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## State Legislative Update

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# STATE LEGISLATIVE UPDATE\*

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## I. STATE LEGISLATIVE FOCUS

### *A. California Builds another Bridge*

Bill Number:	California Senate Bill 766
Summary:	Permitting out-of-state and foreign attorneys, in good standing, to appear in a California-based international commercial arbitration for the limited purpose of representing a party to that proceeding
Status:	California Senate Bill 766 was passed by the California legislature as of July 5, 2018 and is now pending approval from Governor Jerry Brown; Strong likelihood of being enacted

#### *1. Introduction*

When an international commercial dispute arises, parties to agreements are entitled to invoke underlying arbitration agreements. By doing so, the parties agree, among other things, to arbitrate the immediate dispute within the agreement's

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\* The State Legislative Update is an annual article compiled and written by Journal of Dispute Resolution members. It is designed to provide readers with a listing of pertinent legislation affecting Alternative Dispute Resolution ("ADR"). The Update also provides a more detailed look at certain bills because of their importance and/or novelty within the ADR field. If you have comments or suggestions about this feature, please feel free to e-mail the Journal of Dispute Resolution Editorial Board at [JDR@missouri.edu](mailto:JDR@missouri.edu).

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designated jurisdiction. This specified jurisdiction is known as the “seat” of arbitration.<sup>1</sup>

In most circles, the seat of arbitration is considered the single-most critical piece of the arbitration agreement, around which the whole arbitral enterprise pivots.<sup>2</sup> The stakes are high as courts of the seat enjoy a supervisory role over the proceedings and are empowered to challenge arbitration awards and otherwise complement the arbitration process (for better or worse).<sup>3</sup> Consequently, deliberations over the seat are heated as the agreement involves the parties’ choosing an effective judicial “home.”<sup>4</sup> Upon selection of this “home,” all other jurisdictions are relegated to a “secondary” status.<sup>5</sup>

As powerful parties and entities bargain to maximize their strategic advantage in arbitration, immense byproducts of financial gain are created for the locales fortunate enough to host the arbitral participants.<sup>6</sup> In fact, some cities and states reportedly reap over a billion dollars in arbitration-related legal fees annually.<sup>7</sup> Against this canvas, venues, foreign and domestic, have competed with one another to construct the most enticing proverbial table.

Alongside this expanding “accommodation market,” international arbitration has enjoyed widespread proliferation. One Queen Mary University of London survey illustrates international arbitration’s indomitable expansion as 92% of in-house lawyer respondents indicated that arbitration is the preferred mechanism for resolving cross-border disputes.<sup>8</sup> As such, many countries are scrambling to reform their laws and promote pro-arbitration atmospheres.<sup>9</sup> India, Saudi Arabia, Russia, the United Arab Emirates, Ukraine, Myanmar, South Africa, and Japan (among others) have all pressed their respective law-making bodies to enact pro-arbitration reforms.<sup>10</sup> Many other jurisdictions are in dire need of these arbitral reforms, and California, as stands, is one such jurisdiction.<sup>11</sup>

In the world of international arbitration, it is clear—California is *not* a popularly used seat of arbitration.<sup>12</sup> This phenomenon at first glance makes very little sense. California is understood to have a mature, consistent, and veteran legal system

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1. Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB. 47, 49 (2010).

2. *Id.*

3. Aceris Law LLC, *The Importance of the Seat of Arbitration*, INT’L ARB. INFO. (Mar. 17, 2014), <https://www.international-arbitration-attorney.com/importance-seat-arbitration/>.

4. Rau, *supra* note 1, at 49.

5. *Id.*

6. Such windfalls include the increased likelihood that a business will settle in the city where it conducts its arbitrations, the enjoyed notoriety of hosting corporations and other powerful entities, and the surge in local economies that these major players are capable of bestowing.

7. Richard Chernick & Howard B. Miller, *California is Missing Out on International Arbitration Business*, DAILY J. (Feb. 9, 2018), <https://www.jamsadr.com/files/uploads/documents/articles/richard-chernick-howard-miller-dailyjournal-california-missing-out-on-international-arbitration-business-2018-02-09.pdf>.

8. Greenberg Traurig LLP, *California Looks to Attract International Arbitrators by Removing Restrictions on Foreign Lawyers*, LEXOLOGY (July 9, 2018), <https://www.lexology.com/library/detail.aspx?g=95d88a9c-8985-4b12-adf0-039f6213fa91>.

9. *Id.*

10. *Id.*

11. *Id.*

12. Madison Grant, *Why is California So Behind in International Arbitration and Is That About to Change?*, AM. REV. INT’L. ARB. (Feb. 22, 2018), <http://aria.law.columbia.edu/why-is-california-so-behind-in-international-arbitration-and-is-that-about-to-change/>.

which honors the Federal Arbitration Act and developed the California International Arbitration Act.<sup>13</sup> Also, California encourages the recognition and enforcement of arbitral awards and agreements to arbitrate.<sup>14</sup> Additionally, California's economy staggers in size; the US Department of Commerce determined California's effective gross domestic product in 2017 to be a colossal \$2.747<sup>15</sup> trillion, which independently ranks it as the 12<sup>th</sup> largest economy in the world.<sup>16</sup> For context, this means California single-handedly surpasses Mexico in economic clout.<sup>17</sup> Additionally, California has many populous, diverse cities with international appeal that offer a trove of resources for hosting international disputes.<sup>18</sup> Lastly, California is strategically located in an area with natural connections to the Asia-Pacific region, which is home to some of the most-rapidly developing economies.<sup>19</sup>

So why is California, in its conducive posture, lagging behind arbitration hot seats like London, Hong Kong, Paris, Shanghai, Munich, and other U.S. jurisdictions such as Florida and New York?<sup>20</sup>

## 2. California's Blunder in Restricting Representation

While the just-posed inquiry is multifaceted, some leading experts have identified California's Business and Professions Code Section 6125 ("Section 6125") as a chief cause of California's status as an arbitration ghost town.<sup>21</sup> Section 6125 states, "No person shall practice law in California unless the person is an active member of the State Bar."<sup>22</sup> This provision was interpreted in *Birbrower v. Superior Court of Santa Clara County* to mean that lawyers not licensed to practice law in California are in violation of the section when representing clients in arbitration.<sup>23</sup>

The California Bar, reacting to criticism of the *Birbrower* decision, established a pro hac vice-like process, which permitted out-of-state attorneys to participate in domestic arbitration disputes in California.<sup>24</sup> Not to be outdone, the California legislature updated Section 6125 to more definitively ensure out-of-state attorneys' place at the arbitration table.<sup>25</sup> What neither the Bar nor the legislature did,

13. *Id.*

14. *Id.*

15. Interactive Data Tables, BUREAU ECON. ANALYSIS, <https://www.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdn=2#reqid=70&step=10&isuri=1&7003=200&7035=-1&7004=naics&7005=-1&7006=06000&7036=-1&7001=1200&7002=1&7090=70&7007=2017&7093=levels> (last visited July 19, 2018).

16. The World Factbook, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publication/s/the-world-factbook/rankorder/2001rank.html#us> (last visited July 19, 2018).

17. *Id.*

18. Greenberg Traurig LLP, *supra* note 8.

19. *California's SB 766: A Step in the Right Direction for International Arbitration in the Golden State*, KING & SPALDING (July 18, 2018), <https://www.kslaw.com/attachments/000/006/097/original/ca071818.pdf?1531920713>.

20. Grant, *supra* note 12.

21. *Id.*

22. CAL. BUS. & PROF. CODE § 6125 (West 1990).

23. *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara Cty.*, 949 P.2d 1, 2 (Cal. 1998).

24. Chernick & Miller, *supra* note 7.

25. *SB-766 International Commercial Arbitration: Representation*, Bill Analysis, CAL. LEGIS. INFO., [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180SB766](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB766) (last visited June 27, 2018).

however, was implement a mechanism to include foreign attorneys within the carve-out to *Birbrower*. Consequently, foreign attorneys remain barred from participation.<sup>26</sup>

The upshot of these summarized events is that California, in its attempt to prevent people from practicing law without a license, too narrowly circled the wagons and has excluded individuals requisite to cross-border arbitration—cross-border attorneys. The resulting effects have been quite manifest; foreign entities (and the aforementioned windfalls they bring) have retreated from California’s shores toward less hostile territories.

### 3. Senate Bill 766—California’s Proposed Inroads

Addressing critique over the *Birbrower* rule, the California Supreme Court, in 2017, convened a working group to explore ideas to spur international commercial arbitration activity in California.<sup>27</sup> The generated solution was that California adopt a modified version of the American Bar Association’s model rules for international arbitration.<sup>28</sup> Specifically, the group encouraged the addition of an article to California’s Code of Civil Procedure which would permit foreign attorneys, subject to certain conditions, to provide legal services in an international commercial arbitration and other related proceedings.<sup>29</sup>

On February 17, 2017, State Senator William Monning sponsored and introduced Senate Bill 766 (“SB 766”).<sup>30</sup> The bill is an act to add Article 1.5 (commencing with Section 1297.185) to Chapter 5 of Title 9.3 of Part 3 of the Code of Civil Procedure, relating to international commercial disputes.<sup>31</sup>

SB 766 would directly reverse *Birbrower* and welcome out-of-state and international parties to arbitrate in California without obtaining in-state representation.<sup>32</sup> In more exact terms, the bill would empower any “qualified attorney” to act in an international arbitration in California provided that the services rendered by the attorney have a sufficient nexus of relation to the lawyer’s home jurisdiction.<sup>33</sup> Alternatively, a “qualified attorney” could be one sufficiently associated with a California lawyer.<sup>34</sup>

To be considered a “qualified attorney,” SB 766 requires that the individual satisfy three conditions.<sup>35</sup> First, the individual must be a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent.<sup>36</sup> Second, the individual must be subject to effective regulation and

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *SB-766 International Commercial Arbitration: Representation*, History, CAL. LEGIS. INFO., [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201720180SB766](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB766) (last visited July 18, 2018).

31. *Senate Bill No. 766*, CAL. LEGIS. INFO. (July 18, 2018), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB766](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB766).

32. *Id.*

33. Greenberg Traurig LLP, *supra* note 8.

34. *Id.*

35. CAL. LEGIS. INFO., *supra* note 31.

36. *Id.*

discipline by a duly constituted professional body or public authority of that jurisdiction.<sup>37</sup> Third, and lastly, the individual must be in good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.

After establishment that one is a “qualified attorney,” the individual must demonstrate that the services rendered arise out of or are reasonably related to the attorney’s practice in a jurisdiction in which the attorney is admitted to practice.<sup>38</sup>

Demonstrating an intention to continue regulatory oversight, SB 766 does not usurp the California Bar’s ability to impose disciplinary measures against out-of-state attorneys.<sup>39</sup>

#### 4. Senate Bill 766’s Reception

Most commentators agree that SB 766 poses an effective compromise and will sufficiently address the disadvantageous environment created by *Birbrower*.<sup>40</sup> JAMS<sup>41</sup> president and CEO Chris Poole voiced his approval of SB 766 and argued its merits thoroughly on a blog post on July 5, 2018.<sup>42</sup> Among other things, Poole celebrated SB 766 claiming that it would recalibrate California as a leading market for international arbitration proceedings.<sup>43</sup>

Commentators are nearly unanimous in their conclusion that SB 766 will benefit California. Many are cheering the move to update California’s arbitration laws and bring the state up-to-speed with other arbitration-friendly jurisdictions, which have successfully courted an abundance of arbitrations.<sup>44</sup> There is also marked anticipation and optimism over the increase in the number of international businesses expected to seat arbitrations in California.<sup>45</sup>

There has been very little to no opposition lodged against the passage of SB 766. In fact, SB 766 passed the California Senate, Assembly, and all its respective committees without opposition whatsoever.<sup>46</sup>

To the excitement of all involved with the bill’s emergence, SB 766 has been enrolled and summarily submitted to Governor Brown on July 11, 2018.<sup>47</sup> The consensus strongly suggests that the bill will soon be signed into law.

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37. *Id.*

38. *Id.*

39. CAL. CIV. PROC. CODE § 1282.4(f) (West 2015).

40. Greenberg Traurig LLP, *supra* note 8.

41. JAMS, founded in 1979, is the largest alternative dispute resolution provider in the world.

42. Chris Poole, JAMS President and CEO’s Statement on the Passing of SB 766 re: International Arbitration in California, JAMS (July 5, 2018), <https://www.jamsadr.com/news/2018/chris-poole-jams-president-and-ceos-statement-on-the-passing-of-sb-766-in-california>.

43. *Id.*

44. KING & SPALDING, *supra* note 19.

45. *Id.*

46. *SB-766 International Commercial Arbitration: Representation*, Votes, CAL. LEGIS. INFO., [https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201720180SB766](https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB766) (last visited July 20, 2018).

47. *SB-766 International Commercial Arbitration: Representation*, Status, CAL. LEGIS. INFO., [https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201720180SB766](https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB766) (last visited July 23, 2018).

