

# Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where do Mediation Principles Fit In?

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All fifty of our United States, and the District of Columbia, have made firm commitments to providing free and appropriate public education to children with special needs.<sup>1</sup> While every state is at liberty to create its own public policy regarding the scope of its responsibilities in educating its constituents,<sup>2</sup> states receiving federal special education funding must comply with the statutory provisions of the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> The basic goal of the Act is to provide to all children with disabilities a free and appropriate public education (FAPE) adapted to meet their individual needs<sup>4</sup> within the least restrictive environment (LRA);<sup>5</sup> it has remained at the heart of the Act since its inception<sup>6</sup> to its current reenactment,<sup>7</sup> a span of thirty years.<sup>8</sup> Since virtually all states apply for federal

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<sup>1</sup> A.F. Blau & A.L. Allbright, *50-State Roundup: Ensuring Children with Disabilities a Free Appropriate Public Education*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 1, 11-19 (2006).

<sup>2</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>3</sup> 20 U.S.C. § 1412(1) (2000).

<sup>4</sup> 20 U.S.C. § 1412(1)(A).

<sup>5</sup> 20 U.S.C. § 1412(5)(A).

<sup>6</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1974) (codified as 20 U.S.C. § 1400) [hereinafter EHA of 1975].

<sup>7</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as 20 U.S.C. § 1400 (Supp. 2004)) [hereinafter IDEIA of 2004].

funding through the IDEIA,<sup>9,10</sup> the current reauthorized Act plays a powerful role in structuring both the scope of available education and the accountability measures offered to students with disabilities.<sup>11</sup>

While originally entitled the Education for All Handicapped Children Act (EHA) when first enacted in 1975,<sup>12</sup> its reauthorization as the Individual Disabilities Education Act (IDEA) of 1997<sup>13</sup> first offered mediation processes to parents and school systems as an available dispute resolution process. Congress mandated that mediation be made available whenever a due process hearing was filed.<sup>14</sup> The intent was to assist parents and school systems in resolving their differences regarding the educational needs for children with disabilities through increased discussions and collaborative efforts; this would reduce the need for costly and adversarial litigation.<sup>15</sup> Alternative dispute resolution (ADR) processes have taken an increasingly dominant role within the newly reauthorized IDEIA of 2004,<sup>16</sup> reflecting Congressional promotion of parent and district collaboration for achieving the Act's goals.<sup>17</sup>

## I. BACKGROUND

In 1966, Congress began a concerted effort<sup>18</sup> to ensure that children with disabilities were treated in a fashion that was similar to their non-disabled peers. This was initiated by enacting a grant amendment to the Elementary and Secondary Education Act (ESA) of 1966<sup>19</sup> “for the purpose of assisting the States in the improvement of programs and projects . . . for the education of handicapped children.”<sup>20</sup> Although this program was later

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<sup>8</sup> A.F. Blau, *The IDEIA and the Right to an “Appropriate” Education: The Measurement Standard*, 1 B.Y.U. EDUC. L.J. (forthcoming 2006-07) (manuscript at 1-2, on file with author).

<sup>9</sup> IDEIA of 2004, *supra* note 7; *see also* Blau, *supra* note 8, at 18.

<sup>10</sup> OSERS OSEP Part B and C State Monitoring and Formula Grants, U.S. Department of Education, available at <http://www.ed.gov/policy/speced/guid/idea/monitor/index.html>.

<sup>11</sup> Blau, *supra* note 8, at 2.

<sup>12</sup> EHA of 1975, *supra* note 6.

<sup>13</sup> Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as 20 U.S.C. § 1415(e)) [hereinafter IDEAA of 1997].

<sup>14</sup> 20 U.S.C. § 1415(e) (Supp. 2004).

<sup>15</sup> Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 45-47 (1999).

<sup>16</sup> IDEIA of 2004, *supra* note 7.

<sup>17</sup> Demetra Edwards, *New Amendments to Resolving Special Education Disputes: Any Good Ideas?*, 5 PEPP. DISP. RESOL. L.J. 137, 138 (2005). “Since 1997, alternative dispute resolution for special education disputes has grown in popularity among legislators and courts, affecting the recently passed amendments of the IDEA.” *Id.*

<sup>18</sup> Act of Nov. 3, 1966, Pub. L. No. 89-750, 80 Stat. 1191, § 161 (1966).

<sup>19</sup> Elementary and Secondary Education Act of 1966, 20 U.S.C. § 7801 (1996) (originally enacted as Elementary and Secondary Education Act of 1966, 20 U.S.C. § 7800 (1966)).

<sup>20</sup> Act of Nov. 3, 1966, *supra* note 18..

repealed and replaced in 1970 by Part B of the ESA,<sup>21</sup> Congress was dissatisfied by the limited progress made under these programs.<sup>22</sup> They later enacted the Education of All Handicapped Children Act (EHA) in 1975, the initial version of today's IDEA.<sup>23</sup> Prior to the EHA, states were at liberty to provide or not provide public education to disabled students whom they deemed were "uneducable."<sup>24</sup> Parents played no part in these school placement decisions and had no legal recourse if they disagreed.<sup>25</sup> With increasing tension between parents and school districts, two landmark district court cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*<sup>26</sup> and *Mills v. Board of Education*,<sup>27</sup> in the early 1970's markedly changed this unilateral power base. By establishing that the denial of educational opportunities to children with disabilities was in violation of the Equal Protection Clause of the Fourteenth Amendment, the *Pennsylvania Ass'n for Retarded Children* and *Mills*<sup>28</sup> decisions ensured that children with mental disabilities, regardless of the severity of their impairment, were no longer excluded from the public educational arena.<sup>29</sup> Further, by holding that school systems could not unilaterally make placement decisions without providing proper notice and opportunity for parental input, these district courts also recognized the importance of due process rights within the special education forum.<sup>30</sup> These landmark cases caught the attention of the public and congressional representatives throughout the states and provided a strong impetus for the development of the Education for All Handicapped Children Act (EHA), which soon followed.<sup>31</sup>

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<sup>21</sup> Education of the Handicap Act, Pub. L. No. 91-230, 84 Stat. 175, Part B (1970).

<sup>22</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 179-80 (1982).

<sup>23</sup> EHA of 1975, *supra* note 6.

<sup>24</sup> See 24 PA. CONS. STAT. ANN. § 13-1375 (West 2006) (previously allowing the State Board of Education to exclude children found to be "uneducable" or "untrainable" from public school programs); 24 PA. CONS. STAT. ANN. § 13-1304 (West 2006) (previously allowing the school districts to refuse to accept or retain students who did not attain a mental age of five).

