Rethinking Special Education Due Process

AASA IDEA Re-Authorization Proposals: Part I

Sasha Pudelski
AASA Government Affairs Manager

April 2013

AASA
THE SCHOOL SUPERINTENDENTS ASSOCIATION

TABLE OF CONTENTS

Executive Summary

The re-authorization of IDEA should have occurred in 2011, but the delay of ESEA and other critical education legislation has meant that advocacy groups are only beginning to introduce legislative fixes or policy recommendations in 2013. AASA has begun to compile recommendations for the next re-authorization of IDEA and *Rethinking the Special Education Due Process System*, is the first report in our series that addresses problems with the current statute as well as proposed improvements. *Rethinking* is intended to spark a thoughtful, new dialogue about the need for critical changes to the special education dispute resolution system. The report contends modifications to the current due process system could greatly reduce, if not eliminate, the burdensome and often costly litigation that does not necessarily ensure measureable educational gains for special education students. At the same time, AASA's proposal preserves the right for parents to move forward with litigation against a district and maintains other effective dispute resolution models that were put in place in the prior re-authorizations.

Why should policymakers reconsider the current due process system in the next IDEA reauthorization?

District compliance with IDEA is radically different today than when IDEA was created over three decades ago. Until recently, requesting a due process hearing was the only meaningful way for parents to know definitively whether a school district was fulfilling its obligations under IDEA. However, major changes to the federal accountability and compliance monitoring system for students with disabilities under No Child Left Behind (NCLB) and IDEA 2004 have opened the door to potential alternatives to due process hearings that would benefit all parties.

The complex system of compliance indicators developed in the last reauthorization of IDEA, coupled with the subgroup accountability system of NCLB, resulted in increased attention on the part of school districts to improve educational outcomes for students with disabilities or be subject to a broad range of penalties and oversight. For example, if districts could not prove they were increasing academic achievement rates for all students with disabilities, or if districts were found noncompliant with a particular statutory requirement for a single student with a disability, the school systems would undergo intensive monitoring by state and federal departments of education and risk losing federal funds. AASA believes these changes have made schools and school districts far more compliant with IDEA and more focused on improving the academic outcomes of students with disabilities.

On the other hand, a close review of the current due process procedures suggests that the current due process system continues to expend considerable school district resources and impedes the ability of school personnel to provide enhanced academic experiences for all students with disabilities because it devotes the district's precious time and resources to fighting the legal actions of a single parent. A new strategy for dispute resolution should be considered given the lack of evidence demonstrating that students who invoke due process protections fare better academically after the hearings. Given the scarcity of education dollars, it is worth reassessing the maintenance of an unproved system for challenging special education disputes. Otherwise, significant dollars, time, and emotional capitol will continue to be expended on a process that has little, if any, real connection to improving education outcomes.

Finally, the due process system is inequitable and unpopular. Dozens of papers and studies have found that the cost and complexity of due process hearings actually hinder low- and middle-income parents in challenging a school district's special education services. Numerous studies have also documented the dissatisfaction felt by parents and schools regardless of outcome. Mutual dissatisfaction occurs even though parents request the vast majority of due process hearings and districts prevail in most cases.

How does the current due process system negatively affect school districts?

Rethinking contains a survey of 200 randomly selected school superintendents from large and small, urban, suburban and rural school districts across the country, and describes what challenges, if any, their districts face in handling special education due process claims. AASA's survey data demonstrate how the current due process system presents significant and unintended consequences for students with disabilities, and the teachers and administrators who serve them.

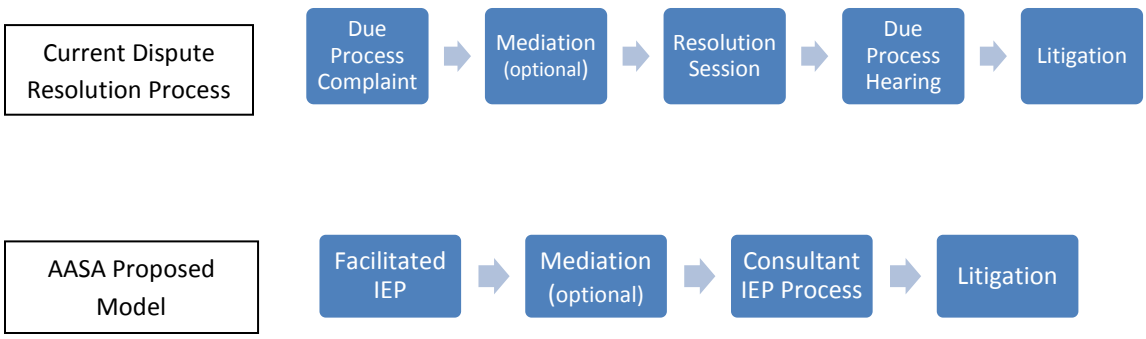
- AASA asked superintendents whether they consider acquiescing to parental requests for students (regarding services, accommodations, placements, etc.) that the district considers to be unreasonable or inconsistent with IDEA requirements to avoid a due process complaint, hearing or litigation. Forty-six percent of respondents indicated that they acquiesce to requests by parents that were considered unreasonable or inconsistent with IDEA less than 10% of the time. Nearly a quarter of respondents indicated they consented to parental requests 26% to 50% of the time. One-fifth of respondents indicated they agreed to parental requests 51% to 75% of the time.
- Teachers forced to participate in due process complaints, hearings or litigation were profoundly affected by these events. When asked to characterize the degree of stress experienced by special education teachers, related services professionals and special education administrators during a due process hearing or subsequent litigation, 95% of respondents classified the stress as high or very high. Twelve percent of school administrators said that more than half of district special education school personnel either left the district or requested a transfer out of special education after being involved in a due process hearing or subsequent litigation.
- The average legal fees for a district involved in a due process hearing were $10,512.50. Districts compelled to compensate parents for their attorney's fees averaged $19,241.38. The expenditures associated with the verdict of the due process hearing averaged districts $15,924.14. For districts that chose to settle with a parent prior to the adjudication of the due process hearing, the settlement costs averaged $23,827.34[1]

What is AASA proposing?

AASA believes that *now* is the time to rethink how parents and districts resolve disputes over a student's individualized education program (IEP). AASA developed this proposal after half a year of discussions and meetings with superintendents, special education administrators, special education lawyers, professors and researchers specializing in special education litigation matters, state officials overseeing due process complaints, special education hearing officers, and other education policy experts. This report is intended to promote a dialogue between education organizations, parent and disability advocacy groups and policymakers. The following recommendations reflect a starting point for members of Congress and advocates to consider and discuss as we prepare for the next IDEA reauthorization.

[1] It should be noted that the Council of School Attorneys estimates much higher average costs for all of these categories.

- Add IEP facilitation to the list of options a district can use to resolve disputes with parents by authorizing districts to contract with a state-approved, trained IEP facilitator. Because most conflict centers on the creation of the IEP, a neutral, state-provided, trained facilitator could help parties reach agreement before any legal paperwork is filed. There is considerable evidence documenting the effectiveness of IEP facilitation in resolving disputes between parents and districts.
- If a formal due process complaint is filed by a parent, both parties could go to mediation. This mediation would consist of a meeting of a trained mediator, the parents and district representatives; no lawyers or advocates on either side would be present.
- If mediation fails, the district and parents would jointly select an independent, neutral special education consultant designated by the state to review evidence of the child's disability and advise the parties on how to devise a suitable compromise IEP.
- The consultant would have 21 days to access student evaluations; interview parents and school personnel; observe the student in school; examine the school's services; and review the student's academic performance. The consultant would then write a report recommending an IEP for the student. The district and parent would be obligated to follow the consultant-designed IEP for a mutually agreed upon period of time.
- If either party were dissatisfied with the consultant IEP after attempting to test it, that party could file a lawsuit, and the consultant's notes and model IEP would be included as part of the record in any litigation. If the parent wished to pursue compensatory education or reimbursement for expenses associated with obtaining private education in the absence of the school district's provision of Free Appropriate Public Education (FAPE), the parent could do so in court only after having attempted to find agreement with the district through the facilitation and consultancy model.



