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New Amendments to Resolving Special Education Disputes: Any Good IDEAs?

*Demetra Edwards**

I. INTRODUCTION

On December 3, 2004, President Bush signed into law the Individuals with Disabilities Education Improvement Act of 2004¹ (hereinafter referred to as the "Amending Act"). Title I of the Amending Act serves to amend key sections of the existing federal special education law, known as the Individuals with Disabilities Education Act (IDEA).² The Amending Act is the most recent in a line of legislation passed to amend federal special education law in order to provide special needs' students with appropriate education and services. In 1990, the Education of All Handicapped Children Act (EAHCA)³ was amended, and recodified as the IDEA, further guaranteeing the right of all disabled children to a "free appropriate public education" (FAPE)⁴ in the "least restrictive environment."⁵ IDEA and its predecessor EAHCA were designed to ensure equal educational opportunities to children with special needs in America's public schools.⁶ Through special education legislation, Congress aimed at providing

* Pepperdine law student, J.D. candidate 2005. I would like to dedicate this article to my mother and father, Debra and William Edwards, who have supported me throughout all of my endeavours. I would also like to thank N. Jane DuBovy and Carrie Watts for introducing me to the ins and outs of special education law. Finally, I would also like to thank Kristen Morse and Melissa Niemann, without whom I would not have survived these last three years.

1. Pub. L. No. 108-446, 118 Stat. 2647 amending 20 U.S.C. § 1400 et seq.

2. 20 U.S.C. § 1400 et seq. Most sections of the Amending Act will take effect on July 1, 2005 and incorporate into the existing codified scheme of IDEA. Since the Individuals with Disabilities Improvement Act of 2004 amends but does not recodify IDEA (20 U.S.C. § 1400 et seq.), citations to the IDEA as amended will be prefaced with the word "Amended." Citations to IDEA prefaced with the word "Pre-amendment" will refer to the version of IDEA that was in force immediately prior to the passage of the Amending Act in December of 2004.

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

4. Amended 20 U.S.C. § 1400(d)(1)(A).

5. *Id.* at § 1412(a)(5). See also 23 C.F.R. § 300.4. Educating a child within the least restrictive environment means educating a disabled child in the same environment as typically developing, non-disabled peers to the maximum extent possible.

6. Congress stated that before the enactment of EAHCA, and subsequently IDEA, most disabled children were not receiving:

appropriate educational services that would enable such children to have full equality of opportunity . . . there were many children with disabilities in the United States participat-

all disabled children with an equal opportunity to become active, self-sufficient members of society.⁷ With these goals in mind, Congress, through IDEA, mandated schools to provide disabled children with “services designed to meet their unique needs” and installed procedural safeguards to ensure that these services be properly supplied by local education agencies.⁸

Providing FAPE under IDEA requires that a disabled child’s educational program afford the child with “some educational benefit.”⁹ This substantive guarantee seems vague and limited because Congress’s emphasis in IDEA is placed on the procedural rights and protections put in place to guarantee the substantive right to FAPE.¹⁰ Procedurally, IDEA states that FAPE means,

special education and related services that – A) have been provided at public expense, under public supervision and directions, and without charge; B) meet the standards of the State educational agency; C) include an appropriate preschool, elementary or secondary school educa-

ing in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and because of the lack of adequate services within the public school system, families were forced to find services outside the public school system

Pre-Amendment 20 U.S.C. § 1400(c)(2). See also Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. Davis L. Rev. 349, 351 (1990) (stating that the initial special education legislation was an attempt to, “bring a large, previously ignored segment of the population into the mainstream of public education.”).

7. Congress found that, “Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” Pre-Amendment 20 U.S.C. § 1400(c)(1).

8. Pre-Amendment 20 U.S.C. § 1400(d)(1)(A). States are responsible for implementing the requirements set forth under IDEA, therefore each state maintains a Due Process Office (special education hearing office) as well as a Mediation Program. For example, in California, the Due Process Office, or SEHO (Special Education Hearing Office) is operated through the McGeorge School of Law at the University of the Pacific in Stockton, CA.

9. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982). The Court stated that, “the intent of the Act [EAHCA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.* at 192. Thus, as it stands, a disabled child’s education revolves around what is appropriate for the child and not what is best. *Id.* at 195. It has also been contended that Congress intended the detailed substantive components to be articulated and enforced by the states. See Jane Babin, *Adequate Special Education: Do California Schools Meet the Test?*, 37 San Diego L. Rev. 211, 224 (2000).

10. See Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under IDEA*, 53 Rutgers L. Rev. 333, 335 (2001) (stating that, “the emphasis of the statute is on procedure - with detailed requirements to ensure parental participation in the initial evaluation and development of a child’s education plan, as well as a complex due process system to resolve disputes between parents, guardians, and the school district if an initial agreement is not possible.”). *Id.* See also David M. Engle, *Law Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 176 (1991) (discussing reasons why the Congress failed to detail substantive rights. Specifically, IDEA legislators believed that the procedural safeguards would proved disabled children with enough protection if their parents decided to legally challenge the school’s actions).

tion in the State involved; and D) are provided in conformity with the individualized education program required under section 1414(d).¹¹

The Individualized Education Program (IEP), mentioned in subsection "D" above, is developed at a meeting of the child's IEP team.¹² This team creates an educational strategy that is aimed at identifying the special needs of the disabled child, establishing specific goals designed to enable the child to be involved and make progress in the general education curriculum, and detailing services to aid in the accomplishment of those goals.¹³ During the creation of the IEP, parents¹⁴ (and a representative if parents choose to bring one) negotiate with the school district, teachers, and school representatives regarding whether or not the child qualifies for services, the proper placement of the child, and any necessary services the disabled child may require.¹⁵ Generally, the school makes offers of placement and services, and parents respond with their own requests regarding

11. Amended 20 U.S.C. § 1401(9)(A-D).

12. Under Amended 20 U.S.C. §§ 1414(d)(1)(B)(i)-(vii), the IEP Team is composed of: (i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who-- (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.

Id.

13. Amended 20 U.S.C. § 1414 (d)(1)(A). The IEP often includes requirements for assessments, one on one aides, recreational therapy and occupational therapy, all used to provide the student with an appropriate education. The IEP team meets annually to examine the child's progress and determine the child's needs. *Id.*

14. The term "parent" includes:

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent); (B) a guardian (but not the State if the child is a ward of the State); (C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or (D) except as used in sections 615(b)(2) and 639(a)(5) (20 U.S.C. §§ 1415(b)(2), 1439(a)(5)), an individual assigned under either of those sections to be a surrogate parent."

Amended 20 U.S.C. § 1401(23).