### 5. Conclusion

SB 766's anticipated passage heralds a conscious effort by California to create inroads with the international community and entice more foreign businesses to nominate the state as their seat.<sup>48</sup> The move is an exciting one and many commentators are optimistic about California's efforts to join the ranks of many other high-profile arbitration seats.

#### B. *Delaware Senate Bill 89: An Attempted Reaffirmation of American Ideals*

Bill Number:	Delaware Senate Bill 89
Summary:	The American Laws for American Courts bill is designed to preserve America's unique values of liberty, which do not exist in many foreign legal systems such as freedom of religion, speech, and the press in addition to rights to due process
Status:	Delaware Senate Bill 89 was submitted by Senator David Lawson twice before; this time, the bill was dismissed from committee and summarily withdrawn

#### 1. Introduction

The United States of America is the longest-standing constitutional republic in the world for manifold reasons but some of the most pertinent include its subscription to enlightened principles.<sup>49</sup> These "principles" as we can refer to them today were mere ideas that were intensely debated in pubs and town halls when America was little more than a loose coalition of British colonies.<sup>50</sup> Products of these debates were many of the rights later enshrined within the collective Charters of Freedom.<sup>51</sup>

By and large, those freedoms were revolutionary and far more dynamic than any offered to signees of the social contract at the time.<sup>52</sup> Due to the radical nature of the inalienable rights proposed, the contemporary wisdom suggested that the American experiment would fail and resemble little more than an abbreviated rendition of the flight of Icarus.<sup>53</sup> Despite discounted expectations of survival by the world, America, in large part due to its guarantees empowering her citizenry, prospered and excelled.

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48. KING & SPALDING, *supra* note 19.

49. *The Basis of the American Republic*, AM. HIST., <http://www.let.rug.nl/usa/outlines/government-1991/the-constitution-an-enduring-document/the-basis-of-the-american-republic.php> (last visited July 24, 2018).

50. *Id.*

51. *America's Founding Documents*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs> (last visited July 24, 2018).

52. AMERICAN HISTORY, *supra* note 49.

53. *Id.*

Many of the unique rights that Americans enjoy today are couched in the Constitution's Bill of Rights.<sup>54</sup> Freedom of the press, freedom of assembly, freedom of religion, and due process are all rights considered indispensable and fundamental to the ordered principles of liberty.<sup>55</sup>

However, as sharply as cultures and modes de vie vary across borders, so do the combinations of rights afforded to countries' respective populaces. This is a source for concern as globalization has gradually interwoven different nationalities, which subscribe to many variations of the "bag of rights," to the same societal cloth. While the interconnectedness provided by globalization yields profound benefits in the context of economic and scientific advancements, it has also agitated the problem of ideological friction.<sup>56</sup>

## 2. Brief History of the Worldly Dispute

The issue was the subject of much writing in the 19<sup>th</sup> century, and scholars such as Friedrich Karl von Savigny surged to prominence.<sup>57</sup> Principally, Savigny called for civilized nations to associate in one legal community and bind its members to certain rules concerning private international law.<sup>58</sup> Of critical importance, Savigny also highlighted the necessity to devise schematics for uniform governance of private international affairs irrespective of the state where the suit happens to be maintained.<sup>59</sup>

Continuing problems of disparate treatment of persons across borders in addition to accentuated deadliness of organized warfare catalyzed the adoption of Savigny's ideas, among others, resulting in the formation of the League of Nations.<sup>60</sup> Tragically, during the League's ineffective tenure, the nations of the world splintered, allying themselves to the mutually incompatible political institutions of fascism, communism, and liberal capitalism.<sup>61</sup> The result of this inconsistent alignment was World War II and all its associated horrors.<sup>62</sup> The United Nations (UN) was formed in the wake of the conflict assigned the mission to prevent any such existential struggle from happening again.<sup>63</sup>

Following the Nuremburg Trials, the UN General Assembly, in Savigny style, issued the Universal Declaration of Human Rights ("UDHR") in Paris on December 10, 1948.<sup>64</sup> The UDHR consisted of 30 articles all of which consecrate some personal right or liberty regardless of nationality or other discriminatory basis.<sup>65</sup>

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54. NATIONAL ARCHIVES, *supra* note 51.

55. *Id.*

56. *Id.*

57. J. Kusters, *Public Policy in Private International Law*, 29 YALE L.J. 745, 746 (1920).

58. FRIEDRICH CARL VON SAVIGNY & WILLIAM HOLLOWAY, *SYSTEM OF THE MODERN ROMAN LAW* 23-27 (1840).

59. *Id.*

60. *Id.*

61. See generally Jan-Werner Muller, *The Triumph of What (if Anything)? Rethinking Political Ideologies and Political Institutions in Twentieth-Century Europe*, 14 J. POL. IDEOLOGIES 211 (2009), <https://www.princeton.edu/~jmueller/JPI-Triumph-JWMueller.pdf>.

62. *Id.*

63. *Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/> (last visited July 24, 2018).

64. *Id.*

65. *Universal Declaration of Human Rights*, OHCHR.ORG, [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (last visited July 25, 2018).



Despite the good intentions, this declaration was considered mere lip service.<sup>66</sup> The Supreme Court of the United States agreed, holding that the declaration “does not of its own force impose obligations as a matter of international law.”<sup>67</sup>

Roughly seventy years later, on March 15, 2006, the international community, back from the drawing board, attempted a new avenue for the protection of international liberties by creating the Human Rights Council (“HRC”) through United Nations General Assembly resolution 60/251.<sup>68</sup> Among other things, the HRC is mandated with educating people on their rights, ensuring all people have the same rights, and investigating governments believed to have violated those rights.<sup>69</sup> The HRC accomplishes this through its Universal Periodic Review in which it analyzes human rights records of all 193 UN member states every four and a half years.<sup>70</sup>

Not long after its inception, the HRC’s efficacy and dedication to bias-free execution was called into question by a number of organizations and people.<sup>71</sup> Those doubts culminated to a critical mass when, citing a perceived bias against Israel and contemptible inclusion of Iran and Venezuela in the HRC, Nikki Haley, U.S. ambassador to the United Nations, announced the United States’ withdrawal from the council on June 18, 2018.<sup>72</sup> What will become of the HRC and the United Nations’ role in policing the international community in the context of individual rights is uncertain. What is certain, however, is that America’s withdrawal will diminish the effectiveness of the committee.

### 3. America’s Unilateral Efforts to Resolve Foreign Law Disparities

#### a. “Save Our State” Laws

America, in consistency with its emphasis on individualism and enthusiasm to experiment, has a history of attempting to solve this international, multilateral problem unilaterally. One of the first offered solutions was “Save Our State” (“SOS”) legislation which largely proclaimed to uphold the laws and constitution of the United States, but also functioned to the preclusion of foreign laws.<sup>73</sup> This legislation chiefly ordered relevant jurisdictions when adjudicating claims to “not look to the legal precepts of other nations or cultures.”<sup>74</sup>

The SOS laws, known as “foreign law bans” in some circles,<sup>75</sup> was an especially ham-fisted approach that functioned as the solution of few problems and the creator of many. Illustrating the intrinsic flaw of SOS laws is simple. Imagine

66. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

67. *Id.*

68. *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited July 24, 2018).

69. *Human Rights Council*, UNITED NATIONS HUM. RTS. 2, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/HRC\\_booklet\\_En.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/HRC_booklet_En.pdf) (last visited July 24, 2018).

70. *Id.*

71. Jessica Donati, *U.S. Withdrawing from U.N. Human Rights Council*, WALL ST. J., <https://www.wsj.com/articles/u-s-poised-to-withdraw-from-u-n-human-rights-council-1529430908> (last updated June 19, 2018).

72. *Id.*

73. Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219, 235 (2014).

74. *Id.*

75. *Id.* at 236.

that separate Belgian and American corporations do business with one another bound by countless contracts to execute various promises. Suppose the American business breaches the contract, and the Belgian company seeks enforcement of their covenants by petitioning an American court in a jurisdiction that has adopted an SOS law. The statute would prohibit the court from considering Belgian law in determining the enforceability of the Belgian judgment. This would be completely unworkable and would result in an effective cessation of international business relations. For this, and many other reasons<sup>76</sup> the SOS amendments never gained real traction.<sup>77</sup>

*b. “American Laws for American Courts”*

As demonstrated earlier, it is paramount to protect American citizens from injurious adjudication that results in the denunciation of fundamental rights. However, it is also of great importance to make sure that in such pursuits, American locales do not preclude or delegitimize foreign law in its essential functions thus destroying the feasibility of international cooperation. The American Laws for American Courts (“ALAC”) legislation (and progeny including Delaware Senate Bill 79 (“SB 79”)) offers itself as that solution.

The ALAC proposal would not completely cleave foreign law, but rather would execute a precise strike against specific unacceptable deprivations of rights while leaving the overarching legal structure intact. In exact terms, the ALAC effects the following:

[any] court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this State and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any law, legal code, or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions, including but not limited to due process, freedom of religion, speech, or press and any right of privacy or marriage as specifically defined by the constitution of this state.<sup>78</sup>

ALAC statutes permit foreign law to operate pursuant to foreign legislative intent and desire up to, but excluding, the point it deprives Americans of their fundamental rights. The statutes are also limited in application to private<sup>79</sup> individuals and withhold protection for a “corporation, partnership . . . or other legal entity that contracts to subject itself to foreign law in a jurisdiction other than this state or the United States.”<sup>80</sup> While the ALAC proposals have been cheered by some, they have also been decried by others.

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76. Volokh suggests that there would be additional problems in the context of evidence law, family law, and tort law.

77. Volokh, *supra* note 73.

78. AMERICAN LAWS FOR AMERICAN COURTS, *supra* note 54.

79. “Private” used in the sense of individual rights.

80. AMERICAN LAWS FOR AMERICAN COURTS, *supra* note 54.

*c. Ongoing Debate Over ALAC*

Criticism directed at ALAC can be sorted into two classes. The first class focuses on the ALAC proponents' stance against foreign, religious laws, primarily Sharia<sup>81</sup> law. Proponents of ALAC cite to specific fundamental rights and doctrines that Sharia law fails to recognize such as freedom of religion, freedom of marriage, and the separation of church and state.<sup>82</sup> Additionally, proponents cite one study which concluded that Sharia law was becoming increasingly influential in outcomes of decisions in American courts.<sup>83</sup>

Commentators promptly pounced and labelled ALAC anti Muslim since it intentionally, and sometimes explicitly, targets Sharia law.<sup>84</sup> While the language of ALAC and bills like SB 89 are facially neutral, it is currently argued that the laws target one religion and thereby violate the Establishment Clause.<sup>85</sup> While some of the denunciation under this class focuses on constitutional problems, most focuses on the detestable demonization of a religious minority.<sup>86</sup>

The second class of contention is more substantive. Simply, the argument is that the laws are unnecessary and redundant since the US Constitution already expressly binds courts to vacate laws and judgments that violate constitutional rights of Americans.<sup>87</sup> This camp does not find the proposals exactly harmful but also does not believe them to be particularly useful.<sup>88</sup>

The counterargument to the second camp is that ALAC and bills like SB 89 are necessary to reemphasize the importance of the Constitution and formally instruct courts what public policy is and thereby minimize erroneous rulings that violate constitutional rights.<sup>89</sup> Additionally, proponents argue that ALAC fits well within the legislation mold of the 2010 federal SPEECH Act, which prohibits enforcement of foreign libel judgments when foreign law condemns speech that would otherwise be protected on American soil.<sup>90</sup>

*4. Delaware Considers and Declines to Join the ALAC Coalition*

Considering all the above, Delaware contemplated joining the ranks of the ALAC coalition alongside Tennessee, Louisiana, Arizona, Kansas, South Dakota,

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81. Islamic code of law coming from a combination of sources including the Qur'an (the Muslim holy book), the *Hadith* (saying and conduct of the prophet Muhammad) and *fatwas* (the rulings of Islamic scholars). *Sharia*, BBC, [http://www.bbc.co.uk/religion/religions/islam/beliefs/sharia\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/beliefs/sharia_1.shtml) (last visited July 24, 2018).

82. AMERICAN LAW FOR AMERICAN COURTS, *supra* note 54.

83. *Shariah in American Courts: The Expanding IncurSION of Islamic Law in the U.S. Legal System*, CTR. SEC. POL'Y (Jan. 5, 2015), <https://www.centerforsecuritypolicy.org/2015/01/05/shariah-in-american-courts-the-expanding-incursion-of-islamic-law-in-the-u-s-legal-system/>.

84. Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states>.

85. *Establishment Clause*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/establishment\\_clause](https://www.law.cornell.edu/wex/establishment_clause) (last visited July 25, 2018).

86. Shanmugasundaram, *supra* note 84.

87. Volokh, *supra* note 73, at 243.

88. *Id.*

89. *Id.*

90. *Id.* at 238.