<sup>25</sup> Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities under the IDEA*, 53 RUTGERS L. REV. 333, 335 (2001).

<sup>26</sup> Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

<sup>27</sup> Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

<sup>28</sup> *Id.* As the defendant in *Mills* was the District of Columbia, thus under Federal and not State legislation, the *Mills* Court held that the school district had violated the Due Process Clause of the Fifth Amendment.

<sup>29</sup> *Id.*

<sup>30</sup> Joshua Andrew Wolfe, Note, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals With Disabilities Education Act*, 55 VAND. L. REV. 1627, 1631 (2002).

<sup>31</sup> *Id.* at 1631-33.

The EHA, by incorporating parental involvement in decision making<sup>32</sup> and providing detailed procedural safeguards<sup>33</sup> to ensure students received a free appropriate public education (FAPE)<sup>34</sup> within the least restrictive environment (LRE),<sup>35</sup> dramatically changed the educational playing field. Parents of children with disabilities now had legal recourse when they thought their children's educational entitlements were being violated.<sup>36</sup> The law afforded parents the opportunity to file for an impartial hearing at the local educational level,<sup>37</sup> appeal that decision at the state educational level,<sup>38</sup> and then file a civil action in either state or federal district court for a review of the state educational determination.<sup>39</sup> Although this federal legislation dramatically diminished the unilateral power base once enjoyed by the state educational agencies by giving parents more of a voice in their children's education, the adversarial relationship between school districts and parents continued to grow.<sup>40</sup> Tensions between parents of students with disabilities and school districts, initially based on the futility felt by parents in having a legitimate say over their children's school placement and educational needs prior to the Act's passage, were further fueled by the litigious forum established to voice these concerns.<sup>41</sup> Instead of an equitable balance of collaborative power, founded on community cooperation and collaboration, parents of disabled children and school districts became court combatants over the selection and appropriation of educational methods, related services and funding resources.<sup>42</sup>

In the decades that followed, Congress recognized that the litigious environment that grew out of the procedural safeguards within the EHA and IDEA (the Act) did little to improve the relationship between schools and parents.<sup>43</sup> Schools diverted significant funds and energy from children's education towards litigation, which enhanced a growing distrust between

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<sup>32</sup> See 20 U.S.C. § 1414(a)-(f) (Supp. 2005) (requiring parental input within the reauthorized IDEA).

<sup>33</sup> 20 U.S.C. § 1415 (Supp. 2004).

<sup>34</sup> 20 U.S.C. § 1412(1)(A) (2000).

<sup>35</sup> 20 U.S.C. § 1412(5)(A).

<sup>36</sup> *Mills*, 348 F. Supp. at 875, 878.

<sup>37</sup> 20 U.S.C. § 1415(f)(1)(A).

<sup>38</sup> 20 U.S.C. § 1415(g)(1)(2).

<sup>39</sup> 20 U.S.C. § 1415(i)(1)(A)-(B).

<sup>40</sup> Blau, *supra* note 8, at 22-23.

<sup>41</sup> *Id.*

<sup>42</sup> Marchese, *supra* note 25, at 335. Marchese suggests the statute's due process protocols represented the primary means for parents to exercise influence over educational placement, despite their participation within the Individual Education Plan development process. *Id.* at 351. School districts and parents were often locked into draining and lengthy conflicts often taking years to resolve. *Id.* at 335.

<sup>43</sup> Edwards, *supra* note 17, at 144.

school districts and the parents of students with disabilities.<sup>44</sup> Based on positive reports from numerous states across the country,<sup>45</sup> congressional committees proposed the incorporation of alternative dispute resolution methods, specifically the use of mediation, within the reauthorized IDEA of 1997.<sup>46</sup>

As mandated within the IDEA of 1997, mediation was offered to parents after they requested a due process hearing.<sup>47</sup> These impartial hearings were filed when disputes arose between parents and schools regarding the child's Individual Education Plan (IEP) – the legal document specifying the elements required for a student's receipt of an FAPE within the LRE. As reauthorized and refined within the current IDEIA of 2004, mediation processes are available to both parents and schools for resolving any dispute arising either prior to or concurrent with a due process request and are not limited to disputes involving the IEP.<sup>48</sup> Mediations are confidential processes in which an impartial mediator, knowledgeable in special education law, acts as a neutral facilitator to encourage both sides in a dispute to work collaboratively to reach a mutually acceptable agreement.<sup>49</sup> When both sides reach a written agreement, that agreement is legally binding.<sup>50</sup> The Act ensures that the process is voluntary,<sup>51</sup> that it is not used to deny or delay a parent's right to a due process hearing,<sup>52</sup> and that the process is conducted by a qualified and impartial mediator trained in effective mediation techniques.<sup>53</sup> Neither the reauthorized IDEA of 1997 nor the current refined 2004 Act define a mediation model for states to use or the specific qualifications necessary in

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<sup>44</sup> Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?* 8 HARV. NEGOT. L. REV. 201, 204 (2003).

<sup>45</sup> EILEEN M. AHEARN, *MEDIATION AND DUE PROCESS PROCEDURES IN SPECIAL EDUCATION: AN ANALYSIS OF STATE POLICIES* 6 (1994). Ahearn reports that by 1994, thirty-nine states had some form of special education mediation systems. *Id.*

<sup>46</sup> Nancy A. Welsch, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*. 19 OHIO ST. J. ON DISP. RESOL. 573, 612 (2004).

<sup>47</sup> 20 U.S.C. § 1415(e) (Supp. 2004).

<sup>48</sup> RANDY CHAPMAN, *THE LEGAL CENTER FOR PEOPLE WITH DISABILITIES AND OLDER PEOPLE, THE EVERYDAY GUIDE TO SPECIAL EDUCATION LAW: A HANDBOOK FOR PARENTS, TEACHERS AND OTHER PROFESSIONALS* 43 (2005).

<sup>49</sup> See CARRIE J. MENKEL-MEADOW, LELA L. LOVE, ANDREA K. SCHNEIDER & JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 266-324 (2005) (providing a comprehensive discussion of mediation processes).

<sup>50</sup> 20 U.S.C. § 1415(e)(2)(F)(iii) (Supp. 2004).

<sup>51</sup> 20 U.S.C. § 1415(e)(2)(A)(i).

<sup>52</sup> 20 U.S.C. § 1415(e)(2)(A)(ii).

