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# In Defense of IDEA Due Process

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# In Defense of IDEA Due Process

Mark C. Weber\*

## Abstract

*Due Process hearing rights under the Individuals with Disabilities Education Act are under attack. A major professional group and several academic commentators charge that the hearings system advantages middle class parents, that it is expensive, that it is futile, and that it is unmanageable. Some critics would abandon individual rights to a hearing and review in favor of bureaucratic enforcement or administrative mechanisms that do not include the right to an individual hearing before a neutral decision maker.*

*This Article defends the right to a due process hearing. It contends that some criticisms of hearing rights are simply erroneous, and that others are overstated. The system is generally fair to the various classes of parents, even if some parents are better able than others to use it effectively. Costs are remarkably low given the number of children receiving special education, and hearings and hearing requests have been in decline for years. Far from being futile, the due process hearing system is one in which parents win a significant percentage of cases. And far from being out of control, hearings are generally being managed effectively. The system could be rendered still more efficient with a few modest reforms of the special education statute and its interpretation.*

\*Vincent DePaul Professor of Law, DePaul University. Thanks to my co-panelists and to the participants in and organizers of the Ohio State University Moritz College of Law Symposium on Dispute Resolution in Special Education. Many thanks to my research assistant, Lee Robbins. ©2014 Mark C. Weber. All rights reserved.

## In Defense of IDEA Due Process

Due Process hearing rights afforded by the Individuals with Disabilities Education Act<sup>1</sup> are under attack. A major professional group and several academic commentators complain that the hearings system unfairly advantages middle class parents, that it is unduly expensive, that it is futile, and that it has gone out of control.<sup>2</sup> Critics would abandon the system in favor of government enforcement or various forms of review of decisions about special education decisions that do not include the right to an individual hearing before a neutral decision maker.<sup>3</sup>

This Article defends the right to a due process hearing. It contends that some criticisms of hearing rights are flat-out wrong, and that others are badly overblown. The system is, on the whole, fair to the various classes of parents, even if some parents are better able than others to use it effectively.<sup>4</sup> Costs are remarkably low given the number of children enrolled in special education, and the numbers of hearings and hearing requests have been in decline for years.<sup>5</sup> Far from being futile, the due process hearing system is one in which parents prevail in a significant number of cases.<sup>6</sup> And far from being out of control, hearings are being managed effectively; moreover the system could be rendered still more efficient with a few modest reforms of the special education statute and its interpretation.<sup>7</sup>

Special education matters to millions of children who otherwise would not be effectively served by public education.<sup>8</sup> Due process hearing rights are needed to protect children's vital

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<sup>1</sup> 20 U.S.C. §§ 14000-1482 (2006) (IDEA)..

<sup>2</sup> See *infra* text accompanying notes \_\_\_ [AASA & academics].

<sup>3</sup> See *infra* text accompanying notes \_\_\_ [AASA & Pasachoff reforms].

<sup>4</sup> See *infra* text accompanying notes \_\_\_ [response to challenges].

<sup>5</sup> See *infra* text accompanying notes \_\_\_ [GAO report, etc.].

<sup>6</sup> See *infra* text accompanying notes \_\_\_ [Parents never win anyway].

<sup>7</sup> See *infra* text accompanying notes \_\_\_ [describing criticisms].

<sup>8</sup> See *infra* text accompanying notes \_\_\_ (describing state of education for children with disabilities before Congress established rights parents could enforce).

right to a meaningful education. This Article outlines the case in favor of IDEA due process rights. Part I gives a brief background on IDEA and the due process hearing rights the statute affords parents of children with disabilities. Part II details the charges that have been leveled against the existing due process system. Part III presents the defense, arguing that the system is fair and not overly costly, that it affords ample opportunities for success to parents, and that it operates well within manageable bounds. Part IV explores the sometimes unrecognized benefits of the due process system in protecting important educational interests from arbitrary decision making and in building up a body of special education law precedent. Part V explores the drawbacks of some of the alternatives that have been put forward to replace due process. Finally, Part VI offers a few modest reforms that could make the due process hearing system more efficient.

## I. IDEA AND IDEA DUE PROCESS RIGHTS

The Individuals with Disabilities Education Act requires states that receive federal special education funding to provide a free, appropriate public education to all children with disabilities within their jurisdiction.<sup>9</sup> Participating states and local school districts must provide appropriate educational programs, and must also furnish services related to education, such as transportation, speech therapy, sign language interpretation, and school nursing.<sup>10</sup> The law requires that children with disabilities be educated, to the maximum extent appropriate, with children who do not have disabilities, and that school districts afford children with disabilities the supplementary aids and services needed to prevent them from being removed from regular classes.<sup>11</sup>

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<sup>9</sup> See 20 U.S.C. § 1411(i) (2006) (authorizing appropriations).

<sup>10</sup> *Id.* § 1401(26) (defining “related services”).

<sup>11</sup> *Id.* § 1412(a)(5).

Parents of children with disabilities have rights to notice and consent and the right to participate in the creation of their child’s individualized education program (IEP). The IEP document sets out the services that the school district commits itself to deliver to the child.<sup>12</sup> It contains a statement of the child’s current levels of academic achievement and functional performance; a list of measurable annual goals, both functional and academic; a description of how the child’s progress toward meeting the annual goals will be measured; an elaboration of the special education and related services and supplementary services to be provided; an explanation of the child’s participation with nondisabled children in regular classes; a list of accommodations needed by the child on state and district assessments; and several other terms.<sup>13</sup>

Parents may challenge the program or placement that the school district offers by demanding an adversarial “due process hearing,” and they or the school district may appeal the result of the hearing to court.<sup>14</sup> At the due process hearing, the parent and the school district have the right to be accompanied and advised by an attorney, to present evidence and cross-examine witnesses, and to compel the attendance of witnesses.<sup>15</sup> They have the right to a written transcript, and to a written document including the findings of fact and decision.<sup>16</sup> The hearing officer must not be an employee of the state educational agency or the school district involved in the child’s education, must not have a professional or personal interest that conflicts with the objectivity, and must have the knowledge and ability to understand the law, conduct the hearing,

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<sup>12</sup> *See id.* § 1414(d).

<sup>13</sup> *Id.* § 1414(d)(1)(A)(i).

<sup>14</sup> *Id.* § 1415(f)-(i). School districts may also invoke the due process hearing procedure, and are prone to do so if, for example, the parents refuse to consent to a child’s initial evaluation for special education eligibility. *See* § 1414(a)(1)(D)(ii)(I). States may create a state-level hearing review procedure that must be exhausted before the matter goes to court. § 1415(g). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys’ fees are available to parents if they are successful, § 1415(i)(3)(B)-(F), and to prevailing state educational agencies and school districts in limited circumstances if the parents’ hearing request is frivolous or for an improper purpose, § 1415(i)(3)(B)(i)(II)-(III). The law also provides rights to challenge long-term suspensions, expulsions, or other removals from school imposed on children with disabilities. § 1415(k).

<sup>15</sup> § 1415(h)(1)-(2).

<sup>16</sup> § 1415(h)(3)-(4).

and render and write the decision.<sup>17</sup> In all but rare circumstances, the parents have the right to keep the child in the current educational placement pending the outcome of the hearing and appeals.<sup>18</sup>

The guarantee to each child with a disability of the right to a free, appropriate education, and the guarantee to parents of procedural rights that include a face-to-face hearing in front of a neutral decision maker were key features of the 1975 Education for All Handicapped Children Act.<sup>19</sup> The participation and hearing rights manifested a “congressional emphasis” on the individual ability of parents to enforce the law’s underlying obligations.<sup>20</sup> Two federal cases that influenced Congress in its drafting of the law had upheld procedural due process claims against exclusion of children with disabling conditions from public school as well as equal protection claims over the denial of appropriate educational services.<sup>21</sup>

Parents of children with disabilities spent years courting political allies to secure passage of the Education for All Handicapped Children Act, with its guarantee of appropriate education and procedural protections.<sup>22</sup> Although some states and local school districts served children with disabilities and received limited federal special education reimbursement, before passage of the 1975 Act approximately 1.75 million children with disabilities were excluded from public school altogether and another 2.5 million were in programs that did not meet their needs.<sup>23</sup> In 1990, Congress renamed the Education for All Handicapped Children Act the Individuals with

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<sup>17</sup> § 1415(f)(3)(A).

