

## Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys

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### ABSTRACT

The federal law that guarantees an appropriate and inclusive education for children with disabilities relies on private enforcement; parents concerned about the inadequacy of their children's education can take advantage of an administrative hearing to seek resolution of disputes with the child's school district. While conceived in the Individuals with Disabilities Education Act (IDEA) as a prompt and informal tool, evidence suggests that special education due process hearings have become overly complex, prohibitively expensive, and excessively lengthy, thus limiting their accessibility and usefulness as an enforcement mechanism.

Despite numerous studies highlighting the flaws of special education due process, few have taken advantage of a particularly important resource for crafting reform proposals: the attorneys who practice special education law. Tapping into practitioners' lived experiences of special education due process provides us with a clearer sense of how the due process system plays out in practice and, importantly, how differing perceptions of the system's flaws may facilitate or impede attempts to build support for particular reforms.

In addition to cataloging various features of the due process system that differ from state to state, this article reports data from a nationwide survey of practicing special education lawyers that elicited their views about the effectiveness of the due process system. The most salient observation obtained from the survey is that the attorney's client—be it the parents or the school district—strongly shapes the attorney's perceptions of the system's flaws and targets for change. Yet the results also suggest a number of reforms that could improve and streamline the system while garnering support from both parents and school districts. Recommendations include

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(1) more rigorous training of hearing officers, both in terms of case management and substantive special education law; (2) publication at the state level of more comprehensive and uniform standards for procedure, discovery, and admission of evidence; (3) development of additional funding sources for parent attorneys and expert witnesses; and (4) state review of rules with an eye toward greater procedural simplicity.

## INTRODUCTION

Since the passage of the Individuals with Disabilities Education Act (IDEA) in 1975, parents of children with disabilities have had the ability to request due process hearings to resolve disputes between parents and school districts regarding the special educational programming provided to their children.<sup>1</sup> While the basic idea of an administrative hearing before a hearing officer has been a consistent pillar of the IDEA over the past forty-five years, the effectiveness of the due process hearing to resolve disputes between parents and school districts is a perennial concern.

The leading complaints concerning the due process system are its complexity and expense.<sup>2</sup> While parents and child advocates have expressed dismay that the due process system is financially out of reach for most families,<sup>3</sup> school administrators have suggested that the due process system is burdensome and costly for school districts as well.<sup>4</sup> Observations about the increasing “judicialization” of due process procedures have been the subject of many studies,<sup>5</sup> as have many diverse recommendations for

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<sup>1</sup> The Education for All Handicapped Children Act of 1975, often referred to as PL 94-142, was the original title of the law now entitled the Individuals with Disabilities Education Act. When passed, the law required states to provide parents the opportunity for an impartial due process hearing conducted by the State educational agency or the local educational agency or intermediate educational unit. Parties to the hearing were given the right to be accompanied by counsel, compel the attendance of witnesses, present evidence, cross examine opposing witnesses, obtain a written decision with findings of fact, and obtain a transcript of the hearing. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, §§ 615(b)(2), 615(d), 89 Stat. 773, 788–89 (1975).

<sup>2</sup> See, e.g., Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, 26(3) J. DISABILITY POL’Y STUD. 135, 137 (2015) (referencing numerous concerns about due process in published commentaries).

<sup>3</sup> See, e.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011); 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 (2011).

