumption of the efficacy of mediation in resolving IDEA disputes by allowing local and State education agencies to require "parents who choose not to use the mediation process to meet . . . with a disinterested party . . . to encourage the use, and explain the benefits, of the mediation process to the parents." [57] While this section may create a textual inconsistency when read alongside the "voluntariness" provision, the assumed benefits of early conflict resolution outweighed concerns of possible coercion. [58]

The experiences of State mediation programs to resolve IDEA disputes before they mature to due process claims support Federal confidence in the effectiveness of mediation. More than thirty-nine states currently operate special education mediation systems using a variety of mediation approaches. [59] Regardless

53. Even if parents have counsel to balance power disparities, they still cannot participate actively in an administrative hearing in which their language is alien and inappropriate. *See* LUCIE E. WHITE, SUBORDINATION, RHETORICAL SURVIVAL SKILLS, AND SUNDAY SHOES: NOTES ON THE HEARING OF MRS. G. (1990) (detailing the difficulties and strategies of a woman welfare recipient uncomfortable in administrative hearing).

54. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(1), 111 Stat. 37, 90 (1997).

55. H.R. REP. NO. 105-95, at 106 (1997).

56. Congress has not enthusiastically supported its own recommendations for the use of ADR. In the 1991 Amendments to the Civil Rights Act, for example, Congress ambivalently included a provision to encourage the resolution of Title VII employment discrimination claims through the use of ADR methods. *See* H.R. REP. NO. 102-40(II), at 78 (1991) (describing statutory encouragement of ADR as "an empty promise which will in no way assist claimants or employers in the resolution of such claims").

57. § 615(e)(2)(B).

58. *See infra* pp. 47-48.

59. SCHRAG, *supra* note 30, at 6.

of the mediation program employed, disputants have reached agreements using mediation in more than sixty percent of the cases. [60] California, offering mediationwhenever a due process request is made, has demonstrated the greatest success — resolving 851 of 993 disputes prior to due process. [61] In the Contra Costa region alone, conflicts have ended successfully each time the parties have participated in mediation. [62] Congress thus concluded that the success of mediation depends upon the frequency of its use. [63] The IDEA promotes the greater use of mediation by insuring that parents are informed about its availability and benefits. [64]

The demonstrated effectiveness of mediation in resolving numerous State special education disputes may derive from its emphasis on solving problems rather than affirming rights. [65] Mediation, instead of determining claims of right, helps parties previously at an impasse to achieve a settlement and to avoid a formal adversarial hearing. [66] By uniting disputing parties through relationships rather than dividing them according to claims of right, [67] mediation empowers the disputants to control their conflict so that they may design a creative solution in the best interests of the child — the fundamental goal of both parent and school official. [68]

B. Efficient Dispute Resolution

Mediation also attracted the attention of Congressional reformers of the IDEA because of its promise to resolve IDEA conflicts faster and cheaper than due process hearings. [69] Two statutory provisions reflect an expectation by Congress that mediation is expedient and inexpensive: mediation should not "delay

60. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. 55,057 (1997) (to be codified at 34 C.F.R. § 300.506) (proposed Oct. 22, 1997); *see* SCHRAG, *supra* note 30, at 19 (reporting anecdotally that the average may be as high as 80%).

61. AHEARN, *supra* note 41, at 17.

62. *Id.*

63. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057

64. § 615(e)(2)(B).

65. Zirkel, *supra* note 34, at 412.

66. Goldberg & Huefner, *supra* note 11, at 705.

67. Engel, *supra* note 7, at 204.

68. School officials are not necessarily interested in reducing the costs of educating each child when doing so sacrifices educational quality. Unlike a pure public choice analysis of typical administrative agencies, State and local educational agencies attract front-line employees who are often interested in building relationships and not maximizing their budgets and influence. *See generally,* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). *But cf.* Shemberg, *supra* note 46, at 747 (suggesting that school officials and parents have no mutual interests with which to mediate).

69. *See* S. REP. NO. 105-17, at 3 (1997) (stating one of the purposes of the IDEA amendments is to lower the costs to school administrators and policymakers in the delivery of education to children with disabilities); H.R. REP. NO. 105-17, at 106 (explaining that due process should be avoided and mediation employed whenever possible to facilitate early resolution of disputes).

or deny a parent's right to a due process hearing" [70] and "the State shall bear the costs of the mediation process." [71] Concerned that school districts could use mediation as an adversarial tool to lengthen the IDEA dispute resolution process and further burden parents in time and money, Congress specifically considered mediation as a means of early and not extended conflict resolution. [72] A Federal requirement that States finance IDEA mediations precommits them to a more cost-effective dispute resolution process [73] and provides an additional incentive for parents to agree to mediate their disputes. [74]

Various data from States that have previously used mediation as an alternative to due process suggest significant efficiency gains. Mediations average in cost from $350 to $1000 compared to due process hearings that often exceed tens of thousands of dollars. [75] Additionally, mediations require less time for parties to prepare [76] and to resolve conflicts than do due process hearings. [77] Minnesota, for example, has reduced its typical IDEA conflict resolution session from a several day due process hearing to a six hour mediation. [78] A lesser emphasis on formal presentations and evidentiary procedures, and a greater focus on informal party involvement, may explain the decreased amount of time necessary to resolve an IDEA dispute. Complementing its reduction of the average cost and time for resolving disputes, mediation also diminishes the marginal cost of settling future IDEA conflicts. Mediation facilitates cooperative and honest communication between IDEA disputants and thus helps to build enduring relationships between parents and school officials that will dis-

70. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(2)(A)(ii), 111 Stat. 37, 90 (1997).

