

The University of Akron

EVERY DAY COUNTS: PROPOSALS TO REFORM THE IDEA'S DUE PROCESS STRUCTURE

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Potential SPED Disputes

- Eligibility
- Services/Individualized Educational Program (IEP)
- Placement (Least Restrictive Environment)
- Summer School (Extended School Year or "ESY")
- Compensatory Education
- Transportation or Related Services
- Disciplinary Issues (MDR)

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Current SPED Dispute Resolution

- The parties:
 - Must/can attend a **resolution session**, which is an informal session between the LEA and the parents.
 - Can participate in **mediation** (also available pre-filing).
 - Can waive the resolution session, decline to participate in mediation, and request that a **hearing** be scheduled.

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The Resolution Session

- IDEA requires that the parties engage in a resolution session within 15 days after the LEA receives notice of a due process complaint.
- Attendance is mandatory, unless both parties agree to waive the session.
- Counsel for the school district may not attend the resolution session unless counsel for the parents also is present.
- The resolution session is not confidential and no mediator is present.
 - Unlike mediation, statements made in the resolution session may be used against a party in the due process hearing.
- Any agreements reached in the resolution session can be voided within three days after the session.

Mediation

- IDEA requires the States to offer mediation. 20 U.S.C. §1415(e).
- Mediation is voluntary and cannot be used to deny or delay the right to a due process hearing.
- The mediator must be impartial and knowledgeable about "effective mediation techniques." 20 U.S.C. §1415(e)(2)(A)(iii).
- If parents decline mediation, the LEA or SEA can offer parents "an opportunity to meet" with a disinterested person who will explain the benefits of mediation. 20 U.S.C. §1415(e)(2)(B).
- The SEA must maintain a list of mediators.
- The cost of mediation is born by the State.
- Mediation is confidential. Any statements made "may not be used as evidence in any subsequent due process hearing or civil proceeding." 20 U.S.C. §1415(e)(G).

Hearing/Timelines

- Mediation and the resolution session can delay a due process hearing.
- The LEA has up to 30 days after the filing of a due process complaint to resolve the matter. 20 U.S.C. §1415(f)(1)(B)(ii). That 30-day period can be adjusted in three ways.
 - The parties can agree to waive the resolution session before the expiration of the 30-day period;
 - The parties can participate in either the resolution session or mediation, but agree that no settlement will be possible before the 30-day period expires; or
 - The parties can agree to continue mediation at the end of the 30-day period, in which case the 45-day hearing period will not begin to run until one of the parties withdraws from mediation.

Hearing/Timelines

- At the end of the 30-day period, unless the period is adjusted, the hearing officer has 45 days to hold the hearing and issue a decision.
 - The minimum time for resolution is 75 days, unless the parties agree to an expedited timeline.
 - The hearing officer always has the discretion to extend the time within the 45-day period at the request of either party.

One-Tier v. Two-Tier

- Another structural aspect of due process is that IDEA allows each state to choose whether to have a "one-tier" or a "two-tier" administrative due process structure.
- In a one-tier system, the due process complaint is heard and ruled upon by a hearing officer, and any appeal of that decision is made to a federal or state court.
- In a two-tier system, an appeal of the hearing officer's decision is first made to an individual appointed by the state department of education to review hearing officer decisions. After that "state level review" (Ohio), an aggrieved party can file suit in federal or state court.
- Eight states have a two-tier system. The remainder, and the District of Columbia, are a one-tier system.

Criticisms of Due Process

- Advocates for parents/children say that due process is too expensive for parents who cannot afford to pay attorneys and expert witnesses. They advocate that IDEA be amended to allow the recovery of expert witness fees and to clarify the current provisions regarding an award of attorneys' fees to a prevailing party.
- Some advocates and scholars voice real concerns that the system of private enforcement does not serve minority and low-income children.
- School administrators/organizations say that the cost of due process, mainly attorney and hearing officer fees, is so high that LEAs often "cave in" and provide unnecessary services. They contend that, due to limited funds, other children receive fewer special education services when a dispute is resolved by providing unnecessary services.