Alabama, and North Carolina.<sup>91</sup> That contemplation kicked off when SB 89 was introduced on May 22, 2017. Senator David Lawson was the primary sponsor of the bill and was joined by several other legislators of bipartisan affiliation.<sup>92</sup>

At the time of this writing, SB 89 is still technically being deliberated by the legislature, but has been voted out of the Committee on Judicial & Community Affairs in the Senate with five on its merits, which is effectively a death sentence for the bill.<sup>93</sup> Therefore, the likelihood that Delaware will enact SB 89, and thereby embrace the ALAC, is slim. Regardless, Senator Lawson may strike again as this is his third time introducing the exact legislation.<sup>94</sup>

Despite another strike out and SB 89's untimely demise, its reemergence speaks to the ancillary movement sweeping the nation to codify renewed vows of allegiance to the Constitution and a willingness to vacate foreign judgments which discount fundamental rights. With mankind becoming ever more closely associated through globalization's interweaving, we may continue to see state legislatures deliberate and implement ALAC proposals closely resembling Delaware's most recent legislative casualty.

### *C. Resolution of Disputes in Education: From Mending Educational Labor Relations to the Handling of Sexual Assault on College Campuses*

Bill Numbers:	Illinois Senate Bill 452; Maryland House Bill 1731; Maryland Senate Bill 639; Maryland House Bill 913; Maryland Senate Bill 607; Mississippi House Bill 454
Summary:	Provide for the use of alternative dispute resolution in various aspects and at differing levels of education
Status:	Illinois Senate Bill 452 sent to the governor Maryland House Bill 1731 referred to the House Rules and Executive Nominations Committee Maryland Senate Bill 639 passed into law Maryland House Bill 913 passed into law Maryland Senate Bill 607 passed into law Mississippi House Bill 454 died in committee

#### *1. Introduction*

Education is often viewed as one of the necessary cornerstones of achieving the American Dream. As such, education intersects with many political topics including social justice, labor and employment, and women's rights. This intersection often creates disputes between the desires of educators, parents, and legislators. Displeasure with student performance, inadequate school governance,

91. *Delaware Senate Bill 89*, LEGISCAN, <https://legiscan.com/DE/bill/SB89/2017> (last visited July 24, 2018).

92. *Id.*

93. *Id.*

94. Sarah Mueller, *State Sen. Lawson Argues Legislation on American Law Doesn't Target Muslims*, DEL. PUB. MEDIA (May 6, 2018), <http://delawarepublic.org/post/state-sen-lawson-argues-legislation-american-law-doesnt-target-muslims>.

and conflicting value sets lead to confrontations which are often brought into the judicial system.<sup>95</sup> Such disputes have involved a myriad of topics, from the inclusion of female students in athletics to the distribution of condoms in high schools.<sup>96</sup> Some have questioned the legitimacy of allowing the court system to influence education, with some worrying that the inclusion of judicial precedence will thwart the educational goals of schools.<sup>97</sup> This concern has lead legislators to attempt to confine such disputes to those who seem to know the issues best: the parents, educators, and students.

## 2. Broad Scope of Bills

While each bill relates to a different aspect of education, each seeks to establish a system in which disputes are adjudicated quickly and fairly. The scope of the bills demonstrates the flexibility with which alternative dispute resolution can be applied to various types of disputes within the educational system. The Illinois bill sought to amend an existing law which outlined policies and procedures for the adjudication of labor disputes in the educational field. The Maryland bills spanned a range of educational topics and applied alternative dispute resolution strategies to each. From peer mediation programs, disciplinary proceedings for public school personnel, and two bills regarding disciplinary procedures for sexual assault cases at institutions of higher education, the Maryland bills sought to make certain informal adjudicative proceedings commonly held within education. Finally, the Mississippi bill aimed to curb violence and bullying by creating an innovative student mediation program. Though addressing a variety of issues within education, each bill sought to simplify and streamline adjudicative procedures already in place in varying aspects of education.

## 3. Illinois Senate Bill 452

The Illinois Educational Labor Relations Act (“Act”) established the right of educational employees to organize and bargain effectively.<sup>98</sup> The Act defined unfair practices as any practice prohibited by Section 14 of the Act and enabled the resolution of unfair practice disputes.<sup>99</sup> To administer the Act, the Illinois Educational Labor Relations Board was established.<sup>100</sup> The Act also established the Illinois Educational Labor Mediation Roster, which is available to both the educational employer and to labor organizations for purposes of arbitration of grievances and mediation or arbitration of contract disputes.<sup>101</sup> If, after a reasonable period of negotiation and within 90 days of the scheduled start of the school year, either party can petition the Board to begin mediation.<sup>102</sup> The Board can, at its own

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95. Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99 (1996).

96. *Id.* at 110.

97. *Id.* at 111.

98. 115 ILL. COMP. STAT. 5/1 (2018).

99. *Id.* at 5/2.

100. *Id.*

101. *Id.* at 5/6.

102. *Id.* at 5/12.

discretion, motion for the parties mediation at this time.<sup>103</sup> If mediation was requested by the parties, the mediator conducts a fact-finding investigation and provides recommendations for the resolution of the dispute.<sup>104</sup> Mediation must be approved by the Board and conducted before a qualified, impartial mediator.<sup>105</sup> If the parties fail to reach an agreement within 45 days of the scheduled start of the school year and neither party requests mediation, the Illinois Education Labor Relations Board has authority to invoke mediation.<sup>106</sup>

Illinois Senate Bill 452 was introduced by Senator John Cullerton and Representative James Durkin on January 24, 2017.<sup>107</sup> The law passed both houses on May 31, 2018 and was sent to the governor on June 29, 2018 to be signed.<sup>108</sup> The bill amends the Illinois Educational Labor Relations Act.<sup>109</sup> The amendment makes a technical change concerning the application of the Open Meetings Act to collective bargaining negotiations and grievance arbitrations.<sup>110</sup>

#### 4. Maryland House Bill 1731

House Bill 1731 (“Bill”), an act concerning “Public Safety—Student Peer Mediation Program Fund—Establishment,” was introduced by Delegate Keith Haynes on February 19, 2018.<sup>111</sup> The Bill was read and referred to the House Rules and Executive Nominations Committee.<sup>112</sup> The Bill was introduced to establish the Student Peer Mediation Program Fund (“Fund”).<sup>113</sup> The Fund would provide grant assistance to schools and community-based organizations in the Baltimore City region to establish student peer mediation programs to reduce juvenile violence.<sup>114</sup> The Fund would be administered by the Executive Director of the Governor’s Office of Crime Control and Prevention.<sup>115</sup> The governor would be required to provide at least \$250,000 to the fund annually,<sup>116</sup> and the Executive Director would establish procedures for the grant application process.<sup>117</sup> Any school or community-based organization would be eligible to apply for grant assistance from the Fund.<sup>118</sup>

#### 5. Maryland Senate Bill 639

Senator Guy Guzzone and fifteen co-sponsors introduced an act concerning “Education—Public School Personne—Disciplinary Hearing Procedures” (“Bill”)

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103. *Id.*

104. 115 ILL. COMP. STAT. 5/12 (2018).

105. *Id.*

106. *Id.*

107. S.B. 452, 100th Leg., Reg. Sess. (Ill. 2018).

108. *Id.*

109. *Id.*

110. *Id.*

111. S.B. 1731, 438th Leg., Reg. Sess. (Md. 2018).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. S.B. 1731, 438th Leg., Reg. Sess. (Md. 2018).

118. *Id.*

on February 1, 2018.<sup>119</sup> The Bill was vetoed by the Governor on April 4, 2018.<sup>120</sup> The veto was overridden by a 32 to 14 vote in the Maryland Senate and an 89 to 49 vote in the Maryland House of Representatives on April 5, 2018.<sup>121</sup> The Bill will now become law on October 1, 2018.<sup>122</sup> The purpose of the Bill is to alter certain existing procedures for suspending or dismissing certain public school personnel.<sup>123</sup> On the recommendation of the county superintendent, a county school board can suspend a teacher, principal, supervisor, assistant superintendent, or other educational professional for misconduct, immorality, insubordination, incompetency, or willful neglect of educational duties.<sup>124</sup> The Bill authorizes certain public school personnel to request a hearing before the county board or seek arbitration under certain circumstances.<sup>125</sup> If the individual's request does not specify that the hearing be before an arbitrator, the request is assumed to be for a hearing before the county school board.<sup>126</sup> The Bill specifies the proper procedures for arbitration and assigns responsibility to the individual for 50% of the cost and expenses of arbitration and 50% to the county board.<sup>127</sup> If the parties are unable to mutually agree upon an arbitrator, the county board is allowed to request from the American Arbitration Association a list of arbitrators available to hear such a dispute and make a decision in a timely manner.<sup>128</sup> The bill provides that the arbitrator's decision and award is final and binding upon the parties, but may be subject to review by a circuit court.<sup>129</sup> If judicial review of the arbitrator's decision is requested, the review will be governed by the Maryland Uniform Arbitration Act.<sup>130</sup>

### 6. Maryland House Bill 913

House Bill 913 ("Bill 913"), an act concerning "Higher Education—Sexual Assault Policy—Disciplinary Proceedings Provisions," was introduced on February 5, 2018, by Delegate Aruna Miller and eighteen co-sponsors.<sup>131</sup> Bill 913 was moderately partisan, with the majority of support coming from Democratic legislators.<sup>132</sup> The purpose of Bill 913 is to regulate the adjudication of sexual assault disciplinary proceedings on college campuses.<sup>133</sup> Bill 913 requires the governing body of each institution of higher education, on or before August 1, 2019, to adopt and submit to the Maryland Higher Education Commission a revised, written policy on sexual assault that included certain disciplinary proceedings provisions and the proper procedures for reporting an incident of sexual assault.<sup>134</sup>

119. S.B. 639, 438th Leg., Reg. Sess. (Md. 2018).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. S.B. 639, 438th Leg., Reg. Sess. (Md. 2018).

125. *Id.*

126. *Id.*

127. S.B. 639, 438th Leg., Reg. Sess. (Md. 2018).

128. *Id.*

129. *Id.*

130. *Id.*

131. H.R. 913, 438th Leg., Reg. Sess. (Md. 2018).

132. *Id.*

133. *Id.*

134. *Id.*

The disciplinary proceedings provisions required under Bill 913 authorize an institution of higher education to use mediation or other informal mechanisms for the resolution of a complaint relating to the institution's sexual assault policy if: (1) the complaining student requests an informal mechanism; (2) all parties to the complaint and the institution agree to the use of the informal mechanism; (3) the institution participates in the informal mechanism by providing trained staff; (4) any party may end the informal mechanism at any time in favor of a formal resolution proceeding; and (5) the alleged misconduct does not involve sexual assault or sexual coercion.<sup>135</sup> The commission must, in consultation with state and local bar associations and legal services providers, develop a list of attorneys and legal services programs willing to represent students on pro bono or at fees equivalent to those under a legal services program for representation in either a formal or informal dispute resolution setting.<sup>136</sup> However, a student may choose to hire their own attorney independent from this list or choose not to have an attorney for the proceedings.<sup>137</sup> The disciplinary proceedings provisions must also include a description of the rights of certain students, such as the student's right to the assistance of an attorney, the legal service organizations and referral services available to the student, and the student's right to have a personal support of the student's choice at any hearing, meeting, or interview during the disciplinary proceedings.<sup>138</sup>

### 7. *Maryland Senate Bill 607*

Senator Joan Conway, along with sixteen co-sponsors, introduced the "Higher Education—Sexual Assault Policy—Disciplinary Proceedings Provisions" bill ("Bill") on January 21, 2018.<sup>139</sup> The Bill was approved by the governor and enacted on May 5, 2018.<sup>140</sup> The Bill is now part of the state code under chapter 394.<sup>141</sup> Due to its strong Democratic support, the Bill was considered partisan.<sup>142</sup> The purpose of the Bill is to require the governing body of each institution of higher education to adopt and submit to the Maryland Higher Education Commission a written, revised policy on sexual assault that includes certain disciplinary proceedings provisions.<sup>143</sup> The Bill would also require the disciplinary proceedings provisions to include a description of a students' rights, regarding the disciplinary proceedings provisions, and specifies that an institution of higher education may not discourage a student from retaining a private attorney.<sup>144</sup> The sexual assault policy required under the Bill must conform with § 485(f) of the Higher Education Act of 1965, Title IX of the Education Amendments of 1972, and any additional requirements outlined within the Bill.<sup>145</sup> The format of disciplinary proceedings conducted in accordance with the Bill must be agreed upon by all parties, including the accused

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135. *Id.*

136. *Id.*

137. H.R. 913, 438th Leg., Reg. Sess. (Md. 2018).

138. *Id.*

139. H.R. 607, 438th Leg., Reg. Sess. (Md. 2018).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. H.R. 607, 438th Leg., Reg. Sess. (Md. 2018).



student and the institution of higher education.<sup>146</sup> The law will take effect on October 1, 2018.<sup>147</sup>

### 8. Mississippi House Bill 454

House Bill 454 (“Bill 454”), an “Act to Amend Section 37-11-54, Mississippi Code of 1972,” was introduced on January 5, 2018 by Representative Omeria Scott.<sup>148</sup> Bill 454 was referred to the Education Committee, where it died on January 30, 2018.<sup>149</sup> If Bill 454 had been successful, it would have taken effect July 1, 2018.<sup>150</sup> The purpose of Bill 454 was to require the State Board of Education to develop curriculum and implement a program of conflict resolution and peer mediation to be used by local school districts.<sup>151</sup> The curriculum developed for use must be age and grade appropriate and incorporated into the instructional curriculum of each school district.<sup>152</sup> Local school boards would be required to incorporate evidence-based practices and positive behavioral intervention supports into individual school district policies and Codes of Conduct.<sup>153</sup> In developing the curriculum, the State Board of Education would include at least one model that included instruction and guidance for peer mediation and another model that provides instruction and guidance for teachings concerning the integration of conflict resolution and mediation into the existing classroom curriculum.<sup>154</sup> The purpose of such programs is to reduce violence and bullying in educational settings and to improve failing school districts.<sup>155</sup> The program would provide school administrators with an alternative to handling student disciplinary matters and curb suspension and expulsion of students.<sup>156</sup> During participation in such programs, a student would be required to receive youth peer counseling deemed appropriate by the school district.<sup>157</sup>

### 9. Conclusion

Each bill varies in scope and topic, seeking to preserve a fundamental value of the American educational system. Protecting the labor rights of teachers, ensuring the right to a fair and impartial hearing to a student accused of sexual assault, and attempting to eradicate oppressive disciplinary structures are all valid goals which can be achieved with the inclusion of alternative dispute resolution. Dragging cases through the court system can be time-consuming and fraught with emotion. By confiding cases to resolution between the parties involved, alternative dispute resolution enables educators, parents, and students to remain active participants in

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146. *Id.*

147. *Id.*

148. H.R. 454, 2018 Leg., Reg. Sess. (Miss. 2018).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. H.R. 454, 2018 Leg., Reg. Sess. (Miss. 2018).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

adjudicative procedures that directly impact the education system in which they are a part.