71. § 615(e)(2)(D).

72. H.R. REP. NO. 105-17, at 106. Although mediation could benefit IDEA disputants at different stages of the dispute resolution process, Congress may have sought to avoid the indeterminacy of the due process system by limiting the use of mediation to the pre-due process period.

73. This section could be interpreted as demanding "another underfunded entitlement" from the States. Yet, the paternalistic mandate for the use of mediation may serve as a catalyst to change local cultures unfamiliar and resistant to this informal method of dispute resolution. *See* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (critiquing mandatory forms of mediation for secretly limiting choices of procedure and removing equal protection before the law).

74. When read with the provision allowing parents to be encouraged to use mediation, this section demonstrates Congress' attempt to overcome any parental reluctance to trying mediation — identified as the most significant obstacle to successful IDEA mediations. *See* Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057. Yet, query whether these provisions contradict the requirement for voluntariness. *See infra* 47-48.

75. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057. The actual costs of mediating an IDEA dispute may even be less. *See* SCHRAG, *supra* note 30, at 20 (reporting that IDEA mediators are paid between $200 and $400 per mediation).

76. Goldberg & Huefner, *supra* note 11, at 706.

77. SCHRAG, *supra* note 30, at 20-21.

78. *Id.*

courage future disputes from developing. [79] Parents may then prove less likely to "name, blame, and claim" their grievances in a formal process because they have resolved their conflicts previously through an informal means. [80]

C. Fair Dispute Resolution

Mediation suggests a fair method for resolving IDEA disputes because it increases the participation of parents in the process of devising the best educational program for their child. [81] A central purpose of the 1997 IDEA amendments sought to "enhance the input of parents of children with disabilities in the decision making that affects their child's education," [82] and thus Congress reflected this goal by including mediation as a form of dispute resolution. Compelling parents to mediate their special education claims, however, would undermine any sense of fairness generated by mediation. [83] Cognizant of the need for fair participation in mediation, Congress enacted a provision mandating mediation to be "voluntary on the part of the parties." [84] Local or State education agencies, even when encouraging the use of mediation, must respect the requirement of voluntary participation by allowing only a "disinterested party" to educate parents about the potential gains from mediation. [85]

The fairness of a special education mediation also depends upon the perceived neutrality of the mediator. [86] Fair selection of mediators occurs either through a randomized process or by a joint agreement between parent and agency. [87] To bolster the appearance of neutrality further, the Secretary of Education has clarified the impartiality requirement [88] to exclude from the possible pool of mediators employees of any local or State education agency

79. *See id.* at 19 (explaining that mediation builds sustaining relationships between schools and parents that can last over time); Goldberg & Huefner, *supra* note 11, at 706 (stating that mediation helps parties build continuing relationships).

80. *See* William Felstiner, Richard Abel, and Austin Sarat, *The Emergence and Transformation of a Dispute: Naming, Blaming, and Claiming*, 652 L. & SOC'Y REV. 631, 640 (1981) (explaining how experiences help transform disputes).

81. Zirkel, *supra* note 34, at 407.

82. S. REP. NO. 105-17, at 3.

83. *See* Shemberg, *supra* note 46, at 746 (citing an essential character of mediation as voluntariness and arguing against mandatory IDEA mediation).

84. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(2)(A)(i), 111 Stat. 37, 90 (1997).

85. § 615(e)(2)(B).

86. *See* Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057 (finding that the extent to which mediation has been used in the states depends upon the perception of the mediator as a neutral third party).

87. H.R. REP. NO. 105-95, at 106. The IDEA does not explain, however, how mediators will be selected, trained, and paid.

88. § 615(e)(2)(A)(iii).

providing direct services to the child subject of a mediation as well as those who have personal or professional conflicts of interest. [89]

Because mediation invites parent participation and relies upon the skills of a neutral facilitator, it offers a method of dispute resolution on its face more fair and compatible with the overall purpose of the IDEA than the oft discredited due process system.