<sup>4</sup> See Sasha Pudelski, *Rethinking Special Education Due Process*, AM. ASS’N OF SCH. ADMIN. (April 2016), [https://www.aasa.org/uploadedFiles/Policy\\_and\\_Advocacy/Public\\_Policy\\_Resources/Special\\_Education/AASARethinkingSpecialEdDueProcess.pdf](https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf)

<sup>5</sup> See, e.g., Perry A. Zirkel, Zorka Karanxha & Anastasia D’Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 27 (2007).

change.<sup>6</sup>

Notably, despite numerous studies highlighting the flaws of special education due process, few have explored the experiences and perceptions of the attorneys who practice special education law in order to gain insight into the flaws of due process and to lead policymakers to potential solutions. Those that have sought input and observations from practicing attorneys focused on a particular state (Pennsylvania) or, although national in scope, limited the discussion to attorney attitudes toward a narrow set of topics (resolution sessions, IEP facilitation, binding arbitration, and the two-tier system).<sup>7</sup> As a contribution to the effort to analyze more fully the efficacy of due process as a mechanism for dispute resolution, we undertook a national survey of practicing special education lawyers that tapped into attorneys' attitudes regarding the overall complexity, accessibility, and effectiveness of the due process system in their state. In addition, we asked respondents to share their thoughts about the use of formal discovery and expert witnesses in special education due process. We also provided respondents with an opportunity to share their recommendations for how best to improve the due process system.

As described more fully in this article, the survey results bore out the continued concern of many that the due process system is problematic. In answer to survey questions, lawyers found fault with the knowledge and objectivity of hearing officers, the length of hearings, the pressure put on the system by attorney and expert witness fees, and the overall complexity of due process hearings. Most notable, however, were the very distinct differences in the perceptions of the attorneys who represent school districts and the attorneys who represent parents. While attorneys on both sides of special education disputes expressed some level of dissatisfaction with the process, each group perceived the flaws in fundamentally different ways. School district attorneys tended to see the high cost of plaintiff's attorney fees (which school districts must bear if parents prevail, due to the fee-shifting provisions of the IDEA) as an intractable problem limiting the efficient resolution of cases. In contrast, parent attorneys focused more on the cost of expert witnesses (the cost of which is not shifted to districts, even if parents prevail) as a barrier to parents trying to access the due process system and find resolution to their disputes. Both groups of attorneys identified issues with hearing officers as interfering with the effectiveness of due process, with school lawyers more likely to raise concerns about their lack of skills and knowledge and parent lawyers more concerned about perceived bias.

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<sup>6</sup> See, e.g., Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 *CASE W. RES. L. REV.* 143 (2015); S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 *J. NAT'L ASS'N L. JUDICIARY* 544 (2012).

<sup>7</sup> Zirkel, *supra* note 5 at 28, 30 n.14, 50 n.85.

Despite these differing perceptions, however, the attorney responses suggested that a number of reforms could garner general support.<sup>8</sup> First, reforms targeting the quality and objectivity of hearing officers would invite greater faith in the system. State education agencies could begin by looking seriously at how they choose, pay, and train hearing officers, with an eye toward assuring that hearing officers are well versed in both hearing management and substantive special education law, and are not biased toward one side or the other. Second, states should revisit their rules to ensure that they have developed and published clear standards for procedure, discovery, and admission of evidence. This would leave less to the discretion of hearing officers and would create a more uniform and predictable experience for all parties. Third, federal, state, and local educational authorities should explore funding sources to support legal organizations that provide free or low-cost representation to parents and to fund needed experts. This would ease the financial pressures that often prevent all but the wealthiest of parents from pursuing due process and reduce the high cost of due process for all parties. Finally, states should examine their choices about due process to eliminate as much procedural complexity as possible by considering such changes as putting time limits on hearings and limiting discovery.

The article is organized in five parts. Part I provides relevant background information on special education due process hearings, which are required by the Individuals with Disabilities Education Act for dispute resolution between parents and school districts. Part II reviews previous work done on this topic, focusing specifically on the few studies that have surveyed special education practitioners with due process experience. Part III reports the results from an original national survey of special education lawyers conducted in late 2019 and early 2020. Part IV provides an analysis of the results and makes recommendations. Part V concludes by acknowledging how intractable the problems with due process have been and focusing on the recommendations that might have the best chance of success.