<sup>18</sup> § 1415(j). *But see* § 1415(k)(4) (providing exception for certain school disciplinary matters).

<sup>19</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3(c), 89 Stat. 773, 773.

<sup>20</sup> *See Bd. of Educ. v. Rowley*, 476 U.S. 176, 205-206 (1982).

<sup>21</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). The Supreme Court commented on the importance of these cases to the formation of the Education for All Handicapped Children Act in *Rowley*. 458 U.S. at 192-94.

<sup>22</sup> *See* ROBERTA WEINER & MAGGIE HUME, . . . AND EDUCATION FOR ALL: PUBLIC POLICY AND HANDICAPPED CHILDREN 14-21 (2d ed. 1987).

<sup>23</sup> H.R. REP. NO. 94-332, at 11-12 (1975).

Disabilities Education Act, and that is the name the law has today.<sup>24</sup> The Individuals with Disabilities Education Improvement Act of 2004 embodies the most recent set of amendments.<sup>25</sup>

The Supreme Court's one foray into interpreting the appropriate education duty is *Board of Education v. Rowley*, a 1982 case in which the Court held that appropriate education means services sufficient to provide "some educational benefit" to a child with a disability.<sup>26</sup> Services must be beneficial<sup>27</sup> so that access to education is meaningful.<sup>28</sup> But the Court said that the congressional objective was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."<sup>29</sup> Schools had to provide a "floor of opportunity" that would give "access to specialized instruction and related services."<sup>30</sup>

The Court at the same time stressed the importance of the procedural rights, including hearing rights, that the special education law provides:

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<sup>24</sup> Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103. Over time, the term "handicapped" became disfavored, and many favored placing the person first and the description of disability second, to emphasize that a person with a disability is a human being rather than a manifestation of an impairment. See Illinois Attorney General, Disability Rights: Manual of Style for Depicting People with Disabilities, available at <http://www.ag.state.il.us/rights/manualstyle.html> (visited Feb. 19, 2014).

<sup>25</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified in scattered sections of 20 U.S.C. §§ 1400-1482 (2006)). See generally Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7 (2006) (describing and commenting on 2004 Reauthorization).

<sup>26</sup> 458 U.S. 176, 200 (1982).

<sup>27</sup> *Id.* at 200-01.

<sup>28</sup> *Id.* at 192. The Court said there must be "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

<sup>29</sup> *Id.* at 192.

<sup>30</sup> *Id.* at 201. The Court applied this some-benefit definition of appropriate education to reverse a holding that a first-grade student who was deaf but had lipreading skills and a hearing aid was entitled to a sign language interpreter even though she achieved satisfactory grades and passed from grade to grade without interpretation services. *Id.* at 209-10. The Court said, "We do not attempt to establish a single test for determining the adequacy of educational benefits conferred upon all children covered by the Act," *id.* at 202, but indicated that if a child is advancing from grade to grade in regular education classrooms the standard is likely to be met, *id.* at 203-04 & n.25. The Court rejected a standard used by the lower courts in the case that a child must be provided services sufficient to maximize her potential commensurate with the opportunity provided children without disabilities to maximize their potentials. *Id.* at 198.

When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard.<sup>31</sup>

Additional decisions from the Supreme Court interpreting the special education law place further emphasis on procedural rights. In *Honig v. Doe*, the Court noted that before passage of the 1975 Act, “Congress’ earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory”;<sup>32</sup> the Court upheld the parents’ enforceable right to keep a child with disabilities who had been excluded from school for disciplinary violations to remain in the current educational placement pending a due process hearing challenging the child’s removal.<sup>33</sup> In a 2007 case, the Court ruled that

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<sup>31</sup> *Id.* at 205-06 (citation omitted). The Court also noted that one of the two constitutional right to education cases that most influenced Congress in drafting the Act required the public school system to afford a hearing before an independent hearing officer, to permit attorney representation at the hearing, and provide a right to confront and cross-examine adverse witnesses. *Id.* at 194 n.20 (citing *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 879-881 (D.D.C. 1972)). The other required the defendant to hold a hearing on any change in a child’s educational assignment. *Id.* (citing *PARC v. Pennsylvania*, 334 F. Supp. 1257, 1266 (E.D. Pa. 1971)).

<sup>32</sup> 484 U.S. 305, 310 n.1 (1988), *superseded in part by statute*, 20 U.S.C. § 1415(k)(4).

<sup>33</sup> *Id.* at 323-26. As it had in *Rowley*, the Court stressed the importance of procedural rights, including the right to a due process hearing:

Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decisions they think inappropriate. These safeguards include the right to examine all relevant records pertaining to the identification, evaluation, and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child’s placement or program; an opportunity to present complaints concerning any aspect of the local agency’s provision of a free appropriate public



parents could enforce the law by going to court to challenge the outcome of the due process hearing without an attorney, even though in other contexts they would need a lawyer to proceed in court on their child's behalf.<sup>34</sup> In affirming this further ability to challenge the decisions of the public schools, the Court stressed that IDEA gives parents independent, enforceable rights that are both procedural and substantive,<sup>35</sup> and that "[t]he statute's procedural and reimbursement-related rights are intertwined with the substantive adequacy of the education provided to a child . . . ."<sup>36</sup>

## II. CHALLENGES TO IDEA DUE PROCESS HEARING RIGHTS

The due process hearing rights that Congress established nearly forty years ago are now under attack. A recent report of the American Association of School Administrators (AASA) argues that "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."<sup>37</sup> These "modifications" consist of abolishing the due process hearing system, which the AASA contends is unnecessary, hard for low- and middle-income parents to use, and bothersome to public school staffs,<sup>38</sup> frequently

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education; and an opportunity for "an impartial due process hearing" with respect to any such complaints.

*Id.* at 311-312 (citations omitted).

<sup>34</sup> *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

<sup>35</sup> *Id.* at 531 ("IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made.").

<sup>36</sup> *Id.* at 531-32.

<sup>37</sup> Sasha Pudelski, American Association of School Administrators, *Rethinking Special Education Due Process 2* (April, 2013),

[http://www.aasa.org/uploadedFiles/Policy\\_and\\_Advocacy/Public\\_Policy\\_Resources/Special\\_Education/AASARethinkingSpecialEdDueProcess.pdf](http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf).

<sup>38</sup> *Id.* at 3, 6-9.

causing them to accede to parental requests they consider unreasonable<sup>39</sup> and imposing stress on personnel<sup>40</sup> and legal expenses on school districts.<sup>41</sup>

Criticism comes not merely from the targets of due process hearing requests, who might be expected to complain, but from academic sources as well. Professor Pasachoff criticizes the IDEA due process and appeals system as a private enforcement mechanism, which, she says, in a non-means-tested entitlement program, leads to enforcement disparities and resource allocation distortions between rich and poor that public enforcement—monitoring and the like—may avoid.<sup>42</sup> That view is perhaps reinforced by stories in Professor Colker’s recent book about special education that portray poor parents as unable to succeed in exercising due process rights, while describing better-off families who prevail.<sup>43</sup> The AASA narrative also gains support from seemingly offhand comments disparaging individual IDEA litigation in one of the articles in a *Journal of Law and Education* symposium on the thirtieth anniversary of the *Rowley* case.<sup>44</sup> A student note in last year’s *Journal of Law and Education* also attacks the due process system as unfair and calls for a replacement, though it does not say what that ought to be.<sup>45</sup> Finally, Professor Rosenfeld has proposed voluntary binding arbitration as an alternative to due process

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<sup>39</sup> *Id.* at 10-12.

<sup>40</sup> *Id.* at 12-13.

<sup>41</sup> *Id.* at 13-14

<sup>42</sup> Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1416 (2012) (“If beneficiaries with fewer financial resources consistently bring fewer claims than their wealthier counterparts, relying heavily on private enforcement may mean that the former group will not receive their fair share of the distribution. Reliance on private enforcement will thus unintentionally undercut the statute’s substantive goals.”).

