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I. INTRODUCTION

Special education disputes are an emotional, sometimes combative process that often leaves the student dealing with the consequences. Under the Individuals with Disabilities Education Act (IDEA), parents have the right to make use of mediation for resolving disputes regarding their special needs student's education. Alternative dispute resolution has been widely utilized and is viewed as a positive alternative to due process hearings. In some states, attorneys are not permitted to attend these mediation sessions for fear that they would create an adversarial environment.

This Comment discusses the future of alternative dispute resolution in special education conflicts by first examining a brief history of the IDEA and the areas it covers. Due process complaints under the IDEA and mediation as a solution to due process complaints will then be addressed. Then, it will focus on mediation and its impact on parents and schools, particularly the advantages and disadvantages of mediation, and the presence of attorneys in mediation. Finally, it will look towards collaborative law, when two attorneys and their clients collaborate to reach an agreement, and the future of collaborative dispute resolution in the special education field. This Comment will show that mediation has a better chance of succeeding when attorneys represent both parties. Furthermore, collaborative dispute resolution may be an ideal solution that reaps the benefits of alternative dispute resolution while avoiding the drawbacks of traditional mediation in special education disputes.

II. BACKGROUND

A. EAHCA and IDEA

In 1970, United States schools educated only one in five children with disabilities.[1] Many states had laws that excluded certain students, such as those who were

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1. U.S. Office of Special Education Programs, *History: Twenty-Five Years of Progress in Educating Children with Disabilities through IDEA*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/speced/leg/idea/history.pdf (last visited Feb. 21, 2016) [hereinafter *History: Twenty-Five Years of Progess*].

deaf, blind, emotionally disturbed, or intellectually disabled.[2] Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975.[3] At the time of enactment, more than one million children in the United States had no access to the public school system.[4] The EAHCA called for free, appropriate public education (FAPE) for all handicapped children of school age.[5] According to the United States Department of Education, an appropriate education includes "education services designed to meet the individual education needs of students with disabilities as adequately as the needs of nondisabled students are met."[6] A parent or public agency may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child.[7]

The EAHCA was re-codified as the IDEA in 1990.[8] In the IDEA, Congress found that disabilities are a natural part of the human experience and that having a disability in no way diminishes the right of individuals to participate in or contribute to society.[9] Congress noted that the EAHCA did not meet disabled children's needs because there was a lack of adequate resources within the public school system which forced families to find services outside the public school system.[10] According to Congress, the implementation of the EAHCA had been further impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.[11] The IDEA was amended in 1997, incorporating a mediation provision.[12] The IDEA was amended again in 2004 to align with the requirements of the No Child Left Behind Act.[13] In 2009, President Obama signed the American Recovery and Reinvestment Act, which designated $12.2 billion to be used for funding the IDEA.[14] The IDEA was most recently amended in 2011, when it was updated to include specific interventions for children three and under.[15] Today, early intervention programs and

2. *Id.*

3. Mark C. Weber, *The Transformation of the Education of the Handicapped Act*, 24 U.C. DAVIS L. REV. 349, 350 (1990).

4. Jane West, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind*, NATIONAL COUNCIL ON DISABILITY 6 (Jan. 25, 2000) http://files.eric.ed.gov/fulltext/ED438632.pdf.

5. Weber, *supra* note 3, at 350-51.

6. Office for Civil Rights, *Free Appropriate Public Education for Students with Disabilities*, U.S. DEP'T OF EDUC. (August 2010) http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html.

7. 34 C.F.R. § 300.507(a) (2015).

8. *See* Justice Burke, et. al, *The Right Idea: A Critical Look inside the Individuals with Disabilities Education Act (IDEA), its Effectiveness and Challenges, and the Role of the Lawyer in its Protection and Enforcement*, AM. B. ASS'N (2012) http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_aba_annual/6_1.authcheckdam.pdf; Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2010).

9. 20 U.S.C. § 1400(c)(1).

10. *Id.* at § 1400 (c)(2)(D).

11. *Id.* at § 1400(c)(4).

12. Edward Feinberg, *The Role of Attorneys in Special Education Mediation*, MEDIATE.COM, http://www.mediate.com/articles/cadre4.cfm (last visited Feb. 5, 2016).

13. Office of Special Education Programs, *Alignment with the No Child Left Behind Act*, U.S. DEP'T OF EDUC. (Feb. 2, 2007) http://idea.ed.gov/object/fileDownload/model/TopicalBrief/field/PdfFile/primary_key/3.

14. *American Recovery and Reinvestment Act of 2009: IDEA Recovery Funds for Services to Children and Youths with Disabilities*, U.S. DEP'T OF EDUC. (April 1, 2009), http://www2.ed.gov/policy/gen/leg/recovery/factsheet/idea.html.