15. See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value* 19 Ohio St. J. on Disp. Resol. 573, 613-16 (2004).

what they believe to comprise an appropriate education.¹⁶ Most special education disputes arise when parents disagree with the terms and services offered for their child's IEP or feel that the child's school is failing to properly implement an agreed upon IEP.¹⁷

The procedural safeguards of the IDEA provide parents of disabled children with the right to file complaints regarding their child's education with their local educational agency.¹⁸ These disputes can be resolved through many different processes, including negotiation, mediation, and administrative (due process) hearings with the right to appeal to a federal district court.¹⁹ Although procedural due process hearings remain a main method through which parents may seek to resolve their disputes under the IDEA, the Amending Act's provisions take the focus away from due process hearings and place an emphasis on alternative dispute resolution.

Resolution of special education disputes has been the subject of much discussion in education law in the last five years.²⁰ Specifically, discussions have centered upon the use of alternative dispute resolution methods to resolve disagreements between parents and schools. In 1997, Congress reauthorized the IDEA, and among other amendments, implemented a mediation provision for the first time.²¹ Under the 1997 mediation provision, every state is required to provide parents with an option to mediate prior to a requested due process hearing.²² The mediation option is completely voluntary.²³ Since 1997, alternative dispute resolution for special education disputes has grown in popularity among legislators and courts, affecting the recently passed amendments of IDEA.²⁴

Congress was scheduled to reauthorize the IDEA in 2003.²⁵ Although 108th Congress made much progress, only the House of Representatives (the "House") succeeded in passing a reauthorization bill in 2003.²⁶ The Senate

16. *Id* at 610-11.

17. *See* Welsh, *supra* note 15, at 614.

18. Amended 20 U.S.C. § 1415(b)(6).

19. *Id.* at § 1415. *See also* 34 C.F.R. 300.507.

20. This is evidenced by President George W. Bush's Commission on Excellence in Special Education, Exec. Order No. 13,227, 66 Fed. Reg. 51,287 (Oct. 2, 2001). The President stated that the Commission was created in part to amend the current system, which, "places process above results, and bureaucratic compliance above student achievement, excellence and outcomes." *Id.* These ideas are codified in the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et seq.

21. Amended 20 U.S.C. § 1415(e).

22. *Id.*

23. *Id.*

24. *See* Marchese, *supra* note 10, at 336 (stating, "ADR options are now available and their use is encouraged by state and federal courts throughout the country."). *See also* Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* 3, 10-11 (3d ed. 1999).

25. Information available at www.fcsn.org/idea/idea.html (Federation for Children with Special Needs website).

26. HR 1350, passed by the United States House of Representatives on April 30, 2003 with a 251-171 vote. *See* <http://www.edworkforce.house.gov/press/press108/04apr/ideaph043003.htm>.

adjourned prior to considering its bill that year.²⁷ On May 13, 2004, the Senate managed to incorporate its own bill (S. 1248) into the House bill (H.R. 1350), and pass the resulting amended legislation by a 95-3 vote.²⁸ The final bill, H.R. 1350 (the Amending Act), received the President's signature on December 3, 2004.²⁹

The Amending Act is rife with alternative dispute resolution provisions. For example, the Amending Act includes a provision requiring a resolution session, in essence a negotiation session,³⁰ prior to a due process hearing and also reinforces the requirement that states provide voluntary mediation.³¹ The preference for these dispute resolution processes was fueled by a concern for reducing costly due process hearings, seeking less adversarial resolutions, and concerns for escalating attorneys' fees awards.³² At the signing ceremony of the Amending Act, President Bush commented, "When schools are so busy trying to deal with unnecessary and costly lawsuits, they have less time to spend with students. So we're creating opportunities for parents and teachers to resolve problems early. We're making the system less litigious, so it can focus on the children and their parents."³³ Comments like these demonstrate the government's intention to create as many alternatives to due process hearings as possible in order to encourage (or mandate) negotiation, mediation and arbitration.

The newly required resolution sessions and other forms of alternative dispute resolution mandated by the Amending Act will have significant impacts on children with special needs. This article first analyzes the state of affairs under the IDEA prior to the passage of the Amending Act, and the affects that the 1997 reauthorization alternative dispute resolution amendments had on special education law. Next, this article will address the appropriateness of the newly enacted negotiation and settlement methods, specifically the resolution session provision,³⁴ and the benefits and detriments for resolving special education is-

27. S.1248. The Senate HELP (Health, Education, Labor, and Pensions) Committee passed the bill on June 25, 2003. However, the Senate adjourned in December 2003 before considering the bill. See <http://www.fcsn.org/idea.html>.

28. Available at www.thomas.loc.gov.

29. *Id.*

30. Amended 20 U.S.C. § 1415(f)(1)(B).

31. Amended 20 U.S.C. § 1415(e).

32. See Stefan Hanson, *Buckhannon, Special Education Disputes, and Attorney's Fees: Time for Congressional Response Again*, 2003 B.Y.U Educ. & L. J. 519, 530-31 (2003); see also Babin, *supra* note 9 at 222.

33. This comment as well as the rest of the President's remarks at the signing of the Individuals with Disabilities Education Improvement Act of 2004 can be found at www.whitehouse.gov/news/releases/2004/12/20041203-6.html.

34. Amended 20 U.S.C. § 1415(f)(1)(B).

sues using these processes. This article will further discuss the amendments regarding attorneys' fees, and finally the House's failed proposal for voluntary binding arbitration and the possible repercussions for allowing this process in the future.

II. DISPUTE RESOLUTION FOR SPECIAL EDUCATION ISSUES – IDEA

A. *Procedural Safeguards and Due Process*

The IDEA states,

Any State education agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.³⁵

Included in these procedural safeguards are: the parent's right to examine all of the child's school records, attend and participate in meetings regarding the identification of a child's disability, services for an identified disability, school placement, and the right to obtain an independent evaluation.³⁶ In addition to these procedural protections, IDEA states that parents of disabled children must be provided with, "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child."³⁷

If a parent chooses to file a complaint with the school regarding a disabled child's education, they may choose to attend mediation³⁸ to resolve any such dispute or proceed to a due process hearing.³⁹ A due process hearing is a quasi-judicial forum where parties are given the opportunity to present oral and written arguments supporting their positions as well as witnesses and evidence.⁴⁰ A neutral third party will adjudicate the dispute and issue a final decision.⁴¹ The

35. Amended 20 U.S.C. § 1415(a).

36. Amended 20 U.S.C. § 1415(b)(1); *see also* 34 C.F.R. § 300.502. Other procedural guarantees set forth in IDEA include the right of parents to receive prior written notice whenever a disabled child's school or school district "proposes to initiate or change or refuses to initiate or change" the placement, identification of the child's disability or child's evaluation. Pre-Amendment 20 U.S.C. § 1415(b)(3).