<sup>43</sup> See RUTH COLKER, *DISABLED EDUCATION* 4-5, 153-60, 169-72, 184-87 (2013)

<sup>44</sup> Andrea Kayne Kaufman & Evan Blewett, *When Good Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the Rowley Definition of a Free, Appropriate Public Education*, 41 J.L. & EDUC. 5, 22 (2012).

<sup>45</sup> Cali Cope-Kasten, Note, *Bidding (Fair)Well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013). The note was the George Jay Joseph Education Law Writing Award winner.

for parties who choose it, and recently published a major article in support of the proposal.<sup>46</sup> The House bill that became IDEA's reauthorization in 2004 included binding arbitration,<sup>47</sup> though the measure did not appear in the version of the bill that passed.<sup>48</sup>

### III. CRITIQUES AND RESPONSES

Diverse objections are raised by the AASA, by the academic commentators, and, undoubtedly, by others. The system is said to reward parents who have more resources and to distort allocations of public educational services. The system is challenged as being too costly. Affording hearing rights is futile because, supposedly, parents rarely win. Even some authorities who generally support due process hearing rights think that due process, as practiced, has gotten out of control. Each of these contentions deserves an answer.

*1. Does the system unfairly advantage parents with resources?* The proper response here is confession and avoidance. Yes, the system works better for those with the financial power and temerity to use it effectively. That will tend to be parents who are middle class and above or who have educational or professional expertise. But this should hardly be a surprise. The "haves" come out ahead in the legal system generally, and Professor Galanter's classic discussion of the mechanisms by which they do suggests that the result is all but inevitable.<sup>49</sup> In an economic system that permits inequality of resources, those who are better off will be able to afford better access to advocacy services just as they can afford better shelter, better nutrition, better clothing, better medical care, and better everything else. But that does not mean that the opportunities for

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<sup>46</sup> S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 544 (2012). President Bush's Commission on Excellence in Special Education made a proposal to allow for binding arbitration in 2002. PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 35 (2002).

<sup>47</sup> H.R. 1350, 108th Cong. § 205 (2003).

<sup>48</sup> See generally Weber, *supra* note \_\_ [Fla. 2006] at 32 (contending that Congress was wise in rejecting arbitration proposal).

<sup>49</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

advocacy should be taken away, leaving no one with the ability to use the law to assert their rights. Leveling parents of disabled children down simply levels the educational bureaucracy up.

One must admit that Professor Pasachoff's position is more nuanced than that discussion might make it out to be. She takes the view that disparities are morally worse in distribution of services under a statute like IDEA that does not purport to give more to the wealthy, than disparities are in other situations.<sup>50</sup> But it is hard to view inequalities as more of a problem with regard to advocacy over public education services than with they are with criminal justice,<sup>51</sup> which should be equally available to rich and poor, or minimizing one's taxes, a task for which the rich have far more resources to spend strategically on lawyers and accountants, than the poor do.<sup>52</sup> The disparities on educational advocacy are, one would think, much less troubling than disparities on who serves in the military.<sup>53</sup> It is true, as Professor Pasachoff says, that rich families are better prepared to deal with retaliation for exercising their hearing rights by exiting the public school system,<sup>54</sup> but that is hardly a reason to eliminate procedural rights for everyone. Middle class employees are in a superior position to withstand retaliation if they complain about discrimination too, but that does not mean Congress should eliminate the right to

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<sup>50</sup> Pasachoff, *supra* note \_\_, at 1442 (discussing "moral" consequences of enforcement disparities). *But see id.* at 1434-35 ("I consider not an abstract, moral question about the appropriate components of the social contract for children with disabilities, but a narrower question about the distribution of public moneys in the context of a statute that does not purport to give more to the wealthy.") (footnote omitted).

<sup>51</sup> Notably, Supreme Court cases mandating access to criminal defense for those who are poor do not guarantee equality of advocacy. *Cf. Gideon v. Wainwright*, 372 U.S. 335 (1963) (guaranteeing right to counsel in criminal cases involving imprisonment); *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring provision of free trial transcript or alternative means of supporting appeal for indigent defendant).

<sup>52</sup> Although the Supreme Court has at times said that due process entails the right to be represented by counsel in a judicial or administrative proceeding, it has not said that the attorney must be provided for free for people who cannot afford representation if the case is a civil one. *See Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (holding that due process rights, including right to pre-termination hearing, apply to general assistance cutoff; stating, "We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.").

<sup>53</sup> *See ironically U.S. Continues Proud Tradition of Diversity on Front Lines*, THE ONION (Mar. 26, 2003), <http://www.theonion.com/articles/us-continues-proud-tradition-of-diversity-on-front,3170/> ("With blacks and Hispanics comprising more than 60 percent of the Army's ground forces in Iraq, the U.S. military is continuing its long, proud tradition of multiculturalism on the front lines of war.").

<sup>54</sup> Pasachoff, *supra* note \_\_, at 1444.

file administrative complaints and individual lawsuits over discrimination.<sup>55</sup> Moreover, since courts will award attorneys' fees to parents who prevail at IDEA due process hearings, one major equalizer, an attorney, will often be available to rich and poor.<sup>56</sup>

As will be developed at greater length below, another effective leveler is the ripple effect of successful due process proceedings on all, even when brought by better-resourced parents.

Even Professor Pasachoff acknowledges:

Poor children with disabilities have undoubtedly gained from the self-interested advocacy of families with more financial resources on the whole—whether in litigation broadly defining rights under the IDEA, amendments to the statute setting expansive terms, or generous appropriations decisions—even if in the particulars of individual cases the positive externalities are minor.<sup>57</sup>

In direct response to Professor Pasachoff and a similar argument from the AASA<sup>58</sup> that the wealthy parents' successful hearings draw to their children resources that should be spread among all, it is hardly clear that there is a fixed pot of educational goods and if the better advocated-for children succeed, the poorer advocated-for will necessarily have less. Due process is not a zero-sum game, for several reasons. More expensive services are not always what the

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<sup>55</sup> The Supreme Court has recently reaffirmed the availability of administrative and judicial remedies for retaliation against those who complain about employment discrimination. *See, e.g.*, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (upholding retaliation claim under 42 U.S.C. § 1981 for complaining about discrimination against co-worker); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (upholding claim for retaliation under Title IX of Education Amendments of 1972, 20 U.S.C. §§ 1681-82 and applicable regulations). *See generally* Michael J. Zimmer, *A Pro-Employee Supreme Court? The Retaliation Decisions*, 60 S.C. L. REV. 917 (2009) (discussing recent retaliation caselaw).

<sup>56</sup> Obviously, one could exaggerate the importance of fees awards, given that they come at the end of the case, and only when the parents succeed, and there are the well know problems of mootness and the offer of judgment rule standing in the way. *See* Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, 65 OHIO ST. L.J. 357 (2004) (discussing difficulties with obtaining attorneys' fees in special education cases under current law). Nevertheless, many lawyers in private practice demand little or no retainer from the client when taking IDEA cases.

<sup>57</sup> Pasachoff, *supra* note \_\_, at 1459.

<sup>58</sup> Pudelski, *supra* note \_\_, at 7-8.

parent asks for—witness the number of cases where the parent wants services in a less restrictive environment and the school resists, even though the less restrictive placement may be less costly.<sup>59</sup> When that is not the case, due process decisions upholding private placements may lead districts to create in-house public school programs that serve a larger group of children, at a lower per-child cost.<sup>60</sup> Moreover, additional resources are typically available outside the school district’s immediate budget, for example, in state risk pools for funding education of children with high needs,<sup>61</sup> if the state establishes the pool and district applies for assistance.<sup>62</sup> Even apart from risk pools, and depending on a given state’s special education funding mechanism, state money to a district may increase when the district provides more intense services to one or more students.<sup>63</sup> Moreover, it is not obvious that all school administrators are eager to play Robin-Hood-in-Reverse in the way a critic might suggest.<sup>64</sup> Educators have professional integrity and

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<sup>59</sup> See, e.g., *Bd. of Educ. v. Ross*, 486 F.3d 267 (7th Cir. 2007) (denying placement in general education setting for child with Rett Syndrome); see also Weber, *supra* note \_\_ [Fla.], at 44-45 (contending that school officials who oppose less restrictive programs are frequently captives of standardized operating procedure).