IV. Criticisms of IDEA Mediation

Despite the apparent promise of mediation for resolving IDEA disputes, mediation also invites arguments against its application to the special education context. [90] IDEA mediation, absent clear quality control standards, may not realize its potential for ending parent and agency disputes effectively and efficiently. The legislative provisions designed to insure fair and impartial mediation also create inconsistent mandates that contradict the intentions of Congress for voluntary and equitable party participation. Thus, even proponents of mediation realize that it may not prove the most appropriate method for settling IDEA conflicts. [91]

A. Ineffective Quality Control

The amended IDEA requires States and local education agencies to employ only "qualified" mediators, but neither Congress [92] nor the Department of Education [93] have defined the specific qualifications necessary for IDEA mediators. Mediators are expected to be "trained in effective mediation techniques" [94] and "knowledgeable in laws and regulations relating to the provision of special education and related services," [95] but these conditions are discussed separately in the statutory text and therefore distinct from the "qualified" requirement. [96]

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89. Proposed 34 C.F.R. 300.506(b)(6)(c) clarifies requirements of impartiality:

> An individual who serves under this part — (1) may not be an employee of — (i) any LEA or any State agency described under § 300.194; or (ii) an SEA that is providing direct services to a child who is the subject of the mediation process; and (2) must not have a personal or professional interest.

Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057.

90. *See* Shemberg, *supra* note 46, at 748-752 (arguing against the IDEA mediation amendment).

91. *See* SCHRAG, *supra* note 30, at 28 (admitting that some IDEA disputes are not appropriate for mediation).

92. §§ 615(e)(2)(A)(iii) & (2)(C).

93. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057.

94. § 615(e)(2)(A)(iii).

95. § 615(e)(2)(C).

96. *Id.* The cannons of statutory interpretation, advising against an interpretation of a provision that would render other provisions unnecessary, supports the conclusion that Congress would not include two terms to mean the same thing. *See, e.g.,* Ratzlaf v. United States, 114 S. Ct. 655, 659 (1994).

No professional organization currently certifies or reviews mediators of special education disputes. [97] IDEA mediators, therefore, lack a national governing process by which to define and satisfy the IDEA criterion of "qualified mediator."

Congress may have omitted Federal guidelines for qualifying IDEA mediators because it believed that individual standards set by the States would better realize the benefits of mediation. [98] For example, the House Committee "believe[d] that, in States where mediation is offered, mediation is proving successful both with and without the use of attorneys. Thus, the Committee wish[ed] to respect the individual State procedures with regard to attorney use in mediation, and therefore, neither require[d] nor prohibit[ed] the use of attorneys in mediation." [99] Congress' vague statutory treatment of mediator qualifications, however, is inconsistent with its detailed demands for who may encourage a parent to use mediation. [100] Twenty-two States have prepared written qualifications for special education mediators, [101] but even these standards may cause confusion when combined with general mediator regulations. [102] The laissez faire attitude of Congress toward the qualifications of IDEA mediators, therefore, implies motivations beyond a Republican enthusiasm for federalism.

Undefined qualifications for IDEA mediators may reflect a political rather than a substantive strategy by the Congressional drafters. Research examining the best practices of special education mediation provides few specific suggestions for establishing national qualifications for mediators. [103] Congress may have recognized the intense debate surrounding mediator qualifications occurring in the States [104] and thus sought to sidestep a contentious provision that threatened passage of the IDEA amendments. For example, Congress avoided

97. The Society for Professionals in Dispute Resolution (SPIDR) do provide some self-regulation of mediators nationally, but this is a voluntary organization focused on general and not context specific mediation standards. SPIDR, MEMBERSHIP DIRECTORY, 4-5 (1997).

98. *See* Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057 (recognizing considerable differences in implementing and using mediation throughout the States); *see, e.g.*, FLA. STAT. ANN. § 44.106 (West 1992) (regulating the qualification, certification, discipline, and training of mediators according to standards and procedures established by the Florida Supreme Court).

99. H.R. REP. NO. 105-95, at 106.

100. § 615(e)(2)(B).

101. AHEARN, *supra* note 41, at 8.

102. In Florida, for example, must IDEA mediators satisfy the stringent qualifications of "family" mediators because special education disputes implicate issues that affect families? *See* FLA. RULES FOR CERTIFIED AND COURT APPOINTED MEDIATORS Rule 10.010(b) (1992) (requiring a 40 hour training program, graduate degree, professional experience, and good moral character for mediators of "family and dissolution of marriage issues").

103. *See* AHEARN, *supra* note 41, at 8 (suggesting vague qualities such as interpersonal and problem solving abilities, tolerance for frustration, a concern for fairness, and respect for confidentiality).

104. *See, e.g.*, Jay Folberg, *Certification of Mediators in California: An Introduction*, 30 U.S.F. L. Rev. 609, 609 (1996) (explaining a debate in California over mediation certification standards).

angering both the legal and the mediation lobbies by allowing States to choose whether to use attorneys in mediation. [105] Until Congress can obtain a consensus on easily identifiable standards for IDEA mediators, it has little incentive to enact federal guidelines which may upset the coalition of interest groups supporting the IDEA amendments.