## I. DUE PROCESS UNDER THE IDEA

The IDEA is the primary federal law governing the education of children with disabilities. In return for federal funding, states commit to implementing a special education program that accords with the Act's

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<sup>8</sup> While a variety of reform proposals might generate considerable support from *either* parent attorneys or school attorneys, we have focused on proposals that might find broad consensus and thus have a better chance of implementation.

mandates.<sup>9</sup> Eligible students aged three through twenty-one are guaranteed a “free appropriate public education”<sup>10</sup> (FAPE) in the least restrictive environment (LRE). Once a child has been identified as eligible, the school district must respond appropriately to the child’s unique needs by developing an Individualized Education Program (IEP). An IEP is a written plan that sets forth the child’s present levels of performance; the child’s strengths and weaknesses; the measurable annual goals the child is expected to attain; the programs and services the child will receive to address their learning needs; and classroom and testing accommodations and modifications.<sup>11</sup>

Due to the inherent vagueness in the terms “free appropriate public education” and “least restrictive environment,” parents and school districts sometimes disagree on what special education services and placement a child should receive under the law. Recognizing this, the IDEA provides several dispute resolution tools to help resolve differences of opinion, one of which is a due process hearing.<sup>12</sup> The law requires states to establish a hearing process that allows any party to present a complaint related to the identification, evaluation, or educational placement of a child, or the provision of FAPE.<sup>13</sup> A hearing to address the complaint must be held by an impartial hearing officer; parties have the right to be represented by counsel, present evidence and witnesses, cross-examine opposing witnesses, and compel the attendance of witnesses.<sup>14</sup> The hearing officer is obliged to make findings of fact and conclusions of law, issue a written decision that determines whether a violation of the IDEA has occurred and, if a violation has occurred, award appropriate relief. The law also guarantees the right of a party disagreeing with the hearing officer’s decision to bring a civil action in state or federal court.<sup>15</sup> If the parent prevails, the law allows the court to require the school district to pay the parent’s costs and attorney fees (but not the costs of any expert witnesses).<sup>16</sup>

Although all states must adhere to those core provisions of the IDEA, as

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<sup>9</sup> While the term “states” is used throughout, it is meant to include other jurisdictions that receive funding for special education through the IDEA, including the District of Columbia and the Bureau of Indian Affairs.

<sup>10</sup> 20 U.S.C. § 1401(9) (2018) (“A free appropriate public education” is defined as special education and related services provided in conformity with an individualized education program for a child with a disability); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188–89 (1982) (requiring states to provide only a minimum floor of educational opportunity to students, not the best education possible).

<sup>11</sup> 20 U.S.C. § 1414(d) (2018).

<sup>12</sup> The full list of formal dispute resolution tools includes facilitated IEP meetings, mediation, state complaints, and due process petitions. 20 U.S.C. § 1415(f) (2018).

<sup>13</sup> 20 U.S.C. § 1415(b)(6)(A) (2018).

<sup>14</sup> 20 U.S.C. § 1415(h) (2018).

<sup>15</sup> 20 U.S.C. § 1415(i)(2) (2018).

<sup>16</sup> 20 U.S.C. § 1415(i)(2)–(3) (2018).

well as timelines by which certain events must take place,<sup>17</sup> they have considerable room for customizing the due process framework to suit the state's particular needs.<sup>18</sup> Some of the areas open to customization include the statute of limitations period,<sup>19</sup> the use of a one-tier or two-tier administrative review system,<sup>20</sup> the allocation of the burden of proof,<sup>21</sup> the use of discovery rules, the use of evidence rules,<sup>22</sup> qualifications and employment of hearing officers,<sup>23</sup> regulations concerning permissible representation,<sup>24</sup> and timelines for filing in federal court.<sup>25</sup>

In some of these areas, the states have largely converged on the same practice. For instance, forty-four states have set the statute of limitations period at two years. Thus, a due process hearing must be requested within two years of the date the parent or district knew or should have known about the alleged violation of the IDEA. Five states (Alaska, Louisiana, North Carolina, Texas, and Wisconsin) have restricted the statute of limitations period to one year, while only Kentucky has extended it to three years.<sup>26</sup>