<sup>60</sup> This phenomenon has happened with regard to highly specialized services for young children with autism. See Office of Diverse Learner Supports & Services, Chicago Public Schools, Autism Instructional Supports & Services, [http://www.cpsdiverselearner.org/index.php?option=com\\_content&view=article&id=1633&Itemid=643](http://www.cpsdiverselearner.org/index.php?option=com_content&view=article&id=1633&Itemid=643) (last visited Feb. 14, 2014) (describing extensive support services for students with autism, with first consideration to supplemental aids provided in public school general education classrooms).

<sup>61</sup> See 20 U.S.C. § 1412(e)(3)(A)(i) (2006) (“For the purpose of assisting local educational agencies . . . in addressing the needs of high need children with disabilities, each State shall have the option to reserve for each fiscal year 10 percent of the amount of funds the State reserves for State-level activities under paragraph (2)(A) – (I) to establish and make disbursements from the high cost fund to local educational agencies in accordance with this paragraph during the first and succeeding fiscal years of the high cost fund . . .”).

<sup>62</sup> Eve Muller, National Association of State Directors of Special Education, Risk Pools: State Approaches (Apr. 2006), [http://nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/178\\_dea70b21-4c4b-4bb9-8433-4c92266754a2.pdf](http://nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/178_dea70b21-4c4b-4bb9-8433-4c92266754a2.pdf) (reporting that 30 of 42 state respondents said their states had risk pools before 2004 IDEA Reauthorization, and that 25 of 30 planned to continue the existing risk pools, with remaining 5 planning to adopt risk pool arrangement found in new law, and 5 of 12 without risk pools planning to use procedure under new law).

<sup>63</sup> See THOMAS PARRISH ET AL., 1 STATE SPECIAL EDUCATION FINANCE SYSTEMS 1999-2000, at 3-11 (2003) (describing state special education financing systems generally, including those that employ weighting systems for assumed extra costs of educating children in various disability categories and those that allocate funding based on teacher and related service personnel counts).

<sup>64</sup> See Pasachoff, *supra* note \_\_, at 1441-42 (“When facing choices among possible programs for a wealthy child and a poor child, districts have an incentive to acquiesce to the more expensive requests of the former and to provide the less expensive option to the latter, since the risk of a private enforcement action is greater with wealthier families.”).

take their obligations to serve all children seriously,<sup>65</sup> though the due process hearing system is still needed to deal with lapses and disagreements.

Many thoughtful writers who argue that people without means are at a disadvantage in the due process system do not want to get rid of hearing rights. Instead, they would expand remedies and supports to make it easier for poor parents to use the system. One article by a trio of experts lists specifics such as creating emergency and interim hearing procedures, strengthening notice, reinstating the right to expert witness fees, shifting the burden of proof to school districts, reinstating the catalyst theory for attorneys' fees, and increasing the number of publicly funded lawyers.<sup>66</sup> Professor Colker does not propose reducing due process rights; on the contrary, she supports provision of a free educational advocate for parents as soon as there is reason to think their children may need special education.<sup>67</sup> Professor Chopp, who appears to agree with some of the criticism concerning advocacy disparities, calls for increased public enforcement of IDEA in addition to increased access to free and low-cost attorney services so parents may make use of existing due process hearing and litigation rights.<sup>68</sup> Even Professor Pasachoff has a "disinclination to eliminate private enforcement of the IDEA."<sup>69</sup> Of serious concern, however, is that legislators or others reading the critiques of due process will ignore

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<sup>65</sup> See Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 446 (1998) ("In reaching the placement decision teachers, special education specialists, school psychologists, and others make professional judgments, based on their evaluation of the child in question, as to what degree of integration is appropriate. This judgment is necessarily complex, contextual, and nuanced.").

<sup>66</sup> Elisa Hyman, Dean Hill Rivkin, & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender, Soc. Pol'y & L. 107, 156-59 (2011).

<sup>67</sup> COLKER, *supra* note \_\_, at 245; see also Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 Yale L.J. 1802, 1822-23 (2008) (calling for free educational advocate services).

<sup>68</sup> Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 458-59 (2012).

<sup>69</sup> Pasachoff, *supra* note \_\_, at 1461 (stating in addition, "Few suggestions, I think, would more swiftly eviscerate the possibility of real reform that would benefit poor children with disabilities than to argue that private enforcement should be cut. Moreover, eliminating private enforcement of the IDEA would likely reduce the benefits offered to wealthier children under the statute, thereby promoting equality by leveling down.").

caveats of that type. For example, the AASA paper cites Professor Pasachoff several times;<sup>70</sup> it also cites Professor Rosenfeld several times, though he would retain due process hearing remedies while adding an arbitration option.<sup>71</sup>

2. *Is the hearing system too costly for school districts?* The AASA links the cost of hearings, particularly the risk of having to pay parents' attorneys' fees and the lost time for school personnel, to what it declares is the over-willingness of school districts to accede to unjustified demands from parents for services for their children.<sup>72</sup> Impartial study of the costs tells a different tale. One extensive multi-state study of hearings is a Government Accountability Office investigation from 2003. Its title reflects its principal observation: *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*.<sup>73</sup> It reported a five-year decline in hearings held (even though hearing requests increased during that period), and concluded, "Overall, dispute resolution activity was generally low relative to the number of students with disabilities. About 5 due process hearings were held per 10,000 students with disabilities."<sup>74</sup> If districts are settling disputes on the basis of anything other than predictions of actual outcomes at hearings, it would seem that they are drastically miscalculating the likelihood that a hearing will in fact occur, much less that the parents will prevail and the district will be liable for fees.<sup>75</sup> Since the time of the GAO report, IDEA has been amended to discourage parental hearing requests by, among other

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<sup>70</sup> Pudelski, *supra* note \_\_\_, at 8 nn. 16, 20, 11 n. 33.

<sup>71</sup> *Id.* at 15-16. Professor Rosenfeld has unequivocally dissociated himself from the AASA's recommendations. See S. James Rosenfeld, *Director's Statement on AASA Report on Due Process*, SEATTLE UNIVERSITY SCHOOL OF LAW IDEA ALJ/HO ACADEMY, <http://www.law.seattleu.edu/continuing-legal-education/idea-aljho-academy> (last visited Mar. 21, 2014).

<sup>72</sup> Pudelski, *supra* note \_\_\_, at 11.

<sup>73</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (2003).

<sup>74</sup> *Id.* at Highlights.

<sup>75</sup> Regarding rates of parental success, see *infra* text accompanying notes \_\_\_-\_\_\_.



things, making parents and their attorneys subject to liability for the district’s attorneys’ fees if the request is found to be frivolous.<sup>76</sup> Not surprisingly, the latest data show a 10 percent decline in hearing requests over the past seven years, and a 58% decline in hearings held.<sup>77</sup>

Moreover, if the districts are concerned about hearing expenses and their side effects on policy, they may—and do—buy insurance. As the AASA notes, “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.”<sup>78</sup>

3. *Parents never win, anyway?* The urban legend is that parents very rarely win due process hearings, and so taking away hearing rights would not matter. The premise of the argument is simply false. Parents do win, and the rate of winning goes up dramatically when they have attorney representation.<sup>79</sup> An Illinois study covering a five-year period showed a success rate of 16.8 percent for parents without attorneys and 50.4 percent for those with attorneys.<sup>80</sup> Given that both clients and lawyers are likely to present multiple claims, some stronger or weaker than others, success on one major issue should be considered success on the case as a whole. The Illinois study defined it that way.<sup>81</sup> A study of hearings (both with attorney

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<sup>76</sup> See 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III) (2006). The statute also now contains much more elaborate pleading requirements than before, further discouraging not fully considered requests by parents. *See id.* § 1415(b)(7)A).