Positive inaction by Congress on the issue of attorney involvement in mediation, although politically savvy, nevertheless ignores the possibility that IDEA mediators may in fact practice law. [106] Because the IDEA requires the drafting of written mediation agreements for successfully settled disputes, [107] non-lawyer mediators preparing such agreements may then be compelled by Congress to practice law unethically. [108] Moreover, if mediators offer predictions or assessments of how a court might analyze the dispute, then they serve a legal function by applying principles of law to concrete facts. [109] Several states concerned with the unauthorized practice of law by mediators have already restricted the extent of professional advice mediators may provide to disputing parties. [110]

The IDEA also expects mediators to be "trained in effective mediation techniques." [111] The statutory text, the legislative history, and the administrative regulations of the IDEA, however, offer no substantive discussion explaining the requirements of mediator training or practice. Unlike the qualifications provision, States generally agree on the extent and type of training necessary to mediate an IDEA dispute. [112] Yet, no consensus exists on what mediation techniques are most effective for resolving IDEA disputes. [113] States have implemented single mediator, co-mediator, and group mediator models, each demonstrating various strengths and weaknesses. [114] Consequently, the IDEA commands

105. H.R. REP. NO. 105-17, at 106.

106. *See* Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST OF LITIG. 57, 61 (1996) (arguing that drafting settlement agreements constitutes the practice of law); *see also* H.R. REP. NO. 105-17, at 107 (offering a model written agreement).

107. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(2)(F), 111 Stat. 37, 90 (1997).

108. "A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.5(b) (1995); *but cf.* Schrag, *supra* note 30, at 23 (stating value of not using lawyers in mediation).

109. Menkel-Meadow, *supra* note 106, at 61; *but see also* Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST OF LITIG. 57, 74 (1996) (asserting in part that mediators do not practice law because mediators have no identifiable clients).

110. *See generally* CPR INSTITUTE FOR DISPUTE RESOLUTION, SELECTED READINGS IN ADR ETHICS 11-24 (November 1996) (listing various State proposals and provisions for advice giving in mediation).

111. § 615(e)(2)(A)(iii).

112. SCHRAG, *supra* note 30, at 23 (explaining importance of in-depth training, including erasing negativity and simulations).

113. *Id.* at 27 (saying insufficient information exists from the states on the most efficient and effective mediation strategies).

114. *Id.* at 8-12.

State and local agencies to train their mediators in effective mediation techniques when effectiveness proves an imprecise and relative criterion.

B. Inequitable Balance of Power

Mediation under the IDEA may produce an unfair process of dispute resolution because the statute creates a structural bias favoring educational agencies. Despite the expressed interest of Congress in maintaining the impartiality of mediators, [115] the IDEA provides for the selection of mediators through a state maintained list. [116] State approved mediators, although not formal employees of the state or local educational agency, [117] have distinct reputational and financial interests in obtaining and maintaining placements on a roster of IDEA sanctioned mediators. With more than 5,800 requests for due process hearings expected during the next year throughout the nation, [118] a privileged position on the State mediation list could greatly profit a mediator. [119] Mediators may then have a rent-seeking incentive to favor school districts that guarantee them future opportunities to mediate. [120] The IDEA mediation amendment, therefore, contains an ethical paradox: impartial IDEA mediators are to be chosen from a State maintained list, but being listed by the State implies partiality by creating a professional conflict of interest for the mediator.

Judicial consideration of the selection process for hearing officers suggests that a State sponsored list of mediators would not independently pose an actual conflict of interest for IDEA mediators. [121] In *Leon v. Michigan Board of Education*, a federal district court considered whether an attorney who had represented both parents and school districts in special education disputes could serve impartially as a hearing officer. [122] The court, finding "no measurable probability of a bias to warrant automatically excluding attorneys who counsel other school districts from the pool of potential hearing officers," [123] rejected

115. § 615(e)(2)(A)(iii).

116. "The State shall maintain a list of individuals who are qualified mediators and knowledgeable in the laws and regulations relating to the provision of special education and related services." § 615(e)(2)(C).

117. *See* Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057 (explaining that a formal relationship would necessarily create a conflict of interest).

118. *Id.*

119. This may prove true especially for mediators who specialize only in resolving IDEA disputes.

120. The proposed 34 C.F.R. 300.506 enacts the House Committee intention that mediators be selected from the State approved list at random or jointly by parents and school officials. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,0599. Yet, neither C.F.R. nor the House Committee provide for any effective monitoring or enforcement of this provision.

121. *See* Leon v. Michigan Bd. of Educ., 807 F. Supp. 1278, 1284 (E.D. Mich. 1992) (sanctioning the selection of IDEA hearing officers from a pool of employees of school districts, state universities, and attorneys who represent school districts).