<sup>53</sup> 20 U.S.C. § 1415(e)(2)(A)(i)-(ii), (e)(2)(C).

the mediator. The Department of Education regulations<sup>54</sup> promulgated to enforce the Act also do not establish a model or mediator qualifications.<sup>55</sup> If mediation processes are not chosen by parents as a forum to resolve their grievances, the Act explicitly encourages local and state educational agencies to offer parents and schools an opportunity to meet with a disinterested party whose role is to explain the benefits of mediation.<sup>56</sup> While special education mediation remains a voluntary process, the Federal Act's mandate to offer mediation as a form of dispute resolution makes it readily available to both parents and schools as a supplement to due process hearings.<sup>57</sup>

While early reports, after the enactment of the IDEA of 1997, suggested that mediation served an important and positive function within the special education community,<sup>58</sup> parents continued to file due process complaints in greater numbers and neither parents nor school districts embraced the active use of mediation. This was evident in the state of New York. Between September 2004 and August 2005, approximately 4000 due process complaints were filed in New York, the majority originating in New York City.<sup>59</sup> During that same period, only 500 mediation requests were filed (55-60% from New York City).<sup>60</sup> While a reported 95% of these mediations resulted in written agreements,<sup>61</sup> parents and school districts, especially within New York City, did not typically choose mediation as an available dispute resolution method. The growing distrust between parents and school personnel and the lack of effective collaborative efforts based on equal voice in developing the Individual Education Plan (IEP) – the legal document upon which

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<sup>54</sup> 34 C.F.R. §§ 300.1-300.114 (2006).

<sup>55</sup> See 34 C.F.R. pt. 300; see also D'Alo, *supra* note 44, at 201.

<sup>56</sup> 20 U.S.C. § 1415(e)(2)(B) (Supp. 2004). In the reauthorized act of 2004, the statute, as passed by Congress, states, “[a] local educational agency or a State agency may establish procedures to offer parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party . . . to encourage the use and explain the benefits, of the mediation process to the parents.” IDEAA of 1997, *supra* note 13, at §615(e)(2)(B) (emphasis added). In the 1997 reenactment, the statute stated, “[a] local educational agency or State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party . . . to encourage the use, and explain the benefits, of the mediation process to the parents.” *Id.* (emphasis added).

<sup>57</sup> IDEAA of 1997, *supra* note 13, at § 615(e)(1) (stating that mediation is available “at minimum . . . whenever a hearing is requested . . .”); IDEIA of 2004, *supra* note 7, at § 615(e)(1) (ensuring that mediation is available “. . . involving any matter, including matters arising prior to the filing of a complaint . . .”).

<sup>58</sup> See Linda R. Singer & Eleanor Nace, *Mediation in Special Education: Two States' Experiences*, 1 OHIO ST. J. ON DISP. RESOL. 55 (1985).

<sup>59</sup> Memoranda from Rebecca Goldstein, Director of Finance and Contract Administration, N.Y. State Dispute Resolution Ass'n, Inc. (NYSDDRA) to author (Apr. 12, 2006 and May 1, 2006) (on file with author).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

each child's educational program was based – was not significantly changed. Therefore, the perception of the effectiveness of voluntary mediation, as loosely structured within the Act (both the 1997 and 2004 reenactments), did not on its own serve to transform power disparities or heal the years of distrust between parents and schools.<sup>62</sup>

## II. ALTERNATIVE DISPUTE RESOLUTION PROCESSES WITHIN THE IDEIA OF 2004

In 2004, Congress enacted the Individuals with Disabilities Improvement Act (IDEIA).<sup>63</sup> Each reenactment of the EHA of 1975 has reinforced the Act's original founding principles, one of which is the entitlement of a free appropriate public education within the least restrictive environment for all students with disabilities.<sup>64</sup> While the basic Act has not changed, each reenactment has added refinements to reflect the growing sophistication in identifying and assessing students with disabilities; the accountability and measurement of educational benefits, service provisions, discipline management protocols, students' rights, teacher qualifications, and parent participation within the IEP processes; and the due process and conflict resolution procedures available to both parents and schools.<sup>65</sup> While the inclusion of voluntary mediation, as originally promoted within the 1997 reauthorized Act, remained intact within the 2004 improvement act, "resolution sessions"<sup>66</sup> became a core feature of the due process protocol. A mandated dispute resolution session, as defined within the 2004 Act, is a meeting within which parents and school personnel have a final opportunity to air their grievances and resolve their disputes after a parent has filed a due process complaint but prior to scheduling an impartial hearing.<sup>67</sup> While the session may be waived if both sides agree in writing or request mediation,<sup>68</sup> resolution sessions are mandatory meetings between parents and school representatives with settlement authority.<sup>69</sup> In another attempt to equalize the playing field, attorneys representing the schools are barred from attending these

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<sup>62</sup> Marchese, *supra* note 25, at 337.

<sup>63</sup> IDEIA of 2004, *supra* note 7.

<sup>64</sup> Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 10-11 (2006).

<sup>65</sup> IDEAA of 1997, *supra* note 13; *see also* IDEIA of 2004, *supra* note 7; *see also* Blau, *supra* note 8, at 5-6

<sup>66</sup> *See* 20 U.S.C. § 1415(f)(1)(B)(i) (Supp. 2004).

<sup>67</sup> CHAPMAN, *supra* note 48, at 52.

<sup>68</sup> 20 U.S.C. § 1415(f)(1)(B)(i)(IV).

<sup>69</sup> 20 U.S.C. § 1415(f)(1)(B)(i)(II), (f)(1)(B)(i)(II).

sessions, unless the attorney represents the parent.<sup>70</sup> Third party neutrals do not facilitate the dispute resolution sessions nor are these sessions treated as confidential.<sup>71</sup> Decisions reached between the parties are binding and enforceable.<sup>72</sup> After the agreement is signed, each party has three business days to void the agreement.<sup>73</sup>

Because the enactment of this regulation came into effect in late 2005, data regarding the impact of these sessions on conflict resolution is not yet available.<sup>74</sup> Informal observations in New York City<sup>75</sup> suggest that the mandatory nature of these sessions, the need to conduct these meetings within a prescribed period of time (fifteen days following receipt of a due process complaint notice),<sup>76</sup> and the large number of due process complaints filed, have resulted in school districts placing compliance with the Act's resolution session requirement as a top priority.<sup>77</sup> Concurrently, interest in promoting voluntary mediation, a process which may address a broader range of disputes, has been less frequently promoted.

Where, then, does mediation fit in within the reauthorized Act?

### III. SPECIAL EDUCATION MEDIATION WITHIN THE REAUTHORIZED IDEIA

On the heels of the *Pennsylvania Ass'n for Retarded Children* decision in 1972 and the enactment of the EHA in 1975, California, Connecticut, and Massachusetts reported positive outcomes of special education mediation.<sup>78</sup> By the mid-1980s, these states reported increasing numbers of positive mediated outcomes.<sup>79</sup> Aware of the growing adversarial stance that was arising between parents and schools, proponents of cooperative dispute resolution turned to voluntary mediation to promote better relationships between

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<sup>70</sup> 20 U.S.C. § 1415(f)(1)(B)(i)(III).