<sup>77</sup> Center for Appropriate Dispute Resolution in Special Education, Trends in Dispute Resolution under the Individuals with Disabilities Education Act (Dec. 2013), [http://www.directionservice.org/cadre/pdf/Trends\\_DR\\_IDEA\\_DEC2013.pdf](http://www.directionservice.org/cadre/pdf/Trends_DR_IDEA_DEC2013.pdf).

Even the AASA admits that “longitudinal data collected by the Department of Education demonstrate the decline in the use of due process hearings.” Pudelski, *supra* note \_\_, at 11.

<sup>78</sup> Pudelski, *supra* note \_\_, at 14; *see also* Chopp, *supra* note \_\_ [NAALJ], at 455-56 (discussing prevalence of school districts’ insurance for special education hearings and stating that it permits districts to take more aggressive negotiation postures).

<sup>79</sup> There is no good way to tell whether the attorney effect is because the attorneys take only the best cases, or they present them better, or some combination of the two. *See generally* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2188-95 (2012) (complaining that studies of effectiveness of attorney representation do not or cannot account for selection effects).

<sup>80</sup> MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS 1997-2002, at 7 (2002), *available at* <http://dueprocessillinois.org/Access.pdf>.

<sup>81</sup> Archer, *supra* note \_\_, at 3 (“As defined here, a parental ‘win’ means that the parent substantially prevailed on

representation and without) in Iowa showed a parental success rate of 32 percent and mixed results in additional 8 percent of cases.<sup>82</sup> Another study of 575 hearings in 41 states in 2005-06 gave the parental win rate of 30.4 percent and mixed results in another 10.4 percent.<sup>83</sup> The student note criticizing due process procedures that was referred to above described a study of hearings in Wisconsin and Minnesota from 2000 to 2011 that showed that parents who were represented by attorneys had a 13 percent win rate and a “split decision” rate of 23 percent.<sup>84</sup>

Of equal importance, beneficial deterrent effects occur with regard to how school districts serve other children, even though the parents do not always succeed, or succeed in a majority of cases. Consider an analogy: The National Center for State Courts reports that the win rate at trial for medical malpractice plaintiffs is only 23 percent,<sup>85</sup> yet the prospect of malpractice liability increases the care with which medical providers behave.<sup>86</sup> One may be reluctant to make comparisons to the criminal justice system, but it is worth noting that the win rate for criminal defendants is extremely small.<sup>87</sup> Nevertheless, few Americans would advocate giving up the right to a criminal trial. It seems obvious that the prospect of a criminal case going to trial before

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at least one, but not necessarily all, of the major issues in a case.”).

<sup>82</sup> Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 27, 37 (2007).

<sup>83</sup> Tracy Gershwin Mueller, & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL’Y STUDS. 131, 137 (2011).

<sup>84</sup> Cope-Kasten, *supra* note \_\_, at 528. Reported win rates for parents tend to be artificially low because many hearings are ones invoked by school districts to obtain permission to evaluate. See 20 U.S.C. § 1414(a)(1)(ii)(I) (2006) (permitting school districts to use due process hearing procedures when parent refuses to consent to child’s initial evaluation for special education or fails to respond to request for consent). It should be no surprise that districts win almost all of those cases

<sup>85</sup> Cynthia G. Lee & Robert C. LaFountain, Nat’l Ctr. for State Cts., *Caseload Highlights* (Apr. 2011), at 4 [http://www.courtstatistics.org/~/\\_media/Microsites/Files/CSP/Highlights/18\\_1\\_Medical\\_Malpractice\\_In\\_State\\_Court.s.ashx](http://www.courtstatistics.org/~/_media/Microsites/Files/CSP/Highlights/18_1_Medical_Malpractice_In_State_Court.s.ashx) (interpreting nationwide data from 2005).

<sup>86</sup> Of course, some argue that this effect is excessive in medical malpractice, but deterrence occurs, whether it is at an optimal level or not. For a concise discussion of the “defensive medicine” issue, see Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1473 (2007) (book review).

<sup>87</sup> United States Attorneys reported a conviction rate of 93% for FY 2010 (81,934 defendants convicted out of 91,047 defendants). EXECUTIVE OFFICE FOR U.S. ATTYS., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2010 STATISTICAL HIGHLIGHTS, *available at* [http://www.justice.gov/usao/reading\\_room/reports/asr2010/10statrpt.pdf](http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf).

a neutral judge and jury makes the police and prosecutors more careful in making sure that the person charged is indeed guilty. Tellingly, the AASA relies on the existence of deterrent effects when it complains that school districts give in and provide services to avoid threatened due process proceedings.<sup>88</sup> The AASA says that districts frequently accede to requests from parents that they would not agree to but for the existence of due process.<sup>89</sup> This argument entails the conclusion that the existence of the hearing right has a powerful effect.

Nonetheless, the AASA contends that:

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.<sup>90</sup>

Given the overall small numbers of children involved in hearings and absence of any clear control group, it is difficult to imagine what kind of research the AASA is demanding. The AASA could be contending that enhanced or different services than those offered by the district caused no benefit to the child, though a researcher would be hard put to design a controlled experiment that would be consistent with ethical practices that would test that hypothesis. Or it could be contending that compensatory services or tuition reimbursement are no good for the individuals who receive them, but that seems counterintuitive at best and in some instances preposterous.

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<sup>88</sup> Pudelski, *supra* note \_\_\_, at 11-12.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.* at 7.

4. *Are hearing rights out of control?* There are those who believe that the due process system as originally conceived was a good thing, but that hearings have become too frequent, too long, and too complicated.<sup>91</sup> This position too is dubious. As noted, in recent years the number of hearings has declined significantly.<sup>92</sup> As a rule, hearings are also short: one state study determined that 47 percent of hearings took one day or less, and 23 percent were decided with no hearing at all.<sup>93</sup>

That system can hardly be described as one that is out of control, but if the description were accurate, there are means to fix it short of eliminating important due process protections. One factor relative to the complexity of due process hearings that is readily subject to legal reform is the judicial exhaustion rule. In special education cases, courts apply administrative exhaustion requirements with vehemence.<sup>94</sup> Knowledgeable practitioners realize that if they fail to completely develop an issue at due process, they will not be able to rely on it if the case goes to court. Moreover, even if an issue has properly been raised at hearing, it is extremely difficult to persuade judges hear new evidence on the issue when the case is on appeal to the district court.<sup>95</sup> Obviously, some hearings become protracted due to poor presentation on one side or both. But some, notably a locally famous 13-day hearing in Illinois,<sup>96</sup> become protracted because highly skilled lawyers know the hearing is their only chance to build a record for appeal, and

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<sup>91</sup> See Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403, 404-05 (1994) (stating that due process has become too time-consuming, overly adversarial and unduly formal).

<sup>92</sup> See *supra* text accompanying notes \_\_\_\_.

<sup>93</sup> Ill. State Bd. of Educ., *supra* note \_\_, at 2.

<sup>94</sup> See, e.g., *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 725 (10th Cir. 1996) (requiring administrative exhaustion despite argument exhaustion would have been futile); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 21.8 (3d ed. 2008 & supp. 2012) (collecting cases enforcing administrative exhaustion rule).

<sup>95</sup> See, e.g., *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (requiring admission of evidence only in limited circumstances). This fact remains true despite the statutory language that the court "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C)(i) (2006).