Similarly, forty-three states have chosen to implement a one-tier administrative review system as opposed to a two-tier system. In one-tier systems, the state department of education conducts the hearing and the losing party can then appeal to state or federal court. In two-tier systems, the hearing is conducted by the local educational agency, and the losing party can then appeal to the state department of education, which will appoint a

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<sup>17</sup> For instance, school districts must schedule a resolution meeting between the parents and school district within fifteen calendar days of receiving a due process complaint, unless both the parent(s) and school district agree in writing not to have a resolution meeting or to use mediation instead. The State Education Agency (SEA) or the public agency directly responsible for the child's education must also ensure that, no later than forty-five days after the thirty-day resolution period expires, a final decision is reached in the hearing and a copy of the decision is mailed to each party.

<sup>18</sup> This approach has been described as "cooperative federalism." See *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (citing *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999)).

<sup>19</sup> 20 U.S.C. § 1415(f)(3)(C) (2018).

<sup>20</sup> 20 U.S.C. §§ 1415(g)(1), (i)(2)(A) (2018).

<sup>21</sup> The IDEA is silent on which party bears the burden of proof at a due process hearing, though the U.S. Supreme Court in *Schaffer* interpreted the IDEA as placing the burden of proof on the party seeking relief, which is nearly always the parent. Nevertheless, some states have assigned the burden to the school district.

<sup>22</sup> The IDEA does not specify whether the rules of civil procedure or the rule of evidence must be used in a due process hearing.

<sup>23</sup> 20 U.S.C. §§ 1415(f)(3)(A)(i)–(iv) (2018).

<sup>24</sup> The IDEA provides parents with the right to be accompanied and advised by counsel and individuals with special knowledge or training with respect to the problems of children with disabilities. 20 U.S.C. § 1415(h)(1) (2018).

<sup>25</sup> 20 U.S.C. § 1415(i)(2)(B) (2018).

<sup>26</sup> Alaska has a one-year statute of limitations for parents and a sixty-day statute of limitations for school districts. ALASKA STAT. § 14.30.193(a) (2008); ALASKA ADMIN. CODE tit. 4, § 52.550(a) (2007); LA. ADMIN. CODE tit. 28, § 1511(F) (2020); N.C. GEN. STAT. § 115C-109.6(b) (2006); 19 TEX. ADMIN. CODE § 89.1151(c) (2018); WIS. STAT. § 115.80(1)(a)(1) (2020); KY. REV. STAT. § 157.224(6) (2004).

review officer or review panel.<sup>27</sup> Only after the review officer or panel issues a decision can the losing party appeal to state or federal court. Those states with a two-tier system are Kansas, Kentucky, North Carolina, Nevada, New York, Ohio, and South Carolina.<sup>28</sup>

Another area in which the majority of states have converged on the same practice is the allocation of the burden of proof. In 2005, the Supreme Court ruled that the party requesting a due process hearing bears the burden of proof under the IDEA unless a state enacts legislation to the contrary.<sup>29</sup> The majority of states have declined (despite pressure from parents and advocates) to pass such legislation. Because the vast majority of due process cases are initiated by parents,<sup>30</sup> they typically bear the burden in the states that have not specifically shifted it to school districts.<sup>31</sup> Only six states—Connecticut, Delaware, Florida, New Jersey, Nevada, and New York—place the burden of proof on the school district.<sup>32</sup>

More variation exists among the states when it comes to rules about representation, hearing officer qualification, use of formal discovery, rules of civil procedure, and rules of evidence. For example, the IDEA provides that parties have “the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities[.]”<sup>33</sup> Whether or not this right extends to allow parents to be represented by special education advocates, rather than only by licensed attorneys, has not been addressed by Congress or the Supreme Court. The regulation of the practice of law, which includes unauthorized practice rules, is determined at the state level. Thus, states can

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<sup>27</sup> 20 U.S.C. § 1415(f)–(g) (2018).