Introduction

In 2010, 95% of all U.S. students with disabilities were educated in public schools;[2] in 1970, the number was only 20%.[3] It is a major victory for both education and civil rights advocates that students with disabilities are now present in every school in the country. Federal education law passed over 30 years ago made the radical recomposition of America's classrooms possible, but the large jump in the number of students educated in public schools was catalyzed by the federal courts. Judicial decisions in *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*[4] and *Mills v. Board of Education*[5] declared that students with disabilities were constitutionally guaranteed the right to be educated in public schools. The courts also specified that students with disabilities were entitled to receive educational services within the public school system; in *PARC*, this was defined as a "public program of education and training appropriate to the child's capacity," while in *Mills*, this was defined as a "free and suitable publicly-supported education." Never before was the right to an "appropriate" or "suitable" education conferred on a subset of students.

In 1975, Congress, under steady pressure from disability rights advocates, educators and parents, passed the Education for All Handicapped Children Act (EAHCA), which "guaranteed a supplementary set of rights to children classified as handicapped."[6] The statute included the right to an "appropriate education" in the "least restrictive environment" with the provision of "related services." [7] Under the EAHCA, parents were allowed to request a special education evaluation for their child and consent or revoke consent to special education. Parents were also given the right to ask for an independent education evaluation at public expense when they disagreed with the school district's special education assessment. Most importantly, if parents believed their child was not receiving an appropriate education, they could request a due process hearing overseen by an independent hearing officer where they could be represented by counsel, call and cross-examine witnesses, and examine records relating to the child.[8]

The due process provisions in the EAHCA, today known as the Individuals with Disabilities Education Act, were nearly identical to the provisions ordered by the court in *PARC*. However, Congress' decision to leave the enforcement of students' rights to parents stands in a stark contrast to other civil rights legislation that was enacted during this period. For example, when Congress passed Title VI of the Civil

---

[2] Four percent of students with disabilities are enrolled in segregated education placements (publicly and privately funded), and less than 1% of students are in separate residential facilities, or in hospital or homebound placements.
American Youth Policy Forum and Center on Education Policy. (2002). "Twenty-Five Years of Educating Children With Disabilities: The Good News and the Work Ahead." Washington, D.C.: Author.
[3] Aud, S. and G. Hannes, eds. (2012). "The Condition of Education 2011 in Brief." NCES 2011-034. Washington, D.C.: U.S. Government Printing Office.
[4] *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. PA 1971).
[5] *Mills v. Board of Education*, 348 F. Supp. 866 (D. DC 1972).
[6] Engel, D.M. (1991). "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference." *Duke Law Journal* 166: 180-205.
[7] Congress enacted the Education for All Handicapped Children Act (the "EAHCA") in 1975. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C.A. §§ 1400–1487)
[8] 20 U.S.C. §1415

Rights Act in 1964, the Office of Civil Rights within the Department of Health, Education, and Welfare was charged with ensuring black students would be educated alongside their white peers in the public school system. Similarly, Title IX,[9] which was added to the Higher Education Act of 1965 in 1972, did not leave to her parents the enforcement of a female student's right to equal education opportunities. But with EAHCA, advocates believed a student's right to a "free appropriate public education in the least restrictive environment"[10] (FAPE in the LRE) could not be adequately monitored by a single administrative agency.[11] Then and now, students with disabilities are the only persons with individualized and statutorily created remedies in the form of entitlements in our schools. Other students, including "at-risk" students, receive targeted services only when school budgets allow, and their parents have no legal right to assert claims or demand services.[12]

"...rather than detailing the substantive rights of children with disabilities, the EAHCA created a novel relationship between their parents and school district personnel and developed a set of procedures to regulate that relationship. Thus, in school districts across the United States, the fate of millions of children with disabilities came to depend on the peculiar dynamics of the interaction between parents and local educators."

— David Engel

I. Flaws in the current special education due process system

There are many reasons for questioning the efficacy of the current due process system. First, as a result of major changes to key pieces of federal education legislation, due process is no longer the major lever for ensuring students with disabilities are provided an individualized plan that "confers an educational benefit."[13] From the 1980s to the early 2000s, the Individuals with Disabilities Education Act's due process provisions were critical to safeguarding the rights of students with disabilities because state and federal oversight of district special education programs was minimal. Requesting a due process hearing or filing a state complaint were the only meaningful ways for parents to know definitively whether a school district was fulfilling its obligations under IDEA to specifically serve their child.

But the 2001 No Child Left Behind Act (PL 107-110) (NCLB) and the 2004 reauthorization of IDEA (PL 108-446) greatly expanded the U.S. Department of Education's and state departments of education's role in monitoring local districts' compliance with federal education statutes and regulations. NCLB required districts to disaggregate student achievement by the disability status of its students and employed sanctions for districts unable to demonstrate marked improvement for students with disabilities. The 2004

[9] 20 U.S.C. §§ 1681
[10] 20 USC § 1400(d)(1)A)
[11] The Senate EACHA bill included a state-level, independent complaint agency called "the entity," which would conduct periodic evaluations of state and local compliance, receive complaints from individuals, provide opportunities for hearings, notify the state or local agency of a violation, and take steps to correct it. However, the civil rights community felt that the Office of Civil Rights was not enforcing antidiscrimination policies as aggressively as it should, and this influenced disability rights leaders to oppose an agency enforcement mechanism in the EACHA.
Neal, D. and D. Kirp. (Winter 1985). "The Allure of Legalization Reconsidered: The Case of Special Education." *Law and Contemporary Problems* 48: 63-87.
[12] Freedman, M.K. (May 2012). "Special Education: Its Ethical Dilemmas, Entitlement Status, and Suggested Systemic Reforms." *University of Chicago Law Review* 79, 1: Online exclusive. *http://lawreview.uchicago.edu/news/volume-79-issue-1-online-exclusive-miriam-kurtzig-freedman.*
[13] *Board of Education of the Hendrick Hudson Central School District of Westchester County v. Rowley*, 458 U.S. 176, 200 (1982).

reauthorization of IDEA required districts to report on a host of compliance and performance metrics known as "measurable indicators" to ensure they were quickly identifying students eligible for special education, pushing students toward inclusive education settings and not disproportionately identifying students for specific disabilities, among other factors. Failure to comply with federal statutes and regulations or meet performance goals set by the state could result in the loss of federal funding and/or intensive state monitoring and mandated improvement activities to assure future compliance. Together, NCLB and IDEA have wielded significant pressure on districts to improve the academic performance of students with disabilities and comply with IDEA's statutory and regulatory requirements. As a result, overall district compliance is driven much more by the new reporting and monitoring requirements of NCLB and IDEA 2004 than it is by hearing officers' rulings, which provide only student-specific remedies. Thus, filing for due process is a small and, at times, hollow means for parents to ensure district are complying with IDEA by providing their child FAPE in the LRE.

Second, there is no evidence demonstrating that successful challenges to an IEP in a due process hearing lead to marked improvements in the academic performance of students with disabilities or improvements to what the district was providing students originally. No research proves that students who take advantage of IDEA's due process provisions fare better academically after undertaking the hearing process. This point should not be taken lightly. While some due process hearings are filed because parents believe they were not given proper notices or that paperwork completed by the district was incomplete or inadequate, the majority of parents request a due process hearing because they believe the district is not committing enough time and resources to improving their child's academic performance. As a result, both parties spend considerable time and effort arguing over the adequacy of the IEP provided by the district with no knowledge as to whether a new IEP will provide better or worse results. If, after 35 years, the special education due process system does not definitively ensure better education outcomes for students with disabilities, AASA questions why it continues to exist.