37. Amended 20 U.S.C. § 1415(b)(6).

38. Amended 20 U.S.C. § 1415(e).

39. *Id.* at § 1415(d)-(f).

40. *Id.* at § 1415(h). These procedures are explained in a Notice of Procedural Safeguards provided to parents as required under IDEA, 20 U.S.C. § 1415(d)(1)-(2). I am currently referencing the Notice of Procedural Safeguards provided to parents in the state of California, issued by the California Special Education Hearing Office, University of the Pacific, McGeorge School of Law, Institute for Administrative Justice, 8 (2004) (hereinafter "Notice").

41. *Id.* at § 1415(i)(1)(A).

disabled child's placement cannot be changed pending the resolution of a dispute.⁴²

However, as stated earlier, in the 1997 reauthorization of IDEA, Congress amended the statute to require that mediation be available to parents as an alternative method of resolving their disputes with the school any time a complaint is filed.⁴³ The IDEA states that parents must be provided with "an opportunity for mediation."⁴⁴ Thus, upon the request for a hearing, the hearing office will automatically place the dispute on calendar for hearing but also assign a mediator.⁴⁵ Mediation is voluntary and may be waived.⁴⁶ If the parties attend mediation and do not come to an agreement, they may still proceed to due process.⁴⁷

Initial disagreements between the parents of a disabled child and the responsible school district can go through several aspects of dispute resolution before reaching a due process hearing. Some disputes can be resolved through negotiation at IEP meetings and informal discussions.⁴⁸ When these methods do not succeed, parents are forced to file a request for a due process hearing. However, the next section will illustrate how the amount of disputes ultimately resolved through due process hearings is beginning to diminish since the 1997 push for the use of alternative methods, such as mediation. The subsequent sections will discuss how the Amending Act's new provisions push even harder for use of alternative dispute resolution methods beyond mediation.

42. Amended 20 U.S.C. 1415(j). This is known as the "stay put" provision. See Marchese, *supra* note 10, at 352. This provision applies to all procedural forms of resolution (i.e. mediation or due process hearings).

43. *Id.* at § 1415(e).

44. *Id.* at § 1415(b)(5).

45. This is the procedure in California and the IDEA does not include details about calendaring hearings. It is up to each state to provide the mediation alternative to the due process hearing. *Id.* In California, the Hearing Office chooses to assign a mediator to the case who will contact the parties to schedule mediation upon receipt of the complaint, although attendance is still voluntary. See Notice at 8-9.

46. Amended 20 U.S.C. § 1415(e)(2)(A)(i); 34 C.F.R. §300.506(b)(1)(i). See also Cal.Educ.Code §§ 56500.3, 56346(b).

47. If either party waives the mediation or an agreement is not met at a scheduled mediation, then the parties are entitled to proceed to a due process hearing. This right to proceed to a hearing is inherent in the voluntary nature of the mediation. 20 U.S.C. § 1415(e)(2)(A)(i).

48. See Babin, *supra* note 9, at 222.

B. Mediation

Mediation is a form of dispute resolution that involves a neutral third party who aids disputing parties in negotiating to an agreed upon resolution.⁴⁹ The neutral third party, or mediator, lacks authority to make a binding decision and is barred from persuading the parties to conform to the mediator's opinion regarding the best outcome of the dispute.⁵⁰ Instead, the mediator's job is to focus on identifying the interests of the disputing parties and facilitate a settlement according to those interests.⁵¹ However, if a power imbalance exists between the parties' negotiating skills, the mediator may interject to equalize the discussion.⁵² Generally, if an agreement is reached, the parties will compose and sign a mediation agreement in order to formalize their settlement for purposes of enforcement.⁵³

The 1997 reauthorization of the IDEA saw the first formal introduction of mediation in federal special education law.⁵⁴ Although several states provided parents with the option to mediate prior to 1997,⁵⁵ it wasn't until this reauthorization that any mediation program became mandated under federal law.⁵⁶ Specifically, IDEA requires that each state provide a mediation program for resolving special education disputes whose use is voluntary on the part of the parties.⁵⁷

49. See Marchese *supra* note 10, at 346. For a more detailed analysis on the process of mediation, see Christopher W. Moore, *The Mediation Process: Practical Strategies For Resolving Conflict*, 6, 15 (1986). The parties may create their own resolution and are not bound by legal remedies. See Linda R. Singer & Eleanor Nace, *National Institution for Dispute Resolution, Mediation in Special Education: Two States' Experiences* 6 (1985).

50. See Marchese, *supra* note 10, at 346.

51. *Id.*

52. *Id.* However, the mediator's role is to remain neutral in the substantive outcome of the case, although the mediator may attempt to aid a weaker party by instructing them in procedure or voicing their interests to the opposing party. See generally Moore, *supra* note 49, at 65. See also Steven S. Goldberg, *Counterpoint: Special Education Mediation: Responding to a Proposal of Reform*, 30 J.L. & Educ. 127 (2001) (stating that, "special education mediators can encourage exchanges of information, help parties to understand the others' views, simulate the parties to develop creative solutions, and invent solution that meet the basic interest of all parties.").

53. In reference to special education law, written agreements are addressed under Amended 20 U.S.C. § 1415(e)(2)(F); 34 C.F.R. § 300.506(b)(5).

54. Amended 20 U.S.C. § 1415(e).

55. Mediation was first used in special education disputes in Massachusetts during the mid-1970's. See Marchese *supra* note 10, at 347. See also Singer & Nace, *supra* note 49, at 6. A majority of the states already had some form of mediation program in place prior to the 1997 amendment. See Marchese, *supra* note 10, at 345.

56. Amended 20 U.S.C. § 1415(e)(1).

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process."

Id.

57. Amended 20 U.S.C. § 1415(e)(2)(A)(i).

Mediation cannot be used to delay or hinder a parent's right to a due process hearing.⁵⁸ The mediation must be conducted by a "qualified and impartial mediator"⁵⁹ who is chosen from a list of individuals that is maintained by the state.⁶⁰ If an agreement is reached, the terms of the agreement must be included in a written mediation agreement,⁶¹ and if no agreement is reached then all discussions are to remain confidential and cannot be used in a subsequent due process hearing.⁶² The state is responsible for covering the costs of the mediation process.⁶³

Congress' reasoning for including the voluntary mediation provision in 1997 was fueled not only by the number of states independently implementing successful mediation programs, but also by a concern for maintaining workable relationships between parents and schools.⁶⁴ According to the Senate Committee Report accompanying the 1997 reauthorization of IDEA, in states where mediation programs were available, "litigation [was] reduced, and parents and schools . . . resolved their differences amicably, making decisions with the child's best interest in mind."⁶⁵ Since parents and school districts are constantly working together to obtain an appropriate education for the child, resolving disagreements that arise in an adversarial manner can damage the ability of parents and schools to work together and hinder both parties' ability to provide for the child.⁶⁶ Due to the need to maintain the parent/school relationship, the Senate Committee reported that it is its "strong preference that mediation become the norm for resolving disputes under IDEA."⁶⁷

Although mediation is Congress's preference, its ability to successfully resolve special education disputes has been criticized.⁶⁸ Despite the fact that mediation can be a cost effective, efficient, non-adversarial means of resolving

58. *Id.* at § 1415(e)(2)(A)(ii).