*D. Ending Confidentiality in Sexual Assault and Harassment Arbitration*

**Bill Numbers:** Missouri House Bill 2552; New York Assembly Bill 8981; New York Assembly Bill 9547; New York Assembly Bill 10632; New York Senate Bill 6972; New York Senate Bill 7848; New Jersey Senate Bill 3581.

**Summary:** Reports of widespread sexual misconduct in the workplace have led legislatures to consider measures for ensuring victims' access to justice. Since many employment contracts require claims to be arbitrated confidentially, legislatures are considering removing the confidentiality requirement or exempting sexual misconduct claims from arbitration.

**Status:** Missouri House Bill 2552 passed and sent to the Governor.  
New York Assembly Bill 8981 referred to Governmental Operations.  
New York Assembly Bill 10632 referred to committee.  
New York Senate Bill 6972 referred to committee  
New York Senate Bill 7848 passed the senate  
New Jersey Senate Bill 3581 died in committee

*1. Introduction*

The recent disclosure of widespread sexual harassment of women by the news media and by victims using the #MeToo<sup>158</sup> moniker on social media has increased public awareness and discussion of this issue. In August 2017, singer Taylor Swift brought suit in a Colorado District Court against a radio disc jockey who groped her during a public appearance.<sup>159</sup> She is one of the few fortunate victims. Swift had access to the courts and had the resources to resist settling, and she won her

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158. This term was coined by Tarana Burke, activist and founder of Just Be, Inc., a non-profit organization supporting "victims of sexual misconduct." Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME, <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements> (last updated Mar. 22, 2018).

159. Lavanya Ramanathan, *On the Stand in Her Groping Case, Taylor Swift was Every Woman. And That's What's So Sad.*, WASH. POST (Aug. 11, 2017), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/08/11/on-the-stand-in-her-groping-case-taylor-swift-was-everywoman-and-thats-whats-so-sad/?noredirect=on&utm\\_term=.063d22ab0e30](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/08/11/on-the-stand-in-her-groping-case-taylor-swift-was-everywoman-and-thats-whats-so-sad/?noredirect=on&utm_term=.063d22ab0e30).

claim.<sup>160</sup> Typically, when sexual harassment occurs on the job, victims are often constrained from filing suit by employment contracts providing for mandatory arbitration of all employment disputes.<sup>161</sup> The details of the arbitration claim and its outcome are “generally cloistered,” owing to the imposition of confidentiality requirements on the parties.<sup>162</sup>

The effect of mandatory arbitration and confidentiality on the vindication of sexual harassment claims is exemplified by last year’s revelation of persistent sexual harassment at Fox News by executives and on-camera personalities.<sup>163</sup> The company had “settled case after case, generally hiding the harassment problem behind confidential settlements and arbitration.”<sup>164</sup> When reporter Andrea Tantaros declined a settlement offer of more than a million dollars, and instead filed a complaint in New York state court, Fox News was able to “compel confidential arbitration.”<sup>165</sup> Only by finding a loophole in her mandatory confidential arbitration clause was Gretchen Carlson, a Fox News anchor at the time, able to sue Roger Ailes, the former head of Fox, in court and bring the issue into the light of day.<sup>166</sup>

In response to the discovery of the breadth of injustice that goes unchallenged under forced arbitration clauses in employment contracts, several state legislatures have introduced bills seeking to change the system. Proposals include: (1) excluding sexual assault and harassment claims from the confidentiality requirements of arbitration; (2) excluding such claims from arbitration all together; and (3) prohibiting the state from doing business with contractors whose employment contracts require the confidential arbitration of sexual misconduct claims.

## 2. Mandatory Arbitration

Although “[e]mployees who sign arbitration agreements are usually forced to do so,” such contracts are enforceable under the Federal Arbitration Act (“FAA”).<sup>167</sup> In fact, Supreme Court cases which allow arbitrators to make preliminary determinations concerning the enforceability of such agreements further solidify employers’ prerogative to limit employees’ remedy to that of arbitration.<sup>168</sup> Still, there is evidence that “repeat-players” manipulate the private arbitration process to their advantage by erecting hurdles to accessibility and by embracing and perpetuating the confidential nature of arbitration.<sup>169</sup> For example, the agreements create a “de facto bar to any relief” by requiring employees to bear

160. Andrew Flanagan, *Taylor Swift Wins Sexual Assault Lawsuit Against Former Radio Host*, NAT’L PUB. RADIO (Aug. 14, 2017), <https://www.npr.org/sections/therecord/2017/08/14/543473684/taylor-swift-wins-sexual-assault-lawsuit-against-former-radio-host>.

161. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

162. Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 606-07 (2018).

163. Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN. ST. L. REV. 463 (2018).

164. *Id.* at 467.

165. *Id.* at 472.

166. *Id.* at 509.

167. *Id.* at 507.

168. *Id.*

169. Resnik, *supra* note 162, at 607.

the cost of the proceeding, at a rate many cannot afford.<sup>170</sup> The Supreme Court's recent decision, *Epic Systems Corp. v. Lewis*, affirming companies' right to insert class arbitration waivers into these agreements forecloses plaintiffs' option of making arbitration more affordable by banding together and apportioning arbitration costs.<sup>171</sup> Tellingly, "amidst tens of millions of consumers and employees" subject to mandatory arbitration clauses, "almost none file arbitration claims."<sup>172</sup> And, according to a 2016 study of cases arbitrated by the American Arbitration Association ("AAA"), only 18% of plaintiffs in the 6,000 cases examined prevailed when they did so.<sup>173</sup>

With the deck stacked against them, "one-shot"<sup>174</sup> players have no incentive to arbitrate. And if they do arbitrate, the process is kept confidential, as required by clauses in their employment contract and in the current general practice of arbitration.<sup>175</sup> Under these contracts, they may be prohibited from "discuss[ing] either processes or outcomes" involved.<sup>176</sup> Although confidentiality is not an inherent characteristic of arbitration, the practice of requiring confidentiality has evolved out of the generous leeway given to arbitrating entities under the FAA to define the terms of their contracts.<sup>177</sup> Initially confidentiality mutually benefitted arbitrating companies by protecting their public reputations, today, confidentiality is used to prevent "similarly-situated [one-shot]" plaintiffs from "know[ing] the harms alleged, the positions taken, or the remedies accorded" others.<sup>178</sup> The AAA, having played a key role in arbitration since 1925, supports confidentiality, and requires confidentiality by its members in its ethical standards.<sup>179</sup> The courts likewise have consistently upheld private providers' mandate for keeping arbitration "bilateral and confidential,"<sup>180</sup> noting that "limits on confidentiality would undermine the 'character of arbitration itself.'"<sup>181</sup>

### 3. The Bills

#### a. Missouri House Bill 2552

Missouri House Bill 2552 was introduced on February 22, 2018 by Rep. Kevin Corlew (R), adding § 435.352 to RSMo Chapter 435, amended by the Special Committee on Small Business as follows:

Any clause in a predispute arbitration agreement between an employer and an at-will employee that requires arbitration proceedings, or the results thereof, to be confidential and nondisclosable shall not be enforceable as to claims of sexual harassment, sexual assault, human trafficking, or a felony or misdemeanor offense

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170. Nunez, *supra* note 163, at 508.

171. *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1622-23 (2018).

172. Resnik, *supra* note 162, at 609-10.

173. Nunez, *supra* note 163, at 508.

174. Resnik, *supra* note 162, at 607.

175. *Id.* at 609-10.

176. *Id.*

177. *Id.* at 641.

178. *Id.* at 643.

179. *Id.* at 641.

180. Resnik, *supra* note 162, at 629.

181. *Id.* at 643 (quoting *Guyden v. Aetna, Inc.*, 544 F.3d 376, 384-85 (2d Cir. 2008)).

under Chapter 566, or claims of discrimination or harassment based upon any protected status under federal or state law.<sup>182</sup>

Proponents of the bill intend it to protect “victims of sexual harassment and related claims and prevent wrongdoers from hiding illegal conduct behind closed arbitration proceedings.”<sup>183</sup>

#### b. New York Assembly Bill 8981

New York Assembly Bill 8981 adds § 170-c to its executive law, providing that “neither the state nor any state agency . . . nor the legislative and judicial branches of government, nor any fund of any of the foregoing, or any officer of any of the foregoing, shall contract or renew a contract for the supply of goods, services, or construction with any overseas contractor,” unless the contractor and his subcontractors and franchisors agree not to use employment contracts requiring mandatory binding arbitration of disputes involving sexual assaults.<sup>184</sup>

The bill was introduced by JoAnne Simon (D) on January 9, 2018 in response to reports of sexual assaults perpetrated against overseas employees of American defense contractors.<sup>185</sup> A memorandum in support of this legislation states that these employees “cannot bring charges in the country where the crime was committed and binding arbitration clauses often bar them from using courts in the U.S.”<sup>186</sup> The bill would provide a remedy for victims like KBR employee Jamie Leigh Jones, who was brutally raped on the job in Iraq and returned home to the U.S. to find that her employment contract required her to resolve her claim through arbitration “run by KBR.”<sup>187</sup> She spent several years, beginning in 2005, suing for the right to bring her claim in court and, after prevailing on the procedural front, continues to litigate the substantive matter today.<sup>188</sup>

#### c. New York Assembly Bill 9547

New York Assembly Bill 9547 prohibits the state from investing retirement and social security funds in “stocks, securities or other obligations of any institution

182. *Missouri Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/?pdmfid=1000516&crd=ae98cb91-7754-4bf2-8655-22cfe75b0413&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5S0K-1FY0-02HP-H0SX-00000-00&pddocid=urn%3AcontentItem%3A5S0K-1FY0-02HP-H0SX-00000-00&pdcontentcomponentid=148780&pdteaserkey=sr1&pditab=allpods&ecomp=Lfmfk&earg=sr1&prid=0a7cc316-ca87-4df8-be7d-3d5514083cb5> (last visited May 25, 2018).

183. *HCS HB 2552—Arbitration Agreements*, HOUSE.MO.GOV, <https://www.house.mo.gov/billtracking/bills181/sumpdf/HB2552C.pdf> (last visited Nov. 9, 2018).

184. *New York Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=bc61627e-d3a9-4ce8-9102-1f4350837e69&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RCH-WDF0-02N4-N44C-00000-00&pdcontentcomponentid=11943&action=linkdoc&ecomp=53qvk&prid=534b7697-797b-496d-a037-f8635dac9935> (last visited May 25, 2018).

185. *2017 Legis. Bill Hist. NY A.B. 8981*, LEXISNEXIS (Jan. 10, 2018), <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=19715b78-f55c-44d9-aa80-250ad2ba2284&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RCR-JWG0-00GJ-33D9-00000->

186. *Id.*

187. *Id.*

188. *Id.*

or company” that requires its employees to “resolve through arbitration any claim . . . arising out of sexual assault or harassment . . . and/or . . . agree[] to non-disclosure of any resulting settlements.”<sup>189</sup>

Matthew Titone (D) introduced the bill on January 23, 2018, citing the “Me too” movement as a signal to legislatures to “take sexual harassment seriously” and prevent “repeat offenders” from “continuing on with their lives and jobs with little to no legal ramifications.”<sup>190</sup>

#### d. New York Assembly Bill 10632

New York Assembly Bill 10632 adds Subdivision 10 to § 1692 of the vehicle and traffic law to read, “No [transportation network company] user agreement shall contain a mandatory arbitration clause for certain offenses including . . . sexual offenses pursuant to Article one hundred thirty of the penal law.”<sup>191</sup>

The bill was introduced by Assembly member Jaime R. Williams (D) on May 9, 2018, to address the increasing number of mobile app user agreements requiring consumers to forfeit their “right to use the court system and their Constitutional right to due process.”<sup>192</sup> The Memorandum in Support of Legislation states that sexual assault is “among the most serious problems facing users,” think apps such as Uber and Lyft, and that it is unconstitutional to arbitrate criminal cases.<sup>193</sup>

#### e. New York Senate Bill 6972

New York Senate Bill 6972 provides in § 398-F (D)(2) that “[n]o written contract . . . to which an employer is a party, shall contain a mandatory arbitration clause relating to unlawful discriminatory practices based on sexual harassment.”<sup>194</sup>

189. *New York Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=8cfd93ba-a25b-4b4d-9053-82fc498870e5&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RGH-6YV0-02N4-N4PB-00000-00&pdcontentcomponentid=11943&action=linkdoc&ecomp=53qvk&prid=081151dc-7f74-4767-acad-6894396702c5> (last visited May 25, 2018).