<sup>28</sup> Since 1991, the trend has moved toward one-tier systems. See Connolly et al., *State Due Process Hearing Systems Under the IDEA: An Update*, 30 J. DISABILITY POL’Y STUD. 156, 157 (2019) (summarizing trend and reporting that in 1991, twenty-six states were using a two-tier system; by 2010, nine states were using two tiers; in 2020, just seven states use two tiers). See E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. Of Educ., 773 F.3d 509, 515 (4th Cir. 2014) (upholding North Carolina’s two-tier system).

<sup>29</sup> Schaffer v. Weast, 546 U.S. 49, 61–62 (2005).

<sup>30</sup> A school district might file a complaint to defend the appropriateness of its evaluation when the parent is seeking an independent educational evaluation or to challenge a parent’s refusal to consent to special education services. Nevertheless, such complaints are rare.

<sup>31</sup> See Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?*, 13 CONN. PUB. INT. L. J. 1 (2013) (discussing the burden of proof in due process cases); Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27 (2005).

<sup>32</sup> CONN. AGENCIES REGS. § 10-76h-14 (2000); DEL. CODE ANN. tit. 14, § 3140 (1983); FLA. STAT. ANN. § 1008.212 (2013) (placing burden on school district only with respect to expedited hearings); N.J. STAT. ANN. § 18A:46-1.1 (2008); NEV. REV. STAT. 388.467 (2015); N.Y. EDUC. LAW § 4404(e) (McKinney 2007) (placing the burden of production and persuasion on the district except in cases involving tuition reimbursement when the parent unilaterally places their child in private school).

<sup>33</sup> 20 U.S.C. § 1415(h)(1) (2018).

determine the role of a non-attorney in due process hearings. Eleven states allow non-attorney advocates to represent parents in a due process hearing.<sup>34</sup>

The process for hiring and qualifying hearing officers is mostly controlled at the state level. The federal law requires that hearing officers possess knowledge of and have an ability to understand the law, regulations, and court decisions; possess the ability to conduct hearings; and possess the ability to render and write decisions consistent with the law.<sup>35</sup> The officers may not be an employee of the state or local educational agency (LEA) involved in the child's education or care and may not have a personal or professional conflict of interest.<sup>36</sup> This leaves states with the option to have hearings heard by panels or individuals, by lawyers or by non-lawyers, and by people with particular expertise in special education or lacking in such knowledge.<sup>37</sup> Hearing officers can be full or part-time and may or may not be part of a state system for administrative hearings.<sup>38</sup>

Presently, administrative law judges (ALJs) preside over special education due process hearings in seventeen states.<sup>39</sup> Among the thirty-three states that do not use ALJs, many have simply adopted the IDEA's requirements for hearing officers and left it at that. But other states have

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<sup>34</sup> With the sole exception of Texas (89 TEX. ADMIN. CODE §1175 (2018)), state statutes and codes uniformly fail to explicitly state whether or not attorney advocates are permitted to represent parents in a due process hearing. We reached out to the relevant state education departments by phone and email to determine whether or not advocate representation was allowed. All email responses are on file with the authors. In states where the rules are not specific about the right to be represented by a non-attorney in a due process hearing, the non-attorney advocates risk prosecution for the unauthorized practice of law. *See In re Arons*, 756 A.2d 867, 874 (Del. 2000) (finding neither the IDEA nor the due process clause of the U.S. Constitution gives parents the right to be represented by lay advocates in special education administrative hearings and affirming the decision of the Delaware Board on Unauthorized Practice of Law that the lay advocate in a due process case was engaged in the unauthorized practice of law).

<sup>35</sup> 20 U.S.C. § 1415(f)(3)(A)(ii)–(iv) (2018).