59. *Id.* at § 1415(e)(2)(A)(iii).

60. *Id.* at § 1415(e)(2)(C).

61. *Id.* at § 1415(e)(2)(F).

62. *Id.* at § 1415(e)(2)(G).

63. *Id.* at § 1415(e)(2)(D).

64. S.Rep. No. 105-17 at 36-37 (1997).

65. *Id.* at 37. For further discussion, *see also* Marchese, *supra* note 10, at 349.

66. *See generally* Marchese, *supra* note 10, at 355-54.

67. *Id.*

68. *See* Marchese, *supra* note 10, at 349-65 (suggesting that if uneducated parent advocates are at mediation with a school district who values budget over parental input then the process will be undermined by "power imbalances and information inequities."). *See also* Goldberg, *supra* note 52, at 127. *But see* Jonathen A. Beyer, *A Modest Proposal: Mediating IDEA Disputes without Splitting the Baby*, 28 J.L. & Educ. 37 (1999) (proposing that mediation would be a beneficial means of resolving special education disputes if mediators were specifically trained to resolve special education disputes).

special education disputes,⁶⁹ scholars suggest that these benefits cannot outweigh the detriments.⁷⁰ For example, because mediation is centered upon creating a mutually beneficial resolution, the ultimate settlement will be a compromise of the interests of the two parties.⁷¹ Given that school districts often times bring to the mediation table their financial constraints regarding requested services, the end result may find the parent compromising their child's educational needs in return for a quick and amicable mediation agreement.⁷² Instead of adjudicating whether or not FAPE is being provided, parents and schools are playing "let's make a deal." Some may argue that the statistics support the proposition that mediation is a successful means of resolving special education disputes.⁷³ However, the ability to come to a *final* resolution does not necessarily equate to the ability to create a *good* resolution that is appropriate for the child, or in compliance with the requirements of FAPE.⁷⁴

Despite these concerns, the Amending Act does not substantially change IDEA's mediation provisions.⁷⁵ However, the government's desire to push parents away from due process and into alternative dispute resolution processes is more strongly evidenced by the Amending Act's new provisions.

69. See Beyer, *supra* note 68, at 37.

70. See Marchese, *supra* note 10, at 349-64. See generally Goldberg, *supra* note 52.

71. See Marchese, *supra* note 10, at 354 (stating that the emphasis of mediation is on "collaborative decision making.>").

72. *Id.* at 358-59 (stating that because a disproportionate share of the school district's budget and manpower is allocated toward children with special needs that districts are forced to weigh the costs associated with a child's education when deciding on a disabled child's placement and services).

73. For example, the Senate Committee on Health, Education, Labor and Pensions stated in its report on S. 1248 that, "Between 1992 and 2000, the Texas Education Agency received 3,637 referrals for special education mediation, and conducted 1,108 mediation settlements. Settlements were agreed to in 77 percent of the cases, amounting to an estimated savings of \$50 million in attorneys' fees and related expenses." See also Beyer *supra* note 68 at 45, stating, "California . . . has demonstrated the greatest success – resolving 851 of 993 disputes prior to due process." Also, in 1999, thirty-nine states operating mediation programs experienced a 60% success rate. *Id.* However, "success" was determined by the number of agreements reached at mediation and was not a long-term determination. *But see* Goldberg, *supra* note 52, at 128-29 (stating that, "the few studies of special education mediation that have been published to date address only the efficiency of the mediation procedures, or what researchers refer to as the antecedents of short term success: reaching agreement, serving disputant goals, and producing immediate party satisfaction.>").

74. See Marchese, *supra* note 10, at 350-51. Marchese suggests that, "the rush to resolve the conflict may yield results that are unfair to the very people the IDEA was designed to empower." *Id.* Marchese also argues that, "the 'successful' resolution of a mediation resulting in an agreement does not address the appropriateness of the child's placement under the IDEA." *Id.* at 354.

75. Some have also argued that mediation can be a successful form of resolving special education disputes if Congress would provide states with some guidance as to how states should select mediators, what mediation model they should apply and how states should monitor and improve mediation success. See Grace E. D'Alo, *Accountability in Special Education Mediation: Many A Slip 'Twixt Vision and Practice?*, 8 Harv. Negot. L. Rev. 201 (2003).

III. REVISIONS TO IDEA – THE AMENDING ACT OF 2004

A. *The Resolution Session*

Most of the provisions of the Amending Act are set to take effect on July 1, 2005.⁷⁶ The Amending Act contains several amendments regarding litigation and procedural safeguards, including the enforcement of a statute of limitations,⁷⁷ limiting the ability to amend complaints,⁷⁸ and allowing a State or local educational agency, under specific circumstances, recover attorneys' fees if they are the prevailing party of a due process hearing.⁷⁹ However, for the purposes of this section, I will concentrate on the new dispute resolution procedures proposed under this bill, specifically the "resolution session."⁸⁰

The proposed resolution session provision states, "prior to the opportunity for an impartial due process hearing . . . the local educational agency shall convene a meeting with the parents . . ." ⁸¹ The local education agency must hold such meeting within fifteen days after receiving a parents' complaint.⁸² The purpose of the meeting is to discuss the parents' complaint⁸³ and clarify the issues contained therein so as to provide the school district with the opportunity to resolve the complaint.⁸⁴ This meeting may be waived, but only in the event that the parents and the local educational agency agree in writing to do so or agree to use mediation.⁸⁵ The parties required to attend the meeting include a school agency representative that possesses decision-making authority,⁸⁶ the

76. See Amended 20 U.S.C. § 1400 et.seq.

77. Amended 20 U.S.C. § 1415(f)(3)(C). Both parents and agencies are now subject to a two-year statute of limitations provision. That is, a parent or agency must request a due process hearing "within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows." *Id.* Two main concerns arise from this new provision. First, how will courts determine when a parent or agency "should have known" about the actions that form the basis of the complaint? Second, what is the State's ability to create even shorter statutes of limitation on requests for due process? The next few years will demonstrate whether this provision proves problematic.

78. *Id.* at § 1415(c)(2)(E).