15. 20 U.S.C. § 1431 (2012).

services are provided to almost 200,000 eligible infants and toddlers, and nearly six million young people receive special education and related services.[16]

B. IDEA

The IDEA has four parts. Part A covers general provisions; Part B covers assistance for education of all children with disabilities; Part C covers infants and toddlers with disabilities; and Part D covers national activities to improve the education of children with disabilities.[17] The purpose of the IDEA was to ensure that all children with disabilities have a FAPE available to them that emphasizes special education.[18] In doing so, Congress wanted to provide services to meet disabled students' unique needs and prepare them for further education, employment, and independent living.[19] By enacting the IDEA, Congress aimed to strengthen the role and responsibility of parents in order to give them more opportunities to participate in the education of their children.[20] Congress also wanted to give parents and schools more opportunities to resolve their disagreements in positive and constructive ways.[21]

Congress mandated that children with disabilities be educated to the maximum extent appropriate, receive education in inclusive settings with children who are not disabled, and furnish supplementary aids and services to avoid the need for removal of children from regular classes.[22] The parents of these children have the right to participate in the creation of an Individualized Education Plan (IEP), which sets out the services to be delivered to their child.[23] If a student or parent feels that the school district is not providing a FAPE or is not complying with the IEP, they may challenge the school district.[24]

Students and parents may employ five primary methods to challenge a school district for failure to provide a FAPE or an IEP: (1) an informal meeting, (2) a facilitated IEP meeting, (3) a complaint with the Department of Education, (4) mediation, and (5) a due process hearing.[25] The parties do not need to proceed sequentially through these five stages, but may instead start at any stage and choose to opt out of any method.[26] The United States Government Accountability Office (GAO) compiled a report in 2014 that studied dispute resolution in education.[27] The GAO found that from 2004 through 2012, the number of due process hearings decreased nationwide from under 7,000 to slightly above 2,000.[28] This trend was largely driven by steep declines in New York, the District of Columbia, and Puerto Rico,

16. *History: Twenty-Five Years of Progress*, *supra* note 1.
17. *See* 20 U.S.C. § 1400 (2010) (for Part A); *Id.* at § 1411 (for Part B); *Id.* at § 1431 (for Part C); *Id.* at § 1450 (for Part D).
18. *Id.* at § 1400(d)(1)(A).
19. *Id.*
20. *Id.* at § 1400(c)(5)(B).
21. *Id.* at § 1400(c)(8).
22. 20 U.S.C. § 1412(a)(5) (2012).
23. 20 U.S.C. § 1414(d) (2012).
24. 20 U.S.C. § 1415(b)(6) (2012).
25. Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 504 (2013).
26. *Id.*
27. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-390, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION (2014).
28. *Id.* at 14.

three locations that together accounted for almost 6,000 due process hearings in 2004 to 2005, and for almost 1,000 in 2011 to 2012.[29] State educational agencies' (SEA) representatives in these locations cited the use of mediation or resolution meetings as key among the reasons for the decline.[30]

C. Due Process Complaints Under the IDEA

Under the IDEA, parents are given the right to file a due process complaint.[31] A due process complaint is a written document used to request a due process hearing.[32] These complaints are related to the identification, evaluation, or education placement of a child with a disability, or the providing of a FAPE to the child.[33] In a due process hearing, the school district and parents present arguments and evidence to the impartial hearing officer,[34] who makes a determination of legal rights and responsibilities.[35] Parties who do not prevail in a due process hearing may file suit in federal or state courts.[36]

In a 1997 study, Peter Kuriloff and Steven Goldberg tracked the reactions of parties in 30 due process hearings held between January 1, 1987, and June 30, 1988.[37] Kuriloff and Goldberg found that a large majority of parents felt that the hearings were not fair and that the decisions did not accurately reflect the facts of their cases.[38] A majority of school officials felt that the hearings were fair, but only half reacted positively to the experience.[39] The majority of both groups, parents and school officials, negatively assessed the experience of the hearings as a forum for special education decisions.[40] This study showed that due process hearings leave both sides of the dispute with negative feelings, making it difficult to move forward.

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29. *Id.* at 12.

30. *Id.* at 9. Resolution meetings allow parents and districts an opportunity to resolve a dispute by providing an opportunity for them to discuss the complaint and the facts that form the basis of that complaint. *Id.*

31. 20 U.S.C. § 1415 (2012).

32. 34 C.F.R. § 300.508 (2012).

33. CADRE, *IDEA Special Education Due Process Complaints/Hearing Requests*, DIRECTION SERVICE 2 (Jan. 2014) http://www.directionservice.org/cadre/pdf/DueProcessParentGuideJAN14.pdf.

34. *See* 34 C.F.R. § 300.511(c) (2012). A hearing officer must not be an employee of the SEA that is involved in the education or care of the child, or a person with a personal or professional interest that conflicts with their objectivity in the hearing. They must possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by federal and state courts. They must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice, and they must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

35. Feinberg, *supra* note 12.

36. *Id.*

37. Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation A Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 40 (1997).