Criticisms of Due Process

- It also is said that due process is inherently anti-collaborative and poisons the school-parent relationship, in a circumstance where a cooperative relationship is so critical in allowing the child to benefit as much as possible from educational services.
- Another criticism, heard mainly from practitioners, is that the quality of review by independent hearing officers can vary greatly depending on the particular individual's training or experience in presiding over special education disputes and the process by which the hearing officer is "hired" and paid.

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Proposals to Amend Due Process

- The debate has produced a number of different proposals to modify special education due process procedures in order to improve the system.
 - IEP Facilitation
 - Voluntary, Binding Arbitration
 - Enhancing Public Enforcement of IDEA
 - A Radical Overhaul -- AASA Proposal
 - Minor "Tweaks"

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IEP Facilitation

- Parents report that they feel marginalized in IEP meetings.
- They sometimes do not have the expertise to understand terminology.
- Even if they do understand the terminology/methodology and have substantive contribution, sometimes school personnel are not open to parental involvement because they consider themselves to be the experts in the field.
- Parents sometimes feel that school personnel patronize them - that their opinions or suggestions are based on emotion, not reasoned judgment about the child's educational needs.
- The presence of the IEP facilitator is designed to alleviate any of these concerns or conditions within the IEP meeting.

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IEP Facilitation

- IEP Facilitation exists in 29 states and the District of Columbia.
- IEP Facilitation is a process to resolve a dispute about the contents of a child's IEP before the filing of a due process complaint.
- The parties agree to hold IEP meetings with the assistance of a neutral third-party who will facilitate open communication and a task-oriented focus to the meeting.
- The IEP facilitator is a neutral person who is not there to write an IEP, but is there to ensure that the parties effectively communicate their positions with one another and work together to try and reach common ground with regard to the contents of the child's IEP.

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Voluntary, Binding Arbitration

- When IDEA was amended in 2004, there was at least one proposal made to add voluntary, binding arbitration as an alternative dispute resolution mechanism.
- In 2012, Professor S. James Rosenfeld set forth a model for voluntary, binding arbitration in a scholarly article. See S. James Rosenfeld, "It's Time for an Alternative Dispute Resolution Process," 21 J. NAT'L. ASS'N. ADMIN. L. JUDICIARY 544 (2012).
- While acknowledging that further details are needed, he proposed that disputes would be heard by a three-person panel consisting of an educator, a lawyer, and an individual with expertise in the child's disability.
- The decision of the panel would be binding, with no right to appeal.

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Public Enforcement of IDEA

- Statistics demonstrate racial disparities in evaluation, disability category, placement and discipline.
- Statistically children of lower-income families will be classified as requiring special education.
- Some scholars call for enhanced public resources – assigning free advocates to each child, increased governmental involvement in reviewing data that is disaggregated by family income, a database of IEPs that is disaggregated by family income.

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A Radical Overhaul

- AASA proposal released in July 2013.
 - Explicitly states that it wishes to create a "lawyer-free" system designed ease burdens on school districts.
 - Proposes to abolish the due process system entirely in favor of a new structure

Facilitated IEP ↔ Mediation ↔ IEP Consultant ↔ Litigation

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Minor Tweaks

- Recovery of attorneys' and expert witnesses fees.
- Relaxing the rules about exhaustion of administrative proceedings
- Streamlining due process proceedings by, among other things, minimizing pre-hearing motion practice
 - Eliminating the two-tier structure
- Enhancing the training of IHOs
- Clarifying the means to enforce a settlement reached in a special education dispute.

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The Survey

- 393 individuals completed the survey.
 - 156 respondents said that they represented school districts.
 - 243 respondents said that they represented parents/children.
 - The survey does not include data for Puerto Rico, which has become an active jurisdiction for special education disputes.
- Solicited responses through national and state organizations
 - ELA, COSA, COPAA
 - Special Education/Special Needs organization (e.g., Autism Speaks)
 - Yahoo list-servs and other informal groups in the field
 - Internet searches
 - Review of due process hearing decisions

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Survey of SPED Practitioners

- Designed a survey that would touch on some of the current issues in due process.
- Items not in the current structure.
 - IEP facilitation
 - Voluntary, binding arbitration.
- Topics related to the current structure:
 - The resolution session.
 - One-tier v. two-tier structures.