79. *Id.* at § 1415(i)(3)(B). State or local educational agencies can only recover attorneys' fees if the court determines that, "the complaint filed was frivolous, unreasonable, or without foundation" or the complaint was presented for any improper purpose." *Id.* at §§ 1415(i)(3)(B)(i)(I), (II).

80. *Id.* at § 1415(f)(1)(B).

81. *Id.* at § 1415(f)(1)(B)(i).

82. *Id.* at § 1415(f)(1)(B)(i)(I).

83. *Id.* at § 1415(f)(1)(B)(i)(IV).

84. *Id.*

85. *Id.*

86. *Id.* at § 1415(f)(1)(B)(i)(II).

parents of the special needs child, and the relevant members of the IEP Team.⁸⁷ The local educational agency is not allowed to bring an attorney to the meeting unless the parents arrive with their own counsel.⁸⁸ The local educational agency is then provided the opportunity to resolve the complaint within thirty days of the initial receipt of the complaint.⁸⁹ If the complaint is not resolved to the satisfaction of the parents within the thirty-day window, the case may proceed to a due process hearing.⁹⁰

This thirty-day window of opportunity to resolve complaints can be viewed in two ways. First, the resolution session may provide the parents and the school district with a last opportunity to discuss their concerns, clarify their grievances, and reach a settlement agreement, thus avoiding the costs and emotional strain associated with due process hearings.⁹¹ The second perspective views this meeting as a possible delay and pressure tactic. School districts may abuse the meeting requirement in an attempt to wind down the two-year statute of limitations.⁹² In addition to delaying due process, this meeting may also be construed as a means through which school districts may pressure parents into a settlement agreement.⁹³

Congress asserts the first view, claiming that the dispute resolution amendments (including resolution sessions) are proposals intended to improve the complaint process and parent/school relationships. As Representative John Boehner (R-OH), Chairman of the House Education & Workforce Committee, stated during the construction of the House bill, "The rights of parents are preserved under H.R. 1350, but innovative solutions are proposed to resolve problems in a timely fashion, reduce costly litigation, and refocus IDEA on teaching children rather than compliance with regulations."⁹⁴ Chairman Boehner also stated, "[b]y providing options such as binding arbitration,⁹⁵ parents and schools

87. *Id.* at § 1415(f)(1)(B)(i).

88. *Id.* at § 1415(f)(1)(B)(i)(III).

89. *Id.* at § 1415(f)(1)(B)(ii).

90. *See infra* note 94.

91. This is often the argument in favor of holding a mediation prior to due process. *See Beyer, supra* note 68, at 44-45.

92. *See supra* note 77.

93. School districts have an incentive to settling cases prior to due process, especially if they feel they have a losing case because in the event that they lose, the school district will be required to pay for the prevailing party's attorneys' fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

94. The Chairman's statements are published in a document entitled "*The Improving Education Results for Children with Disabilities Act: Separating Fact from Fiction.*" This document is available at <http://edworkforce.house.gov/issues/108th/education/idea/factsfiction.htm>. This document acts as a fact sheet. Presenting what the Committee believes to be common myths regarding the bill and responding to those "myths" with the "truth."

95. The House's proposal for voluntary binding arbitration is discussed *infra* Section V of this article.

will have new opportunities to address problems without fear of costly litigation.”⁹⁶

In the report by the Senate Committee on Health, Education, Labor and Pensions regarding S.1248, the Committee stated,

States and school districts must be held accountable for complying with IDEA. However, many school representatives, policy analysts, and even some parents of children with disabilities believe that the current accountability provisions in IDEA focus more on measuring compliance with legal processes rather than gauging student performance and results.⁹⁷

The committee report goes on to state that it is

discouraged to hear that many parents, teachers, and school officials find that some current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere, in regards to special education. In response, the committee has made changes to promote better cooperation and understanding between parents and schools, leading to better educational programs and related services for children with disabilities.⁹⁸

Although the resolution session provision presents itself as one step in the Amending Act’s overall goal of improving the complaint process of IDEA, many take the second perspective and see this provision as yet another burden placed on parents on their way to due process. The stated goal of the Amending Act’s procedural amendments is to restore trust between parents and schools by creating options to the adversarial due process hearing.⁹⁹ However, many special education advocacy groups see this provision and other new changes as causing “an already unbalanced conflict resolution system to be weighted more heavily against parents – further eroding what little trust parents have for the system.”¹⁰⁰

For example, The Council for Exceptional Children¹⁰¹ stated in its preliminary analysis of S. 1248 that it:

96. *Id.* at § 1415(f)(1)(B)(i)(III).

97. Senate report of November 3, 2003, 108-185 First Session, available at [http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1\(sr185\)](http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1(sr185)).

98. *Id.*

99. See *supra* notes 94 and 97.

100. See www.wrightslaw.com/news/2003/idea.disrights.advocates.pdf. Wrightslaw is the leading on-line special education information source for parents and advocates of children with disabilities. The site was established by Pete and Pam Wright. Pete Wright is a special education attorney who represents children with disabilities. He successfully represented a disabled child before the United States Supreme Court in *Florence County Sch. Dist. Four v. Shannon Carter*, 510 U.S. 7 (1993). Pam Wright is a psychotherapist and editor of *The Special Ed Advocate*.

101. The Council for Exceptional Children (CEC), established in 1922, is a private nonprofit membership organization committed to improving educational outcomes for individuals with special needs. CEC is an active network of fifty-nine state/provincial units, seventeen special-interest divisions, hundreds of local chapters and subdivisions, and more than 50,000 individual members in the

recommends deleting 'opportunity to resolve complaint' [resolution session] prior to the opportunity for an impartial due process hearing. This provision could deny or delay a parent's right to a hearing. Furthermore, there is nothing in [the] current statute that would prohibit an LEA [local educational agency] from establishing informal procedures that would accomplish the same purpose as these meetings as long as they were consistent with due process hearing procedures.¹⁰²

Likewise, the League of Special Education Voters¹⁰³ circulated an online petition asking Senators to vote "No" on S. 1248.¹⁰⁴ The petition stated that the League disagrees with the implementation of preliminary meetings [resolution sessions]. Specifically, one of pleas in the petition stated, "No additional mandatory pre-due process meetings: Typically, due process is a parent/guardian's last resort. They have had countless meetings with the school, making little or no progress. Families must not be further burdened with extra meetings."¹⁰⁵

It is apparent that Congress' goals of improving the complaint process by providing efficient, non-adversarial resolutions to special education disputes is acceptable to most parents, advocates, and attorneys. However, the resolution session and preliminary meeting methods that both the House bill and the Senate bill have proposed are not viewed as beneficial procedures. Instead, as argued in the next section, these methods are essentially mandatory negotiation sessions that do not decrease the adversarial nature of special education dispute resolution.