38. *Id.*

39. *Id.*

40. *Id.*

D. Mediation under the IDEA

An alternative to due process hearings is mediation. The IDEA requires that any educational agency that receives federal assistance establish procedures that allow parties to resolve their disputes through a mediation process.[41] The IDEA mandates that mediation procedures be established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint, to resolve such disputes through a mediation process.[42]

The mediation process must be voluntary and conducted by a "qualified and impartial mediator who is trained in effective mediation techniques."[43] Mediation cannot be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B of the IDEA.[44] The SEA is required to maintain a list of qualified mediators comprised of people who are familiar with the relevant laws and regulations.[45] While some SEAs allow parents and schools to choose a mediator together, others select the mediator on a random, rotational, or otherwise neutral basis.[46] The state must bear the cost of the mediation process, and the sessions must be scheduled in a timely manner and held in a location that is convenient to the parties.[47]

The GAO found that the rate of mediation decreased slightly from 2004 to 2012.[48] The GAO also found that 69 percent of mediations resulted in agreements.[49] The Center for Appropriate Dispute Resolution in Special Education (CADRE) reported statistics on the use of mediation in the 50 states (excluding the District of Columbia and outlying areas), and found that between the 2004 to 2005 school year and the 2009 to 2010 school year, 18,644 due process-related mediations were held; of those, 63 percent reached agreements.[50]

If a resolution is reached to resolve the complaint, the parties shall execute a legally binding agreement that sets forth the resolution and states that the discussions that occurred during the mediation process shall be confidential.[51] The agreement must be signed by both the parent and a representative of the agency with authority to bind such agency.[52] The signed, written mediation agreement is legally binding and enforceable in any state or federal court.[53]

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41. 20 U.S.C. § 1415(e)(1) (2012). The Committee on Education and the Workforce, U.S. House of Representatives, described mediation as "an attempt to bring about a peaceful settlement or compromise between parties to a dispute through the objective intervention of a neutral party. Mediation is an opportunity for parents and school officials to sit down with an independent mediator and discuss a problem, issue, concern, or complaint in order to resolve the problem amicably without going to due process." GEORGE A. GIULIANI, THE COMPREHENSIVE GUIDE TO SPECIAL EDUCATION LAW 192 (2012).
42. 20 U.S.C. § 1415(e)(1).
43. *Id.* at § 1415(e)(2)(A).
44. Feinberg, *supra* note 12.
45. 20 U.S.C. § 1415(e)(2)(C)
46. CADRE*, IDEA Special Education Due Process Complaints/Hearing Requests*, *supra* note 33, at 4.
47. 20 U.S.C. § 1415(e)(2)(E).
48. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 27, at 15.
49. *Id.* at 16.
50. CADRE, *Six Year State and National Summaries of Dispute Resolution Data*, DIRECTION SERVICE 2, http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Tables%2004-05%20thru%2009-10%20Summary%2021March%202012.pdf (last updated February 14, 2012).
51. 20 U.S.C. § 1415(e)(2)(F)(i).
52. *Id.* at § 1415(e)(2)(F)(ii).
53. *Id.* at § 1415(e)(2)(F)(iii).

III. POLICY

A. Mediation and its Impact on Parents and Schools

For school districts, the mediation process has many positive aspects. Mediation proceedings are private, which protects the reputation of the school.[54] Mediation is less expensive than a due process hearing because of less preparation work for attorneys, and thus lower attorney's fees, and because the state pays for the mediator.[55] Furthermore, schools can be "repeat players" within the special education dispute system.[56] As school administrators are more likely than parents to be familiar with the process of mediation and the IDEA's mandates for students, they are likely to have a natural advantage in the mediation setting. Additionally, even if a school cannot have its attorney participate in the mediation, the school still has the ability to consult with its attorney outside of the mediation to ensure that its legal obligation under the IDEA and relevant state law is met.[57] Finally, the SEA curates the list of approved mediators and selects the mediator on a random, rotational, or otherwise neutral basis.[58] Some SEAs allow parents and schools to choose a mediator together.[59] Schools may have worked with a particular mediator before and are therefore familiar with the mediator and his or her process, which can give the schools an advantage.[60]

The mediation process can also penalize school districts. Some parents will not be satisfied with anything less than the specific outcome they have in mind.[61] These parents will not take mediation seriously, so mediation is a waste of time and money for the school district.[62] Furthermore, it is likely that the school will have to continue interacting with the parents and student after the mediation is concluded. Unless the child is close to graduating, he or she will continue progressing through the school district. If either party is left unhappy at the conclusion of mediation, the

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54. 34 C.F.R. § 300.506(b)(8) (2012).

55. CADRE, *Considering Mediation for Special Education Disputes: A School Administrator's Perspective*, DIRECTION SERVICE 2, http://www.directionservice.org/cadre/pdf/Considering%20Mediation%20for%20Special%20Education%20Disputes.pdf (last updated August 2007); *see also* 34 C.F.R. § 300.506(b)(4) (for regulation requiring the state to pay for the mediator).