<sup>96</sup> *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. 221*, No. 002535, Ill. State Bd. of Educ. (Aug. 29, 2002), available at <http://www.dueprocessillinois.org/ISBE2535.PDF>.

they want the record to be comprehensive.<sup>97</sup> Unfortunately, matters seem to have become worse, not better, for the prospects of relaxation of exhaustion requirements. As an illustration, in a 2013 Eleventh Circuit case, the court insisted that every single claim presented by a set of facts be raised and exhausted before it could properly be brought to court.<sup>98</sup>

Some supposed reforms to IDEA have also increased complexity of hearings, and these too should be undone if Congress wishes to undertake real reform. The pleading requirements put in place in 2004 increase paperwork and promote delay.<sup>99</sup> Settlement procedures under existing law, including IDEA's offer of settlement rule, are ambiguous and have unintended negative consequences.<sup>100</sup> In contrast, a few helpful steps have recently been taken to simplify hearings, such as the trend in the states away from two tier (hearing and decision and then review officer proceeding) systems to one-tier processes.<sup>101</sup> Better case management by means of prehearing conferences and orders has led to more focused and quicker hearings, as has the increasing professionalization of the corps of administrative law judges and independent hearing

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<sup>97</sup> A study by the Illinois State Board of Education listed as reasons for increasing costs and increasing number of hearing days as (in order): the complexity of the cases; the increased use of expert witnesses; "The need to prepare a thorough and convincing record in the event of a court appeal;" and four other factors. Ill. State Bd. of Educ., Study of the Illinois Due Process Procedures (Mar. 28, 2001), at 3, [http://www.isbe.state.il.us/spec-ed/pdfs/dp\\_study.pdf](http://www.isbe.state.il.us/spec-ed/pdfs/dp_study.pdf).

<sup>98</sup> A.L. v. Jackson Cnty. Sch. Bd., 62 IDELR 103 (11th Cir. 2013) (unpublished).

<sup>99</sup> See 20 U.S.C. § 1415(c)(2) (2006) (creating extensive requirements for due process complaints and restricting amendment); Zirkel et al., *supra* note \_\_ [Creeping] at 48 ("[T]he Congressional prescription in the latest amendments to the IDEA, particularly the strengthened notice-pleading feature and extended timeline for the hearing decision, clearly borrow from, and potentially add to, the judicialization trend. Time will tell whether the new pre-hearing procedures reduce the frequency and complexity of cases that go to hearing, but the likely trade-off will be not only more technical threshold issues, such as whether the complaint was sufficiently specific, but also closer and more complex cases, thus meaning longer duration to decision.").

<sup>100</sup> See Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard To Do*, 43 LOY. L.A. L. REV. 641, 662-65 (2010) (discussing aspects of procedure related to settlement of IDEA cases that need improvement).

<sup>101</sup> See Richard Zeller, *Dispute Resolution System Functions and Activities* (2006), <http://www.directionservice.org/cadre/pdf/APR%20Indicator%20Summary%20B16%20-%20B19%20-%202006-07.pdf> ("More states seem to be moving toward single tier hearings systems managed by State Offices of Administrative Hearings (OAH). Potential benefits include: better trained and skilled Administrative Law Judges (ALJs) as hearing officers who have focused experience and daily support for conducting/managing hearings.") (also listing potential disadvantages).

officers.<sup>102</sup> The AASA states that “the 2004 reauthorization of IDEA mandated that hearing officers be lawyers.”<sup>103</sup> That is of course incorrect; but there is no doubt that hearing officers’ expertise in conducting hearings efficiently has increased over the years, and it was wise for Congress to require in 2004 that hearing officers possess the knowledge and ability to understand the law, to conduct hearings, and to render and write decisions.<sup>104</sup>

#### IV. UNDERAPPRECIATED BENEFITS OF THE EXISTING SYSTEM

One obvious argument in favor of the existing system is the perhaps tautological, but critically important, point that due process hearings afford due process. Due process is constitutionally required, and for good reason. Due process of law protects against arbitrary governmental decisions, those that are made without allowing the persons affected to participate or without following a consistent legal principle.<sup>105</sup> The interest at stake in IDEA cases is that of families in the education of their children, as vital an interest as there is. The Supreme Court declared in *Brown v. Board of Education*, “[Education] is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>106</sup> If by *Rowley*’s definition, what children with disabilities are entitled to is access to education that is beneficial to them, the deprivation of that access needs to be protected by adequate procedures. What those procedures should be has been articulated in a line of due process cases stretching from before *Goldberg v. Kelly*,<sup>107</sup> which

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<sup>102</sup> Significant in this regard are the activities of the National Association of Administrative Law Judiciary, <http://www.naalj.org/> (last visited Feb. 18, 2014).

<sup>103</sup> Pudelski, *supra* note \_\_\_\_, at 16.

<sup>104</sup> 20 U.S.C. § 1415(f)(3)(A)(ii)-(iv) (2006). Before the amendment, a district court declared that “there is no federal right to a competent or knowledgeable ALJ.” *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 583 (D. Md. 2000).

<sup>105</sup> See Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 6-7 (1992).

<sup>106</sup> 347 U.S. 483,493 (1954).

<sup>107</sup> 397 U.S. 254 (1970)

includes *Goss v. Lopez*,<sup>108</sup> and the right to education actions such as *Mills* and *PARC*. Those cases demonstrate that adversary procedures are needed—and widely provided—in any number of situations where citizens are dissatisfied with determinations that government actors make concerning essential entitlements for individuals and families.<sup>109</sup> The adversary procedures include a neutral decision maker<sup>110</sup> rendering a decision with a statement of reasons, as well as the opportunity to compel attendance of witnesses and confront and cross-examine opposing witnesses.<sup>111</sup>

Cases such as *Mills* and *PARC* presaged the procedural due process test articulated in *Mathews v. Eldridge*, a test that considers the importance of the individual interest affected; the risk of erroneous deprivation of the interest and the probable value of additional safeguards; and any countervailing governmental interests.<sup>112</sup> Applied to the entitlement to appropriate special education services, the test requires hearing rights. Access to education is of critical importance; adversary hearing procedures protect against a very real risk of deprivation; and, as this paper seeks to demonstrate, existing hearing procedures represent a wise congressional determination that any countervailing concerns do not prevail. In other words, due process hearing rights are

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<sup>108</sup> 419 U.S. 565 (1975).

<sup>109</sup> See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.4 (2011) (collecting cases in which hearing rights have found to be required by due process).

<sup>110</sup> See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding that due process requires recusal of judge who received significant campaign contributions from litigant); *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (requiring disinterested adjudicator in case involving imposition of minor fine).

<sup>111</sup> See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972) (detailing hearing rights for revocation of parole); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); see also *id.* at 270-71 (requiring opportunity to be heard by counsel and statement of reasons by decision maker in welfare termination hearing).

<sup>112</sup> 424 U.S. 319, 335 (1976). Critics have charged that the Supreme Court’s interpretation of procedural due process does not account for all of the concerns embodied in the constitutional clause. See, e.g., Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976). This Article does not attempt to propose alternatives to current procedural due process doctrine.

both crucial and constitutionally required. The label “due process hearing” is so familiar that one forgets it embraces a correct conclusion of law.

The development of a body of precedent at the administrative level is another important benefit of having due process hearing rights.<sup>113</sup> Precedents are established either locally or more broadly when due process cases are adjudicated and appealed. It may be correct, as Professor Pasachoff says, that many cases are unique and so lack general applicability,<sup>114</sup> but many other cases fall into patterns—behavior intervention, least restrictive environment, specialized services for children with autism, transportation, private placement, and so on. Within each of these fields, administrative rulings and decisions on judicial review provide the body of law that practitioners and adjudicators need for guidance in future cases.<sup>115</sup>

The need to establish precedent through hearings and judicial review brings up an additional important benefit of existing due process hearing procedures: they produce comprehensive records for review in the courts. Imagine a federal judge trying to sort through notes or a transcript of a freewheeling, informal discussion of a child’s needs and proposed services, and trying to decide whether to allocate trial time to an evidentiary hearing to go over everything again.<sup>116</sup>

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<sup>113</sup> This side-benefit of litigation in establishing precedent has often been noted. *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 376 (2013) (“[L]itigation also generates positive externalities by enhancing compliance with efficient laws and producing precedents to guide future conduct.”).

<sup>114</sup> *See* Pasachoff, *supra* note \_\_\_, at 1440.

<sup>115</sup> For an argument that the federal special education law would benefit from more case-by-case adjudication ultimately leading to a more coherent body of law on the topic of appropriate education, see Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J. L. & EDUC. 95 (2012).

<sup>116</sup> This point may of course be taken too far, as with the current caselaw on exhaustion and limits on admissibility of new evidence on review. *See supra* text accompanying notes \_\_\_.