122. *Id.*

123. *Id.*

the reasoning of the Eleventh Circuit Court of Appeals in *Mayson v. Teague.* [124] In *Mayson*, the Court of Appeals affirmed a lower court ruling that prohibited school board officers and employees, as well as a university professor, from serving as a hearing officer, because of potential conflicts of interest. [125] Yet, the *Mayson* court exhibited substantial deference to the fact finding of the lower court. [126] Read complementary, *Leon* and *Mayson* suggest that the courts would not find a State list of mediators, alone, sufficient to constitute a conflict of interest.

Even without the creation of an actual conflict of interest, a list of State sponsored mediators may undermine the impartiality of mediation by presenting the appearance of impropriety. [127] The effectiveness of mediation in IDEA disputes has been shown to be dependent upon the extent to which the parties perceive the mediator as a neutral facilitator. [128] Parents may avoid mediation entirely if they view the process as controlled by the State. Mediators too closely associated with the State would suggest an unfriendly process to parents and therefore undermine IDEA attempts to motivate parents to use mediation instead of due process. [129] For IDEA mediation to prove fair and effective, mediators should avoid actual as well as apparent conflicts of interest.

Another biased provision of the IDEA authorizes State and local education agencies to require parents who decline mediation to meet "with a disinterested party . . . to encourage the use, and explain the benefits, of the mediation process to the parents." [130] The statutory text, by referring only to encouragement of the use and the benefits of mediation, illustrates an implicit preference by Congress for this discussion to convince parents to use mediation. Additionally, while the "disinterested" parties are not State employees, [131] they may still have a professional predilection for mediation. Specifically, individuals contracted by an alternative dispute resolution (ADR) entity naturally hold a philosophical and professional predisposition for the promotion of ADR. [132]

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124. *Id.*

125. Mayson v. Teague, 749 F.2d 652, 658-59 (11th Cir. 1984) (finding university professors involved in formulating State special education policy sufficiently impartial to serve as due process hearing officers).

126. *Id.* at 659.

127. *See* SCHRAG, *supra* note 30, at 23 (stating that perception of conflict of interest could arise if state educational agency personnel are used as mediators).

128. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057; *see* AHEARN, *supra* note 41, at 7 (citing opinions suggesting the clearer the neutrality of the mediator the greater chance for successful mediation).

129. § 615(e)(2)(B).

130. *Id.*

131. Disinterested parties are under contract with "a parent training and information center or community parent resource center in the State . . . or an appropriate alternative dispute resolution entity." *Id.*

132. Those attracted to the potential benefits of ADR often exhibit almost fanatical enthusiasm. I suppose in contrast to the horrors of modern litigation, who could blame them? *Cf.* Steven H. Goldberg, *"Wait*

Parties from an ADR entity, therefore, may prove more interested than disinterested in a parent's use of mediation to resolve an IDEA dispute.

Resolving IDEA disputes through mediation may also unfairly exploit the disadvantaged nature of the parties. Parents with children with disabilities often are poor, [133] emotionally vulnerable, [134] and undereducated. [135] They may not understand the difference between a mediator and a hearing officer because of their previous institutional experiences. [136] Moreover, school officials and mediators, conversant in the discourse of special education law, [137] may disempower parents by communicating in technical jargon. [138] Unknowledgeable parents may then more willingly accept the recommendations of a school official or an actively involved mediator. [139] Even parents who strongly advocate their interests in mediation may discover that they compromised too easily. [140] Mediators attempting to compensate for a parent's lack of power or skill receive no ethical guidance from the IDEA [141] and may find themselves serving more as advocates than as mediators. [142]

V. Toward an Appropriate Use of Mediation in IDEA Disputes

With the recent enactment of an IDEA mediation requirement into law, State and local educational agencies are now bound like Ulysses to navigate between the Scylla of mediation's promises and the Charybdis of mediation's pitfalls. Educational administrators, despite good faith interest in implementing mediation systems, have to rely upon limited and vague federal guidelines, [143] insuf-

a Minute. This Is Where I Came In." A Trial Lawyer's Search for Alternative Dispute Resolution, 1997 B.Y.U. L. Rev. 653, 659 (describing the romantic allure of ADR as a panacea for perceived judicial problems).

133. *See* Shemberg, *supra* note 46, at 750 (citing research that more than one-third of special education parents are poor).

134. Goldberg & Huefner, *supra* note 11, at 706; Engel, *supra* note 7, at 188.

135. *See* Shemberg, *supra* note 46, at 750 (stating that more than one-third of parents with children with disabilities have not completed high school).

136. Goldberg & Huefner, *supra* note 8, at 706.

137. § 615(e)(2)(C).

138. SCHRAG, *supra* note 30, at 24; *see* WHITE, *supra* note 53, at 133.

139. *See* HANDLER, *supra* note 10, at 69 (detailing that low income parents are more likely to accept classification decisions rendered by individuals with authority).

140. *See* Engel, *supra* note 7, at 199 (citing that the gendered nature of parents makes them more likely to acquiesce); *but see* Joseph McKinney & Geoff Schultz, *Hearing Officers, Case Characteristics, and Due Process Hearings*, 111 EDUC. L. RPT. 1069 (finding that female hearing officer more likely to rule for parents).