56. For example, from 1996 to 2001, there were anywhere between 111 and 190 mediation hearings held each school year in Pennsylvania. There are a little over 500 school districts in Pennsylvania. While it is unreported how many mediations each district held, the statistics would seem to imply that it is likely that district officials have participated in mediations. *See* Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 218 (2003). Number of school districts found on the Pennsylvania Dep't of Education website. See *Public Elementary and Secondary Schools*, PENN. DEP'T OF EDU., http://www.education.pa.gov/Documents/About%20PDE/Pennsylvania%20Education%20Directory/PAEdDirectory_SD.pdf (last visited March 2, 2016) (listing Pennsylvania school districts).

57. One such example of this is the participants of the Missouri United School Insurance Council (MUSIC), which is comprised of 478 public school districts, community colleges, and education associations. By joining MUSIC, members have coverage for, among other things, special education due process liability. *See Coverages Included*, MO. UNITED SCH. INS. COUNCIL, http://www.musicprogram.org/2015/05/20/coverages-included/ (last visited Feb. 5, 2016).

58. 34 C.F.R. §300.506(b)(3)(ii).

59. *Id.*

60. D'Alo, *supra* note 56, at 218.

61. *See* Bethlehem Area Sch. Dist. v. Zhou, No. 09–03493, 2012 WL 930998 (E.D. Pa. Mar. 20, 2012).

62. *Id.*

result can be a series of awkward future working relationships between the administrators and teachers and the parents who have to continue to interact with each other as the student progresses through the district.[63]

The facts underlying the United States District Court for the Eastern District of Pennsylvania case *Bethlehem Area School District v. Zhou* are an example of mediation failing to alleviate strife between parents and the school district.[64] In *Bethlehem*, the school district argued that the parent abused the due process system by requesting repeated due process hearings.[65] The school district also alleged that the parent improperly sought unnecessary interpretation services in an effort to drive up costs so that the district would pay to place her son in private school.[66] However, when the district attempted to call the mediator at trial, the parent filed a motion for summary judgment in order to have the case decided in her favor.[67] The parent pointed to the Mediation Rules, signed by her, the district representatives, and the mediator, in which they agreed that the "discussion during the mediation is confidential," and that "the mediator will not be called as a witness in further legal proceedings."[68] The parent prevailed, and the court ordered the district to refrain from introducing evidence of any statements made at the mediation.[69] This case is an example of how failures at mediation can lead to continued conflict and strife between parents and school districts, particularly when one side views the other as behaving unfairly.

For parents, mediation can provide a tool to avoid the administrative bureaucracy of a due process hearing. Mediation is a much faster process than a hearing; the mediation process must be completed in 30 days, whereas a due process complaint, from filing a complaint to the due process hearing, can be completed in 45 days but usually takes approximately six months.[70] The mediation itself generally takes less than a day, whereas a due process hearing can last several days, and the entire process may take several months from beginning to end.[71]

Parents have more avenues to pursue if the parties are unable to reach an agreement in mediation, whereas a due process hearing's decision is binding.[72] Parents also do not have to pay for the mediation process.[73] Mediation has more opportunity

63. This is evidenced in *Bethlehem*; since the school felt as though the parent took advantage of the mediation program, their future working relationship was likely to be tense.

64. Bethlehem Area Sch. Dist. v. Zhou, No. 09–03493, 2012 WL 930998 (E.D. Pa. Mar. 20, 2012).

65. *Id.* at *1.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at *5.

70. *Comparison of Options in the IDEA Compliant System*, MO. DEP'T ELEMENTARY & SECONDARY EDUC., https://dese.mo.gov/sites/default/files/Comparing%20the%20systems_0.pdf (last visited Feb. 5, 2016).

71. *Id.*

72. *Id.*

73. If the parents choose to proceed with a due process hearing and win, they are entitled to reimbursement of their attorney's fees. If the parents lose, they must pay their own attorney's fees but not those of the school's attorney. There are two exceptions. Fees can be owed to the prevailing SEA by the parent's attorney if that attorney filed a complaint that was frivolous, unreasonable, or without foundation, or continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. Fees can also be owed to the prevailing SEA by the parent or parent's attorney if the complaint was presented for any improper purpose (such as to harass, cause unnecessary delay, or to needlessly increase the cost of litigation). *See* 20 U.S.C. § 1415(i)(3)(B) (2012).

for parental involvement, is more cooperatively focused, and emphasizes future relationships.[74]

The mediation process also has potential disadvantages for parents. Parents are generally not familiar with the mediation process and, in many states, are not allowed to have their attorneys present.[75] Furthermore, most parents will not have the experience with the IDEA necessary to know what the law mandates they receive or what services meet the standard of a FAPE. This inexperience can result in the parent requesting services that go beyond what the school is required to provide.[76] Without an attorney, parents do not have someone who can give them an assessment on how much they are asking for; and if parents do not trust the mediator, then no unbiased party is present to give the parents impartial advice. If the parents are asking for too much, the parents may never receive what they think they deserve.