<sup>71</sup> *Agreements Made During Resolution Sessions are Binding*, THE SPECIAL EDUCATOR (Nat'l Ass'n of Special Educ. Teachers) Mar. 3, 2006, at 11 [hereinafter *Agreements*].

<sup>72</sup> 20 U.S.C. § 1415(f)(1)(B)(iii)(I)(II) (Supp. 2004).

<sup>73</sup> 20 U.S.C. § 1415(f)(1)(B)(iv).

<sup>74</sup> The New York State Education Department is tracking the outcomes of resolution sessions in the state of New York. At the time this paper was completed in fall 2006, NYSED had no data available for distribution. NYC Department of Education administrators, at the advice of their DOE attorneys, refused to speak to the author regarding Dispute Resolution Sessions thus suggesting that IDEIA implementation, at least in NYC, is considered a sensitive issue.

<sup>75</sup> Personal observations and communication with Michele Kirschbaum, Coordinator Special Education Mediation, Safe Horizon Community Mediation Centers, Feb. 6, 2006 [hereinafter Kirschbaum Communications].

<sup>76</sup> 20 U.S.C. § 1415(f)(1)(B)(i)(I).

<sup>77</sup> Kirschbaum Communications, *supra* note 75.

<sup>78</sup> 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, 38, 43 (1997) (explaining that between forty-five and seventy percent of mediations resolved disputes via agreements).

<sup>79</sup> *Id.* at 44. "[I]n the early years of Pennsylvania's mediation program . . . eighty-six percent of the cases in mediation reached an agreement." *Id.*



schools and parents.<sup>80</sup> The use of mediation was based upon the assumption that the presence of a neutral third party, who would facilitate the parties' movement toward co-constructed solutions, would result in general satisfaction by parents and school districts and reduce the existing tension.<sup>81</sup> In particular, mediation was promoted as a means to achieve the goals of self-determination, collaborative problem solving, and relationship building between school systems and parents, all of which were perceived as being in the best interest of the child.<sup>82</sup>

Anecdotal information about the positive results of special education mediation throughout the country initially prompted Congress to include voluntary mediation within the reauthorized IDEA of 1997.<sup>83</sup> The reauthorized IDEA of 2004 further promoted mediation by additionally offering parents and schools the opportunity to utilize mediation *before* filing due process complaints thus broadening the potential positive impact of mediation processes.<sup>84</sup>

Despite the relatively high percentages of agreements reached within the earliest reported cases,<sup>85</sup> and even higher percentages reported in the more recent studies since the inclusion of voluntary mediation with the reenacted acts,<sup>86</sup> mediation has remained underutilized.<sup>87</sup> Advocates for mediation have suggested that the lack of understanding about the mediation process by school personnel, parents, and organizations might explain their resis-

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<sup>80</sup> D'Alo, *supra* note 44, at 204.

<sup>81</sup> Welsch, *supra* note 46, at 611.

<sup>82</sup> Marchese, *supra* note 25, at 354. Marchese suggests that mediation also needs to be examined in relation to the statutory obligations within which it functions. *Id.* He cautions that a "successful" resolution in mediation might not address the "appropriateness" of the child's placement or educational program under the IDEA. *Id.*

<sup>83</sup> S. REP. NO. 105-17, at 26 (1997); *see also* Marchese, *supra* note 25, at 348.

<sup>84</sup> IDEA of 2004, *supra* note 7, at § 615(e)(1). The education department of several states (e.g., New York) had incorporated pre-grievance mediations several years prior to the reauthorization of the IDEA of 2004. *See also* Goldstein Memoranda, *supra* note 59.

<sup>85</sup> Goldstein Memoranda, *supra* note 59.

<sup>86</sup> Hon. Yvette N. Diamond, *Administrative Law Perspective: OAH-What's It All About?* 39 MD. B. J. 4 (Feb. 2006). The Honorable Judge Diamond states, "The OAH's mediation program is a prime example of the benefits of [alternative dispute resolutions]. In calendar year 2004, the OAH received 505 special education mediation requests . . . [O]f those, 330 mediations were actually conducted and 184 settled[,] yielding a 56% success rate for mediation." Diamond, *supra* note 86, at 9. These results were based on a pilot project conducted by the Maryland OAH in 2004. *See* Goldstein, *supra* note 59. NYSDRA reported 95% of special education mediations conducted between September 2004 and August 2006 resulted in full or partial written agreements. *Id.*

<sup>87</sup> MICHELE KIRSCHBAUM, SAFE HORIZON, SPECIAL EDUCATION MEDIATION: AN OVERVIEW (2006) [hereinafter KIRSCHBAUM Special Education].

tance to recommend mediation.<sup>88</sup> Subsequent studies focusing on the parties' general satisfaction with the mediation processes and their perception of procedural fairness have suggested that special education mediation may have fallen short of some of its desired goals.<sup>89</sup> While written agreements were often reached, parties reported only moderate satisfaction with the mediation process and felt that the goals of long-term relationship building, improved communication and collaboration, and the establishment of mutual trust, were not achieved.<sup>90</sup>

Perhaps the underlying problem is due not to the shortcomings of mediation processes but to the shortcomings of the Act itself. Although the Act altered the power imbalance between school systems and parents, it did not significantly neutralize the imbalance that existed in favor of the schools.<sup>91</sup> School personnel retained the decision-making power as "educational professionals" regarding the services they would offer students.<sup>92</sup> In contradiction, parents were provided with little more power than was necessary to approve the recommended services, veto power to refuse them, and a "voice" to provide input<sup>93</sup> in recommending alternative services; a voice, many felt, that was not often heard outside the due process protocol.<sup>94</sup> Although schools openly invite parents to be part of the IEP team, as mandated, and welcome parental input, the schools ultimately make decisions based on their own assessments and available resources.<sup>95</sup> Parents either accept these decisions or refute them via informal or formal complaints. The experience of this power imbalance is often renewed each year when parents and school personnel meet to discuss projected appropriate educational services for the yearly update of the child's Individual Educational Program (IEP).

Some research efforts suggest that the accumulated tensions and mistrust brought to the mediation sessions present an almost insurmountable

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<sup>88</sup> *Id.*

<sup>89</sup> Kuriloff, *supra* note 78, at 48. Table 1 illustrates parents' and school officials' perceptions of fairness within each stage of the mediation process. *Id.* at 49. "Participants in this study generally expressed only mild satisfaction with mediation and perceived it only as a modestly fair procedure." *Id.* at 60.