Third, the cost and complexity of a due process hearing hinder low- and middle-income parents from exercising the procedural protection provisions to which they are entitled. IDEA's complex protocols and mandates disproportionately benefit wealthy, well-educated parents, who can deftly and aggressively navigate the due process system with the aid of private counsel and paid education experts. Because of education, language or income barriers, the majority of low-income parents cannot obtain representation, afford to pay for it or advocate effectively for their children.[14] Notably, it is districts composed of high

[14] Massey, P.A. and S.A. Rosenbaum. (Spring 2004). "Disability Matters: Toward a Law School Clinical Model: For Serving Youth With Special Education Needs." *Clinical Law Review* 11, 2: 271-334.

populations of low-income students that are more likely to struggle to meet IDEA mandates.[15] In addition, the parents residing in these districts file due process requests at a considerably lower rate than their wealthier counterparts.[16] The correlation between low quality of education for students with disabilities and the low earnings of their parents[17] means that families of children who are in dire need of improved educational services are the least able or likely to advocate and seek enforcement of IDEA's education protections through the due process system. As a result, "the rights provided by the IDEA become worthless because parents do not have true avenues to exercise them."[18]

While Congress did not intend for money to be siphoned from general education to special education, Congress never provided local districts with the promised 40% reimbursement needed to cover the cost of educating students with disabilities. As a result, the federal share of funding has not kept pace with the increased numbers of students identified as entitled to services under the statute. Districts must provide special education services to students with disabilities regardless of the cost, and when wealthy parents obtain services for their children, leading to increases in overall spending, less money is available for other children in the system.[19] Even individual actions by middle-income parents can result in judicial decisions or settlements contrary to the interests of the neediest children the district serves.[20] "A due process hearing is not designed to provide relief for the feelings of hostility and anger that parents may be experiencing during heated disputes with a school district over their child's special education services. The hearings are ill-suited to satisfy parents searching for a resolution for the tension with a school district. At best, special education due process hearings offer parents vindication rather than a long-term remedy for anger and resentment between parents and districts."[21]

Finally, numerous studies[22] document the dissatisfaction felt by parents and schools with the due process system. A study on the fairness of special education hearings[23] found that both parents and school officials had negative experiences with hearings, regardless of who prevailed. Most due process hearings

---

[15] Shah, N. (Aug. 2012). "Federal Special Ed. Ratings Fault D.C. — Again." *Education Week* 31, 37. www.edweek.org/ew/articles/2012/08/03/37ratings.h31.html; *Corey H. v. Board of Education of the City of Chicago*, 995 F. Supp. 900 (N.D. Ill. 1998); Weintraub, F.J., et al. (2008). "A Contextual Overview of the Modified Consent Decree in the Los Angeles Unified School District." *Journal of Special Education Leadership* 21, 2: 51-57.

[16] Only 4% of the lowest-income and 10% of middle-income districts had due process hearings, while 52% of the highest-income districts did. Pasachoff, E. (2011). "Special Education, Poverty, and the Limits of Private Enforcement." *Notre Dame Law Review* 86, 4: 1426.

[17] Budoff, M., A. Orenstein and C. Kervick. (1982). *Due Process in Special Education: On Going to a Hearing*. Cambridge, Mass: Ware Press; Kirst, M.W. and K. A. Bertken. (1983). "Due Process Hearings in Special Education: Some Early Findings From California." *Special Education Policies: Their History, Implementation and Finance:* 136-68

[18] Brief for the Council of Parent Attorneys and Advocates Inc., et al. as Amici Curiae in Support of Petitioners at 8-9, *Winkelman ex rel. Winkelman v. Parma City School District.*,127 S. Ct. 1994 (2007) (No. 05-983).

[19] For example, the more wealthy parents who obtain reimbursement for private school tuition or coveted slots in classrooms with low teacher-student ratios, the less money there is in the system to provide other children with special education services. Caruso, D. (2005). "Bargaining and Distribution in Special Education." *Cornell Journal of Law and Public Policy* 14, 2: 171-197.

[20] Pasachoff (cited at 15).

[21] Cope-Kasten, C. (2011). Bidding (Fair) well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution. *Honors Projects.* Paper 30. http://digitalcommons.macalester.edu/poli_honors/30

[22] Zirkel, P.A. and G. Scala. (2010). "Due Process Hearing Systems Under the IDEA: A State-by-State Survey." *Journal of Disability Policy Studies* 21, 1: 3-8; Lanigan, K.J., et al. (2001). "Nasty, Brutish... and Often Not Very Short: The Attorney Perspective on Due Process." *Rethinking Special Education for a New Century*. C.E. Finn Jr., A.J. Rotherham and C.R. Hokanson Jr., eds. Washington: D.C. Thomas B. Fordham Foundation; Fritz, J.M. (2008). "Improving Special Education Mediation." *International Review of Sociology* 18, 3: 469-480; Craparo, T. (2003). "Remembering the 'Individuals' of the Individuals with Disabilities Education Act." *New York University Journal of Legislative and Public Policy* 6: 467-524; Lake, J.F. and B.S. Billingsley. (2000). "An Analysis of Factors That Contribute to Parent–School Conflict in Special Education." *Remedial and Special Education* 21, 4: 240-251.

[23] Goldberg, S.S. and P.J. Kuriloff. (1991). "Evaluating the Fairness of Special Education Hearings." *Exceptional Children* 57, 6: 546-555; Zirkel, P.A. (1994). "Over-due Process Revisions for the Individuals with Disabilities Education Act." *Montana Law Review* 55, 2: 403-414.

produce disappointing results and take a great emotional toll on parties' personal and professional lives.[24] For instance, families may harbor feelings of distrust and anger toward the school before, during and after the hearing, while education professionals may have negative and cautious attitudes toward the student and his or her family going forward.[25] These sentiments can lead to less collaboration between the parties after the hearing, and "a less cooperative relationship between parent and school can cause subsequent problems with development of IEPs and conflict resolution with respect to changing educational placements."[26] Moreover, a student's needs cannot be effectively addressed when the adults responsible for that student's education will not work together. The student "is not well served by hostility and accusations between her school and her home," because it "is the student's education that is undermined by the absence of civility and cooperation between her family and her educators."[27]

A due process system that no longer serves as a powerful compliance lever, that breeds hostility and feelings of dissatisfaction between parents and school officials, that provides no known academic benefit to students, and that unintentionally limits some parents from safeguarding special education rights for their children should be reconsidered. AASA's newest report, *Rethinking the Special Education Due Process System*, examines whether the current due process system is the best course of action for ensuring all public school students with disabilities are provided opportunities to receive the services they need in school and to transition into a postsecondary environment. *Rethinking* explores the hidden costs associated with special education due process proceedings and subsequent litigation, particularly the fiscal, social and emotional toll that due process takes on everyone involved. It also proposes an alternative system that is more equitable, efficient and effective at ensuring parents can challenge whether a district is providing a free appropriate public education in the least restrictive environment to their child.

II. Results and Analysis of AASA Survey on IDEA Due Process System

From October 23 to November 5, 2012, AASA surveyed 200 school superintendents from across the United States to gauge their experiences with special education due process hearings and litigation. The goal of the survey was to gain a better understanding of how frequently district administrators were receiving requests for due process and how they were handling those requests. The survey found that 15% of respondents had one due process hearing within the last five years. Twenty-three percent of districts had two to five due process hearings within the last five years, with a third of those districts maintaining student enrollment between 1,000 and 3,000 students. Seven percent of districts had six to 10 due process hearings within the last five years, while 3% of districts had 11 or more due process hearings over the

[24] Mills, G.E. and K. Duff-Mallams. (1999). "A Mediation Strategy for Special Education Disputes." *Intervention in School and Clinic* 35, 2: 87-92.
[25] Getty, L.A. and S.E. Summy. (2004). "The Course of Due Process." *Teaching Exceptional Children* 36, 3: 40-44.
[26] Shemberg, A. (1996). Mediation as an alternative method of dispute resolution for the Individuals with Disabilities Education Act: A just proposal. *Ohio St. J. on Disp. Resol.*, *12*, 739.
[27] In re: Walnut Valley Unified Sch. Dist., 102 LRP 3457 (Cal. Apr. 18, 2000)

Excerpts of comments from AASA's survey regarding the cost of due process:

A superintendent from a suburb in northeastern Pennsylvania wrote: "We acquiesce to avoid due process hearing 95% of the time because due process will inevitably cost the school district large amounts of financial resources we don't have."

A superintendent from a rural district in Maryland stated the following: "Our district is not wealthy. We avoid due process at all costs, making every effort to work with the family to minimize unreasonable requests. We cannot afford even one major compensatory education decision. The costs of due process are almost always greater than working something out with the parent."

A superintendent from a Connecticut suburb wrote that while his district is "always consistent with IDEA, there are times when we'll settle with a parent rather than pursue due process due to the cost."