B. Statistics on Mediation's Impact on Parents and Schools

B. L. Nowell, an associate professor at the North Carolina State University School of Public and International Affairs, conducted a study in 2007 that evaluated the impact of special education mediation on parent-school relationships.[77] The study asked parents how they felt six months after an agreement had been reached in their mediation session with the school.[78] Seven parents were asked about their mediation experiences; none had participated in due process hearings at the time of the interview.[79] Two outcomes were studied: the interpersonal relationship between the parent and the school, and the parents' sense of efficacy after the mediation process.[80]

Four parents reported positive to neutral effects on the interpersonal relationships between themselves and the school.[81] One parent reported a positive effect of increased responsiveness by the school to the parent's concerns.[82] The more common neutral reaction, felt by three parents, was described as decreased negative interactions with school personnel.[83] This reaction was attributed to the fact that the issue had been resolved, and so interaction dropped off.[84]

Five parents noted positive effects from mediation on their sense of efficacy in influencing their child's education.[85] Some parents felt that the school had gained more respect for their knowledge of their rights and the special education system in

74. SHARON SCHUMACK & ART STEWART, WHEN PARENTS AND EDUCATORS DO NOT AGREE: USING MEDIATION TO RESOLVE CONFLICTS ABOUT SPECIAL EDUCATION 4 (1995).

75. *See infra* notes 106-110 and accompanying text.

76. In *Bethlehem*, the parent was requesting that the school place her son in private school, which they were not required to do. Bethlehem Area Sch. Dist. v. Zhou, No. 09–03493, 2012 WL 930998 (D.E.D. Pa. Mar. 20, 2012).

77. Branda L. Nowell & Deborah A. Salem, *The Impact of Special Education Mediation on Parent-School Relationship: Parents' Perspective*, 28 REMEDIAL & SPECIAL EDUC. 304, 307 (2007).

78. *Id.* at 306.

79. *Id.*

80. *Id.* at 307-09.

81. *Id.* at 307.

82. *Id.* at 307-08.

83. Branda L. Nowell & Deborah A. Salem, *The Impact of Special Education Mediation on Parent-School Relationship: Parents' Perspective*, 28 REMEDIAL & SPECIAL EDUC. 304, 307 (2007).

84. *Id.* at 308.

85. *Id.* at 307-08.

general.[86] Those parents felt they gained respect for their ability to hold the school accountable, and for forcing the school to abide by the law.[87] Other parents became more interested in special education advocacy and expressed a desire to work in the field.[88]

However, three parents also reported that mediation negatively affected interpersonal relationships with school personnel.[89] In some cases, parents and school personnel displayed decreased trust and communication.[90] One parent stated, "Now they (the school district) won't tell me anything. They used to tell me things — now it's nothing . . . . That's it. Because I made waves. I know that's what it is."[91] Adversarial behavior between parents and their school's personnel also increased.[92]

Three parents also reported signs of decreased self-efficacy.[93] A reduced sense of efficacy resulted when the mediation negatively affected parents' belief in their ability to influence decision-making regarding their child's education.[94] Parents expressed these effects in several ways: dashed expectations concerning hopes for positive changes, decreased optimism for the future, and reinforced perceptions of powerlessness to effect change within the school.[95] Some parents described school personnel as engaging in the same behaviors as before, while others felt excluded from the implementation process.[96] Other parents expressed doubt that things could get better, or believed that they would have to elevate the issue to court.[97] For some parents, the mediation reinforced perceptions of their lack of power and inability to affect change within the school.[98]

Out of the seven parents, three described a negative impact on interpersonal relationships with school personnel, three described decreased interaction, and only one felt a positive impact on interpersonal relationships.[99] In regards to the parents' sense of efficacy, two reported a negative impact, one reported mixed sentiments of positive and negative impacts, and four reported a positive impact.[100]

In Kuriloff's study of New Jersey mediations, 26 of the 29 parents surveyed replied that they would undergo mediation again, while only three said they would not.[101] Sixteen of 24 school officials said they would go through the process again, while three were ambivalent, and five said they would not.[102] The mediation process provides positive and negative consequences for both parties. Above all, statistics show that mediation can leave both sides feeling unheard and bitter about the process, making moving forward in the relationship difficult if not impossible.

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86. *Id.* at 308.
87. *Id.*
88. *Id.*
89. Nowell & Salem, *supra* note 83, at 308.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* One parent reported both empowerment and disempowerment, accounting for the increased number of responses regarding efficacy.
94. *Id.* at 309.
95. Nowell & Salem, *supra* note 83, at 309.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Kuriloff & Goldberg, *supra* note 37, at 64.
102. *Id.* at 65.