141. Neither the text nor the legislative history mention any ethical obligation or rules for power balancing. § 615(e) at Appendix.

142. This would turn the mediation process on its head because it rejects the formal protections afforded by having an advocate.

143. Assistance to States for the Education of Children With Disabilities, 62 Fed. Reg. at 55,057.

ficient field evidence on the most effective and efficient mediation strategies, [144] and a simplified definition of mediation in the special education literature. [145] While a detailed empirical analysis of the best application of mediation to IDEA disputes remains beyond the scope of this discussion, the following section recommends strategies for designing and implementing successful IDEA mediation programs, derived from the alternative dispute resolution literature and from the experiences of States that have experimented in special education mediation.

A. "Multidimensional Mediation"

Mediation encompasses myriad techniques and strategies employed by third-party neutrals to facilitate dispute resolution. Collectively, different mediator orientations separate into two approaches: facilitative and evaluative. [146] With the primary objective of helping to clarify and enhance communication between the parties, the facilitating mediator presumes that the parties are more knowledgeable than the mediator and therefore are better able to develop solutions. [147] Alternatively, the evaluating mediator attempts to offer guidance to the disputants based upon the mediator's own expertise, qualifications, and impartiality in the field in which the dispute arises. [148] Facilitative and evaluative mediation techniques also vary according to the perceived scope of the conflict for which they are employed. Narrowly defined disputes emphasize the parties' interests in resolving their particular conflict while broadly tailored disputes consider relational and community interests. [149]

Typical IDEA conflicts implicate highly technical issues and involve dramatically disadvantaged parents. [150] IDEA mediators, therefore, should be prepared to conduct evaluative mediations to insure that parents are sufficiently informed and involved in determining their child's educational placement. This may require a mediator to interpret the complicated terminology of school officials for parents, as well as to recast the "jargon-less" articulations of parents for school districts, so that appropriate solutions may be developed from

144. SCHRAG, *supra* note 30, at 27.

145. *See, e.g., id.* at 4 (defining mediation as a uniform facilitation process).

146. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques*, 1 HARV. NEGOTIATION L. REV. 7, 24 (1996). I emphasize facilitative and evaluative strategies here rather than discussing mediation models that differ according to the number of mediators used. SCHRAG, *supra* note 30, at 8-9. While the number of mediators may be an important variable, the substantive technique applies regardless of the number of mediators.

147. Riskin, *supra* note 146, at 24.

148. *Id.*

149. *Id.* at 22.

150. *See supra* notes 133-140 and accompanying text.

the parties' underlying interests. [151] Parents may also expect a mediator to assess risks and offer recommendations. [152] Especially when legal representation is discouraged, [153] informal dispute resolution will leave disadvantaged parents vulnerable to power imbalances and potential recommendations from the mediator. [154] Mediators, therefore, should engage in evaluative techniques in order to preserve an informal atmosphere while still maintaining a balanced negotiation. [155] Instead of transforming the mediator into an advocate, evaluative mediation offers disadvantaged parties the equality of opportunity [156] necessary to understand, incorporate, and satisfy their underlying interests into a fair agreement. [157]

IDEA mediation may also involve relatively equal, if not advantaged, parents with respect to understanding and advocating the issues in dispute. [158] Internet access to new special education research and "chat-groups" offers parents a massive informational resource that can be used to redefine "appropriateness" in an educational programming dispute. [159] These parents are typically well-versed in the issues concerning their child's education and therefore do not require informational power balancing in mediation. For conflicts in which parents are sufficiently informed, the IDEA mediator may expect more success from a facilitative strategy that concentrates on the strengths and weaknesses of each party's position than on defining pre-established positions. [160] The facilitative mediator may also concentrate on explaining the consequences

151. *See* Riskin, *supra* note 146, at 30-31.

152. *See* John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST OF LITIG. 70, 70 (1996) (explaining that parties often expect mediators to examine the merits of their case).

153. *See* AHEARN, *supra* note 41, at 9 (citing California as one of several states which prohibit attorneys from participating in pre-hearing mediations).

154. Shemberg, *supra* note 46, at 749; *see* Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 592 (1995) (describing how facilitative mediation preserved power imbalances in a divorce mediation).

155. Mediators evaluating claims and disputes, however, should be careful to perform factual rather than legal evaluations of the parties' positions. *See supra* notes 106-108 and accompanying text.

156. Evaluative mediation as a precondition to fair settlements involving disadvantaged parties suggests an underlying Rawlsian assumption that fairness cannot be achieved without ensuring an equality of opportunity for the naturally disadvantaged. *See* JOHN RAWLS, A THEORY OF JUSTICE 104 (1971). Query whether behind a "veil of negotiation ignorance" parties to mediation would adopt a "difference principle" in which evaluative mediation would account for power imbalances.