B. Resolution Sessions and Their Consequences

1. Resolution Sessions as Mandatory Negotiation

Negotiation is "a communication process that people use to plan transactions and resolve conflict."¹⁰⁶ The resolution session provision implemented by the Amending Act fits this basic definition. The amendment states that the purpose of the meeting is to provide a forum, "where the parents of the child discuss their complaint, and the specific issues that form the basis of the complaint,

United States and eighty-two other countries. CEC advocates for appropriate government policies and helps attorneys and advocates obtain resources for their professional practice. Information available at www.cec.sped.org.

102. The CEC Preliminary Analysis of S. 1248, available at www.cec.sped.org.

103. The League of Special Education Voters is a group of parents, guardians, friends, and relatives of children with special needs. Its members are advocates and professionals whose goal is to protect the rights of disabled children, particularly by influencing political developments. Information is available at www.spedvoters.org.

104. This petition is available at <http://www.petitiononline.com/nos1248/petition.html>.

105. *Id.*

106. Charles B. Wiggins & L. Randolph Lowry, *Negotiation and Settlement Advocacy: A Book of Readings*, WestGroup Publishing Co., St. Paul, MN, 1997 at 3.

and the local educational agency is provided the opportunity to resolve the complaint”¹⁰⁷ This discussion is a “communication process” that Congress intends the parties to use to “resolve conflict.” Hence, the resolution session will hereinafter be referred to as “negotiation” or “negotiation conference.”

It is important to note that this negotiation is not voluntary for parents. The negotiation conference can only be waived if *both* parties agree to waive such meeting in writing,¹⁰⁸ or if the parties agree to attend mediation.¹⁰⁹ Therefore, this negotiation is essentially mandatory if a parent files a complaint with the school and requests a due process hearing for the purposes of resolving the complaint.¹¹⁰

Congress views negotiation in nearly the same light as mediation. Congress intends these negotiation conferences to provide parents and schools with a less adversarial, less costly, less time consuming, and more congenial method of resolving disputes.¹¹¹ By requiring a mandatory negotiation session prior to due process, Congress aims to prevent emotionally and financially costly litigation.¹¹²

Requiring parties to meet in a final attempt to resolve the complaint prior to due process seems like a reasonable measure. However, this suggested requirement fails to take into account all of the other informal discussions, negotiations, and even mediations that parties have likely participated in prior to taking the final step of filing for due process.¹¹³ Most parents and school districts have already discussed the issues contained in the parent’s complaint prior to the official filing, and it is these issues that the two parties have failed to resolve through other means.¹¹⁴ Therefore, forcing the parties to meet yet again is an unnecessary step in the process. In fact, it will serve as a blockade to the due process hearing and yet another procedural requirement of the type that Congress is trying to eliminate.¹¹⁵

Making the decision to file for due process is not easy for parents. Many factors must be considered, including the financial burden of seeking legal counsel, paying for expert witnesses, and the emotional and psychological affects the

107. Amended 20 U.S.C. § 1415(f)(1)(B)(i)(IV).

108. *Id.*

109. *Id.*

110. *Id.* at § 1415(f)(1)(B)(i).

111. See Goldberg, *supra* note 68, at 128 (stating that, “Mediation has been touted as less time consuming, less expensive and less emotionally costly than other more adversarial forms of disputing, including due process hearings and litigation.”).

112. See *supra* note 33.

113. See *supra* note 104 and 105.

114. See generally Goldberg, *supra* note 52.

115. See *supra* note 94.

hearing can have on the child in question, especially if the child testifies.¹¹⁶ Parents are often eager to accept an alternative to this process, but sometimes nothing else has succeeded and therefore they are seeking their last resort.

Another issue parents may be dealing with is a school district's past non-compliance with IDEA. If a parent feels that their child has been deprived FAPE in the past, the parent may seek additional services to compensate for past wrongdoing. It is often difficult to negotiate this into a settlement agreement when perceived past non-compliance has not been determined by a hearing officer; the school district will not admit to past non-compliance if they believe they have acted lawfully. This creates another situation where parents feel that due process is their only remedy.

School districts prefer to avoid due process because they are required to pay the other party's attorneys' fees if they lose the case.¹¹⁷ Even if the school district wins at due process, they still suffer the financial consequences connected with their own attorneys' fees and expert witness fees.¹¹⁸ In addition, teachers may be required to testify, taking them out of the classroom on regular school days and forcing the school to find a substitute. These are events that the school district would rather avoid; therefore, great incentives exist for school districts to settle the case prior to a due process hearing.

Although school districts prefer settlement arrangements, they are still managing mixed motives during the settlement process. As stated earlier, school districts are on tight budgets, and a lack of specially trained staff also places constraints on the types of services that the school district is willing to offer for a child with special needs.¹¹⁹ Therefore, during the settlement process, the local educational agency is driven to settle the complaint with parents and avoid litigation, but also pressured to make sure that the settlement is within their means.¹²⁰

The school district's motivations create a dangerous situation for parents during the mandatory negotiation conference. Because the school district is eager to settle but stubborn to shift on financial issues, the district will attempt to create a compromise between the two parties that resolves some of the complaint's issues but extinguishes others. Likewise, parents are reluctant to move from their positions. However, school representatives have extensive experience in these types of negotiations, whereas parents may only have previous meetings with these representatives as their reference.¹²¹ Therefore, school representatives have a large advantage over parents in skill, knowledge, and experi-

116. See Beyer, *supra* note 68, at 41.

117. Amended 20 U.S.C. § 1415(i)(3)(B)(I).

118. However, under the Amending Act, school districts are now able to recover attorneys' fees under special circumstances. See *supra* note 79.

119. See Marchese, *supra* note 10, at 358-59.

120. *Id.*

121. *Id.* at 360-62.

ence in these situations. Although parents are allowed to bring an attorney to these negotiations, some may refrain from doing so because of the cost; school districts are not required to pay for attorneys' fees associated with negotiations.¹²² Therefore the mandatory negotiation gives rise to a situation where some inexperienced parents serve as their child's advocate at a negotiation where the opposing party has maximum experience and training in special education law and negotiation tactics.¹²³ This puts some parents at a severe disadvantage and risks their ability to avoid manipulation into a settlement agreement.¹²⁴ The consequences can be devastating for a child because parents may not be aware of the rights they are sacrificing in return for their consent.¹²⁵

Similar arguments have been made concerning mediation of special education disputes.¹²⁶ Yet the dangers are even greater for parents in a mandatory negotiation situation because if they are inexperienced and lack professional representation, not even a neutral third party can help save them from making agreements that are detrimental to their child's education. Mediation at least provides the parents with an individual who can provide support, help parents to understand the school districts views and proposals, aid in the creation of mutually beneficial solutions, and prevent school districts from making inappropriate offers.¹²⁷

122. See Amended 20 U.S.C. §§ 1415(i)(3)(B), (D). School districts are only required to pay for attorneys' fees if the parents prevail in a due process hearing. Attorneys' fees associated with mediation and other informal meetings are not mandated, and most state laws state the same. Although attorneys' fees can be negotiated into settlement agreements, some scholars argue that this results in parents trading, "pieces of a child's educational program for reimbursement of attorneys' fees." See Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time For Congressional Response Again*, 2003 B.Y.U. Educ. L.J. 519, 546 (2003).