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The Survey – IEP Facilitation

- 117 school district attorneys and 140 parent/child attorneys.
- Is IEP facilitation a "valuable vehicle to resolve disagreements quickly?"
 - Twelve school district attorneys (11%) strongly agreed; fifty-two (49%) agreed; twenty-six (25%) neither agreed nor disagreed; twelve school district attorneys (11%) disagreed; and four (4%) strongly disagreed.
 - Five (4%) parent-child attorneys strongly agreed; thirty-three individuals (29%) agreed; thirty-four (30%) neither agreed nor disagreed; thirty-three (29%) disagreed with the proposition; and ten (9%) strongly disagreed.
- Does IEP facilitation help the parties avoid due process?
 - Seven school district attorneys (7%) strongly agreed; thirty-eight (37%) agreed with the proposition; thirty (29%) neither agreed nor disagreed; twenty-six (25%) disagreed; three (3%) strongly disagreed with the proposition.
 - Just five parent-child attorneys (4%) strongly agreed; twenty-six (23%) agreed; twenty-four (21%) neither agreed nor disagreed, forty-eight (43%) disagreed, and nine (8%) strongly disagreed.

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The Survey – IEP Facilitation

- Narrative Comments:
 - "IEP facilitation is an excellent way to keep the IEP process on track in terms of coverage of topics, management of time and management of conflicting personalities."
 - "It is particularly useful for those cases where there have been multiple IEP team meetings and personalities have stood in the way in terms of meaningful discussion."
- Training:
 - "I do not believe that IEP facilitation is being conducted by highly qualified individuals. The facilitators have not been effective in resolving contentious matters. Their function appeared to be nothing more than conducting the meeting."
 - "I have never encountered any facilitator who has specific training and experience in facilitating IEP meetings. They are 'borrowed' from other disciplines in the hope that their presence will somehow add value to the process. Usually they are superfluous to the process."

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The Survey – IEP Facilitation

- Type of Dispute:
 - "I only find IEP facilitation helpful when Districts and Parents are having trouble communicating, but not when there is a substantive issue regarding the appropriateness of placement or services."
 - "I believe it is a valuable means to solve disputes arising out of miscommunication. I have not found it is a helpful means to resolve disputes arising out of disagreement with assessment results[,] current levels of performance and best practice with service delivery[,] times[,] amounts and different types of providers."
 - "Facilitation is a tool to assist parties to find common ground and reach agreement. When one party approaches the IEP meeting with a fixed goal / outcome and is unable / unwilling to consider alternatives, facilitation may help to highlight the differences but not facilitate a resolution."

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The Survey – IEP Facilitation

- Should IEP facilitation should be mandated?
 - An overwhelming majority of the parent-child attorneys (88%) answered "No." A majority of the school district attorneys (57%) also answered "No."
- In favor:
 - "[D]ue process is very expensive and the parties should be forced through several different procedures prior to going to court."
 - "Too many times, due process hearings are filed without any attempts to engage the school district in meaningful communication about the pending issues. This results in fractured feelings between the school personnel and the family."
- Not in favor:
 - "It should never be required. If the parties do not wish to do it on their own, it will not be successful."
 - "There are already resolution meetings or mediation requirements. No need to add a redundant layer of ADR."
 - "It really depends on the case. If you know going in that there's no hope of resolving the dispute, IEP facilitation is a waste of time. Because of this, I don't think it should be mandated."

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The Survey – Arbitration

- Asked respondents whether IDEA due process should include the option of a voluntary, binding arbitration model.
- 77 school district attorneys (57%) said No.
- 139 parent-child attorneys (67%) said No.
- Asked if the lack of an appeal right made arbitration unattractive.
 - 145 parent-child attorneys (73%) agreed.
 - 62 school district attorneys (48%) agreed.

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The Survey – Resolution Session

- Asked whether the resolution session was a valuable vehicle to resolve special education disputes quickly,
 - Eight school district attorneys (6%) strongly agreed; forty-five (35%) agreed; twenty-eight (22%) neither agreed nor disagreed; thirty-two (25%) disagreed; and sixteen (12%) strongly disagreed.
 - Five parent-child attorneys (3%) strongly agreed; twenty-eight (15%) agreed; forty (21%) neither agreed nor disagreed; fifty-eight (30%) disagreed; and sixty (31%) strongly disagreed.
- Asked whether, based on experience, the respondents had "substantial success" in resolving special education disputes at the resolution session, the survey respondents generally answered in the negative.
 - Four school district attorneys (3%) strongly agreed; twenty-seven (21%) agreed; thirty-three (26%) neither agreed nor disagreed; forty-four (35%) disagreed; and nineteen (15%) strongly disagreed.
 - Four parent-child attorneys (2%) strongly agreed; twenty-five individuals (13%) agreed; thirty-five individuals (18%) neither agreed nor disagreed; forty-six (24%) disagreed; and eighty (42%) strongly disagreed.