190. *2017 Legis. Bill Hist. A.B. 9547*, LEXISNEXIS (Jan. 23, 2018), <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=d97d09f9-338a-42b0-b969-bdafc4f57893&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RGH-5C30-00GJ-30GM-00000-00&pdcontentcomponentid=303448&action=linkdoc&ecomp=53qvk&prid=8cfd93ba-a25b-4b4d-9053-82fc498870e5>.

191. *New York Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=78e85ab9-201b-431d-b298-2c7530bcb9da&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5S94-0FB0-02N4-N41V-00000-00&pdcontentcomponentid=11943&action=linkdoc&ecomp=53qvk&prid=edb62d88-3889-41bc-b833-b981502af0f7> (last visited May 25, 2018).

192. *2017 Legis. Bill Hist. NY A.B. 10632*, LEXISNEXIS (May 10, 2018), <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=9d4f6345-cd00-462b-bf3e-ffc1cc417762&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5S99-VN30-00GJ-32CR-00000-00&pdcontentcomponentid=303448&action=linkdoc&ecomp=53qvk&prid=78e85ab9-201b-431d-b298-2c7530bcb9da>.

193. *Id.*

194. *New York Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=9786e51d-2bac-43a6-b286-2156ed7b39b9&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem>

Responding to the recent revelation of sexual harassment “by high profile public figures . . . in varied employment settings,” Senator Catharine Young (R) introduced this bill on December 15, 2017.<sup>195</sup> The bill eliminates confidentiality in any settlement related to sexual harassment claims in order to prevent offenders from continuing “patterns” of sexual harassment, particularly in the workplace.<sup>196</sup> For the same reason, it bans employers from requiring mandatory arbitration of sexual harassment complaints.<sup>197</sup>

*f. New York Senate Bill 7848*

New York Senate Bill 7848, introduced March 4, 2018 by Senator Catharine Young (R) as amended, states that “[n]o written contract [for government procurement] . . . entered into [with state contractors] . . . shall contain” a mandatory arbitration clause for resolving allegations of sexual harassment.<sup>198</sup>

The purpose of the bill is to “prevent sexual harassment in the workplace, ensure accountability, and combat the culture of silence that faces victims.”<sup>199</sup> Proponents cite a 2016 United States Equal Opportunity Employment Opportunity Commission study finding that 25%-85% of women in the workplace report having been sexually harassed.<sup>200</sup>

*g. New Jersey Senate Bill 3581*

New Jersey Senate Bill 3581§ 1(a) provides that “[a] provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of . . . harassment shall be deemed against public policy and unenforceable,” and under § 2 that “[a] provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a

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%3A5R6V-4780-02N4-N391-00000-00&pdcontentcomponentid=11943&action=linkdoc&ecomp=53qvk&prid=f4ab492a-bb09-4ba2-b603-29fb14adf907 (last visited May 25, 2018).

195. *2017 Legis. Bill Hist. NY S.B. 6972*, LEXISNEXIS (JAN. 8, 2018), <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=5d4ae6fb-8238-4ce0-8312-c547d12e4b54&pdlinktype=Document&pdcontentfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RC9-JFS0-00GJ-31VV-00000-00&pdcontentcomponentid=303448&action=linkdoc&ecomp=53qvk&prid=9786e51d-2bac-43a6-b286-2156ed7b39b9>.

196. *Id.*

197. *Id.*

198. *New York Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/?pdmfid=1000516&crd=0d002e5b-f2ef-4061-9ebc-c563a9c48ef8&pdcontentfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RV3-XDX0-02N4-N1VM-00000-00&pdcontentcomponentid=11943&pdteaserkey=sr0&pditab=allpods&ecomp=Lfmfk&earg=sr0&prid=7ffc237f-c708-47b1-9738-d6dc3f584ab1> (last visited May 25, 2018).

199. *2017 Legis. Bill Hist. NY S.B. 7848*, LEXISNEXIS (Mar. 5, 2018), <https://advance.lexis.com/document/?pdmfid=1000516&crd=0d002e5b-f2ef-4061-9ebc-c563a9c48ef8&pdcontentfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5RV3-XDX0-02N4-N1VM-00000-00&pdcontentcomponentid=11943&pdteaserkey=sr0&pditab=allpods&ecomp=Lfmfk&earg=sr0&prid=7ffc237f-c708-47b1-9738-d6dc3f584ab1>.

200. *Id.*

claim of . . . harassment shall be deemed against public policy and unenforceable.”<sup>201</sup>

The bill was introduced on December 4, 2017, by Senator Loretta Weinberg (D) but failed in committee.<sup>202</sup> It would have banned mandatory arbitration of sexual harassment claims and the usage of confidentiality or non-disclosure provisions to frustrate these claims in employment contracts.

#### 4. *Observations*

To unwind the harm perpetuated by secrecy and silence surrounding sexual assault and harassment claims, legislators are principally taking one of three approaches: (1) prohibiting employers from keeping arbitration of these claims confidential, (2) banning mandatory arbitration of these claims in employment and consumer contracts, and/or (3) refusing to contract with or invest in companies that require their employees to arbitrate these claims. The imbalance of power between employers and employees suggests that employees may not have a voice in abdicating their right to seek redress in the courts. Too many times, to get the job, employees know they must acquiesce to terms they might otherwise reject. Because arbitration is often either unaffordable or futile, some individual employers carry out unfair or illegal labor practices unchecked. And while it is unjust that employees subject to these conditions cannot seek recompense in the courts, they do have the option to resign and find a more hospitable work environment.

On the other hand, it is increasingly clear that there is an epidemic of sexual harassment and assault in the workplace making it less feasible for employees who resign to find a safe work environment. Media accounts of systemic sexual harassment demonstrate that the process for preventing and addressing sexual assault and harassment claims is deeply flawed.

#### 5. *Conclusion*

The bills listed above attempt to limit companies from using arbitration as a shield against accountability for sexual misconduct in the workplace. On the surface, it appears that stripping arbitration of its secrecy is an effective means of doing so. But without additional legislative action to ensure the accessibility of arbitration, claims will be lost, and the issue of confidentiality made immaterial. In the absence of such reform, the most promising remedial measures consist of both a blanket prohibition of mandatory arbitration of sexual misconduct claims in employment contracts, and a state policy of investing only in companies that exclude such claims from their employment arbitration agreements.

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201. *New Jersey Bill Tracker*, LEXISNEXIS, <https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crd=180bc29a-54e8-4a8d-befc-140eed0527f3&pdlinktype=Document&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5R42-H0J0-01HC-X1WV-00000-00&pdcontentcomponentid=7499&action=linkdoc&ecomp=53qvk&prid=7227d3a9-b368-447f-9c70-be983d14022a> (last visited May 25, 2018).

202. *Id.*



*E. Alternative Dispute Resolution Arises in Educational Disputes*

Bill Numbers: Vermont House Bill 897, otherwise known as Act 173;  
Utah Code 30-3-10.9

Summary: Vermont House Bill 897 enacted federal special education standards into the state code; Utah Code 30-3-10.9 extended educational dispute resolution for parents

Status: Enacted

*1. Introduction*

As the standards for special education students in America rise, the need to handle the resulting disputes expands. Special education disputes are a common, yet emotional, process for all parties involved. Such disputes can result in a split between the family and the school district; a split that can potentially leave negative consequences on the student. In 1975, Congress, realizing the personal nature and prevalence of special education issues, passed what would become the Individuals with Disabilities Education Act (“IDEA”).<sup>203</sup> IDEA offers states federal funds to assist in educating children with disabilities.<sup>204</sup> This Act also ensures the child’s parents the right to make use of mediation for resolving these disputes.<sup>205</sup> This alternative dispute resolution process for special education claims solves thousands of disputes each year without having to pursue further litigation.<sup>206</sup> However, in light of the recent Supreme Court decision *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, scholars predict that the Court’s new and more demanding standard of what a child’s educational goals must be could potentially change the role of mediation in special education disputes.<sup>207</sup>

This potential role change has taken shape in the form of several legislative initiatives throughout multiple state houses. This section will address legislation pertaining to mediation in special education seen in Utah and Vermont. Additionally, this section will analyze the potential impact this new legislation could have on the special education mediation process. Finally, this section will address the potential new *Endrew* standard has on special education disputes and legislation.

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203. 20 U.S.C. § 1400 (2010).

204. *See id.*; *see also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295 (2006).

205. 20 U.S.C. § 1415(e) (2004).

206. Carolyn Thompson, *Following Supreme Court Ruling, More Special Education Fights Seen Coming*, CHI. DAILY L. BULL. (May 10, 2017), <http://www.chicagolawbulletin.com/Archives/2017/05/10/Special-ed-funding-5-10-17>; *see also* Grant Simon, “Hardly Be Said to Offer An Education at All”: *Endrew* and its Impact on Special Education Mediation, 2018 J. DISP. RESOL. 133 (2018).

207. *See* Simon, *supra* note 206.

## 2. Bills

Utah Code 30-3-10.9 provides dispute resolution options for a child's education plan.<sup>208</sup> This bill was passed by both the Utah House of Representatives and Utah Senate.<sup>209</sup> It became effective May 8, 2018. This bill extends the right of dispute resolution beyond issues between the child and the school; the right for educational dispute mediation now covers disputes between parents.<sup>210</sup>

In federal legislation, both parents are part of a child's "IEP Team" (which includes teachers, school officials, and the child's parents).<sup>211</sup> If an issue arises between the parents and the rest of the IEP team, federal law mandates the availability of mediation.<sup>212</sup> However, with Utah Code 30-3-10.9, this right to mediation now extends to disputes between parents.<sup>213</sup> Utah Code 30-3-10.9 specifically provides that a "process for resolving [educational] disputes shall be provided unless precluded or limited by statute. A dispute resolution process may include counseling, mediation or arbitration by a specified individual or agency, or court action."<sup>214</sup> By extending the right to dispute resolution for a child's education to disputes between parents, Utah law is far more generous than IDEA or the *Endrew* guarantee.<sup>215</sup>

Utah is not the only state to change its educational mediation and dispute resolution processes in the wake of *Endrew*. Vermont passed House Bill 897, otherwise known as Act 173.<sup>216</sup> Act 173 was first introduced in the Vermont House of Representatives on February 23, 2018.<sup>217</sup> It passed both the Vermont House and Senate on May 9, 2018 and was signed into law by the Governor on May 25, 2018.<sup>218</sup>

Act 173 originated when, in 2016, the Vermont General Assembly directed the Agency of Education to "contract with a consulting firm to review current practices and recommend best practices for the delivery of special education services in school districts."<sup>219</sup> Following this review, Vermont passed Act 173 to extensively rework how special education services were conducted.<sup>220</sup> Act 173 provides that the State of Vermont is "committing to participate in dispute resolution as provided under federal and State law."<sup>221</sup> Unlike the Utah statute that expanded rights in a post-*Endrew* world, Act 173 specifically intended to make Vermont procedures compliant with existing standards.<sup>222</sup> After *Endrew* raised the standard for special

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208. UTAH CODE ANN. § 30-3-10.9 (West 2018).

209. *Id.*

210. *Id.*

211. 20 U.S.C. § 1414(d)(1)(B) (2015).

212. 20 U.S.C. § 1415(e) (2004).

213. UTAH CODE ANN. § 30-3-10.9 (West 2018).

214. *Id.*

215. See 20 U.S.C. § 1400 (2010); see also *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006); *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

216. H. 897 (Act 173), VT. GEN. ASSEMB., <https://legislature.vermont.gov/bill/status/2018/H.897> (last visited Nov. 9, 2018).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. VT. GEN. ASSEMB., *supra* note 216.