123. Please note that several parents of special needs children are very well schooled in special education law and many are attorneys and advocates. However, I am noting what the potential situation will be like for parents who are new to the special education system and IDEA.

124. The danger of a potential power differential was noted by Steven Marchese regarding parent and school district mediation. See Marchese, *supra* note 10, at 360-64. Marchese noted, "Congress' failure to require states to pay for outside assistance at mediation increases the likelihood that less advantaged parents will make agreements without a full understanding of the legal consequences." *Id.* at 360.

125. *Id.* at 360.

126. *Id.*

127. See Goldberg, *supra* note 68, at 128.

IV. AMENDMENTS REGARDING ATTORNEYS' FEES

A. Attorneys' Fees Provisions Under IDEA

According to IDEA prior to and subsequent to the passage of the Amending Act, school districts are required to fully compensate parents for their attorneys' fees if the parents prevail at a due process hearing.¹²⁸ Attorneys' fees are not required for representation at IEP's, mediations, negotiations, or informal meetings.¹²⁹ Although attorneys' fees are often negotiated into settlement agreements, the current IDEA only mandates that attorneys' fees be paid to parents who succeed at due process.

B. The Proposed Cap

Recently, Congress has expressed concerns that attorneys' fees are getting too large for school districts to afford.¹³⁰ This concern is also compounded by the view that the payment of attorney's fees would be better spent on improving the educational system that failed parents in the first place. However many advocacy groups are weary of changing this provision because it may hinder parents' ability to seek appropriate representation.¹³¹

1. The House's Failed Proposal

Some provisions suggested by the House of Representative's bill did not make it through to the final version of the Amending Act. However, it is important to keep these failed proposals in mind because they are likely to reappear at the next amending of IDEA, when they threaten to become part of federal special education law.

H.R. 1350 suggested allowing state governors to set the rate for attorneys' fees.¹³² The provision stated, "Fees awarded under this paragraph shall be based on rates determined by the Governor of the State (or other appropriate State official) in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees

128. Amended 20 U.S.C. § 1415(i)(3)(B)(i)(I).

129. Amended 20 U.S.C. §§ 1415(i)(3)(ii), (iii).

130. See 143 Cong. Rec. S435-02 (1997) (statement of Sen. Gorton).

131. Some difficulty already exists for parents seeking counsel, especially those who cannot afford to put down the initial costs associated with due process. This is especially the case for lower income earning, limited English proficiency parents. See Stephen Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 Hastings Women's L.J. 1, 15 (2004).

132. H.R. 1350 section 205(i)(2)(C)(i).

awarded under this subsection.”¹³³ This proposal stems from a concern that parents are seeking due process judgments in order to recover their attorneys’ fees as opposed to cooperating in early dispute resolution processes that don’t provide the same financial benefit.¹³⁴ However, procedural safeguards are already in place in IDEA to ensure against excessive attorneys’ fees, making the House of Representative’s proposal moot.

Under the current IDEA (as amended by the Amending Act), attorneys’ fees are awarded based on rates prevailing in the community where the hearing took place, and no bonus or multiplier can be used in calculating fees.¹³⁵ In addition, attorneys’ fees will not be awarded if a parent turned down an offer that was equally favorable to the parent as the relief obtained at hearing and the offer was made over ten days prior to the hearing.¹³⁶ Further safeguards include reducing the amount of attorneys’ fees in the following situations: if the parent unreasonably delayed the final resolution, if the attorneys’ hourly rate unreasonably exceeds that prevailing in the community, if time spent was excessive in comparison to the case, or if the attorney failed to provide the school district with proper information in the due process complaint.¹³⁷

Given the present provisions in IDEA, H.R. 1350’s proposed amendment would only serve to limit a parent’s ability to seek legal counsel because the rates set by the Governor are likely to be lower than the average attorney’s hourly rate.¹³⁸ With this provision in place, parents may have a harder time retaining an attorney practicing in special education law who can front the costs without the assurance of full reimbursement of their regular fees upon winning the case. Therefore, parents may be forced to make up the difference between the amount determined by the Governor and the attorney’s actual rates. Thus, the House’s provision effectively limits a parent’s ability to obtain a professional advocate, thereby placing a child’s access to FAPE in jeopardy.

133. *Id.*

134. *See* Hanson, *supra* note 122, at 521.

135. Amended 20 U.S.C. § 1415(i)(3)(C).

136. *Id.* at §§ 1415(i)(3)(D)(i)(I), (II). However, if a parent is substantially justified in turning down the offer, than this provision will not apply. *Id.* at § 1415(i)(3)(E).

137. *Id.* at §§ 1415(i)(3)(F)(i)-(iv).

138. Although H.R. 1350 does not list a suggested rate, considering that Congress inserted this provision because it was concerned with escalating attorneys’ fees costs paid by school districts, it is fair to infer that the potential rate set by the Governor will be below what an average attorney charges per hour.

C. *The Amending Act's New Attorneys' Fees Provision*

Under the Amending Act, state and local educational agencies are now able to recover attorneys' fees, under special circumstances, if they are the prevailing party at a due process hearing. Specifically, IDEA states that if a parent's complaint is deemed "frivolous, unreasonable, or without foundation" or if an attorney continues to litigate after the litigation "clearly became frivolous, unreasonable, or without foundation," then the state or local educational agency can recover attorneys' fees if the agency prevails at due process.¹³⁹ In addition, attorneys' fees may be awarded to a prevailing state or local educational agency against the parent or the attorney of the parent if the complaint was "presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."¹⁴⁰

Although this provision is intended to reduce unwarranted costly litigation, it also acts as a threat to potentially valid claims. As both Congressmen and President Bush stated, one of the Amending Act's goals included eliminating "unnecessary and costly lawsuits" in order to concentrate teachers' effort on students' progress.¹⁴¹ Teachers, parents, school administrators and attorneys agree that this is a valid goal. However, the fear of paying thousands of dollars in attorneys' fees may prevent some parents and attorneys from pursuing a claim for fear that an administrator will argue that the claim is "unreasonable." In order for this provision to be successful, hearing officers must operate under the assumption that parents and their attorneys are bringing a claim in order to ensure a special needs child's right to FAPE, not in an effort to act unreasonably or harass the school district. Otherwise, attorneys will likely act too cautiously when choosing their cases, leaving valid claims unlitigated.