<sup>90</sup> *Id.* at 60-67.

<sup>91</sup> Marchese, *supra* note 25, at 337. "As written, however, the revised statute does little to improve this system. It will take more than the option of voluntary mediation to transform power disparities and a poor parent/district relationship in the absence of a sincere willingness by all parties, in particular school districts, to collaborate to design an appropriate placement." *Id.*

<sup>92</sup> *Id.* "Described as 'an extension and elaboration of the negotiation process,' mediation involves the intervention of a third party who has no decision-making power." *Id.*

<sup>93</sup> See 20 U.S.C. § 1414(c)(1)(B) (Supp. 2005). "[O]n the basis of that review and *input* from the child's parents . . ." (*emphasis added*).

<sup>94</sup> See D'Alo, *supra* note 44, at 217. Even within mediation processes, "there is not a proportional amount of attention given to parents having a voice in the outcome (self-determination) . . ." *Id.*

<sup>95</sup> D'Alo, *supra* note 44, at 207 (noting that "it was clear that a 'seat at the table' did not guarantee that parents would get the educational services they expected or the protection they hoped for from the due process system").

barrier to relationship building and true collaboration between the parties.<sup>96</sup> Others note that procedural issues, within the newly reauthorized Act of 2004, actually work against the use of mediation prior to the filing of a due process complaint by implicitly, if not intentionally, discouraging parents.<sup>97</sup> The “stay-put rule” whereby a student’s educational program or placement is safeguarded and cannot be altered during the pendency of the hearing and appeals process, unless through mutual agreement or court order,<sup>98</sup> does not apply to pre-due process complaint mediations.<sup>99</sup> Before parents even consider the benefits of mediation, they often feel compelled to apply for an impartial hearing out of concern that their child’s placement or services will be changed and to ensure their pendency rights are respected.<sup>100</sup> Despite these roadblocks, the high percentage of agreements reached within special education mediations suggests that its role as a viable dispute resolution alternative within the special education community still holds promise.<sup>101</sup> Given all of these concerns, where, then, might mediation processes be most effectively used within the current spectrum of available dispute resolution and prevention options within the reauthorized IDEIA?

#### IV. UTILIZING MEDIATION, PRINCIPLES OF MEDIATION AND DISPUTE PREVENTION/RESOLUTION ALTERNATIVES<sup>102</sup> IN SPECIAL EDUCATION

There are numerous methods employed by parties in their attempts to resolve or avoid special education disputes. Some parents and school districts have taken their appeals to the United States Supreme Court;<sup>103</sup> others have felt that inaction would be in their children’s best interest because they fear reprisals or find navigating through the system too complex.<sup>104</sup> Extreme action and inaction, however, reflect two extreme positions along a vast spectrum of available alternatives. By offering the option of mediation, *both before and after* filing due process complaints, the reauthorized IDEIA

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<sup>96</sup> See generally Marchese, *supra* note 25.

<sup>97</sup> Kirschbaum Communications, *supra* note 75.

<sup>98</sup> 20 U.S.C. § 1415(j) (Supp. 2004).

<sup>99</sup> Kirschbaum Communications, *supra* note 75.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> The term “dispute prevention/resolution alternatives” as used within this paper refers to processes that help parties avoid litigation as a means of reaching consensus regarding a student’s special education needs.

<sup>103</sup> See *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

<sup>104</sup> David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L. J. 166, 187 (1991).

of 2004 has opened the door for *increased creativity* within the special education community *by employing effective mediation along with the full range of available dispute prevention, resolution, and negotiation principles* throughout the development and implementation of the child's educational program. A range of these alternatives, some newly emerging due to the recent date of the IDEIA's reenactment, are listed in Table 1. A brief description of these established and emerging processes will follow, ranging from voluntary dispute prevention to mandatory dispute resolution alternatives, held prior to, concurrent with, or subsequent to the filing of a due process complaint.

#### A. Available Processes Prior to Filing a Grievance

##### 1. Collaboratively Well-Written Individual Education Plan

The primary means of dispute prevention in special education is a true collaborative approach that brings the parties towards the development of a well-written Individual Education Program Plan. The IEP is the legal document that both prescribes and describes the educational goals and services to be publicly provided to a student.<sup>105</sup> As such, the IEP and its implementation serve as the measurement guide for a child's progress as well as future legal action on behalf of the child. The reauthorized IDEIA brings a comprehensive group of professionals and parents together to design the IEP.<sup>106</sup> Parties should make certain that everything that a child requires for a free appropriate education is written within this document. Because schools are legally required to implement every service and goal prescribed by the IEP, it is less likely that disputes will arise if parents and school personnel do a comprehensive collaborative job in writing the IEP.

While mediation is not typically part of the traditional IEP model, the mediation principles of self-determination, mutual sharing, and active collaboration towards common interests (i.e., the successful education of a child) are all reflected in a well-written IEP.

##### 2. Informal Discussions

When school personnel or parents are uncomfortable with any aspect of a student's educational program or performance, informal discussions between parents and schools are suggested via informal dispute resolution pro-

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<sup>105</sup> 20 U.S.C. § 1214(d) (Supp. 2004).

<sup>106</sup> 20 U.S.C. § 1414(d)(1)(B).

cedures.<sup>107</sup> Parents and school personnel may also communicate their concerns to the school in written form. While informal procedures vary across school districts, parents should be encouraged to meet with teachers, related service providers, or school principals. Contacting the director of special education or the district superintendent may help address questions about proper IEP implementation and insure prompt compliance.<sup>108</sup> Early communication allows parties to voice concerns, repair mistakes, and resolve issues before they reach a point of escalation. Informal discussions may serve to empower parents when they see their concerns addressed without a formal meeting. Again, while mediators are not typically invited to informal discussions, the ability of successful informal meetings to transform power disparities between parents and schools underscores basic principles found within the transformative mediation model.<sup>109</sup> Parents thus empowered bring a more positive attitude to these discussions.

### 3. Individual Education Plan Negotiations

Formal IEP meetings, whether during an annual review or when scheduled specifically to address concerns, provide formal opportunities for parents and school personnel to discuss their perspectives and attempt to resolve their differences via direct negotiation.<sup>110</sup> An advocate or an attorney may accompany parents if they feel the need for additional support. School or regional districts often include parent members as representatives of their school-based team so that parents who come without support might feel less “outflanked” by professionals.<sup>111</sup> Issues that are resolved via negotiations at IEP meetings are then approved by the IEP team and incorporated into the IEP.<sup>112</sup> While mediators are not typically part of the traditional IEP meeting, negotiations between parents and school personnel that are based on

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<sup>107</sup> Edwards, *supra* note 17.