222. *Id.*

education benefits, Vermont passed legislation to comply with existing federal law.<sup>223</sup>

Other states also passed laws that clarified dispute resolution procedures for educational disputes. For example, Tennessee passed a law that clarified educators cannot be forced to be witnesses in alternative dispute resolution proceedings.<sup>224</sup> Virginia also passed a law that allows for mediation for disputes between public state universities.<sup>225</sup>

### 3. Potential Impact of Legislation

#### a. States are Recognizing the Effectiveness of Mediation

When Congress revised IDEA in 1997, it required that mediation be available as a choice whenever a due process hearing from a third party is requested.<sup>226</sup> There are several reasons for Congress's mediation requirement.<sup>227</sup> First, studies showed that mediation could resolve IDEA disputes more quickly and cheaply than due process hearings.<sup>228</sup> Second, due to its informal nature, mediation appeared to offer greater opportunities for participation by parents, guardians, and school officials.<sup>229</sup> This continues IDEA's emphasis on collaboration for the betterment of the child's education.<sup>230</sup> Third, research showed that parties were more likely to accept and implement agreements reached in mediation.<sup>231</sup> Finally, and perhaps most importantly, mediation appeared to allow all parties to openly discuss their concerns and interests, potentially laying the groundwork for more effective future relationships.<sup>232</sup> By expanding the right to mediation for special education disputes, Utah and Vermont legislatures appear to recognize these benefits as well.

Participants of mediation for special education service also have expressed satisfaction with mandated mediation. For example, in 1997, Minnesota saw a high satisfaction rate among mediation participants, with ninety-four percent saying they would use the process again and ninety-six percent saying they would recommend mediation to others.<sup>233</sup> Even as the actual success rate of the mediation process dropped over ten percent in subsequent years, the satisfaction rates among participants have remained consistent.<sup>234</sup> Mediation allows both parties to be

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223. *Id.*

224. S.B. 1942, 110th Leg., Reg. Sess. (Tenn. 2017).

225. H.B. 4006, Reg. Sess. (W. Va. 2018).

226. Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 205 (2003) (citing 20 U.S.C. § 1415(e) (2004)).

227. *Id.*

228. *Id.* (citing Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 45-46 (1999)).

229. D'Alo, *supra* note 226, at 201 (citing Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 47 (1999)).

230. *Id.* at 204.

231. *Id.* (citing Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 239 (1981)).

232. *Id.* at 204 (citing Steven S. Goldberg & Dixie Snow Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703, 705-06 (1995)).

233. James R. Mortenson, *Why Should We Mediate Special Education Disputes?*, LDONLINE (1998), <http://www.ldonline.org/article/6302/>.

234. *Id.*

satisfied with a result while avoiding costly litigation.<sup>235</sup> Utah and Vermont’s mediation focused legislation could help produce more results satisfactory to all parties.

*b. The Impact of Endrew*

As previously mentioned, this legislation was passed in light of the most impactful special education Supreme Court case in decades.<sup>236</sup> To briefly summarize *Endrew*, Petitioner Endrew F. (“Endrew”) was a child with autism enrolled in respondent Douglas County Colorado School District (“School District”) from preschool through fourth grade.<sup>237</sup> By the time Endrew reached the fourth grade, his parents believed that his academic progress had stalled.<sup>238</sup> However, despite Endrew’s parents concern about his progress stalling, Endrew’s Individualized Education Program “IEP” remained largely unchanged by carrying over the same basic goals and objectives from one year to the next.<sup>239</sup> School District staff indicated that these goals were being carried over because Endrew was failing to make meaningful progress toward these goals.<sup>240</sup> When the School District proposed a fifth grade IEP that still failed to adjust Endrew’s goals, Endrew’s parents removed him from public school and enrolled him in a specialized private school for children with autism.<sup>241</sup> At this school, Endrew made significant educational progress rapidly.<sup>242</sup> Endrew’s parents considered this plan as inadequate as the original IEP, and, pursuant to statute, sought reimbursement for his private school tuition by filing an IDEA complaint with the Colorado Department of Education.<sup>243</sup>

Following an Administrative Law Judge’s (“ALJ”) ruling for the school, the district court, agreed with the ALJ that Endrew had not been denied a free and appropriate public education.<sup>244</sup> However, while affirming the decision, the district court acknowledged that Endrew’s performance under past IEPs “did not reveal immense educational growth” but that, regardless, the School District still met its legal burden of providing FAPE for Endrew because the IEP objectives at least showed “minimal progress.”<sup>245</sup> Because Endrew’s previous IEPs had enabled him to make at least minimal progress, the court reasoned that Endrew’s latest IEP was reasonably calculated to do the same thing.<sup>246</sup> In the federal district court’s view, that was all what the United States Supreme Court precedent and FAPE required.<sup>247</sup>

Following the District Court’s decision to affirm the ALJ’s ruling, Endrew’s parents appealed to the Court of Appeals for the Tenth Circuit.<sup>248</sup> On review, the

235. *Id.*

236. Christina A. Samuels, *A Year Out, Endrew F. Ruling Leaves Imprint*, EDUC. WK. (Apr. 27, 2018), <https://www.edweek.org/ew/articles/2018/05/02/a-year-ago-the-supreme-court-raised.html>.

237. *Endrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 991 (2017)

238. *Id.*

239. *Id.*

240. *Id.* at 996.

241. *Id.*

242. *Id.* at 997.

243. *Endrew*, 137 S. Ct. at 997.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

court affirmed the lower court, reciting language from Supreme Court precedent stating that all the School District only had to offer Endrew was “some educational benefit.”<sup>249</sup> The appellate court noted that it had long interpreted this language to mean that a child’s IEP is adequate and provides FAPE if the IEP is calculated to confer an “educational benefit [that is] merely . . . more than *de minimis*.”<sup>250</sup> Applying this low standard, the Tenth Circuit affirmed the “*de minimis*” standard “absent a superseding decision by the Supreme Court.”<sup>251</sup> Following the Tenth Circuit’s decision, the Supreme Court granted certiorari and overturned the lower courts. The Court held that a “*de minimis*” educational benefit is not enough to provide a child with FAPE; rather, school districts must offer children an IEP that is “reasonably calculated to enable each child to make progress appropriate for that child’s circumstances.”<sup>252</sup>

The impact of *Endrew* a year later is still being debated by scholars. Some scholars have suggested that *Endrew* may create more of a need for mediation due to the Supreme Court establishing a higher standard of education required for special educations.<sup>253</sup> As noted during oral arguments, the *Endrew* decision has the potential to impact over eight million special education IEPs.<sup>254</sup> Furthermore, while special education disputes rarely find their way to courts, the Supreme Court recognized that this ruling had the potential to massively increase special education litigation.<sup>255</sup> By passing legislation that directly pertains to special education mediation, Utah and Vermont could help alleviate this potential case load issue.

The prevalence of special education mediation itself had been declining prior to the *Endrew* decision. For example, the rate of special education mediation has decreased from 2004 to 2012 as due process hearings dropped from under 7,000 to slightly above 2,000 nationwide.<sup>256</sup> When such mediations do take place, they often successfully resolve the parties’ concerns. For example, mediations between 2004 to 2012, almost seventy percent of mediations resulted in settlements.<sup>257</sup> Facing a potential caseload increase, Utah and Vermont have taken steps to mitigate special education disputes reaching courts.

However, despite installing a higher educational standard for special education in *Endrew*, school districts have consistently succeeded in disputes when the case does appear before courts. For example, since *Endrew*, around ninety percent of those kinds of disputes between school districts and parents were decided in favor of districts.<sup>258</sup> Perry Zirkel, a professor emeritus of education and law at Lehigh University who has been tracking the impact of the case, noted the following since *Endrew* was decided:

Forty-nine cases were decided by a judge who cited *Endrew* and applied its standard that a special education program must be “reasonably calculated to enable

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249. *Endrew*, 137 S. Ct. at 997.

250. *Id.*

251. *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1340 (10th Cir. 2015).

252. *Id.* at 1341.

253. *Id.* at 1339.

254. Transcript of Oral Argument at 60, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827).

255. *Id.* at 59-60.

256. Katherine McMurtrey, *The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes*, 2016 J. DISP. RESOL. 1, 3 (2016).

257. *Id.* at 5.

258. Samuels, *supra* note 236.

a child to make progress in light of the child’s circumstances.” Of those, forty-four saw no change in the decision, and in 37 of those cases, the decision was for the school district. In two cases, the case was sent back for further evaluation. In three cases, the decision was reversed. But on one occasion, a decision that had been in favor of the parents was reversed, with the district prevailing under the *Endrew* standard.<sup>259</sup>

Therefore, while Utah and Vermont have taken steps to better resolve special education disputes in light of the new Supreme Court standard, it may not have been necessary as courts have consistently been ruling for school districts in cases where mediation was not successfully.

Additionally, *Endrew* has caused an impact on federal legislation in addition to states such as Utah and Vermont. “Special education advocates, and U.S. Secretary of Education Betsy DeVos, said the case would prompt higher standards for students with disabilities. “Tolerating low expectations for children with disabilities must end. Challenging children with disabilities empowers them, and doing so gives them the hope of living successful, independent lives,” DeVos wrote in a Commentary for Education Week.<sup>260</sup> In response, the Department of Education revised certain guidance in order to comply with *Endrew*.<sup>261</sup> Specifically, the Department of Education has reissued guidance directly noting the impact of the *Endrew* decision and addressing the new FAPE standard.<sup>262</sup> This required the Department of Education to explain how FAPE is currently defined, clarifies the standard for determining FAPE and addresses how this ruling can support children with disabilities.<sup>263</sup> Since state legislatures tend to follow Vermont and codified the standards required in federal law, these new guidelines are critical to the development of new special education litigation.

#### 4. Conclusion

When the Supreme Court articulates new standards for existing statutes, legislatures must adjust. Following *Endrew*, the most important Supreme Court special education decision in decades, the Utah and Vermont legislation followed federal trends and passed two different statutes that reinforced the right of mediation in special education disputes. In Utah, this new legislation even extends mediation rights beyond what *Endrew* required. Special education mediation is an important tool in reducing court cases and increasing satisfaction. However, the impact of *Endrew* and need for new legislation might be exaggerated as cases that do go to court generally find for the school even when considering the new, higher standard. Regardless, *Endrew* appears to have greatly impacted state legislation for the 2017-2018 session.

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259. *Id.*

260. *Id.*

261. *Id.*

262. *Department Issues New Q&A on Free Appropriate Public Education Following Supreme Court Decision*, U.S. DEP’T OF EDUC. (Dec. 7, 2017), <https://www.ed.gov/news/press-releases/department-issues-new-qa-free-appropriate-public-education-following-supreme-court-decision>.

263. *Id.*

## II. HIGHLIGHTS

### A. California Senate Bill 766

This bill is an act to add Article 1.5 to Chapter 5 of Title 9.3 of Part 3 of the California Code of Civil Procedure, relating to international commercial disputes.<sup>264</sup> The bill's lead author is democrat Senator William Monning.<sup>265</sup> The bill at this time has passed the Senate and the Assembly Committee on Appropriations.<sup>266</sup> The bill stands good odds at being enacted.

Considering the bill itself, the Assembly Committee on Judiciary recently reviewed the bill and provided a clear, explanatory synopsis of its features, the surrounding context, and the key issue of whether out-of-state attorneys and foreign attorneys that meet certain conditions should be permitted to provide legal services in an international commercial arbitration in California. That synopsis is laid out below<sup>267</sup>:

This measure seeks to clarify the statutes regarding legal representation in international commercial arbitration. International commercial arbitration is a form of arbitration that, typically, involves two large multinational corporations in business-related disputes. Existing law provides that a party in an international commercial arbitration may be represented by any person of that party's choosing whether or not that person is licensed by the State Bar of California. However, existing case law has denied an attorney the ability to recover attorney's fees for cases in which a party was represented by out-of-state counsel in arbitration, unless the underlying statute expressly permits such representation. Accordingly, existing case law essentially forces parties to arbitrate disputes with only attorneys licensed by the State Bar of California.

Proponents argue that limiting representation in international commercial arbitration to attorneys licensed by the State Bar of California has essentially removed California from the legal venues that parties consider using when negotiating international commercial arbitration provisions. Accordingly, in 2017, the Supreme Court of California convened an International Commercial Arbitration Working Group in order to study the issue and propose solutions to boost the rate of international commercial arbitration being conducted in California. The working group suggested that California adopt the American Bar Association's model rules for international commercial arbitration which has successfully been adopted by several other states, including New York and Florida. The model rules, as proposed to be codified by this bill, permit out-of-state and foreign attorneys who are in good standing with their local licensing body to appear in a California-based international commercial arbitration for the limited purpose of representing a party to that proceeding. This bill would require all attorneys appearing in California to submit to the disciplinary oversight of the State Bar of California, limit international commercial arbitration's scope in California to ensure consumers and employees

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264. CAL. LEGIS. INFO., *Senate Bill No. 766*, *supra* note 31.

265. *California Senate Bill 766*, LEGISCAN, <https://legiscan.com/CA/bill/SB766/2017> (last visited Nov. 9, 2018).

266. *Id.*

267. *Proposed Consent: Hearing on SB 766 Before the Assembly Committee on Judiciary*, 2017-18 Gen. Assemb., Reg. Sess. (Ca. 2018) (statement of Mark Stone, Chair of Assembly Committee on Judiciary).

cannot be subjected to this form of arbitration, and enable the State Bar of California to pass information regarding discipline or complaints against an attorney to that attorney's licensing body.