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The Survey – Resolution Session

- Asked whether the parties "most often" do not resolve a special education dispute at the resolution session.
 - Eighteen school district attorneys (14%) strongly agreed; forty-nine (38%) agreed with the proposition; twenty-eight (22%) neither agreed nor disagreed; twenty-nine school (23%) disagreed; and four (3%) strongly disagreed.
 - Seventy-six parent-child attorneys (40%) strongly agreed; twenty-seven (33%) agreed; twenty-eight (15%) neither agreed nor disagreed; twenty parent-child attorneys (11%) disagreed; and four (2%) strongly disagreed.

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The Survey – Resolution Session

- "Many school districts do not agree to it because they see it as an unproductive step which only incurs extra costs for them."
- "It's a waste of time. We almost always waive the resolution session and proceed directly to mediation. The presence of a mediator usually goes a long way toward helping the parties reach an agreement."
- "Resolution sessions are ineffective because most often it consists of the same individuals arguing over the same issues they couldn't resolve at an IEP meeting. There is no one new involved in the process. It just unnecessarily delays resolution [of] the matter."
- "The resolution session/period simply causes delays. School District[s] do not use it to resolve matters, but instead use it as a means of intimidating the parent, delaying the proceedings, and/or a form of discovery in preparation for the hearing."
- "From a school attorney's perspective, voluntary mediation tends to be far more effective if used in that both parties seem to take comfort in and benefit from the facilitation of a neutral third-party. If the parties couldn't work out their issues at an IEP meeting or otherwise, sitting together again at a resolution session is usually not helpful to resolve the case. It can, however, be useful in creating a record of what a district tried to do to resolve a case since the documentation is admissible at a due process hearing (unlike mediation documentation)."

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Resolution Session Data

- Reviewed data published by OSEP regarding the number of due process complaints (DPCs) filed in the 2011-2012 year to determine the "success" of the resolution session
- The most active jurisdictions (by number of DPCs) were California, District of Columbia, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Puerto Rico, and Texas.
 - Two jurisdictions, Puerto Rico and D.C. had the highest settlement rates, 25 and 20% respectively.
 - Three jurisdictions, Pennsylvania, Texas and Illinois, had settlement rates of 15.6%, 12.5% and 10.8% respectively.
 - The remaining four jurisdictions, California, Massachusetts, New Jersey and New York, had settlement rates of 1.8%, 3.8%, 2.1% and 7.8% respectively.

See <https://investor.data.gov/dataset/2c451651-e373-6c4c-93e9-f2027ac4527/resourca/5c22f855-4911-4173-9e18-572317225318>

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Resolution Session Data

- The numbers raise several questions.
 - Example: NJ – of the cases in which a resolution session takes place, 85% of them settle. But a resolution session is held in just 2.5% of due process disputes.
 - The parties waive the resolution session in 97.5% of the disputes.
 - Example: NY – A resolution session is held in about 90% of due process disputes. But only 7.8% of disputes are resolved at the resolution session.
 - The parties participate, but rarely come to a resolution.

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One-Tier v. Two-Tier Structures

- Seventy-seven survey respondents indicated that they had experience litigating in a two-tier system.
- 60% indicated that they would prefer a one-tier structure over a two-tier structure.
 - 29% indicated that they preferred a two-tier structure.
 - 12% had no opinion.
- 64% agreed that the two-tier process unnecessarily increases the costs of due process.
 - 22% disagreed.
 - 14% had no opinion.