C. Mediation and Attorney Presence

Attorney participation in mediation sessions is not clearly addressed in the IDEA.[103] Several states have enacted legislation prohibiting attorney participation.[104] Others allow attorney participation but have restrictions on which side can bring an attorney.[105]

Having attorneys participate in the mediation session provides certain advantages. Attorney participation can correct potential power and knowledge imbalances.[106] Several studies have shown that power imbalances are present in mediation,[107] particularly when there is a cultural or socioeconomic status difference between the parents and the school.[108] Furthermore, attorneys can help parents and school districts determine reasonable expectations. This is particularly so in cases where there is mistrust between the parent and the school district, because reasonable expectations can mean that the mediation will start off on more realistic footing, fostering goodwill between both sides, and preventing wasted time.[109]

However, attorney participation in mediation also has disadvantages. Many states prohibit attorney participation because of the belief that attorneys maintain an adversarial posture in mediations.[110] Attorneys can promote an atmosphere of tension, particularly if they ascribe to a win-lose style of dispute resolution.[111] Proponents of excluding attorneys from special education mediation also argue that mediators have the ability to overcome power imbalances, so attorneys are not needed for that role.[112] Finally, there is the issue of paying for attorney's fees on top of paying for the mediator. It would be costly for schools to pay for their attorneys. However, if parents have to pay for their attorneys, low-income parents and students who might not be able to afford hundreds of dollars in attorney's fees would be disadvantaged.[113]

In Ohio, attorneys for both sides may participate in mediation.[114] If an attorney represents the parents during mediation, then the school district does not have to

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103. Melody Musgrove, *Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, U.S. DEP'T. OF EDUC. OFF. SPECIAL EDUC. & REHABILITATIVE SERVS. 8 (July 23, 2013) https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf.

104. *See infra* notes 106-110 and accompanying text.

105. *See Special Education*, VT. AGENCY OF EDUC., http://education.vermont.gov/special-education/policy-and-administration/dispute-resolution (last updated July 27, 2015) ("You may bring an advocate, support person and/or family members to mediation. Your school district may bring its lawyer but only if you bring one, too.").

106. Feinberg, *supra* note 12.

107. *Id.*

108. *Id.* The National Council on Disability acknowledges that "[c]hildren with disabilities and their families who are non-English speaking, or who live in low-income, ethnic or racial minority, and rural communities, are frequently not represented players in the process. These individuals must be included and given the information and resources they need to contribute and advocate for themselves." *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Feinberg, *supra* note 12.

113. *Id.*

114. *Ohio State Performance Plan Chapter 5.11: Mediation*, OHIO DEP'T EDUC. https://education.ohio.gov/Topics/Special-Education/Federal-and-State-Requirements/Procedures-and-Guidance/Procedural-Safeguards/Mediation (last modified Dec. 10, 2015).

pay the attorney's fees unless the mediation agreement explicitly states otherwise.[115] Illinois also allows attorneys, advocates, interpreters, and other relevant parties with knowledge of the student to participate in the mediation.[116] Pennsylvania does not allow attorney participation from either side during mediation.[117] Missouri prohibits attorney presence during mediation but does allow parents to be accompanied by a lay advocate.[118]

Due Process (DP) Related Mediations By State[119]	**2004-2005**	**2005-2006**	**2006-2007**	**2007-2008**	**2008-2009**	**2009-2010**
Missouri DP Related Mediations Held	13	6	6	4	2	4
Missouri DP Related Mediation Agreements Reached	8	4	6	1	1	1
Ohio DP Related Mediations Held	59	33	50	71	0	43
Ohio DP Related Mediation Agreements Reached	50	23	22	32	0	30
Illinois DP Related Mediations Held	125	96	98	119	92	96
Illinois DP Related Mediation Agreements Reached	100	77	76	83	65	70
Pennsylvania DP Related Mediations Held	8	17	21	29	65	78
Pennsylvania DP Related Mediation Agreements Reached	7	13	18	20	22	20

Number of Mediations Per 10,000 Special Education Students Enrolled[120]	**2004-2005**	**2005-2006**	**2006-2007**	**2007-2008**	**2008-2009**	**2009-2010**
Missouri DP Related Mediations Held	0.9	0.4	0.4	0.3	0.2	0.3
Missouri DP Related Mediation Agreements Reached	0.6	0.3	0.4	0.1	0.1	0.1
Ohio DP Related Mediations Held	2.3	1.2	1.9	2.6	2.7	1.6
Ohio DP Related Mediation Agreements Reached	1.9	0.9	0.8	1.2	2.2	1.1
Illinois DP Related Mediations Held	0.0	3.0	3.0	3.7	2.9	3.1
Illinois DP Related Mediation Agreements Reached	0.0	2.4	2.3	2.6	2.0	2.2