This bill is supported by several attorney organizations including the California Lawyers Association and the Conference of California Bar Associations, as well as several arbitration SB 766 Page 2 practitioner organizations. The bill received overwhelming bi-partisan support in the California Senate and has no known opposition

### B. Delaware Senate Bill 89

This bill (An Act to Amend Title 10 of the Delaware Code Relating to Judicial Procedures) was introduced in the Delaware legislature to limit and void decisions made by any court, arbitrator, tribunal, or administrative agency ruling or decision that implements foreign law which operates to the deprivation of a fundamental constitutional right of one of the affected parties.<sup>268</sup>

The Act is modeled after certain predecessor laws that have passed in Tennessee, Louisiana, Arizona, Kansas, South Dakota, Alabama, and North Carolina.<sup>269</sup> According to one summary, the bill is proposed to clarify public policy and protect American citizens.<sup>270</sup> Additionally, the summary languishes the status quo that exists because “state legislatures have generally not been explicit about what their public policy is relative to foreign laws, the courts and the parties litigating in these courts are left to their own devices.”<sup>271</sup>

This bill garnered bipartisan sponsorship from eighteen different legislators (seven senators and eleven representatives).<sup>272</sup> However, the history indicates that this bill swiftly floundered after being reported out of the Judicial & Community Affairs Committee on June 14, 2017.<sup>273</sup>

Regardless of this bill's untimely demise, I think it speaks to the ancillary movement by other states to enact laws that limit or void the application of foreign laws in international dispute resolutions. This has been an evolving landscape for some time (some research reveals considerable controversy as American Progress has labelled the trend a “foreign law ban”)<sup>274</sup> and I think the recent happenings in Delaware would make for an interesting topic for the legislative update.

### C. Maryland Senate Bill 607

The “Higher Education—Sexual Assault Policy—Disciplinary Proceedings Provisions,” bill 018 by Senator Joan Conway [D].<sup>275</sup> First, the bill passed the state

268. S.B. 89, 149th Gen. Assemb., Reg. Sess. (Del. 2018).

269. *Delaware Senate Bill 89*, LEGISCAN, <https://legiscan.com/DE/bill/SB89/2017> (last visited Nov. 19, 2018).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. Faiza Patel, Matthew Duss & Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems*, CTR. FOR AM. PROGRESS (May 2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/05/ForeignLawBans.pdf>.

275. *Maryland Senate Bill 607*, LEGISCAN, <https://legiscan.com/MD/bill/SB607/2018> (last visited Jun. 27, 2018).



senate with forty-seven votes on March 17, 2018.<sup>276</sup> Then, the bill passed the state house with 130 votes on March 29, 2018.<sup>277</sup> Next, the third reading of the bill was passed by the state senate on April 4, 2018.<sup>278</sup> The bill was approved by the governor and enacted on May 5, 2018.<sup>279</sup> The bill is now a part of the state code under chapter 394.<sup>280</sup> The bill had sixteen co-sponsors and was considered strongly partisan.<sup>281</sup> The purpose of this bill is to require the governing body of each institution of higher education to adopt and submit to the Maryland Higher Education Commission a revised written policy on sexual assault that includes certain disciplinary proceedings provisions.<sup>282</sup> The bill would also require the disciplinary proceedings provisions to include a description of a students' rights regarding the provisions, and specifies that an institution may not discourage a student from retaining a private attorney.<sup>283</sup>

#### *D. Louisiana House Bill 369*

The "Provides for Mediation of the Settlement of Out-of-Network Health Benefit claims Involving Balance Billing," bill was introduced on March 1, 2018.<sup>284</sup> The bill was read by title and referred to the Committee on Insurance on March 12, 2018.<sup>285</sup> The bill failed and is not likely to become legislation.<sup>286</sup> The bill was introduced by Representative Kirk Talbot [R].<sup>287</sup> The bill had no co-sponsors.<sup>288</sup> The purpose of the bill was to provide for mediation of the settlement of out-of-network health benefit claims which involve balance billing.<sup>289</sup> The bill would also require mediation in certain circumstances, require notice of certain information, provide for mediation procedures, encourage confidentiality, and authorize continued mediation of disputes.<sup>290</sup> The bill was meant to encourage settlement of health claim disputes through alternative dispute resolution, with both parties splitting the mediator fees.<sup>291</sup>

#### *E. New Hampshire Senate Bill 496*

New Hampshire Bill 496 was introduced by state Senator Sharon M. Carson (R) on December 20, 2017, and co-sponsored by Senator Bette R. Lasky (D);

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276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Maryland Senate Bill 607*, LEGISCAN, <https://legiscan.com/MD/bill/SB607/2018> (last visited Jun. 27, 2018).

282. *Id.*

283. *Id.*

284. *Louisiana House Bill 369*, LEGISCAN, <https://legiscan.com/LA/text/HB369/2018> (last visited Jun. 27, 2018).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Louisiana House Bill 369*, LEGISCAN, <https://legiscan.com/LA/text/HB369/2018> (last visited Jun. 27, 2018).

291. *Id.*

Senator Kevin A. Avard (R); Representative Robert Renny Cushing (D); Representative Mariellen J. MacKay (R); Representative David A. Welch (R); Representative Janet Wall (D); and Representative Kimberly A. Rice (R).<sup>292</sup> The Senate passed the bill on February 1, 2018 and the House on April 19, 2018.<sup>293</sup> The Governor has not yet taken any action to ratify or veto the legislation.

Under this bill, if a party files a motion for contempt of court for nonpayment of child support, and the amount overdue is equivalent to eight weeks of payments, the court can schedule mediation of the matter between the parties.<sup>294</sup> The mediation will take place within thirty days of filing the motion, unless a hearing is scheduled before that time.<sup>295</sup> Modification of support orders will not be subject to mediation, and mediation will not be ordered without the parties' consent if there is a finding of prior domestic violence.<sup>296</sup>

Although there are no statistics concerning the number of cases involving payment in arrears for an amount equal to eight weeks of child support, the Judicial Branch does not anticipate that the bill will add new cases to its caseload.<sup>297</sup>

#### F. New Jersey Senate Bill 978

New Jersey bill 978, the "New Jersey All-Payer Claims Database Act," was introduced to the Senate by Joseph F. Vitale and Troy Singleton on January 16, 2018.<sup>298</sup> At that time it was referred to the Senate Commerce Committee, and is still in committee.<sup>299</sup> The bill establishes a state database for information related to health insurance claims, and mandates binding arbitration to resolve disputes between payors and providers who render medically necessary services to patients out-of-network.<sup>300</sup> Under § 13(e), if parties fail to negotiate a mutually satisfactory payment amount within fourteen days after billing, either party may initiate arbitration proceedings.<sup>301</sup> Before commencing arbitration, a party must notify the opposing party of its intent to arbitrate.<sup>302</sup> It must then file a request for arbitration with the Department of Banking and Insurance.<sup>303</sup> Both parties must agree on the selection of an arbitrator from a list provided by the Department, of trained arbitrators belonging to the American Arbitration Association or the American Health Lawyers Association.<sup>304</sup> A binding written decision will be rendered within thirty days after the request is filed. Fees and expenses will be paid by the parties as determined in the decision.<sup>305</sup>

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292. *SB 496: New Hampshire Senate Bill*, OPEN: STATES, <https://openstates.org/nh/bills/2018/SB496/#votes> (last visited May 22, 2018).

293. *Id.*

294. S.B. 496, 2018 Gen. Assemb., Reg. Sess. (N.H. 2018) (enacted).

295. *Id.*

296. *Id.*

297. *New Hampshire Senate Bill 496*, LEGISCAN, <https://legiscan.com/NH/text/SB496/id/1784522> (last visited May 22, 2018).

298. S.B. 978, 218th Leg., Reg. Sess. (N.J. 2018).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at § 13(e)(1).

303. S.B. 978, 218th Leg., Reg. Sess. (N.J. 2018).

304. *Id.*

305. *Id.*

*G. Wisconsin House Bill 977*

Assembly Bill No. 977 was introduced by Representatives Taylor, Sinicki, Hebl, Subeck, Berceau, Zamarripa, Crowley, Ohnstad, Hesselbein, Billings, Spreitzer, Pope, Wachs, Barca, Shankland, Anderson, Sargent, Brostoff and Riemer while being cosponsored by Senators Risser, Ringhand and Vinehout.<sup>306</sup> This bill was introduced on February 26, 2018.<sup>307</sup> It was subsequently referred to the Committee on Labor.<sup>308</sup> It failed to pass through the committee.<sup>309</sup> This statute was meant to significantly limit the ability for public employees outside of safety officers to collectively negotiate a contract.<sup>310</sup> This bill was proposed prior to the Supreme Court's decision in *Janus v. AFSCME*.<sup>311</sup> Following this decision, the importance of the bill has diminished as public employees can no longer be forced to pay fees to public unions for collective bargaining purposes.<sup>312</sup> This statute was also proposed amid consistent litigation over previous Wisconsin statutes that established Wisconsin as a "right to work state."<sup>313</sup>

*H. Washington Senate Bill 6407*

Washington Senate Bill 6407 was sponsored by Senator Darneille.<sup>314</sup> The bill's companion in the House is HB 2795.<sup>315</sup> The bill was introduced on January 16, 2018.<sup>316</sup> Senate Bill 6407 passed the Washington Senate and Washington House of Representatives.<sup>317</sup> No member of either chamber of the state legislature voted against the bill.<sup>318</sup> It has since been signed into law by the Governor and became effective on June 7, 2018.<sup>319</sup> The bill sets up dispute resolution possibilities such as mediation in order to reunite abused children to their families.<sup>320</sup> It also sets out potential options courts may consider when conducting dispute resolution for these families.<sup>321</sup>

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306. See Assem. B. 977, 103rd Leg., Reg. Sess. (Wis. 2017); see also *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Janus*, 138 S. Ct. at 2463.

313. See, e.g., Associated Press, *Unions Sue to Overturn Wisconsin Collective Bargaining Law*, CHI. TRIB. (Feb. 26, 2018), <http://www.chicagotribune.com/news/nationworld/midwest/ct-unions-wisconsin-collective-bargaining-20180226-story.html>.

314. See *SB 6407 - 2017-18*, WASH. ST. LEG., <http://apps2.leg.wa.gov/billsummary?BillNumber=6407&Year=2018&BillNumber=6407&Year=2018> (last updated July 11, 2018).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. S.B. 6407, 65th Leg., Reg. Sess. (Wash. 2018).

321. *Id.*

## III. CATALOG OF STATE LEGISLATION

## ALABAMA

Bills Enacted: 2018 H.B. 457 (pharmacies are subject to audits but auditors must set up system of appeals and, if it fails to resolve the conflict, the dispute is punted to mediation); 2018 H.B. 131 (allows an entity audited by the state government to dispute results or report of the recovery audit and agree to arbitrate the dispute).

Bills Pending: 2018 S.B. 17 (Allows a trustee and the co-trustee to request a matter be resolved by arbitration in the event that a trustee or co-trustee shall be unable to agree either on the amount of income or principal, or income and principal, to be used or the benefits to be provided, then either the trustee or the co-trustee may request that the matter be resolved by arbitration).

## ALASKA

Bills Enacted: None.

Bills Pending: 2018 H.B.136 (allows controversies between manufacturers and new motor vehicle dealers, upon agreement, to submit the controversy to arbitration); 2018 H.B. 403 (allows Life and Health Insurance Guaranty Associations to settle disputes in amount of net balance due in arbitration).

## ARIZONA

Bills Enacted: 2018 S.B. 1064 (allows dispute resolution mechanisms for enrollees of health plans who are subject to “surprise out-of-network bills”); 2018 H.B. 2262 (allows condominium unit owners to submit disputes to arbitration if independent appraisals of unit values differ to a high enough degree from the condo association’s appraisal); 2018 H.B. 2601 (allows issuers in compliance with Arizona securities laws of cryptocurrencies to settle any controversy or claim arising from the initial coin offering to arbitration).

Bills Pending: None.

## ARKANSAS

Bills Enacted: 2018 S.B. 112 (appropriates money to the Dispute Resolution Commission and Alternative Dispute Resolution Commission for operating expenses, fees, and services of the Administrative Office of the Courts).

Bills Pending: None.

CALIFORNIA

Bills Enacted: 2018 S.B. 33 (allows a court to vacate an arbitration agreement if between a financial institution/customer and fraudulently created); 2018 S.B. 112 (changes the arbitration selection process); 2018 A.B. 119 (requires the cost of arbitration to be shares by both parties, except in cases in which a public employer objects to the procedure and requests an alternative arbitrator).

Bills Pending: 2018 S.B. 76 (allows the Excluded Employee Arbitration Act to permit an employee organization that represents an excluded employee who has filed certain grievances with the Department of Human Resources to request arbitration of the grievance); 2018 A.B. 1017 (imposes requirements intrinsic to private employment disputes (compulsory arbitration) to public employment); 2018 S.B. 766 (allows individuals not admitted to practice law but are subject to effective regulation/discipline to provide legal services in an international commercial arbitration); 2018 A.B. 2107 (allows the board to consider and make nonbinding findings regarding specified unlawful acts by a manufacturer or dealers that are relevant to a protest before the board).