<sup>36</sup> 20 U.S.C. § 1415(f)(3)(A)(i) (2018).

<sup>37</sup> And although the IDEA does not say anything about staying up to date on special education law and developments, some states require hearing officers to undergo periodic refresher training to maintain their credentials (e.g., Tennessee (TENN. CODE. ANN. § 49-10-606 (2019)) and Wisconsin (WIS. ADMIN. CODE PI § 11.12 (2021))).

<sup>38</sup> *See Connolly, Zirkel & Mayes, supra* note 29, at 158–60 (cataloging the various choices states have made with regard to employment status, organizational home, background, and assignment method of due process hearing officers. The authors highlight the trend toward the use of full-time hearing officers and the use of attorneys rather than special educational professionals as hearing officers).

<sup>39</sup> Arizona (ARIZ. ADMIN. CODE §7-2-405 (2021)), California (CAL. EDUC. CODE §56501(b)(4)(1992)), Colorado (1 C.C.R. 301-8:2220-R-6.02 (2013)), Florida (FLA. ADMIN. CODE r. 6A-6.03311(2014)), Georgia (GA COMP. R. & REGS. 160-4-7-.12(2010)), Hawaii (HAW. CODE R. § 8-60-65(2009)), Iowa (IOWA ADMIN. CODE r. 281-41.511(256B,34CFR300) (2021)), Louisiana (LA. ADMIN. CODE. tit. 28, Pt XLIII, §511(2012)), Maryland (MD CODE. ANN., EDUC., §8-413(2016)), Michigan (MICH. ADMIN. CODE r. 340.1724f(2020)), Minnesota (MINN. R., 3525.3900 (2014)), North Carolina (N.C. GEN. STAT. ANN. § 115C-109.6 (2006)), North Dakota (N.D. ADMIN. CODE 67-23-05-02 (2008)), New Jersey (N.J. ADMIN. CODE § 6A:14-2.7 (2020)), Oregon (OR. ADMIN. R. 581-015-2365 (2007)), Tennessee (TENN. CODE. ANN. § 49-10-606 (2019)), and Washington (WASH. ADMIN. CODE 392-172A-05085 (2007)).

added additional requirements. For example, Louisiana, Virginia, Wisconsin, West Virginia, and Texas require hearing officers to have a law degree; Oklahoma requires hearing officers to have *either* a law degree or a master's degree in education, special education, psychology, or another related field.<sup>40</sup> Delaware has taken a particularly creative approach by requiring that due process hearings be overseen by a hearing panel consisting of three members appointed on a rotating basis. The panel must include a Delaware attorney, an educator knowledgeable in the field of special education, and a lay person with a demonstrated interest in the education of children with disabilities and approved by the Governor's Advisory Council for Exceptional Children.<sup>41</sup>

Finally, the IDEA states that any party to a due process hearing has the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,<sup>42</sup> as well as prohibit the introduction of any evidence at the hearing that was not disclosed to that party at least five business days before the hearing.<sup>43</sup> The IDEA is silent, however, as to whether formal discovery should be available to parties, or whether the hearing will be conducted according to the court rules of civil procedure and evidence. Although due process hearings under the IDEA are not meant to be overly formal and were originally expected to be "commenced and disposed of as quickly as practicable,"<sup>44</sup> there is evidence that due process hearings are quite like complex civil trials in many places.<sup>45</sup> Presently, twelve states use formal discovery in due process hearings, while eight states use the rules of civil procedure and eight states use the rules of evidence.<sup>46</sup>