<sup>108</sup> CHAPMAN, *supra* note 48, at 44.

<sup>109</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). See D’Alo, *supra* note 44, at 205 (discussing mediation models employed in special education).

<sup>110</sup> Jane Babin, *Adequate Special Education: Do California Schools Meet the Test?* 37 SAN DIEGO L. REV. 211, 222 (2000).

<sup>111</sup> CHAPMAN, *supra* note 48, at 31, 39-41.

<sup>112</sup> 20 U.S.C. § 1414(B) (Supp. 2004). IEP teams include parents, at least one regular education teacher if a child is participating in at least one regular education class, a special education teacher, a supervising school district representative knowledgeable about both special and general education, an individual competent in evaluation interpretation, others with special knowledge or related service providers at parents or school district’s request, the student with a disability when appropriate, and early intervention or transition representatives as appropriate when requested.

collaborative rather than competitive negotiation models<sup>113</sup> often will incorporate mediation principles of relationship building, identification of common interests, and mutual satisfaction within the process of negotiation. This assists all parties in maintaining focus on what they might collaboratively perceive as the best interests of the special needs student.

#### 4. Individual Education Plan Facilitation

IEP facilitation is a relatively new process that is not directly noted within the IDEIA but clearly within the scope of alternative resolution processes. While the specific model employed varies, individuals with knowledge about special education law are invited to help facilitate dialog between parents and school personnel.<sup>114</sup> States who have implemented IEP facilitation often do so during “at risk” IEP meetings.<sup>115</sup> The level of concerns that have been expressed prior to the meeting or the existence of communication difficulties between team members typically determines whether a meeting is “at risk.”<sup>116</sup> The defining parameters of “at risk” might easily be extended to include a student’s initial IEP meeting. Given the perceived power imbalance between parents and schools, a facilitator might prove useful the first time parents attend an IEP meeting that is either due to their child’s new classification or a transition of IEP team members. Acting as a third party neutral, the IEP facilitator assists team members in communicating and effectuating an IEP that is in the best interest of the student.<sup>117</sup> A facilitator may improve relationships between members via modeling effective communication techniques and assisting team members to stay on task and remain student-focused.<sup>118</sup> The facilitator does not serve as a formal mediator nor does he or she chair the IEP meeting. Furthermore, the facilitator is not considered a member of the IEP team, and he or she does not direct the participants towards preferred solutions.<sup>119</sup> Current models often use qualified special education mediators as IEP facilitators.<sup>120</sup> This is done because the

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<sup>113</sup> See generally R. FISHER & Y. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991).

<sup>114</sup> Dixie Rider & Kerry Smith, Pennsylvania Office of Dispute Resolution, Learned Lessons: Pennsylvania’s Sometime Rocky Entrance into IEP Facilitation, Presentation at CADRE’s National Symposium on IEP Facilitation (Oct. 29, 2005).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Rider & Smith, *supra* note 114. Results of pilot project performed by the Office of Dispute Resolution (ODR) in Pennsylvania revealed that directive facilitation methods were not appreciated by either parents or schools but the use of broad facilitative skills (principles found within facilitative mediation) was positively received. *Id.*

<sup>120</sup> *Id.*

mediator has unique skills in enhancing relationship building and mutual collaboration within the IEP process. However a mediator's role and a facilitator's role are not synonymous, and keeping this distinction in mind has been reported as key to the success of the process.<sup>121</sup>

##### 5. Manifestation Determination Review Facilitation

The reauthorized Act requires school districts to hold manifestation determination meetings regarding the behaviors of students with disabilities if the school intends to remove students from their classes for more than ten days.<sup>122</sup> The determination is made by the parents, school district and relevant IEP team members.<sup>123</sup> Inviting trained special education mediators to serve as facilitators during manifestation determination reviews (MDR) has been proposed as another creative way to instill underlying mediation principles within the special education community.<sup>124</sup> Because current modifications in the protocols for determining whether the behavior or perceived misconduct of a student with disabilities is a manifestation of a student's disability, a result of improper implementation of an IEP, or both, are under review,<sup>125</sup> MDRs are playing an increasingly dominant role within the reauthorized IDEA of 2004. These reviews are considered "at risk" because they arise in the wake of a behavioral incident and have an immediate impact on a student's educational placement.<sup>126</sup> As such, these meetings are highly emotionally-charged and extremely susceptible to disputes between parents and school personnel. Like the IEP facilitator, the MDR facilitator is a neutral third party committed to assisting the team members to communicate and effectuate a placement. The facilitator does not chair the meeting, take sides on issues, or make decisions. The facilitator's role is to assist the team in collaboratively communicating their interests and reaching resolution for their concerns while remaining on task and student-focused.<sup>127</sup>

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<sup>121</sup> See L.P. Love & J.B. Stulberg, *Partnerships and Facilitation: Mediators Develop New Skills for Complex Cases*, DISP. RESOL. MAG., 14-16 (Spring 2003) (cautioning that the distinctions between facilitative mediation models and facilitation skills should be kept in mind).

<sup>122</sup> 20 U.S.C. § 1414(d)(1)(B)(vi) (Supp. 2004).

<sup>123</sup> *Id.*

<sup>124</sup> Kirschbaum Communications, *supra* note 75.

<sup>125</sup> 20 U.S.C. § 1415(k)(1)(E)(i)-(ii) (Supp. 2005).

<sup>126</sup> Kirschbaum Communications, *supra* note 75.

<sup>127</sup> *Id.*

## B. Processes Available Both Pre and Post Filing of a Due Process Complaint

### 1. Meetings with Disinterested Parties

Congress realized that parents might not immediately embrace the concept of mediation and thus school districts may not be the best resource to explain the mediation processes to parents.<sup>128</sup> Therefore, the Act requires schools to provide parents with the opportunity to meet with disinterested parties from community mediation centers, parent advocacy groups, or appropriate ADR entities to explain the benefits of mediation.<sup>129</sup> The Act offers “disinterested party meetings” exclusively to parents. Outreach programs, through state and local community mediation centers, however, serve as educational resources to school personnel as well.<sup>130</sup> This opportunity may increase knowledge and instill the principles of self-empowerment and self-determination in parents. With this information all parties may feel more optimistic about the potential benefits from the mediation process.