As one superintendent from New York stated, "The cost of due process cannot be measured just in dollars. The toll on staff and the time involved is terrible; we avoid it at all costs."

same period. When respondents were asked whether they engaged in litigation after due process hearings concluded, 3% of districts said they had multiple due process cases that resulted in litigation. The percentage of districts engaged in litigation resulting from a due process hearing is of particular interest, given that the number of federal special education decisions has doubled[28] in 10 years. Fifty-one percent of districts said they had not been involved in special education litigation or due process in the past five years. Of this percentage, 72% of districts identified themselves as rural, and 73% of these school districts enrolled less than 3,000 students. Therefore, suburban and urban areas with larger student enrollment were more likely to be engaged in at least one due process hearing than smaller, rural school districts.

Some states or regions experience more litigation than others. For example, after Washington D.C., New York and New Jersey have the highest numbers of adjudicated due process hearings held overall as well as the highest frequencies of adjudicated hearings held on a per capita basis.[29] New York and New Jersey account for 56% of all adjudicated hearings, while the next six states with the highest due process rates account for 24%.[30] The remaining 20% of adjudicated due process hearings are held by 42 states; the eight states with the lowest due process rates average fewer than three hearings per year.[31]

While there is a pattern of litigiousness, there is no correlation between the number of due process complaints filed by parents and the number of findings by state or federal departments of education of noncompliance. What, then, explains the varying number of incidents of special education litigation across the country? Some states and regions may have active plaintiffs bars or cottage industries of special education lawyers[32] who aggressively pursue

[28] There were 623 decisions in the 1990s, compared to 1,242 decisions rendered between 2000 and 2010.
Zirkel, P.A. and B.L. Johnson. (2011). "The 'Explosion' in Education Litigation: An Updated Analysis." *West's Education Law Reporter* 265: 1-8.
[29] Zirkel, P.A. and K.L. Gischlar. (2008). "Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis." *Journal of Special Education Leadership* 21,1: 22-31.
[30] Ibid.
[31] Ibid.
[32] Zirkel, P.A. (2005). "The Over-Legalization of Special Education." *West's Education Law Reporter* 195: 35-40.

parents of students with disabilities in the hopes of a finding a good candidate for a lawsuit against a school district. Other possible explanations are that people inhabiting certain states have greater financial means or are simply more litigious than individuals in other places.

Sociocultural factors may also contribute to varying rates of litigiousness and due process. In smaller, less wealthy communities, parents may be reluctant to push for additional services because of social pressure not to overburden the district's finances.[33] In other communities, cultural norms place educators in positions of authority that remain unquestioned,[34] reducing the likelihood of due process complaints. Lastly, some parents "have little experience with a legal system and tend to respect the decisions of professional educators,"[35] which generally contributes to low rates of adjudicated due process and litigation in some communities and regions of the country.

But the rate of adjudicated due process hearings and litigation is only one part of determining the extent to which due process affects students, parents and school personnel. In a fiscal climate where districts are laying off school personnel, delaying or eliminating instructional improvement activities, and increasing class size,[36] the possibility of spending tens of thousands of dollars on legal fees for a single special education student borders on the unthinkable. More than ever before, districts are weighing the cost of complying with parents' request for services, programs and placements against the cost of engaging in a due process hearing, even when districts believe these requests are frivolous, unreasonable or inappropriate for the student. The current fiscal environment and the need to do more with less means many school administrators are particularly conscientious of how moving funds from one stream to another can negatively affect groups of students, particularly if they did not budget for those fluctuations ahead of time. As a result, districts less frequently choose to move forward with due process hearings, and longitudinal data collected by the Department of Education demonstrate the decline in the use of due process hearings.[37]

The decision to move forward with a due process complaint or hearing is not taken lightly by districts. Many factors are considered before a district decides to settle with a parent or engage in a due process hearing. AASA asked its members whether they consider acquiescing to parental requests for students (regarding services, accommodations, placements, etc.) that the district considers to be unreasonable or inconsistent with IDEA requirements to avoid a due process complaint, hearing or litigation. Forty-six

---

[33] Pasachoff (cited at 15).
[34] Engel (cited at 5).
[35] Palmaffy, T. (2001). "The Evolution of the Federal Role." *Rethinking Special Education for a New Century*. C.E. Finn Jr., A.J. Rotherham and C.R. Hokanson Jr., eds. Washington: D.C. Thomas B. Fordham Foundation .
[36] Ellerson, N.M. (2012). "Weathering the Storm: How the Economic Recession Continues to Impact School Districts." Alexandria, Va: American Association of School Administrators.
[37] Zeller, R. (2012). "Six Year State and National Summaries of Dispute Resolution Data." Eugene, Ore.: National Center on Dispute Resolution in Special Education.

percent of respondents indicated that they acquiesced to requests by parents that they considered unreasonable or inconsistent with IDEA less than 10% of the time. Nearly a quarter of respondents indicated they consented to parental requests 25% to 50% of the time. One-fifth of respondents indicated they agreed to parental requests 51% to 75% of the time, and 4% of districts indicated they went along with parental requests 76% to 100% of the time in order to avoid a due process hearing or complaint.

Cost is a critical factor when deciding whether to comply with a parent's request or move forward with a due process hearing. Nearly 80% of school administrators took cost into consideration when deciding whether to consent to a parent's request. Predictably, the survey results demonstrated that the lower the cost of the parent's request, the more likely the district was to acquiesce. Nearly 40% of respondents stated they consented to "unreasonable, unnecessary or inappropriate requests by parents" if the cost to comply was less than 20% of the cost to move forward with due process. Fifteen percent of districts stated they acquiesced to an unreasonable request if the cost was 21% to 40% of the cost to move forward with a due process complaint or litigation. Twenty-two percent of districts stated they acquiesced to an unreasonable request if the cost was 41% to 60% of the cost to move forward with a due process complaint or litigation. And almost 10% of districts stated they acquiesced to an unreasonable request if the cost was 61% to 80% of the cost to move forward with a due process complaint or litigation.

School administrators also weigh the emotional burden of engaging in a due process hearing. When asked to characterize the degree of stress experienced by special education teachers, related services professionals and special education administrators during a due process hearing or subsequent litigation, 95% of respondents classified the stress as high or very high, with 4% calling it moderate. Only 1% of superintendents said the stress experienced by school personnel engaged in a due process hearing was unchanged; 1% described it as low or very low. In fact, some superintendents attributed the shortage of special-education-related service professionals, teachers and administrators to the stress associated with the risk of a due process hearing. This is not a new trend. As early as 1997, researchers reported that due process hearings may add to the rapidly increasing attrition of special educators.[38] Twelve percent of school administrators said that more than half of the time, district special education school personnel either left the district or requested a transfer out of special education after being involved in a due process hearing or subsequent litigation. Almost a quarter of school administrators stated that 10% to 25% of the time, teachers either left the district or requested a transfer out of special education after being engaged in due process hearings or similar proceedings. For example, a school administrator from a suburb in Washington state said that one year after his district engaged in a due process hearing requiring extensive

[38] Boe, E.E., et al. (1997). "Why Didst Thou Go? Predictors of Retention, Transfer, and Attrition of Special and General Education Teachers From a National Perspective." *Journal of Special Education* 30 (4): 390-411.

time and paperwork by two special education teachers and three related service professionals, only one of those professionals continued to work in the district. A superintendent from Connecticut remarked that after one protracted due process hearing, her director of pupil personnel services quit her job and left education entirely, the main special educator in the case suffered a heart attack and left the profession, and two related service professionals left the district.

One superintendent from the Piedmont region of North Carolina described how due process hearings affect his district:

"The involvement of attorneys and outside consultants working with our staff has caused half of our highly qualified special education staff to leave the profession. The stress of these situations impacts not only the school level, but also the administrative level, including the time required for administrative assistance to help with collecting historical data and supporting the professional educational team. Our district has had to retain special consultants to assist with difficult parents that add to the cost and an additional stress level for the administrative team in protecting the overall special education programs for other students."

School administrators contemplate other factors, as well. Seventy percent of school administrators considered whether a settlement with one parent would lead to similar requests from other parents in their district, while 12% weighed whether agreeing to a particular settlement in their district could affect requests for the same services or placements in neighboring school districts. Nearly 60% of school administrators reflected on whether a settlement with one parent would be fair to other students. A majority of administrators (56%) chose to settle in the hopes of avoiding the creation or continuation of an adversarial relationship with a parent. Many superintendents (45%) contemplated the loss of instructional time that could occur if teachers and other related service professionals were required to testify at or be involved in preparation for a due process hearing. Several respondents said they always put the child's interest ahead of any other issue they considered, but this factor was not specifically measured in the survey.