Kuriloff and Goldberg studied New Jersey due process filings by mailing questionnaires to parents and school officials who participated in mediation, hearings,

115. *Id.*
116. Special Education Services, *Effective Dispute Resolution, State Sponsored Mediation*, ILL. ST. BD. EDUCATORS http://www.isbe.net/spec-ed/html/mediation.htm (last visited Feb. 5, 2016).
117. *Your Guide to Mediation*, THE OFF. FOR DISP. RESOL. 4, http://odr-pa.org/wp-content/uploads/pdf/medguide.pdf (last revised Sept. 2015).
118. Margie Vandeven, *Missouri State Plan for Special Education*, MO. DEP'T ELEMENTARY & SECONDARY EDUC. 63, https://dese.mo.gov/sites/default/files/Complete%20Part%20B%20State%20Plan%20Final%20Clean%20Version_0.pdf (last revised Mar. 2015).
119. CADRE, *Six Year State and National Summaries*, *supra* note 50, at 13-18.
120. *Id.* at 19-24.

or both.[121] They found that participants in the study generally expressed only mild satisfaction with mediation and perceived it as a "modestly fair procedure."[122] Kuriloff and Goldberg found that having an attorney, as opposed to a non-attorney advocate or no representation, had a positive association with parents' perceptions of "the fairness of mediation, of the agreement reached through it, and of its implementation."[123] Furthermore, both parents and school officials' perceptions of the fairness of mediation, the agreement, and its implementation "moderately to strongly correlated with having an effective advocate, whether an attorney or a lay person."[124] Kuriloff and Goldberg argued that prohibiting attorneys from participating in the mediation process would "seem to tilt the balance of power too much in favor of schools."[125] They noted that school administrators could contact many more experts to develop their arguments than the average parent.[126]

D. Collaborative Law

Collaborative law has become a popular style of alternative dispute resolution since its inception in the 1980s.[127] In collaborative law, each party has his or her own attorney.[128] Both sides then meet to attempt to reach an agreement with which both sides are satisfied.[129] The parties agree to make full and timely disclosures of all relevant information, reducing cost and time.[130] The clients actively participate in the collaborative process and engage in "four-way meetings" with both clients and both attorneys.[131] Experts are jointly retained and, above all, parties agree to act in good faith.[132] If the parties fail to reach a joint agreement, or if either party invokes a court's intervention, both attorneys must immediately withdraw from representing their clients, and both parties must find new attorneys to represent them if they proceed to the litigation stage.[133]

In recent years, collaborative law has expanded. The most common usage of collaborative law is in divorces.[134] Collaborative law has also been used in commercial cases, such as patent infringement suits.[135] Robert F. Cochran, a professor at the Pepperdine University School of Law, identified fields that would benefit from using collaborative practice, such as probate disputes or business disputes, "where the parties want or need to continue to do business with one another."[136]

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121. Kuriloff & Goldberg, *supra* note 37, at 45.
122. *Id.* at 60.
123. *Id.* at 61.
124. *Id.*
125. *Id.* at 62.
126. *Id.*
127. Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 179 (2014).
128. *Id.*
129. *Id.* at 182.
130. Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, 45 BOS. B.J. 12, 12 (2001).
131. *Id.*
132. *Id.*
133. Salava, *supra* note 127, at 183-84.
134. *Id.* at 184.
135. Reynolds & Tennant, *supra* note 130, at 28.
136. Robert F. Cochran, *Collaborative Practice's Radical Possibilities for the Legal Profession: "(Two Lawyers and Two Clients) for the Situation,"* 11 PEPP. DISP. RESOL. L.J. 229, 248 (2011).

Cochran identified two factors present in candidates that would indicate that they would benefit from collaborative law: "the litigants' desire to control and be creative with the outcome and the desire to protect themselves from the emotional turmoil of litigation."[137]

Douglas Reynolds and Doris Tennant argued that this new process converted the role of the lawyer from a strategist intent on winning against an adversary to an intentional settlement worker and advisor.[138] This role change created a paradigm shift from an adversarial model to a problem-solving model.[139] In exercises done by collaborative counsel and litigation counsel, the collaborative counsel focused more on the relationships and interests of the parties, while litigation counsel looked more for facts with which he or she could build a theory of the case.[140] While Reynolds and Tennant have sought to expand the collaborative model into other areas, special education disputes have yet to be considered among those areas ripe for the collaborative model.[141]

IV. COMMENT

Attorney presence in special education mediation should be permitted. The benefits of attorney presence in special education mediation far outweigh any drawbacks, and attorney presence will ensure that there is a level playing field between the parties. As special education dispute resolution progresses, the state and federal governments should adopt collaborative dispute resolution, and permit willing parties to utilize it in order to address and hopefully resolve their disputes while avoiding an adversarial relationship.

Not allowing attorneys to participate in special education mediation only permits an unbalanced mediation field in which the school has all the advantages. The school district has experience with the process, a mediator that it might have worked with before, knowledge about what it does and does not have to provide, and in most cases, an attorney on-call. These advantages can quickly culminate in an adversarial environment.