## V. PROBLEMS WITH THE ALTERNATIVES

The “trust us” approach of AASA is not a good one. It is not realistic to rely on school districts to consistently behave in accordance with the law when they face budgetary and other pressures.<sup>117</sup> Even if some districts do not face those pressures, or if greater costs are not an issue in a given case, anyone who has ever worked in a school, or had significant dealings with one, knows schools are vulnerable to the twin threats of standard operating procedure and entrenched interests.<sup>118</sup>

The alternatives of facilitated IEPs and special education consultancy proposed by AASA are no substitute for existing hearing rights. Nothing in federal law forbids IEP facilitation, so it is freely available to states. About half of states have IEP facilitation now,<sup>119</sup> so whatever gains it provides are being realized already or are not perceived as worthwhile enough to support its adoption. As the AASA concedes, IEP facilitation leaves the power over program and placement with the school district.<sup>120</sup> Moreover, even if facilitation is currently successful, there is no reason to believe that it will continue to be so without due process hearing rights to equalize the bargaining power of the parent and the district.

The “independent, neutral special education consultant” proposed by the AASA is also an unsatisfactory substitute for due process. As the AASA says, under its plan lawyers and advocates cannot serve,<sup>121</sup> which creates a school-side power imbalance from the outset. If the parties try to go to court after the consultant acts, there will be no usable record for review, no

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<sup>117</sup> See Mark C. Weber, “All Areas of Suspected Disability,” 59 LOY. L. REV. 289, 319-321 (2013) (collecting and discussing sources on budgetary pressures on school districts under current economic conditions). This point does not contradict the point made *supra* text accompanying note \_\_\_ that school personnel frequently resist budgetary squeezes and do the right thing. Due process is designed for outlier cases, not normal ones.

<sup>118</sup> For a statement of the contention that American special education has fallen victim to such influences, see RETHINKING SPECIAL EDUCATION 161-62 (Chester E. Finn et al. eds. 2001).

<sup>119</sup> Pudelski, *supra* note \_\_\_, at 17.

<sup>120</sup> *Id.* at 18.

<sup>121</sup> *Id.* at 20.

maintenance of placement, and no one will ever have developed the facts through cross-examination. The consultant merely has the ability to recommend obtaining additional evaluations of the child,<sup>122</sup> and remedies are limited to revised IEPs, not reimbursement of expenses or compensatory education, which, under the plan, only a court (or a voluntary agreement by the school district) could provide.<sup>123</sup> True, “this system is considerably less stressful for special education teachers, specialized instructional support staff and administrators,”<sup>124</sup> but that is because it would be less effective as a means of enforcing the law. If there has been any success with similar ideas in the past, there is no reason to expect it to work once the option of due process is off the table.

Arbitration would eliminate critical protections of the law, most notably control over the nature of the proceedings and scope of the evidence, and depending on the arbitration system adopted, cost-free access, judicial review, and the availability of attorneys’ fees.<sup>125</sup> Due process protections help to moderate the huge power disparity between school districts and parents. Legal remedies are always an equalizer, and are essential to maintaining a just public order.<sup>126</sup>

Mediation as an adjunct to due process has been successful, but it needs the threat of due process to make it work. It is no surprise that diplomatic solutions may depend on the backstop of coercion. The AASA proposal would actually diminish the effectiveness of mediation by

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 4.

<sup>124</sup> *Id.* at 22.

<sup>125</sup> See Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 16 (2004) (“Binding arbitration is not really an appealing endeavor, and may well lead to a lose-lose situation between home and school.”).

<sup>126</sup> See Deborah M Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 745 (2002) (“The established prescriptive norm includes the resolution of disputes and remedying of injustices within a legal system that operates according to just, consistent rules and procedures, and upon which the core principles of democracy are said to depend. The instruments and processes of law are understood to serve as the structures upon which democracy functions.”) (footnotes omitted).

barring attorneys,<sup>127</sup> thus again exacerbating the power inequality that parents face. The AASA report also says, cryptically, that under its proposal “the mediation agreement is not legally binding,”<sup>128</sup> which gives the school district the unilateral ability to revoke whatever agreement it made. Careful observers of mandatory alternative dispute resolution processes note that, like formal adjudication processes, these procedures tend to reflect power imbalances in favor of repeat players.<sup>129</sup>

Monitoring or other public enforcement, as favored by Professor Pasachoff, has its merits, but parents lack any control over it, and the funding cutoff threat is so unrealistic that it does not have much of a deterrent effect. As Professor Pasachoff says, “[E]ven though the federal agency charged with IDEA enforcement repeatedly found states in violation of the IDEA, it has almost never taken any formal action to withdraw funds, limiting its involvement to negotiation and acceptance of minimal improvements.”<sup>130</sup> Professor Pasachoff’s suggestions for strengthening public enforcement<sup>131</sup> may help, although it is difficult to say how politically realistic they are in an anti-regulatory, anti-central government era. The AASA asserts that the current monitoring system conducted by the U.S. Department of Education, combined with enforcement of the No Child Left Behind law, is so effective as to eliminate the need for due process,<sup>132</sup> but that position is hard to square with reality<sup>133</sup> Curiously, although the AASA seems to think that existing monitoring is an adequate substitute for due process, it concedes that

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<sup>127</sup> Pudelski, *supra* note \_\_, at 19.

<sup>128</sup> *Id.*

<sup>129</sup> See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO STATE J. ON DISPUTE RESOLUTION 19, 39-50 (1999).

<sup>130</sup> Pasachoff, *supra* note \_\_, at 1463 (collecting sources).

<sup>131</sup> *Id.* at 1465- 85.

<sup>132</sup> Pudelski, *supra* note \_\_, at 2, 6-7.

<sup>133</sup> See, e.g., Diana Jean Schemo, *School Achievement Reports Often Exclude the Disabled*, N.Y. TIMES, Aug. 30, 2004, at A10 (describing exclusion of children with disabilities from assessments and manipulation of cohorts to avoid reporting achievement).

“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.”<sup>134</sup> That is hardly surprising, for monitoring focuses on record-keeping and various technical compliance indicators more than substantive compliance with appropriate education obligations.

The AASA says that enforcement of Title VI of the Civil Rights Act and Title IX of the Education Amendments relies on executive branch activity rather than individualized remedies and entitlements,<sup>135</sup> but that is incorrect.<sup>136</sup> What is correct is that the Supreme Court eliminated private judicial enforcement of Title VI disparate impact obligations in *Alexander v. Sandoval*.<sup>137</sup> Few informed observers think of that as a positive development for racial justice.<sup>138</sup>

## VI. SOME USEFUL REFORMS

The reforms that might aid enforcement of IDEA without incurring negative side effects are modest procedural changes, only a few of which would demand new legislation.<sup>139</sup>

*1. Providing expert witness fees.* Providing expert witness fees as a matter of course for prevailing parents would equalize the position of the parties in due process disputes.<sup>140</sup>

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<sup>134</sup> Pudelski, *supra* note \_\_\_, at 10

<sup>135</sup> *Id.* at 5-6.

<sup>136</sup> *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (upholding Title IX private right of action); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (upholding Title VI claim) (lead op.).

<sup>137</sup> 532 U.S. 275, 285-86 (2001) (rejecting interpretation of Title VI adopted in *Lau v. Nichols*, 414 U.S. 563 (1974), which upheld Title VI disparate impact claim).

<sup>138</sup> *See, e.g., Adele P. Kimmel et al., The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, FLA. B.J., Jan., 2002, at 24, 26 (“[T]he Court’s ruling in *Sandoval* does not prevent federal agencies from bringing their own enforcement actions, which may include cutting off federal grants to programs that employ policies or practices that have an unjustified disparate impact on minorities. As a practical matter, however, this fact offers little solace to victims of discrimination because federal resources for enforcing Title VI and its regulations are limited. [FN15] Indeed, during the Clinton administration, the United States filed a brief in *Sandoval* stating that “private enforcement provides a necessary supplement to government enforcement” of Title VI and its implementing regulations.”) (footnotes omitted); Derek Black, Comment, *Picking Up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 357 (2002) (“*Sandoval* has closed a door that was once essential to ensuring the enforcement of civil rights legislation and providing equal opportunity to people of all races and ethnicities.”); Melanie K. Gross, Note, *Invisible Shackles: Alexander v. Sandoval and the Compromise to the Medical Civil Rights Movement*, 47 HOW. L.J. 943, 947 (2004) (describing *Sandoval* as “severe blow” to medical civil rights).