For a few administrators, a due process hearing poses such a serious threat that they attempt to budget for these proceedings in case they occur. Districts indicated they earmarked as little as $12,000 a year to as much as $50,000 to address potential costs associated with due process or litigation. While $50,000 may seem like a substantial amount to allocate to prospective legal fees, for the 98 districts surveyed that experienced at least one due process within the last five years, the average cost for employing outside counsel to represent the district was $10,512.50. This amount is not atypical and equals other estimates of the past decade.[39] If the district is found to be in violation of FAPE or chooses to settle with the parent prior to due process, the district frequently pays the attorney's fees incurred by the parent. For districts compelled to compensate a parent for attorney's fees,[40] the average cost was $19,241.38. The average

[39] Opunda, M.A. (1999). "Comparison of Parents Who Initiated Due Process Hearings and Complaints in Maine." Unpublished doctoral diss., Virginia Polytechnic Institute and State University, Blacksburg, Va; Sullivan, J. and B. Mohl. (Spring 2009). "Spending Spiral." *CommonWealth* : 34-46.
[40] PL 99-372 amended EAHCA by authorizing the awarding of "reasonable attorneys' fees" to parents who prevail in due process hearings and judicial proceedings.

expenditures associated with the verdict of the due process hearing were $15,924.14. For districts that chose to settle with a parent prior to the adjudication of the due process hearing, the settlement costs averaged $23,827.34. For many districts, this figure included the cost of the parent's attorney. Many districts have insurance plans through their state association or collective of state associations that may cover some of their legal fees after the due process hearing once they reach their deductible. On average, districts that moved forward with litigation after the due process hearing had an insurance deductible of $7,282.76. In some districts, the insurance deductible was as low as $2,500, but many had deductibles of approximately $10,000. Finally, the combined miscellaneous costs associated with the due process hearing, such as requests by parents for independent education evaluations, the hiring of substitutes to replace teachers who needed to testify at the hearing, the employment of experts for the hearing and any fees paid to the hearing officer, averaged to $7,717.24.

> "The IDEA has produced a system of rights that is cumbersome, inefficient and overly procedural."
>
> — Miriam Kurtzig Freedman

AASA's survey shows that there are many hidden costs to maintaining the current due process system. , and research indicates "the possibility of due process hearings hangs over most inclusive school environments like a mysterious and ever-present threat."[41] As the President's Commission on Excellence in Special Education stated a decade ago in its report on special education, "[special education] disputes of all sorts divert parent and school time and money, and waste valuable energy that could otherwise be used to educate children with disabilities."[42] While the right of parents to dispute their child's education quality is clearly delineated within IDEA, AASA's survey of school administrators highlights how these procedural safeguards produce grave fiscal, social and emotional consequences for school districts. Specifically, the threat of due process undermines efforts by school districts to fairly and efficiently allocate limited financial resources to students with and without disabilities.

[41] Bartlett, L.D., G.R. Weisenstein and S. Etscheidt. (2001). *Successful Inclusion for Educational Leaders.* Upper Saddle River, N.J.: Prentice Hall.
[42] President's Commission on Excellence in Special Education. (2002). *A New Era: Revitalizing Special Education for Children and Their Families.* Washington, D.C.: U.S. Department of Education, Office of Special Education and Rehabilitative Services.

III. Reconsidering a due process framework for IDEA

Congress has not created an individual education entitlement program since 1975, but for many advocates of the original EAHCA legislation, it is impossible to consider a federal special education law that does not provide a unique right to disabled students to receive a "free appropriate public education" and access to a due process system. Yet the need to reconsider a due process framework for IDEA should not be taboo. Judges and the literature agree: Due process is a high-cost, low-reward system.[43] Neither parents nor districts can be blamed for the adversarial climate in special education disputes and the high expenditures by both parties in due process disputes and litigation. IDEA forces parents to advocate for their child against the school, and they should not be condemned for doing exactly what the law expects them to do. But "relying on parents to fight against the school is unfair to them — and to everyone else…the enforcement burden is inequitable and dysfunctional."[44] The entire special education process — beginning with the finding of a disability to the creation of an IEP — provides numerous opportunities for parents and schools to respect each other's roles and responsibilities and build consensus. While recent additions to the dispute resolution system in IDEA, such as mediation[45] and resolution sessions,[46] represent an attempt to limit due process hearings, parents and lawyers intent on moving forward with a due process hearing will not opt to take advantage of these remedies.[47] Consequently, the fundamental structure of the dispute system requires more than minor tweaks in the next iteration of IDEA, despite good-faith efforts to improve the due process system in the past two reauthorizations.

The problem with charging parents with safeguarding their child's right to a free, appropriate public education has been detailed above; the actual hearing process fashioned by the statute has some serious shortcomings that are also ripe for examination. For example, the length of time needed to schedule and complete a due process hearing, and render a decision on the issues at hand, can significantly delay a remedy for the student. While Congress mandated that due process hearings be concluded within a 45-day timeline,[48] in practice, this is rarely the case.[49] Scheduling conflicts — due to attorneys' busy calendars, contractual agreements on working hours and vacations of school personnel and families, and parent and expert-witness availability — often lead to delays.[50] And "hearing officers almost uniformly object to the lack of flexibility imposed by the timeline. Their reasons vary widely, ranging from caseload overload to

[43] Cope-Kasten, C. (2011) "Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution" Unpublished honors project, Macalester College, St. Paul, Minn. *http://digitalcommons.macalester.edu/poli_honors/30*.
[44] Freedman, M.K. (2009) *Fixing Special Education—12 Steps to Transform a Broken System*, Austin, Texas: ParkPlacePubs.com.
[45] Individuals with Disabilities in Education Act, Public Law 105-17 111 Stat. 37 (1997)
[46] Individuals with Disabilities in Education Act, Public Law 108-446 118 Stat 2467 (2004)
[47] Borreca, C. Personal communication, Sept. 27, 2012.
[48] 34 CFR 300.515
[49] Borreca (cited at 45).
[50] Rosenfeld, S.J. (2012). "It's Time for an Alternative Dispute Resolution Procedure." *Journal of the National Association of Administrative Law Judiciary 32*, 544-899.

obstruction from the parties to case complexity."[51] Moreover, the increasing complexity of IDEA disputes means that hearings that used to require a few hours or a single day take much longer. In California, for instance, a hearing typically lasts five to six days.[52] The length of the proceeding coupled with scheduling demands necessitates that hearings occur over the course of several weeks, if not months.

Additionally, hearing officers' professional backgrounds call into question whether they are the best authority for presiding over special education disputes between parents and districts. While the 2004 reauthorization of IDEA mandated that hearing officers be lawyers, "many of the issues that arise in hearings demand expertise concerning disability and education, not law."[53] As a result, there is wide variation in the quality and type of hearing officers across the country, and "many hearing officers are faced with the obligation to decide among proposals that they are not well trained to evaluate."[54]

> *"Few would quarrel with the proposition that almost no one has a good view of due process hearings — including (perhaps surprisingly) many of those who conduct them."*
>
> *— James Rosenfeld*

Reforming special education due process is not an invitation to return to a pre-1975 education system. The inclusion of people with disabilities in all walks of life is now a given, and their full engagement in society benefits everyone. However, parents and disability rights advocates do not usually win at due process hearings and, as a result, AASA questions why they would fight to preserve the status quo system. Although parents request the vast majority of the due process hearings,[55] a quantitative comparative analysis of litigation for cases that took place in the mid-1990s found that districts prevailed in the majority of cases.[56] Among the most common areas for disputes, districts won overwhelmingly.[57] Given the frequency with which school districts prevail in due process hearings, it may seem strange that an organization representing school administrators desires changes to the due process system. But the rationale is simple: AASA does not believe the procedural safeguards in IDEA are functioning as intended and wants the next reauthorization of IDEA to address this problem.

---

[51] Rosenfeld (cited at 48).
[52] Yell, M., A. Katsiyannis and M. Losinski. (Nov. 2011). "The Costs of Due Process Hearings." *Leadership Insider: Practical Perspective on School Law and Policy.*
[53] Rosenfeld (cited at 48).
[54] Rosenfeld (cited at 48).
[55] Only 14.1% of hearings are initiated by districts.
[56] Lupini, W.H. and P.A. Zirkel. (2003). "An Outcomes Analysis of Education Litigation." *Educational Policy* 17, 2: 257-279.
[57] Most of the differences between decision rules in which the prevailing party was either the parent or school district were in the following categories: eligibility (75% district and 25% parent), assessment and evaluation (72% district and 28% parent), IEP (57% district and 43% parent), placement (71% district and 29% parent), behavior (68% district and 32% parent), and related services (64% district and 36% parent).