Comparatively, most parents have not engaged in mediation before, so they lack familiarity with the process. Most parents do not have the legal knowledge necessary to know what a school has to provide, what parents are allowed to request, or the particular language needed to convey their desires and ensure they are met. Not allowing attorneys to be present takes away the only tool a parent can utilize to even the playing field.

As with all dispute resolution, collaborative dispute resolution usage in special education due process could have some disadvantages. Parties who cannot work together would not be good candidates for collaborative dispute resolution; collab-

137. *Id.*
138. Founding members of the Collaborative Law Council, Inc., a Massachusetts not-for-profit organization committed to promoting and practicing collaborative law. Reynolds & Tennant, *supra* note 130, at 12.
139. *Id.*
140. *Id.* at 27.
141. *Id.* at 29.

orative law relies on the "respectful interchange of information and good-faith compromise seeking."[142] The withdrawal requirement and accompanying ethical questions regarding confidentiality and zealous representation also raise concerns. The American Bar Association has said that informed consent by all the participants was the key to successful collaborative law.[143] However, some fear that attorneys might focus too much on settlement and might not adequately fulfill their requirement to advocate zealously.[144]

Despite these fears, a collaborative-style resolution process for special education disputes would provide many advantages. The process is typically less expensive, less adversarial, and more efficient than traditional dispute resolution.[145] In one study of collaborative cases from 2007 to 2010, 86 percent of cases settled.[146]

Collaborative law could solve many of the issues with the traditional use of mediation in resolving special education disputes. The drawbacks of a mediated divorce echo the drawbacks of a mediated due process dispute: "the mediator, as a neutral, cannot redress imbalances between the parties in knowledge or sophistication."[147] Parents who are not well-informed about their rights would have an attorney, which they do not have in mediation. However, their attorney would need to avoid adversarial or argumentative strategies that would only worsen relationships, something that not every attorney can do. Like parties in divorces, parties in special education disputes still have to communicate and work together after the proceedings terminate. Using collaborative dispute resolution would create a healthier relationship between the school and the parents, which would ultimately benefit the child.

Having an attorney present for both sides at mediation would likely lead to a power balance between parties and would ultimately benefit the student for whom the mediation is being held. Furthermore, states should enact laws permitting parents and school districts to choose to engage in collaborative dispute resolution, rather than mediation, in an effort to both equalize the playing field and to promote a less adversarial resolution process. Having the option to pursue collaborative dispute resolution will end up benefitting both the school district and the child, as the collaborative model will foster more goodwill between the parties and ensure that the child's needs are addressed.

Attorneys should be permitted to intervene in mediation sessions between parents and school districts regarding special education disputes. Congress should amend the IDEA to state outright that parents can have attorneys present in mediation sessions. Doing so will give parents the tool they need to get what their child is legally entitled to under the law, while also potentially lessening the animosity felt by parents towards the schools. The fear that attorneys will behave in an adversarial manner just to argue is supported by stereotypes, not facts. However, enacting a collaborative dispute resolution alternative would prevent that fear from being realized.

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142. Salava, *supra* note 127, at 189.
143. Lawrence R. Maxwell, *Ethical Considerations in Collaborative Practice*, AM. B. ASSOC. (June 2015) http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-resolutions/Lawrence_Maxwell.authcheckdam.pdf.
144. Salava, *supra* note 127, at 190.
145. *Id.* at 186-87.
146. *Id.* at 187.
147. *Id.* at 183.

Collaborative dispute resolution could resolve the issue of having power imbalances in the mediation process, particularly in states where attorneys are not allowed to participate in mediation. Even if the states that forbid attorney participation in special education disputes change their laws to allow attorneys to participate in these mediations, this would not address the imbalance of sophistication and knowledge. Collaborative dispute resolution would give parents, schools, and their attorneys more tools and avenues to attempt to resolve a dispute amicably, without leaving either side uninformed or feeling taken advantage of. Like mediation, collaborative dispute resolution could still function as an alternative form of dispute resolution, while still leaving the participants with the opportunity to elevate the dispute to a due process hearing if the alternative dispute resolution fails.

V. CONCLUSION

Attorneys should be allowed to participate in the mediation sessions between school districts and parents. Attorney presence would create a more informed environment, leading to more successful mediations and less negative feelings between the parties. Additionally, having attorneys present during mediation would ensure that the child's needs are not ignored due to the lack of sophistication of most parents.

As alternative dispute resolution becomes more prevalent, collaborative dispute resolution should be tested in resolving special education disputes. The benefits of collaborative law would apply nicely to special education disputes, in that both parties would have help from experienced attorneys who would be focused on creating solutions and preventing further litigation. Above all, collaborative dispute resolution would serve as a more effective resolution method for the disputes that arise in special education.