COLORADO

Bills Enacted: 2018 S.B. 18-027 (allows the Nurse Licensure Compact to include a dispute resolution mechanism); 2018 S.B. 18-180 (allows trustees to include mediation, arbitration or other forms of ADR to resolve disputes concerning interpretation and administration of a trust); 2018 H.B. 18-1233 (Amends 5-15-116 (Consumer's right to file action in court or arbitrate disputes) by making an arbitrator's decision irrelevant to the validity of obligations and debts owed).

Bills Pending: None.

CONNECTICUT

Bills Enacted: 2018 H.B. 5258 (adopts the Revised Uniform Arbitration Act); 2018 H.B. 5396 (allows victims of fraud by financial institutions to bring actions despite the presence of a signed arbitration agreement).

Bills Pending: None.

DELAWARE

Bills Enacted: 2018 S.B. 59 (allows the state to submit issues that cannot be resolved by the enhanced multistate nurse licensure compact to an arbitration panel that will make a final, binding decision).

Bills Pending: None.

## FLORIDA

Bills Enacted: 2018 H.B. 841 (allows homeowner association board members removed to challenge removal and recover attorney's fees and costs if an arbitrator determines removal was wrongful); 2018 H.B. 465 (amends section 627.7015, that authorizes insures to participated in mediations requested by third parties).

Bills Pending: None.

## GEORGIA

Bills Enacted: 2018 H.B. 374 (provides arbitration procedures for taxpayers that are challenging the valuations of property for ad valorem taxes).

Bills Pending: 2018 H.B. 847 (allows the Psychology Interjurisdictional Compact Commission and its powers and conditions to provide for oversight, dispute resolution, and enforcement by members of the compact); 2018 S.B. 325 (allows the Georgia Composite Medical board to utilized dispute resolution mechanisms); 2018 H.B. 678 (provides arbitration procedures for protesting health insurance bill amounts); 2018 S.B. 8 (allows arbitration of billing and reimbursement of health insurance surprise bills for consumer protection).

## HAWAII

Bills Enacted: 2018 H.B. 1235 (allows the use of arbitration to resolve family law disputes and child custody disputes); 2018 S.B. 315 (clarifies provisions required in disclosures by arbitrators); 2018 H.B. 1847 (expands the scope of the condominium education trust fund to cover voluntary binding arbitration between interested parties and amends the conditions that mandate mediation); 2018 H.B. 1873 (provides at the request of any defendant at the time an action is brought, the court shall order mandatory mediation of any quiet title action involving Keleana Land).

Bills Pending: 2018 H.B. 1652 (establishes a trust fund to administer fees and costs associated with the state certified arbitration program); 2018 H.B. 860 (establishes procedures by which condo owners may submit dispute fees, fines to the mediation process prior to payment);

## IDAHO

Bills Enacted: None.

Bills Pending: None.

## ILLINOIS

Bills Enacted: None.

Bills Pending: None.

INDIANA

Bills Enacted: None.

Bills Pending: None.

IOWA

Bills Enacted: None.

Bills Pending: None.

KANSAS

Bills Enacted: 2018 H.B. 2571 (allows for the enacting the Uniform Arbitration Act of 2000 (Revised Uniform Arbitration Act) and amending the Kansas uniform trust code concerning mediation or arbitration provisions in trust instruments).

Bills Pending: None.

KENTUCKY

Bills Enacted: None.

Bills Pending: None.

LOUISIANA

Bills Enacted: None.

Bills Pending: None.

MAINE

Bills Enacted: 2018 H.B. 1018 (allows mediation of property tax appeals).

Bills Pending: 2018 L.R. 2588 (establishes a study commission to examine the implied warranty laws and the arbitration process for laws).

MARYLAND

Bills Enacted: 2018 H.B. 278 (allows parties to utilize mediator and arbitrator panels); 2018 S.B. 639 (allows public school personal to request a hearing before the county board of arbitration); 2018 H.B. 913 (requires the governing body of each higher education institution to adopt and submit a revised written policy on

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sexual assault that includes disciplinary proceeding provisions); 2018 S.B. 607 (allows parties to use mediation in higher education sexual assault proceedings).

Bills Pending: None.

#### MASSACHUSETTS

Bills Enacted: None.

Bills Pending: None.

#### MICHIGAN

Bills Enacted: None.

Bills Pending: None.

#### MINNESOTA

Bills Enacted: None.

Bills Pending: None.

#### MISSISSIPPI

Bills Enacted: None.

Bills Pending: None.

#### MISSOURI

Bills Enacted: 2018 H.B. 2552 (prohibits any clause in a pre-dispute arbitration agreement between an employer and at-will employee cannot require arbitration proceedings or outcomes of sexual harassment, sexual assault, human trafficking, or discrimination claims based on a protected status to be confidential).

Bills Pending: None.

#### MONTANA

Bills Enacted: None.

Bills Pending: None.



NEBRASKA

Bills Enacted: 2018 L.B. 903 (allows an individual chosen by long-term care facility resident or state to act as ombudsman supporting the resident in making decisions regarding medical , social or other personal matters); L.B. 742 (amends the Franchise Practices Act to provide that an arbitrator or court can change or enforce terms of any non-compete agreement by a franchisor headquartered as part of a preliminary order for relief).

Bills Pending: None.

NEVADA

Bills Enacted: None.

Bills Pending: None.

NEW HAMPSHIRE

Bills Enacted: None.

Bills Pending: 2018 S.B. 496 (allows a court to order mediation in cases where the child support payments are in arrears for amounts equal to or greater than what is owed for 8 weeks); 2018 S.B. 151 (prohibits nursing home facilities from requiring patients to sign mandatory arbitration agreements).

NEW JERSEY

Bills Enacted: 2018 A.B. 3824 (established the Office of the Ombudsman for Individuals with Intellectual or Developmental Disabilities and their Families whose duties include providing information and communication strategies for resolving disagreements with various agencies and ensuring a fair process in resolving disputes around support services); 2018 S.B. 1219 (requires person suspecting abuse of an institutionalized elderly person to report suspicions to police and an ombudsman).

Bills Pending: None.

NEW MEXICO

Bills Enacted: None.

Bills Pending: None.

NEW YORK

Bills Enacted: 2018 A.B. 8154 (allows arbitration and mediation proceedings on the weekend if the parties and tribunal consent).

Bills Pending: 2018 S.B. 4537 (allows planning boards to use voluntary nonbinding mediation in making land use decisions).

#### NORTH CAROLINA

Bills Enacted: None.

Bills Pending: None.

#### NORTH DAKOTA

Bills Enacted: None.

Bills Pending: None.

#### OHIO

Bills Enacted: None.

Bills Pending: None.

#### OKLAHOMA

Bills Enacted: None.

Bills Pending: None.

#### OREGON

Bills Enacted: 2018 S.B. 59 (allows Long-term Care Ombudsman to petition for protective order for person in a facility, remove fiduciary power, approve or disapprove a fiduciary's actions, and otherwise protect the person or estate of person in a facility).

Bills Pending: None.

#### PENNSYLVANIA

Bills Enacted: 47 Pa. Stat. Ann. § 2-211 (specifies that Liquor control board enforcement officers don't face compulsory arbitration of labor disputes involving policemen and firemen), 24 P.S. § 11-1125.1 (recognizes role of arbitration when public teachers face suspension), 53 Pa.C.S.A. § 5607 (the property owner shall have the right to request the appointment of professional consultant to serve as arbitrator in land disputes with municipalities), 73 P.S. § 183 (demolition crews have the right for alternative dispute resolution for pay disputes), 24 P.S. § 20-2004-C (colleges must create a dispute resolution board and policies for issues with student transfer credit).

Bills Pending: None.

#### RHODE ISLAND

Bills Enacted: None.

Bills Pending: 2017 Rhode Island Senate Bill No. 2077 (the out-of-network professional shall not bill the patient while the claim is in negotiation, dispute, mediation or arbitration), 2017 Rhode Island Senate Bill No. 2471 (Prevents retaliation from employers for using ADR methods), 2017 Rhode Island Senate Bill No. 2421 (the court may, in its discretion, order mediation to be conducted between the parties and the ward prior to the hearing concerning elder abuse), 2017 Rhode Island Senate Bill No. 2786 (A pharmacy has the right to request mediation by a private mediator, agreed upon by the pharmacy and the pharmacy benefits manager).

#### SOUTH CAROLINA

Bills Enacted: 2018 SC REG TEXT 469083 (NS) (Medicaid disputes may include arbitration issues).

Bills Pending: 2018 SC REG TEXT 466815 (NS) (state insurance regulation does not recognize out of jurisdiction arbitration), 2018 SC REG TEXT 434430 (NS) (insurance analysts that engage in voluntary complaint mediation of complaints are not subject to the jurisdiction of any responsible agency), 2018 SC REG TEXT 440447 (NS) (Mediation is available to workers' compensation issues).

#### SOUTH DAKOTA

Bills Enacted: 2018 South Dakota Senate Bill No. 33 (removes mediation options from damages from oil and gas development and disputes over drainage of water), 2018 South Dakota House Bill No. 1204 (clarifies power of attorney includes ability to agree to alternative dispute resolution), 2018 South Dakota House Bill No. 1036 (establishes mandatory mediation with the director of the agricultural mediation program for farm creditor disputes), 2018 South Dakota Senate Bill No. 167 (allows for mediation in child custody cases).

Bills Pending: None.

#### TENNESSEE

Bills Enacted: 2018 Tennessee Laws Pub. Ch. 1061 (H.B. 2644) (divorcing parents are entitled to mediation), 2018 Tennessee Laws Pub. Ch. 747 (S.B. 2549) (educators cannot be forced to be witnesses in alternative dispute resolution proceedings), 2018 Tennessee Laws Pub. Ch. 714 (S.B. 1757) (mediation is available for chief examiner and family members regarding relative's cause of

death), 2017 Tennessee Senate Bill No. 1942 (LPP disputes are to be solved with alternative dispute resolution methods).

Bills Pending: None.

## TEXAS

Bills Enacted: § 403.302 (mandatory arbitration is allowed to determine of school district property values), §25.25 (arbitration procedures contained in tax protest scheme are not available for local appraisal), § 43.052 (arbitration, if requested, is allowed for municipal annexation), 153.0071 (alternative dispute resolution procedures for parent-child relationships), § 154.052 (sets out the qualifications to be recognized as an impartial third party), 1467.052 (sets out mediator Qualifications), 1467.057 (sets out procedure for No Agreed Resolution from a mandatory mediation concerning health care).

Bills Pending: None.

## UTAH

Bills Enacted: U.C.A. 1953 § 30-3-10.9 (a process for resolving child education disputes shall be provided unless precluded or limited by statute), 2018 UT S.B. 25 (NS) (recognizing alternative dispute resolution does not satisfy the mandatory course required to obtain a divorce), 2018 UT S.B. 223 (NS) (Recognizes that health care disputes can be arbitrated), 2018 Utah House Bill No. 377 (Recognizes that land use disputes can be resolved via arbitration).

Bills Pending: None.

## VERMONT

Bills Enacted: 2018 Vermont Laws No. 173 (H. 897) (codifies federal standards for issue with children and education disputes), 2017 VT H.B. 843 (NS) (establishes arbitration for public record issues), 2017 VT S.B. 105 (NS) (arbitration is enforcement for consumer disputes).

Bills Pending: None.

## VIRGINIA

Bills Enacted: 2018 VA H.B. 1351 (NS) (allows for mediation in child custody cases), 2018 Virginia Laws Ch. 854 (H.B. 1539) (codifies Federal Mediation Act for Metro Disputes), 2018 VA H.B. 1486 (NS) (Recognizes the enforcement of arbitration in insurance disputes).

Bills Pending: None.

WASHINGTON

Bills Enacted: 2017 WA S.B. 6199 (NS) (requires employment administrator programs to have alternative dispute resolution), S.S.B. No. 60322018 (sets funds aside for alternative dispute resolution processes for low income citizens), 2018 Wash. Legis. Serv. Ch. 284 (S.B. 6407) (sets up dispute resolution possibility for abused children/families), 2017 WA S.B. 6245 (NS) (makes arbitration not binding on the legislature for interpreter), 2017 WA H.B. 2777 (state must create a mediation process for tax disputes).

Bills Pending: None.

WEST VIRGINIA

Bills Enacted: 2018 WV S.B. 1005 (NS) (allows for a waiver of venue and jurisdictional defenses to the extent the state allows for alternative dispute resolution for physical therapy disputes), 2018 WV H.B. 4006 (NS) (allows for mediation for disputes between public universities), 2018 WV S.B. 273 (NS) (allows for mediation between the state and a physician).

Bills Pending: None.

WISCONSIN

Bills Enacted: 2017 WI A.B. 551 (NS) (allows for mediation in issues with dependent children in state care), 2017 WI A.B. 1058 (NS) (allows for conflict resolution and peer mediation between children), 2017 WI A.B. 977 (sets funding aside for arbitration with the state).

Bills Pending: None.

WYOMING

Bills Enacted: § 26-49-103 (failure to comply with this act is not admissible in alternative dispute resolution).

Bills Pending: None.