### 2. Special Education Mediation

By electing mediation, before or after filing a grievance, parents and school personnel may collaboratively enlist a neutral third party’s help for a vast range of content areas.<sup>131</sup> The focus of the mediations may range from concerns regarding a child’s placement or services as established within the IEP to the lack of harmonious relationships between parents and school personnel external to the IEP process. The reauthorized IDEIA opens the door for mediating almost any dispute.<sup>132</sup> A neutral mediator, knowledgeable

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<sup>128</sup> *Id.* (stating that “[p]arents also tend to resist mediation when they are informed of the option by school staff, since in the moment of conflict, the suggestion to mediate is coming from the people parents trust the least.”).

<sup>129</sup> 20 U.S.C. § 1415(e)(2)(B)(i)-(ii) (Supp. 2004).

<sup>130</sup> OFFICE OF VOCATION & EDUC. SERVS. FOR INDIVIDUALS WITH DISABILITIES, STATE EDUC. DEP’T, SPECIAL EDUCATION MEDIATION: REAL SOLUTIONS WHERE EVERYONE WINS 1-3 (2001), available at <http://www.vesid.nysed.gov/specialed/publications/policy/mediationbook.htm>.

<sup>131</sup> Questionnaire from M. Kirschbaum & A.F. Blau, Safe Horizon Special Education Mediation Initiative, (Mar. 20, 2006) (on file with author) (listing twelve common disputes which arise between parents and schools: related services, assistive technology, methodology, IEP goals, inclusion, behavior plan, transportation, medication, educational progress, communication, assessment and placement).

<sup>132</sup> 20 U.S.C. § 1415(e)(1) (Supp. 2005) (stating “[a]ny State educational agency or local educational agency that receives assistance under this subchapter shall ensure procedures are 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*”) (emphasis added). The reauthorized Act does not, however, allow the Department of Education to initiate an impartial hearing or mediation when a parent refuses consent for initial provision of services. However, this would be an excellent issue to raise at mediation. See Kirshbaum Communications, *supra* note 75.



about special education law, facilitates a voluntary and confidential discussion between school personnel and parents.<sup>133</sup> The goal is to assist them to collaborate in working out their concerns. The mediator “chairs” the meeting, ensures the parties have ample time to speak, and remains impartial. The mediator reframes the issues expressed by the parties, sets an agenda based on these issues, assists the parties in identifying shared interests, and encourages the parties to jointly create resolutions to their concerns. The mediator has no decision-making or binding authority.<sup>134</sup> The mediator records settlement agreements based on the terms reached by the parties. Written agreements, as mandated within the reauthorized Act, are incorporated into the IEP as binding and enforceable.<sup>135</sup>

The IDEIA of 2004, similar to its predecessor, does not specify the mediation model to be used.<sup>136</sup> The absence of consistency in goals, methods, and guidelines for mediator skills and qualifications reportedly confound special education mediation proposals.<sup>137</sup> While accountability measures in special education mediation remain a source of great concern in the special education community,<sup>138</sup> schools employ the basic facilitative, evaluative, and transformative mediation models.<sup>139</sup> These three models, however, are quite distinct and appear to reflect the diverse goals that set the stage for special education mediation – goals that neither the Act nor the Department

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<sup>133</sup> 20 U.S.C. § 1415(e)(2)(C) (Supp. 2004) (stating that in special education mediation, mediators must be “qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services”). However, subject matter expertise is not a requirement within all mediation processes and is more reflective of evaluative rather than broad facilitative orientations. See MENKEL-MEADOW ET. AL., *supra* note 49, at 306 (explaining “the need for subject-matter expertise typically increases to the extent that the parties seek evaluations – assessments, predictions or proposals – from the mediator . . . . In contrast, to the extent that the parties feel capable of understanding their circumstances and developing potential solutions . . . they might prefer a mediator with great skill in the mediation process, even if she lacks subject-matter expertise”).

<sup>134</sup> Marchese, *supra* note 25, at 346.

<sup>135</sup> 20 U.S.C. § 1415(e)(2)(F)(iii) (Supp. 2004).

<sup>136</sup> 20 U.S.C. § 1415(b)(5) (Supp. 2004). The language of the act simply mandates the availability of a mediation process but does not define the term. *Id.*

<sup>137</sup> See Welsch, *supra* note 46, at 575.

<sup>138</sup> See D’Alo, *supra* note 44, at 249. “In sum, it may not be logical or efficient for state agencies to add more unproven options to their dispute resolution offerings until the original vision of mediation’s promise in special education is closer to being realized in practice and to being demonstrated through further research.” *Id.*

<sup>139</sup> *Id.* at 205 (suggesting that special education “‘facilitative-broad’ mediation . . . focus[es] . . . on aiding . . . parties in self-understanding and communication of . . . underlying interests,” “evaluative-narrow mediation . . . [assesses each side’s] strengths and weaknesses” in light of the probable outcome at a due process hearing towards the “determination of reasonable settlement” options and “‘transformative’ mediation[’s] . . . focus [rests on empowering the parties through] self understanding . . . and mutual recognition of the other’s humanity and concerns”).

of Education regulations have adequately articulated.<sup>140</sup> Special education mediation goals have included the following: reduction in number of litigated disputes, resolution of substantive and procedural conflicts, development of enforceable agreements, promotion of long-term relationship building, development of trust between parents and schools, neutralization of the playing field, individual empowerment for all participants with or without reaching an agreement, and assurance that the best interests of the child with respect to the receipt of a free and appropriate public education within the least restrictive environment are respected.<sup>141</sup>

Along with these diverse goals come various mediation approaches. Individual empowerment might require a transformative mediation model. Leveling the playing field through accurate knowledge of applicable special education law suggests elements of an evaluative mediation process. A facilitative mediation model might best ensure that the parties understand and resolve problems within their ongoing relationship and shared common interests; it would also generate proposals designed to reflect those interests. By mandating that mediators must be qualified in mediation techniques as well as knowledgeable about special education law, the newly reauthorized Act has, at minimum, provided parties with access to a range of mediation processes to achieve varied special education based goals.<sup>142</sup> Guidelines or criteria to determine which mediation processes might best suit particular conflicts would increase both the efficiency and effectiveness of these processes. Research on accountability measures in special education mediation, while still in its infancy, hopes to fill this gap.<sup>143</sup>

### *C. Processes Available Post Filing of Due Process Complaint*

Currently there are two ADR processes that are available exclusively after a due process complaint has been filed and the litigation process has begun. The use of mediation principles within these processes may serve to strengthen the positive outcomes afforded and minimize the financial and emotional cost of sustained litigation.

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<sup>140</sup> 20 U.S.C. § 1415(e) (Supp. 2004).