IV. An Alternative Dispute Resolution Process

When parents initiate a due process complaint against a district, the basis of their claim is that the school district failed to provide a "free appropriate public education in the least restrictive environment" for their child. The terms "appropriate" and "least restrictive" have been debated by lawyers for decades, yet little consensus exists about what they mean. In the meantime, the vast majority of hearing officers lack the education expertise necessary to accurately assess an individualized education program, and beginning in the early 1980s, the courts have shown a reluctance to weigh the merits of various IEPs for students.[58] Who, then, could best make a determination as to whether an individualized education plan meets the basic tenets of IDEA (namely FAPE in the LRE)? When would this party step in to resolve the dispute? What would the cost be? How would parents and districts benefit if due process hearings were no longer part of the dispute resolution picture? AASA suggests a two-pronged approach to replace the due process system. First, make it more difficult for litigation to occur by adding language to the statute creating a mandated facilitated IEP meeting. Second, remove the current due process hearing option and replace it with a special education consultancy model.

It is important to note that AASA believes it is critical to preserve the right of parents to file a state complaint or to initiate an investigation through the Office of Civil Rights as well as to receive prior written notice whenever the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE. Moreover, parents continue to maintain procedural safeguards that enable them to examine records, participate in meetings, and obtain an independent educational evaluation. AASA's proposal focuses on amending the current due process complaint and hearing provisions, and does not in any way impact the ability of parents to initiate litigation against a district, submit any other complaint or request an investigation of any other presumed misconduct by a district.

Two of the most effective alternative dispute resolution models used by states are IEP facilitation and mediation. While mediation was written into the IDEA statute in the 1997 reauthorization, IEP facilitation has never been referenced in the statute. Currently, about half of states have an IEP facilitation process that is available to some or all districts as part of the continuum of dispute resolution options they offer

[58] In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (cited at 12), the Supreme Court made the following statements in regard to educational methodology: "In assuring that the requirements of the [IDEA] have been met, courts must be careful to avoid imposing their view of preferable educational methodology upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents and guardians of the child…"

districts and parents.[59] Because the majority of parent and school interactions take place during the IEP meetings, this venue is where disagreements between both parties tend to begin and fester.[60] Traditionally, IEP facilitation occurs when parties in an IEP meeting agree that the presence of a neutral third party would facilitate communication and problem solving. It is most commonly used when there is a "history of contentious interactions between the family and school, the participants anticipate that they will be unable to reach agreement on critical issues, or when a meeting is expected to be particularly complex and controversial."[61] The IEP meeting is still led by school officials; however, an objective facilitator ensures both sides are able to voice their opinions and concerns constructively during the meeting with the goal of finding a mutually agreed upon IEP that provides FAPE in the LRE. IEP facilitation enables both parties to proactively reach an agreement before emotions and positions become rigid. The use of a "trained and neutral facilitator who can encourage all team members to participate equally and can employ strategies to eliminate a [power] imbalance can be very beneficial."[62]

There are many variations of IEP facilitation models across the country, but AASA proposes mandating an IEP facilitation system where facilitators have training and experience in clarifying points of view, communicating more effectively and resolving conflict. Parents are informed about the IEP facilitation option at the first IEP meeting they attend with the district and notified in writing about the option to engage in facilitation on an annual basis. Either party can request the facilitator, but in situations where an IEP meeting has already been held and parents refused to agree to the IEP, the district must request the facilitator. The facilitation session would not exceed two hours in length unless both sides agree to an extension, and each side would need to submit to the facilitator and to each party a summary specifically listing the items of disagreement and possible corresponding remedies prior to the meeting. The facilitation meeting is not open to lawyers or advocates.

The facilitator is not a member of the IEP team and has no personal interest in the outcome. To qualify as facilitators, participants must attend a five-day facilitated IEP team meeting training as well as a 15-hour continuing education course each year (half of the hours must be focused on special education law and half on the facilitation process). In some states, the majority of the facilitators are retired special education directors or program specialists who are very knowledgeable about the IEP team process and the law, though it is not suggested to require facilitators to have this background.[63] As is the norm in many states, there would be no cost to the district or to parents to engage with a facilitator; the state would bear the cost. The facilitator would be evaluated on an annual basis using facilitation evaluations completed by

[59] Moses, P. Personal communication, Nov. 20, 2012.
[60] Mueller, T.G. (2009). "Alternative Dispute Resolution: A New Agenda for Special Education Policy." *Journal of Disability Policy Studies* 20, 1: 4-13.
[61] National Center on Dispute Resolution in Special Education. "Process and Practice Information." *www.directionservice.org/cadre/ctu/processdefs.cfm* (Dec. 7, 2012).
[62] Mueller, T.G. (2009). "IEP Facilitation: A Promising Approach to Resolving Conflicts Between Families and Schools." *Teaching Exceptional Children* 41, 3: 60-67.
[63] Neale, K. Personal Communication. Aug. 07, 2012.

both sides and by a committee consisting of school district personnel, parents and state officials. The state would design and standardize the training for all facilitators.

There is solid evidence demonstrating the effectiveness of IEP facilitation. In North Carolina, data collected from the 2008-2009 school year found parents and districts reached consensus on all issues 70% of the time.[64] Twenty-two percent of participants reached consensus on "some" issues, while 8% did not reach any agreement. There is also strong support and satisfaction with the IEP facilitation process. In AASA's survey, 75% of school administrators supported the inclusion of IEP facilitation provisions in IDEA. Data collected from 2004 to 2011 in Wisconsin show that 87% of facilitation participants — both district personnel and parents — were satisfied with the facilitation process, and 86% would use the facilitator again.[65] Over 80% of participants in Wisconsin believed the IEP facilitation provided a satisfactory IEP, and 86% of participants did not feel pressured to agree with the IEP. Moreover, parents in North Carolina viewed the IEP facilitation process as a worthwhile means of resolving disputes; of the total facilitation requests made to the state department of education, 62% of the requests came from parents.[66]

While AASA believes the majority of disputes could be resolved using a traditional IEP facilitation model, we also think it would be advantageous to allow parties to use mediation sessions as a secondary process. Mediation has proved to be an effective way of reducing the number of due process hearings,[67] but participation in mediation is not mandatory. Traditionally, when the mediation finally occurs, parents and districts have already discussed their conflict over the IEP or the identification of the child as disabled numerous times, and the relationship has become fraught with tension and anger.

AASA proposes several changes to the current mediation process in IDEA. First, only two representatives of the school district are required to attend the mediation. If the district and parent agree, additional personnel may attend. This ensures that school districts are not perceived as intimidating parents to make a deal and also allows school district personnel who are not needed for the negotiation to maintain their day-to-day duties. Second, the mediation agreement is not legally binding, and lawyers are not allowed to attend the mediation. The use of advocates and attorneys has limited the effectiveness of mediation, because the presence of attorneys "complicates and compromises the outcome of mediation"[68] and

[64] Public Schools of North Carolina, Department of Public Instruction, Exceptional Children Division. "End-of-Year Report: Special Education Facilitation Program." *http://ec.ncpublicschools.gov/parent-resources/dispute-resolution/end-of-year-reports/08-09facilitation.pdf* (Dec. 7, 2012).
[65] Burns, J. Personal communication, Nov. 20, 2012.
[66] Public Schools of North Carolina (cited at 63).
[67] Schrag, J.A and H.L. Schrag. (2004). "National Dispute Resolution Use and Effectiveness Study. Executive Summary." Eugene, Ore.: Consortium for Appropriate Dispute Resolution in Special Education.
[68] See Muller (cited at 58).

exacerbates the power imbalance between parents and district personnel.[69] AASA believes mediation must continue to be a confidential, voluntary dispute resolution process conducted by a qualified and impartial mediator who is trained in effective mediation techniques and whose services are paid for by the state. The mediator should remain focused on improving the relationship between the parties to ensure better communication and future collaboration. As in current law, the mediator will also attempt to steer both parties toward reaching agreement on the IEP or other issues at hand. The state will design and standardize the training for all mediators.