V. OTHER ADR ISSUES – VOLUNTARY BINDING ARBITRATION UNDER H.R. 1350

A. *Is This A Safe Solution For Parents?*

Arbitration is the "submission of a dispute to one or more impartial persons for a final and binding decision."¹⁴² Contracting parties typically agree within their contract agreement to send future or current disputes to arbitration.¹⁴³ This agreement is binding on the contracting parties.¹⁴⁴ The arbitrator renders a

139. Amended 20 U.S.C. § 1415(i)(3)(B)(II).

140. *Id.* at § 1415(i)(3)(B)(III).

141. *See supra* note 33.

142. Christopher R. Drahozal, *Commercial Arbitration: Cases and Problems*, 13 (Matthew Bender & Company, Inc. 2002).

143. *See* Thomas E. Carbobbeau, *Article: A Consideration of Alternative to Divorce Litigation*, 1986 U. Ill. Rev. 1119, 1152 (1986).

144. *Id.*

binding decision at the arbitration proceeding.¹⁴⁵ This decision may be challenged in Court, however the only grounds for appeal are abuse of power by the arbitrator and procedural unfairness (such as the inability to present witnesses).¹⁴⁶ Like mediation, arbitration is a less costly alternative to litigation.

The Federal Arbitration Act establishes a “federal policy favoring arbitration.”¹⁴⁷ Courts strictly adhere to the application of arbitration agreements.¹⁴⁸ Furthermore, when a party raises a claim based on statutory rights, the arbitration agreement will be upheld absent contrary congressional intent stating that such claims are not to be arbitrated.¹⁴⁹ The burden of proving contrary congressional intent is on the party attempting to avoid arbitration and seeking judicial adjudication.¹⁵⁰ However, courts lean in favor of upholding arbitration agreements of statutory claims because, “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”¹⁵¹

Exceptions to the basic preference for upholding arbitration agreements exist when Congress expresses a concern that a specific type of statutory claim is not to be arbitrated. For example, in some areas of bankruptcy and civil rights, Congress has preferred that the courts maintain authority over resolution of disputes in these specific areas.¹⁵² Other areas of law also avoid arbitration, for example divorce and family law.¹⁵³ Arbitration is not considered a beneficial alternative in these matters because, unlike mediation, the parties are bound to the decision of an arbitrator, who may not take into account the emotional aspects of the case nor adhere to rules of law.

H.R. 1350 suggested providing parents with the option of resolving their dispute through binding arbitration upon their request for a hearing.¹⁵⁴ The arbitration provision did not make it into the final draft of the Amending Act, but arbitration may find its way into special education law sometime in the future. The arbitration provision suggested by the House states that the arbitration process shall meet the following requirements:

145. *Id.*

146. *Id.*

147. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Mitsubishi Motots Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

152. *Drahozal*, *supra* note 142, at 141.

153. *See Carbobbeau*, *supra* note 143, at 1154-56.

154. H.R. 1350 § 205(e)(2)(A).

the procedures shall ensure that the voluntary binding arbitration process—(I) is voluntarily and knowingly agreed to in writing by the parties; and (II) is conducted by a qualified and impartial arbitrator.”¹⁵⁵ The amendment goes on to state that, “a local educational agency or a State agency shall ensure that parents who choose to use voluntary binding arbitration understand that the process is in lieu of a due process hearing...and that the decision made by the arbitrator is final, unless there is fraud by a party or the arbitrator or misconduct on the part of the arbitrator.”¹⁵⁶

If the House intends to create a more cooperative dispute resolution process under IDEA, then arbitration is contrary to that purpose. An arbitration proceeding under IDEA will be very similar to a due process hearing. Parties will be presenting their case in front of an impartial third party, with the opportunity to call witnesses and present evidence. Furthermore, parties are set against each other in an adversarial nature, with each party arguing their side to the arbitrator who adjudicates the case. Often time, attorneys will be present to represent each party’s interests. All of these characteristics are shared with the due process hearing procedure.

The danger in arbitration arises when parents agree to arbitrate without full knowledge of what arbitration entails. Although H.R. 1350 provides that parents must agree to arbitration “voluntarily and knowingly,”¹⁵⁷ there is nothing to ensure that this will be enforced. For instance, H.R. 1350 does not include a requirement that the parents attend an informational session on arbitration or at the very least receive an informational packet. Therefore, when a parent signs an arbitration agreement, they may not necessarily be doing so with full knowledge. This may result in the parent signing away their right to due process and subject them to the mercy of an arbitrator’s decision. This is risky because arbitrators are not required to make decisions according to the law, but instead can act outside the law’s limits.¹⁵⁸ Although the procedures of arbitration may be similar to due process hearings, due process is a much safer method because hearing officers are required to follow the law, and a parent maintains the ability to appeal the decision without restrictions.¹⁵⁹

VI. CONCLUSION

A. What Is In Store For The Future Of Special Education Dispute Resolution?

After analyzing the Amending Act and other suggested provisions made during the Amending Act’s creation, it is clear that Congress is attempting to

155. *Id.* at §§ 205(e)(2)(B)(i)(I), (II).

156. *Id.* at § 205(e)(2)(B)(ii).

157. *Id.* at § 205(e)(2)(i)(I).

158. *See* Drahozal, *supra* note 142, at 27 (noting that one reason some commercial or corporate parties prefer arbitration is because it avoids legal precedents).

159. Amended 20 U.S.C. § 1415(i).

improve the dispute resolution process of IDEA and concentrate parent and teacher efforts on the education of the child, not procedural compliance. However, what Congress has inadvertently created is a more complicated process in its attempt to discourage parents from seeking due process hearings. Creating additional negotiations prior to due process hearings, although intended to create opportunities for settlement, actually prolong the dispute resolution process and create additional costs for parents and schools alike. In addition, creating limits on attorneys' fees prevents parents from seeking legal aid altogether and forces parents to act as their own advocate. As such, parents, due to their close emotional connection to the matter, may turn down settlements that objective attorneys would otherwise have recognized as beneficial to the child. The ultimate result of the Amending Act's amendments to IDEA is to prolong the dispute resolution process, to create more costs for parents and schools, to prevent parents from seeking professional representation, and to scare parents and attorneys away from litigating valid IDEA claims. These results are contrary to the purpose of IDEA: to ensure the special need of a child's right to a free, appropriate public education.¹⁶⁰

160. Amended 20 U.S.C. § 1400(d)(1)(A).