<sup>141</sup> Marchese, *supra* note 25, at 349 (questioning “whether [mediation actually] can be used in a manner consistent with the goals of the statute”). As opposed to the due process focus, mediated agreements may resolve disputes based on the disputing parties’ interests that may not necessarily be in the best interest of the child. *Id.*

<sup>142</sup> See 20 U.S.C. § 1415(e)(2)(A)(iii), (e)(2)(C) (Supp. 2004).

<sup>143</sup> D’alo, *supra* note 44.

## 1. Dispute Resolution Sessions

As discussed above, resolution sessions play a dominant role within the due process provisions of the “improvement” Act of 2004.<sup>144</sup> While the benefits of their recent use have not yet been assessed, some scholars already view their inclusion as an improvement.<sup>145</sup> By requiring that parties with settlement authority meet to address their concerns prior to an impartial hearing, the Act provides participants a final opportunity to jointly resolve their differences.<sup>146</sup> Additionally, the Act attempts to equalize the power disparity between parents and school districts by not allowing attorneys on behalf of the school to participate in these negotiation sessions unless the parent also has an attorney at the session.<sup>147</sup> However, the absence of attorneys alone may not be enough to reduce the long-standing friction between parents and school districts or dismiss the general presumption, which is often expressed both by school personnel and by parents, that school districts have the ultimate authority to make decisions regarding a child’s IEP.

Currently, a district or regional representative with binding settlement authority chairs the resolution session.<sup>148</sup> No neutral party facilitates the discussion; however, state and community mediation centers provide schools with dispute resolution skills training.<sup>149</sup> Based on the success of the recent use of special education mediators acting as IEP facilitators, it has been suggested that special education mediators may prove to have a beneficial role as dispute resolution meeting (DRM) facilitators as well.<sup>150</sup> In one proposed DRM facilitator model, a neutral facilitator co-chairs the session with the district representative but has no decision making power.<sup>151</sup> The mediator intervenes only when needed to help parties communicate more effectively, generate forward movement, and ensure that discussions remain student-focused.<sup>152</sup> Written settlement agreements, once reached, are binding and enforceable.<sup>153</sup> If no settlement is reached, the dispute is then scheduled for

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<sup>144</sup> See *supra* notes 68-75 and accompanying text.

<sup>145</sup> Paolo Annino, *The Revised IDEA: Will it Help Children with Disabilities?*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11-14 (2005).

<sup>146</sup> 20 U.S.C. § 1415(b)(5) (Supp. 2004).

<sup>147</sup> 20 U.S.C. § 1415(f)(1)(B)(III) (Supp. 2006) (stating that resolution sessions “may not include an attorney of the local educational agency unless the parent is accompanied by an attorney”).

<sup>148</sup> CHAPMAN, *supra* note 48, at 52-53.

<sup>149</sup> Kirschbaum Communications, *supra* note 75.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> 20 U.S.C. § 1415(f)(1)(B)(iii)(I)-(II)(iv) (Supp. 2004).

an impartial hearing.<sup>154</sup> Applying mediation principles within the mandated resolution sessions might ensure more successful outcomes.

## 2. Settlement Conferences

Settlement conferences are employed at any stage between the filing of a grievance and the hearing officer's final determination.<sup>155</sup> They may be conducted informally or may involve formal meetings with the disputing parties, their attorneys, and the judge present.<sup>156</sup> These conferences typically are conducted, however, as negotiations between opposing attorneys and may result in signed stipulation agreements, which become binding and enforceable by the courts.<sup>157</sup> Using collaborative negotiation models, as opposed to combative models,<sup>158</sup> and mediation principles that generate movement may prove particularly helpful.<sup>159</sup> Using these models is especially important for parents and school districts that must maintain ongoing relationships for the continued education of students with disabilities.

## V. CONCLUSION

Parents and school districts have often disagreed over what each perceives as appropriate educational services for children with disabilities. For over three decades, these disagreements have found their way into the courts fostering a litigious rather than collaborative atmosphere. The recently reauthorized IDEIA has provided sophisticated guidelines regarding both the substantive educational and procedural due process rights available to students with special needs.<sup>160</sup> The Act strongly encourages the use of ADR processes to stem the escalation of litigation and to reduce the tension and mistrust that exists between families and schools.<sup>161</sup> This paper has attempted to provide the context within which to assess and explore where

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<sup>154</sup> Confidentiality principles do not apply. *See Agreements, supra* note 71, at 11 (explaining “[i]t is . . . important to remember any documents from the resolution session can be used in a due process hearing or appeal . . . You could also execute an agreement making discussions at the resolution session confidential”).

<sup>155</sup> *See generally* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) (brief discussion of the mandatory settlement conference).

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

<sup>158</sup> FISHER & URY, *supra* note 113.

<sup>159</sup> JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 97-99 (1987). Six negotiating standards which are useful as movement generators within mediation are: establishing priorities within negotiated issues, acknowledging others' operational constraints, developing trade-offs, pursuing compromises, looking for integrative solutions, and prohibiting demands escalation. *Id.*

<sup>160</sup> *See generally* IDEIA of 2004, *supra* note 7.

<sup>161</sup> *See* 20 U.S.C. § 1415(e) (Supp. 2004).

mediation and mediation principles might best fit within the spectrum of non-litigious dispute prevention and resolution approaches in special education. Mediation processes, which promote self-determination, identification of shared interests, and collaboration in generating solutions, have been underutilized within the special education community.<sup>162</sup> Yet, there exists within the newly reenacted IDEIA a broad range of opportunities to embrace mediation principles both formally and informally in preventing and resolving disputes between parents and schools.<sup>163</sup> Perhaps the spotlight that now shines on ADR processes within the Act will bring increased interest in the value of true collaboration.

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<sup>162</sup> See Kirschbaum Communications, *supra* note 75.

<sup>163</sup> See 20 U.S.C. § 1215(f) (Supp. 2004).

TABLE 1

*Alternative Dispute Prevention and Resolution Processes Available or Newly Emerging Within the Reauthorized IDEIA of 2004*

<b><u>Prior to Filing Grievance</u></b>	<b><u>Prior/Post Filing Grievance</u></b>	<b><u>Post to Filing Grievance</u></b>
Collaboratively Well Written Individual Education Plan (Dispute Prevention)	Meetings with Disinterested Parties  (Dispute Resolution)	Dispute Resolution Session  (Dispute Resolution)
Informal Discussions  (Dispute Resolution)	Special Education Mediation (Dispute Resolution)	Settlement Conference  (Dispute Resolution)
Individual Educational Plan Negotiation (Dispute Resolution)		
Individual Education Plan Facilitation (Dispute Prevention)		
Manifestation Determination Review Facilitation (Dispute Prevention)		