If the proposed IEP facilitation model and mediation session fail to resolve the parties' disputes, a new dispute resolution mechanism is employed. Filing a due process complaint or holding a resolution session or due process hearing will no longer be options. Instead, families and schools jointly select an independent, neutral special education consultant designated by the state to review evidence of the child's disability and advise the parties on how to devise a suitable compromise IEP. This person cannot be a lawyer or an advocate. Each state can determine the specific professional parameters for the consultant, but the ideal candidate will be employed by a higher-education institution in the state and have demonstrated expertise in the child's primary disability as well as experience teaching, administering or providing educational programs to children identified with the child's primary disability. The state department of education contracts the consultants directly and maintains a list of all qualified consultants. The parties must agree on which consultant they employ for the dispute resolution process. The SEA should investigate the consultant's background thoroughly to ensure no prior relationships exist with either the LEA where the consultant will be deployed or with a disability advocacy group or private provider that works with parents. Once selected, the consultant meets with both parties within 15 days of receiving the request.

The purpose of engaging the consultant is to ensure the child receives appropriate services and subsequently help the parties resolve their dispute. The consultant is tasked with the following: interviewing parents and relevant school personnel about the student and the student's weaknesses and strengths, recommending additional evaluations, accessing and reviewing all relevant education assessments and medical documents for the student, observing the student in a variety of school environments, and drafting a written report within 21 days of the initial meeting recommending a specific IEP for the student. Once the report is complete, the district and parent are obligated to follow the consultant-designed IEP for a mutually agreed upon period of time. If either party is dissatisfied with the IEP after the testing period, that party can file a lawsuit in federal court, and the consultant's notes and

[69] Harry, B., N. Allen and M. McLaughlin. (1995). "Communication Versus Compliance: African-American Parents' Involvement in Special Education." *Exceptional Children* 61, 4: 364-77; Lake and Billingsley (cited at 20]

model IEP will be included as part of the record in any litigation. If the parent wishes to pursue compensatory education or reimbursement for expenses associated with obtaining private education in the absence of the school district's provision of FAPE, the parent can continue to do so in federal court as long as an attempt has first been made to find agreement with the district through the facilitation and consultancy model.[70]

The consultancy system is preferable to due process hearings for multiple reasons. First, abolishing the hearing system will shift the focus to substantive issues such as whether the district developed and carried out an IEP that will improve academic achievement for the student, rather than on whether the district violated one of IDEA's 800 compliance requirements.[71] "Since the IDEA is an entitlement statute and requires proactive behaviors on the part of the school, most disputes cite infractions based on IDEA."[72] Subsequently, hearing officers' decisions frequently hinge on procedural technicalities instead of whether the district developed a plan that was reasonably calculated to provide a student with disabilities an education benefit in the least restrictive environment. In a consultancy system, the emphasis is on formulating a strong plan to improve the academic performance of the child, rather than arguing over whether the school district erred in designing or administering the original IEP or whether the parents' demands for services and placements are unreasonable. In essence, the focus is squarely on the results the IEP produced, rather than whether the district abided by the hundreds of paper-based compliance metrics under state and federal law.

Second, this alternative approach is evidence-based. Currently, there is no proof that hearing officers' decisions result in better outcomes for disabled students. While IDEA allows a hearing officer to access records and assessments compiled by school personnel and specialists employed by the school, there is no follow-up to see whether hearing officers' decisions have positively or negatively affected student performance. In contrast, the consultant-recommended IEP will be evaluated and tested. Because the consultant is more adept at analyzing education records and assessments than a hearing officer and can also observe the student at school to make independent determinations about the student's needs, the consultant's IEP will be more appropriate than a hearing officer's final decree. Allowing an agreed-upon period to test the effectiveness of the IEP gives both parties adequate time to observe any measurable differences in the student's performance and what, if any, education benefit the student receives. After this period, the parties meet again with the consultant to review the student's progress. If the district did

[70] The frequency of litigation at the federal level focused on providing compensatory education decisions should decrease remarkably given that these claims are often made after a student has been denied FAPE for a long period of time and because the parent can request a facilitator who will determine whether an evaluation for the student is appropriate, as well as a consultant who will create a neutrally informed IEP within 30 days through the consultant process.
[71] President's Commission on Excellence in Special Education (cited at 41).
[72] Margolis, H. (1998). "Avoiding Special Education Due Process Hearings: Lessons From the Field." *Journal of Educational and Psychological Consultation* 9, 3: 233-260.

not implement the IEP, current law would apply, allowing the parent to at any point dispatch a written complaint to the state requesting an investigation. If the student has not benefited educationally from the new IEP, or either party is not satisfied with the current IEP for other reasons, the consultant can suggest amendments to the IEP and another period of testing can begin. Alternatively, either party can move forward with a lawsuit in federal district court.

Third, a consultancy system ensures that when schools do not provide the appropriate education and services, parents of students with disabilities can remedy this wrong regardless of their means. This proposal greatly levels the playing field between low-income families and districts in IDEA disputes. Since neither party is forced to employ experts, lawyers and other specialists in order to sufficiently challenge the IEP, even the poorest of families can challenge the district's placement, services and programs for their child. Low-income parents need the ability to challenge these districts if they are not providing appropriate services for their children. In addition, by creating a lawyer-free system for special education disputes, costs for districts will be significantly reduced.

Fourth, this system is considerably less stressful for special education teachers, specialized instructional support staff and administrators. While these school personnel will still have to attend the IEP facilitation and meet with the special education consultant, they won't have to waste valuable time preparing their testimony for the due process hearing, meeting with experts and lawyers, and planning lessons for substitutes. The retention of special education personnel is a documented problem for hundreds of school districts, and due process hearings may add to the rapidly increasing attrition of special educators.[73] If districts hope to retain these highly needed staff, it is essential they create an environment that supports, rather than undermines, their expertise: "Teachers went into the field not to become defendants at trial, but to educate, and yes, to advocate for their students. The adversarial climate has eroded that natural positive inclination."[74] Moreover, district personnel may feel validated if an independent consultant suggests an IEP that is similar or identical to what the district initially proposed. For district personnel who proposed an IEP that differs drastically from the consultant's IEP, a review and testing of the consultant's approach could prove instructive and catalyze district personnel to consider modifying their practices and services overall.

Finally, this model will greatly diminish the adversarial relationship characteristic of special education disputes between parents and districts. Jointly choosing a trusted consultant whose expertise both parties respect will reduce accusations of bias, misrepresentation and ill intent. Unlike the due process system,

[73] Boe et al. (cited at 36).
[74] Freedman (cited at 43).

where the hearing officer pronounces a verdict that gives a victory (albeit a partial one at times) to one party or another, the consultancy model won't have inevitable winners and losers. Instead, this option is an opportunity to test a new approach to how to better educate the disabled child in the hopes that all parties will find this new IEP suitable and, most importantly, the child will demonstrate progress toward reaching goals.

The consultancy model outlined above is similar to a voluntary dispute resolution system piloted in Massachusetts since 2009 called SpedEx.[1] The main difference between the proposal outlined by AASA and the SpedEx program is that in Massachusetts, parents and districts must voluntarily agree to hire the consultant, and either party may proceed with due process at any point. Following receipt of the consultant's report, the parties develop the IEP jointly with the consultant's input. If they reach agreement on the IEP, the consultant then observes the child in the program as a follow-up. The parties retain their right to accept or reject the consultant's report and are not obligated to follow it. Moreover, neither party waives their right to pursue due process. While the SpedEx model has shown promise in reducing the use of the due process hearing system,[75] AASA believes adding another layer to the due process system is not the answer, which is why we recommend replacing the due process system with the aforementioned proposal.