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One-Tier v. Two-Tier Structures

- For those survey respondents with experience litigation only in a one-tier structure, the preference for a single-tier structure was even stronger.
- 61% indicated that they would prefer a one-tier structure.
 - 10% indicated that they preferred a two-tier structure.
 - 29% had no opinion.
- 78% agreed that the two-tier process unnecessarily increases the costs of due process.
 - Just 8% disagreed.
 - 14% had no opinion.
- 57% disagreed that a second level of administrative review was preferable because the second administrative review would issue a decision faster than a federal court.
 - Just 15% agreed with that proposition.

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One-Tier v. Two-Tier Structures

- Reasons to prefer a one-tier structure:
 - Less costly. The second tier is often a "rubber stamp" of the first level and creates a barrier to parents getting into court in a timely manner.
 - In NYS, our two-tier system is widely known to have been compromised by the New York State Education Department. All litigation is undertaken with the understanding that the matter needs to be prepared for Federal Court, hearing records need to be more developed as a result (costing both parties time and money), and delays delivery of appropriate services to the child.
 - The two tier process adds to the delays to a child - if a litigious district is involved and a student does not have a decent stay put, the parent has zero leverage and the child suffers for at least an additional year.
 - The SRO makes decisions without the benefit of watching the witnesses testify. He cannot [assess] the true veracity of the witness through reading a transcript.

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One-Tier v. Two-Tier Structures

- Reasons to prefer a two-tier structure:
 - Because Court is not the answer. In Virginia in the federal system, we have "modified de novo" the due process is considered the trial, and that which is not raised is waived. This is harsh on parents who go to due process with "advocates" who are not lawyers while schools always have lawyers. A second tier would help parents.
 - Federal courts are very quick to defer to the administrative decision. I think it makes sense to have an administrative panel review the decision of the individual hearing officer. Appeal to federal court is so lengthy and unlikely to succeed that it impedes use of the federal court process. While the case is pending, the student is languishing in her current educational placement, appropriate or not.
 - [E]asier, quick and more cost effective means to correct problems in hearing decision with someone who understand special education -- federal court judges do not have such expertise.

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Recommendations

- Congress should require the States to offer **voluntary IEP facilitation**.
 - Twenty-nine states do it already. Others are piloting programs.
 - Facilitators must be well-trained in the law, the "medicine," the pedagogy, the therapies and the purpose of facilitation, particularly the need for impartiality.
 - Most valuable when the dispute involves communication and the issues are minor.
 - Cannot work when the dispute does not involve the contents of an IEP.
 - Switching from voluntary to mandatory is viewed as just adding another "layer" and eliminating control/willingness to meet and discuss in good faith.

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Recommendations

- Congress should eliminate the resolution session.
 - Data shows that the resolution session is used rarely in some jurisdictions and carries downsides (use as a litigation strategy).
 - If IDEA is amended to add voluntary IEP facilitation (and the parties use it), then this additional meeting (post-filing) really is redundant.
 - IEP facilitation is better situated as an "upstream" ADR mechanism to resolve disputes that otherwise could be resolved in a resolution session.
 - Eliminating the resolution session will solve issues relating to payment of attorneys' fees, voiding of agreements, enforcement of agreements etc.
 - The resolution session may be of only marginal utility that is outweighed by the delay that it causes and the ability/perception that it is a tool for discovery by school districts rather than a dispute resolution mechanism.

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Recommendations

- Congress should eliminate the two-tier structure.
 - Only a handful of states still retain the two-tier structure.
 - Pennsylvania, the architect of the two-tier structure, switched to a one-tier structure in 2008.
 - The two-tier structure causes delay and increases costs.
 - Eliminating the two-tier structure could improve the quality and professionalism of hearing officer decisions at the first level of review. The SEA will have incentive to train/supervise hearing officers because there will be no "backstop" of a second level of review.

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Recommendations

- Congress should not add any new ADR mechanisms into the layer.
 - Voluntary, binding arbitration in particular is problematic.
 - Data demonstrates that more than 2/3 of the states had fewer than five due process hearings in the 2011-2012 school year.
 - Arbitration is an adjudicated proceeding. Had it been included in IDEA with the 2004 amendments, each state would have been required to develop and maintain a due process track and an arbitration track to adjudicate special education disputes.
 - Waste of resources given the return.
 - Arbitration can exacerbate the inequalities between school districts and parents (also the inequalities between lower income and higher income parents).

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The Article

66 Case Western L. Rev. ____ (2015).

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600654

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Questions?

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