157. Riskin, *supra* note 146, at 31.

158. *See, e.g.*, Delaware County Interm. Unit No. 25 v. Martin K, 831 F. Supp. 1206, 1226 (E.D. Pa. 1993) (awarding reimbursement to lawyer/professor for financing expensive experimental autism treatment); *see also* SCHRAG, *supra* note 30, at 29 (questioning empirical support for the presumed power disparities in special education mediation despite established theoretical arguments).

159. See Delaware County Interm. Unit No. 25, 831 F. Supp. at 1226 (finding new autism therapy more appropriate educational program than traditional therapy offered by the school district).

160. *See* Riskin, *supra* note 146, at 28.

of not achieving a settlement because both parties are already well-informed of their interests. [161]

The effectiveness of IDEA mediation techniques relates to the character of the dispute and the qualities of the disputants. Consequently, IDEA mediators should not adopt a singular mediation strategy; rather, they should alter their techniques depending upon the nature of the parties and their respective interests. Such "multidimensional mediators" may react to the position of the parties and employ contextually appropriate mediation methods. Parents could then be assured of adequate self-representation without the formalistic presence of attorneys. To insure consistency and voluntary trust in the mediation, multidimensional mediators should also disclose and explain their chosen mediating style during the incipient stages of the mediation. [162] Multidimensional mediation avoids valuing the process above the parties by treating each IDEA dispute as the IDEA aims to treat each child with disabilities: individually.

B. Qualified Mediation

Mediators expecting to evaluate the level of information possessed by the parties need a substantive understanding of special education themselves. Under the IDEA, mediators must be "knowledgeable in laws and regulations relating to the provision of special education and related services," [163] but this provision does not establish a requisite level of subject-matter expertise. Despite being educated in special education law and regulations, an IDEA mediator may have little understanding of the provision and quality of special education services. [164]

Substantive expertise of IDEA conflicts means that a mediator should understand not only the legal and administrative procedures implicated by the dispute, but also the cultural and technical practices associated with educating children with disabilities. [165] Mediators should command special education as well as mediation expertise because of the complex and specialized under-

161. *Id.*

162. *See* Bickerman, *supra* note 152, at 70 (suggesting that evaluative mediators frankly disclose their orientation to the parties early in the mediation).

163. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(2)(C), 111 Stat. 37, 90 (1997).

164. For example, an IDEA mediator trained as an attorney may understand the legal and not the substantive technicalities of special education services. *See, e.g.*, SCHRAG, *supra* note 30, at 23 (citing Florida as a state that selects special educators as mediators because of the complexities of special education programs). In this respect, IDEA mediation resembles divorce mediation which requires intradisciplinary and interdisciplinary expertise in areas such as tax law and child psychology.

165. *See* Riskin, *supra* note 146, at 46 (defining subject-matter expertise in mediation as the substantial understanding of the legal or administrative procedures, customary practices, or technology associated with the dispute).

standing necessary to determine the appropriate needs of the child. [166] IDEA disputes typically involve challenges to particular scientific therapies, health treatments, and educational programs that demand a sophisticated understanding of current special education research and services. [167] States already operating special education mediation systems expect mediators to demonstrate substantial fluency in special education before mediating a dispute. [168] Although the mediator may render no substantive judgements, [169] a mediator lacking practical and technical understanding of special education programming would prove unable to evaluate informational imbalances and would be less equipped to propose or to evaluate potential solutions. [170]

State certification programs could insure that IDEA mediators possess both a requisite knowledge in special education and a minimum proficiency in mediation techniques. [171] Certification, as opposed to licensing, is preferable because it would afford parents and school officials greater freedom to choose a preferred and an appropriate mediator. [172] Certification might combine a predetermined number of training hours and mediation experience with a practical examination in which mediation skills are demonstrated. [173] Moreover, mediators could be expected to study special education theory and practice through training courses and "professional internships" in which they observe children with

166. *See id.* at 47 (explaining that the extent of mediator's subject matter expertise should increase relative to the complexity and the importance of the technical issues involved in the mediation).

167. *See generally* Kotler, *supra* note 14, at 331-38 (describing the scientific debate over autism therapies).

168. For states with written qualifications for their mediators, knowledge of special education was listed as a fundamental requirement. AHEARN, *supra* note 41, at 8. Expertise is expected in some states, such as Michigan, or is provided in training programs to mediators, as in Colorado. SCHRAG, *supra* note 30, at 23.

169. *Cf.* Zirkel, *supra* note 34, at 411 (explaining that hearing officers should have expertise in special education).

170. *See* Riskin, *supra* note 146, at 46 (stating that the need for subject matter understanding increases in proportion to the need for mediator's evaluations).

171. *See* Folberg, *supra* note 104, at 609 (defining certification as "a process of recognizing established qualifications or compliance with standards for providing a service and creating incentives to become certified").