Conclusion

School districts across the United States spend over $90 million per year in conflict resolution.[76] Data from the education departments in the most populated U.S. states — California, New York, Texas, Florida and Illinois — indicate that the annual number of due process hearing requests continues to increase.[77] There should be widespread agreement to abandon a system where disputes tend to become more focused on the needs, desires and frustrations of the parties, as opposed to the education needs of the child. Undoubtedly, many in the disability advocacy community will read this proposal and see it not as a well-intentioned policy idea to make IDEA enforcement more reasonable for all parties, but as a way for school districts to reduce the education quality and services provided to students with disabilities and to curb parental rights. Such a reading is improper. While AASA's survey shows that the majority of districts in the U.S. do not engage in a due process hearing or even encounter a due process complaint over the course of five years, over 90% of all school administrators surveyed agree the current threat of

[1] SpedEx. *http://spedexresolution.com* (Dec. 7, 2012).
[75] Scanlon, D. Personal communication, Aug. 2, 2012.
[76] Muller (cited at 58).
[77] Consortium for Appropriate Dispute Resolution in Special Education (CADRE). (2008). "Part B—Three Year Annual Report Summaries for Written Complaints, Mediations and Due Process." Eugene, Ore.: CADRE. *www.directionservice. org/cadre/statecomprpts.cfm* (Nov. 20, 2012)

IDEA due process requires teachers and related service personnel to spend time and resources complying with paperwork that would better be allocated to providing high-quality services and programs for students with disabilities.

The number of teachers who leave special education or the teaching profession entirely after being involved in a due process hearing is a hidden cost of continuing the due process system. In the words of one special education administrator, "Due process is a brutal system. It paralyzes the educational system; it paralyzes individuals."[78] The lack of evidence demonstrating the efficacy of the current due process system is yet another reason to explore alternative approaches. The inequitable access to the due process system by parents with limited means and education abilities demands a system that provides better options. Most significantly, the current due process system is no longer the de facto lever ensuring district compliance with IDEA. The complex system of indicators developed in IDEA 2004, coupled with the subgroup accountability system of NCLB, has forced districts to improve the programs and services of students with disabilities or endure sanctions. In sum, there are many reasons to take a fresh look at the current procedural safeguard system in IDEA, and we hope this report sparks a conversation within the education and disability advocacy community about the serious flaws in the current system and the need to improve the system as a whole.

AASA Survey Findings

[78] Ratcliffe, K.G. (2002). "Testimony Before the Health, Education, Labor and Pensions Committee United States Senate Hearing on IDEA: What's Good for Kids? What Works for Schools?" *www.help.senate.gov/imo/media/doc/Ratcliffe.pdf.*

Q1. Please choose your level of agreement with the following statement: The threat of IDEA due process requires teachers, related service personnel and administrators in my district to spend time and resources complying with paperwork that would be better allocated to providing high-quality services and programs for students with disabilities.

Response	Count	%	Percentage of total respondents
Strongly agree	141	68.78%	
Agree	50	24.39%	
Neither agree or disagree	11	5.37%	
Disagree	2	0.97%	
Strongly disagree	1	0.49%	
Total responses	**205**		20% 40% 60% 80% 100%

Q2. My district acquiesces to parental requests for students (regarding services, accommodations, placements, etc.) that we find to be unreasonable and/or inconsistent with IDEA requirements to avoid a due process complaint, hearing or litigation:

Response	Count	%	Percentage of total respondents
Less than 10% of the time	94	46.08%	
11-25% of the time	13	6.37%	
26-50% of the time	50	24.51%	
51-75% of the time	38	18.63%	
76-100% of the time	9	4.41%	
Total responses	**204**		20% 40% 60% 80% 100%

Q3. My district is likely to acquiesce to parental demand for changes to the student's IEP that we believe are unreasonable, unnecessary or inappropriate if the cost required to yield to the parent's request is:

Response	Count	%	Percentage of total respondents
Less than 20% of the cost to move forward with a due process complaint or litigation	72	36.55%	
21%-40% of the cost to move forward with a due process complaint or litigation	30	15.23%	
41%-60% of the cost to move forward with a due process complaint or litigation	44	22.34%	
61%-80% of the cost to move forward with a due process complaint or litigation	18	9.14%	
81% or more of the cost to move forward with a due process complaint or litigation	12	6.09%	
Other (please specify)	21	10.65%	
Total responses	**197**		20% 40% 60% 80% 100%

Q4. The following factors affect whether my district settles with a parent (check all that apply):

Response	Count	%	Percentage of total respondents
Cost to comply with parent's request	160	79.21%	
Whether the settlement will lead to similar requests from other parents in my district	143	70.79%	
Whether the settlement will lead to similar requests from parents in neighboring districts	24	11.88%	
Whether a similar request was	86	42.57%	

previously granted in the district or in a neighboring district			
The loss of instructional time that could occur if teachers and other related service professionals are required to testify or be involved in preparation for a due process hearing	90	44.55%	
The development of an adversarial relationship with the parent	113	55.94%	
Whether the settlement is fair to other students we are serving in the district	118	58.42%	
Other (please specify)	38	18.81%	
Total responses	**772**		**20% 40% 60% 80% 100%**

Total percentages may exceed 100 since a participant may have selected more than one answer for this question.

Q5. Has your district been involved in special education litigation or a due process hearing in the past five years? Check all that apply.

Response	Count	%	Percentage of total respondents
No.	99	51.03%	
Yes, my district had one due process hearing within the last five years.	29	14.95%	
Yes, my district had two to five due process hearings within the last five years.	44	22.68%	
Yes, my district had six to 10 due process hearings within the last five years.	14	7.22%	
Yes, my district had 11 or more due process cases within the last five years.	6	3.09%	
Yes, my district was involved in one due process hearing that resulted in litigation.	5	2.58%	

Yes, my district has had multiple due process cases that resulted in litigation.	5	2.58%	
Total responses	**202**		**20%** **40%** **60%** **80%** **100%**

Q5. In the past five years, please list the average cost of the multiple or individual cases you had in the following categories:

Response	Cost
Outside counsel	$10,512.50
Attorney fees for parents	$19,241.38
Verdict costs	$15,924.14
Settlement prior to due process hearing or litigation	$23,827.34
Insurance deductible	$7,282.76
Other related costs, such as IEEs, hearing-officer fees, substitutes, etc.	$7,717.24
Total responses	**98**

Q6. Would you support an IDEA provision to permit parents and districts to request an impartial, highly knowledgeable special education facilitator from the state education agency who would attend an IEP meeting and assist the parties in reaching agreement? The state would cover the cost of the facilitator.

Response	Count	%	Percentage of total respondents
Yes	152	75.25%	
No	14	6.93%	
Unsure	36	17.82%	
Total responses	**202**		**20%** **40%** **60%** **80%** **100%**

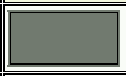
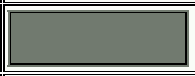
Q7. How would you characterize the degree of stress experienced by special education teachers, related services professionals and special education administrators when they are engaged in a due process hearing or subsequent litigation?

Response	Count	%	Percentage of total respondents
Very high	162	81%	
High	28	14%	
Moderate	8	4%	
Low	1	0.5%	
Very low	0	0%	
Unchanged	1	0.5%	
Total responses	**200**		20% 40% 60% 80% 100%

Q8. Have you noticed a trend of special education teachers either leaving the district or requesting to be transferred to general education classrooms after being involved in a due process hearing, state complaint or other litigation related to special education?

Response	Count	%	Percentage of total respondents
Yes, 50% or more of the time, teachers either leave the district or request a transfer out of special education after being engaged in due process hearings or similar proceedings.	23	11.68%	
Yes, 26%-49% of the time, teachers either leave the district or request a transfer out of special education after being engaged in due process hearings or similar proceedings.	16	8.12%	
Yes, 10%-25% of the time, teachers either leave the district or request a transfer out of special education after being engaged in due process hearings or similar proceedings.	48	24.37%	

No, there is no change.	94	47.72%	
Other (please specify)	16	8.11%	
Total responses	**197**		**20% 40% 60% 80% 100%**

Q9. What was your district's enrollment as of January 2011?			
Response	**Count**	**%**	**Percentage of total respondents**
1-999	47	23.5%	
1,000-2,999	75	37.5%	
3,000-4,999	27	13.5%	
5,000-9,999	29	14.5%	
10,000-24,999	13	6.5%	
25,000-49,999	8	4%	
50,000-99,999	0	0%	
100,000 or more	1	0.5%	
Total responses	**200**		**20% 40% 60% 80% 100%**

Q10. My district is best described as:			
Response	**Count**	**%**	**Percentage of total respondents**
Rural	110	54.73%	
Suburban	73	36.32%	
Urban	18	8.95%	
Total responses	**201**		**20% 40% 60% 80% 100%**

American Association of School Administrators
1615 Duke Street
Alexandria, VA 22314