<sup>139</sup> A catalog of reforms that are somewhat more ambitious than those discussed here is found in Hyman et al., *supra* note \_\_\_, at 155-61.

Moreover, it would not necessarily increase number of hearings. In cases where the experts on both sides agree—a situation that happens more than might be expected—settlements typically ensue. When that does not occur, a more convincing expert presentation by one side or the other may well induce the other side to give in. This reform would require legislation to overrule the Supreme Court ruling that IDEA did not permit expert fees, but that prospect is hardly unrealistic. Congress passed a similar amendment restoring expert fees under the Civil Rights Attorneys Fees Act and Title VII.<sup>141</sup>

2. *Relaxing exhaustion and new-evidence rules.* The proposal would actually not be to relax the rules, but to restore what appears to have been Congress’s intent regarding exhaustion. Senator Paul Simon, a sponsor the 1986 Handicapped Children’s Protection Act, the law that codified IDEA’s exhaustion requirement and applied to selected claims under other provisions, described a broad set of situations in which IDEA does not require exhaustion:

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<sup>140</sup> See Leslie Reed, Comment, *Is A Free Appropriate Public Education Really Free? How the Denial of Expert Witness Fees Will Adversely Impact Children with Autism*, 45 SAN DIEGO L. REV. 251, 299 (2008) (“While some parents will not be dissuaded from pursuing an IDEA lawsuit by the inability to recover expert fees, many parents of children with [autism spectrum disorder] will not have such an opportunity because they will not have the financial backing to fund an expert.”); see also Allan G. Osborne, Jr., & Charles J. Russo, *The Supreme Court Rejects Parental Reimbursement for Expert Witness Fees Under the IDEA: Arlington Central School District Board of Education v. Murphy*, 213 WEST’S EDUC. L. REP. 333, 348 (2006) (“Arlington clearly appears to shift the balance of power to school boards by denying reimbursements to parents for the costs of expert witnesses, thereby possibly limiting parental access to such important help in protecting the educational rights of their children with disabilities.”)

<sup>141</sup> The Civil Rights Act of 1991 overturned *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991), which held that 42 U.S.C. § 1988’s provision of attorneys’ fees to prevailing parties in civil rights cases did not include expert witness fees. Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079. Responding to widespread criticism of *Casey*, see, e.g., Eileen R. Kaufman, *Choosing the Insidious Path: West Virginia University Hospitals, Inc. v. Casey and the Importance of Experts in Civil Rights Litigation*, 19 N.Y.U. REV. L. & SOC. CHANGE 57 (1991), Congress provided for expert witness fees for prevailing parties in cases under the Reconstruction Era Civil Rights Acts, see 42 U.S.C. § 1988(c) (2006), and Title VII, see *id.* § 2000e-3(k). But because *Casey* explicitly distinguished the fees provision in IDEA from § 1988 and noted the congressional intention to have expert witness fees included in IDEA fees awards, *Casey*, 499 U.S. at 91 n.5, Congress had no reason to change IDEA. Then the Court decided *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), applying *Casey*’s interpretation of unamended § 1988 to IDEA and eliminating expert fees in IDEA cases. A congressional effort to overturn *Casey* failed several years ago. See S. 613, 112th Cong. § 2 (2011); H.R. 1208, 112th Cong. § 2 (2011) (both unenacted).

It is important to note that there are certain situations in which it is not appropriate to require the exhaustion of EHA administrative remedies before filing a civil law suit. These include complaints that: First, an agency has failed to provide services specified in the child's individualized educational program (IEP); second, an agency has abridged or denied a handicapped child's procedural rights—for example, failure to implement required procedures concerning least restrictive environment or convening of meetings; three, an agency had adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use the due process procedures—for example, where the hearing officer lacks the authority to grant the relief sought; and four, an emergency situation exists—for example, failure to provide services during the pendency of proceedings, or a complaint concerning summer school placement which would not likely be resolved in time for the student to take advantage of the program.<sup>142</sup>

As noted above, courts are in fact applying a more draconian regime.<sup>143</sup> Courts should also be more faithful to IDEA's text regarding new evidence on appeal.<sup>144</sup>

3. *Continuing to streamline due process proceedings.* This reform could be achieved by discouraging elaborate motion practice, holding prehearing conferences to clarify the dispute, and seizing every opportunity to minimize procedure while still affording ample opportunity to

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<sup>142</sup> 131 CONG. REC. S10,401 (daily ed. July 30, 1985).

<sup>143</sup> See *supra* text accompanying notes \_\_\_\_ (discussing exhaustion).

<sup>144</sup> See 20 U.S.C. § 1415(i)(2)(C)(ii) (2006) (“In any action brought under this paragraph, the court— . . . shall hear additional evidence at the request of a party.”) (emphasis added). *But see, e.g.,* West Platte R-11 Sch. Dist. v. Wilson, 439 F.3d 782, 785 (8th Cir. 2006) (upholding district court refusal to permit supplementation of administrative record).

be heard.<sup>145</sup> Continued movement by states to one-tier hearing systems should also reduce the ponderousness of the system and eliminate unnecessary second-guessing.

4. *Continuing efforts to enhance professionalism and training of independent hearing officers and administrative law judges.* Hearing decisions receive significant deference when reviewed by courts.<sup>146</sup> To justify the deference, the decision makers need to have expertise and professionalism. Hearing officers and administrative law judges should receive education not only on legal issues, but also on the substance of special education and educational assessment: what works when, what is trending, and how to evaluate expert opinions.<sup>147</sup>

5. *Strengthening enforcement of settlements when enforcement is appropriate.* This step is important so that parties do not refuse to settle for fear that the settlement will not be obeyed. Unfortunately, the consequences that ensue when a party reneges on a settlement are anything but predictable.<sup>148</sup> Some relatively simple steps, such as ensuring federal jurisdiction for suits to enforce private settlements of due process hearings, and clarifying that no exhaustion is required for those cases, would increase the certainty that settlements will stick and strengthen the incentives to settle.<sup>149</sup>

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<sup>145</sup> See sources cited *supra* note \_\_\_\_ [Zirkel Creeping article] (discussing steps added to IDEA hearing process in 2004).

<sup>146</sup> See, e.g., *R.E. v. N.Y.C. Dept. of Educ.*, 694 F.3d 167, 189 (2d Cir. 2012) (“[T]he role of the federal courts in reviewing state educational decisions under the IDEA is circumscribed. We must give due weight to the state proceedings, mindful that we lack the specialized knowledge and experience necessary to resolve questions of educational policy. It is not for the federal court to choose between the views of conflicting experts on such questions.”) (citations and internal quotations and alterations omitted).

<sup>147</sup> See Rosenfeld, *supra* note \_\_ [It’s Time], at 551 (“Many hearing officers are faced with the obligation to decide between proposals that they are not well trained to evaluate. Moreover, because of fears of being perceived as partial, many believe themselves handcuffed in asking for or requiring additional information from either of the parties that they suspect may be important, if not crucial, in deciding the case before them.”).

<sup>148</sup> See Weber, *supra* note \_\_ [Settling], at 654-66.

<sup>149</sup> *Id.* at 663-64.

## CONCLUSION

To borrow one of Professor Colker's favorite words,<sup>150</sup> the appropriate conclusion for this paper is, "Don't dis due process." The system of due process hearing rights for parents under IDEA is indeed under attack, but due process rights are worth defending. Due process hearings afford protections to parents and children that will be missed sorely if they are lost. Moreover, with some modest improvements, the due process hearing system could be even more effective at guaranteeing that children receive the education owed them under law.

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<sup>150</sup> Ruth Colker & Kevin M. Scott, *Dissing States? Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001),