172. Licensing prohibits unlicenced practitioners from mediating by imposing criminal sanctions. *Id.* While arguably only State qualified mediators should conduct IDEA mediations, situations may arise in which both the parents and school district would prefer a mediator not accredited by their State, e.g. a mediator from another state. Parties already sophisticated in special education should also have the freedom to choose the mediator and mediation style that best addresses their needs. Bickerman, *supra* note 152, at 70. Discretion to chose third-party neutrals also remains consistent with the intent of the IDEA. *See* H.R. REPORT NO. 105-95, at 106 (explaining that both parents and agencies should agree when selecting a mediator whenever one is not chosen randomly from the State list).

173. *See* Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F.L. REV. 757, 781 (1996) (listing training and experiential hours as prerequisites to mediator certification under proposed California law).

special needs. [174] By linking certification to placement on the approved mediator list, [175] States would create a strong incentive for mediators of special education conflicts to become trained and certified.

C. Impartial Mediation

The benefits of State accreditation and selection of IDEA mediators threaten the perceived impartiality of IDEA mediators by creating an appearance of impropriety through the exercise of state control. [176] Appearing fair and impartial proves especially important for the IDEA mediator who exhibits more influence on resolved outcomes by employing evaluative strategies. [177] To avoid apparent bias, States should contract with independent organizations to maintain and administer the training and selection of mediators.

A State agency could oversee quality control by accrediting training organization [178] which may include those alternative dispute resolution entities that the IDEA characterizes as "disinterested." [179] In this role, the ADR organization will appropriately exercise its bias for increasing the use of mediation [180] while the State agency will remain properly removed from the direct training of mediators. [181] Currently, twenty-nine states already use independently contracted mediators, while only eleven states employ SEA mediators. [182] With private entity training, as well as selecting IDEA mediators from the State list, the appearance of choosing State-friendly mediators diminishes.

Private contractors may also decrease the costs of mediation for State and local educational agencies by capitalizing on experience in ADR administration. Driven by market forces, private ADR entities have a greater economic incentive than bureaucratically budgeted State agencies to set an optimal num-

174. *See* FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS § 10.010(B) (1992) (mandating practical experience in professional field and observation of several family mediations for certifying a family mediator).

175. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e)(2)(C), 111 Stat. 37, 90 (1997).

176. *See* AHEARN, *supra* note 41, at 8 (stating the critical importance of a mediator's neutrality to the parties and that mediators employed by a SEA may appear too close too the school system).

177. Riskin, *supra* note 146, at 47-48.

178. *See* Weckstein, *supra* note 173, at 778 (finding a proposal to have a State agency accredit private organizations for certifying ADR practitioners ethically feasible).

179. § 615(e)(2)(B)(ii).

180. *See supra* note 132 and accompanying text.

181. A first order separation of the State agency from the practicing mediator is consistent with the ethical guideline that mediators cannot be employees of State education agencies that provide *direct* services to the child who is the subject of the mediation. 34 C.F.R. § 300.506(6)(c)(ii) (proposed 1997).

182. AHEARN, *supra* note 41, at 7 (finding additionally that 16 contract with organizations or individuals and 13 contract with any impartial individual trained in mediation).

ber of standing mediators. [183] Competition for mediation contracts should occur frequently and vigorously, however, so as to avoid the suggestion or creation of a partial contractor. Operated independently and competitively, IDEA mediation systems and mediators may maintain apparent and actual impartiality.

VII. Conclusion

The 1997 IDEA mediation amendment promises to improve upon the problems of the due process hearing system but not without creating challenges of its own. To realize the benefits of mediation without suffering from its faults, State and local education agencies should employ State certified mediators experientially trained in sophisticated mediation strategies by independent organizations. Mediators should command substantial expertise in special education and demonstrate effectiveness in evaluative techniques. While not every IDEA dispute requires evaluative mediation, mediators should be skilled in recognizing the qualities of the dispute and the disputants that may require them to adopt a more active role in resolving the conflict.

To assure parents of the actual and apparent neutrality of mediators, States and local education agencies should separate themselves from the selection of mediators and the administration of the mediation system by contracting IDEA mediation services to the winner of a competitive bidding process. Alternative dispute resolution entities better serve the impartial interests of the IDEA as administrators of mediation than as counselors to reluctant parents.

Mediation, as a prelude to formal due process, at best resolves IDEA disputes and at least offers parties the opportunity to communicate their interests informally. When conducted and administered as effectively, efficiently, and fairly as possible, IDEA mediation can allow both parents and educational agencies to realize the best interests of a child with disabilities without "splitting the baby."

Appendix

The full text of the IDEA mediation amendment (§ 615(e)) reads:

> (e) Mediation. —
>
> (1) In General. — Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a

183. *See* SCHRAG, *supra* note 30, at 22 (describing how States with limited technical and procedural experience in mediation maintain pools of mediators far exceeding their actual needs).

mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).

(2) Requirements. — Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process —

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with —

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683; or

(ii) an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 615(e), 111 Stat. 37, 90 (1997).