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<sup>40</sup> LA. ADMIN. CODE. tit. 28, Pt XLIII, § 511 (2012); 8 VA. ADMIN. CODE 20-81-210 (2010); WIS. ADMIN. CODE PI § 11.12 (1998); OKLA. ADMIN. CODE 210:15-13-5 (2008); W. VA. CODE R. § 126-16-1 (2017) (details concerning hearing officers detailed in 126-16 Attachment); 19 TEX. ADMIN. CODE § 89.1170. In contrast, South Carolina seems to set the bar rather low, requiring that a hearing officer be at least twenty-one years of age and a high school graduate. Office of Special Educ. Servs, South Carolina State Dep't of Educ., SPECIAL EDUCATION PROCESS GUIDE FOR SOUTH CAROLINA (2013), <https://ed.sc.gov/districts-schools/special-education-services/state-regulations/special-ed-process-guide-sepg-2013/>

<sup>41</sup> 14 DEL. ADMIN. CODE §§ 926.11.2, 11.4 (2017); DEL. CODE ANN. tit. 14 § 3137(d) (2012).

<sup>42</sup> 20 U.S.C. § 1415(f)-(h) (2018).

<sup>43</sup> 34 C.F.R. § 300.512 (2017).

<sup>44</sup> See 121 CONG. REC. 37,416 (1975).

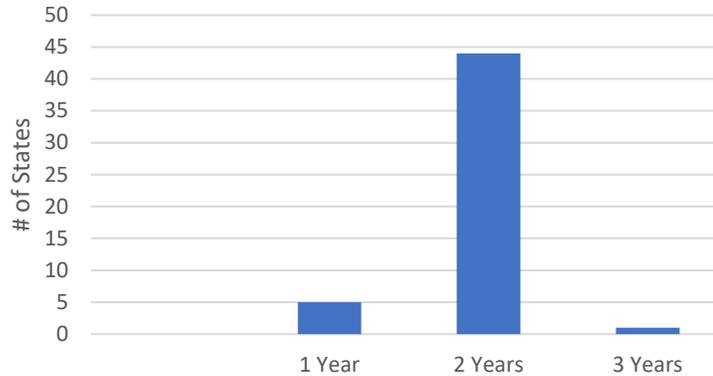
<sup>45</sup> See, e.g., Zirkel et. al, *supra* note 5.

<sup>46</sup> Of the states that allow for discovery, the rules of civil procedure, and/or evidence, only a few explicitly state as such in their state administrative codes. For those states' whose statutes and regulations are silent, we relied upon phone calls to the appropriate state divisions (either the state education department or the office of administrative hearings) and also the attorney responses to our surveys. The twelve states that permit formal discovery are: Colorado (1 COLO. CODE REGS § 104-1(2014)), Florida, Iowa ((IOWA ADMIN. CODE 281-41.1010(5) (17A,256B)), Indiana (511 IND. ADMIN. CODE 7-45-7), Kentucky (KY. REV. STAT. § 13B.080), Massachusetts, Missouri, Montana (MONT. ADMIN. R. 10.16.3513), North Carolina, North Dakota, South Dakota, and Wyoming. The eight states in which the

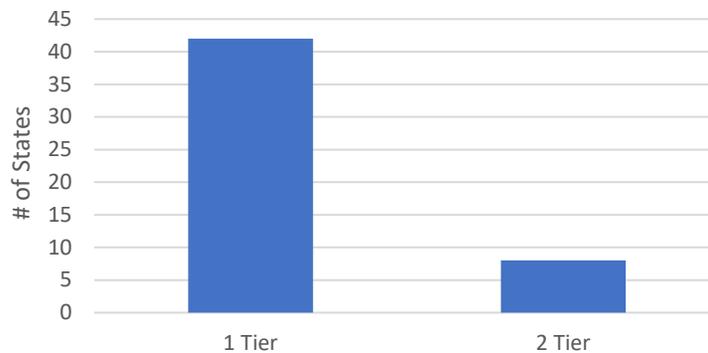
Three states (Indiana, North Carolina, and South Dakota) use formal discovery, the rules of civil procedure and the rules of evidence.<sup>47</sup>

The following graphs reflect the practices in the states:

#### *Statute of Limitations*



#### *Two Tier v. One Tier Appeal*

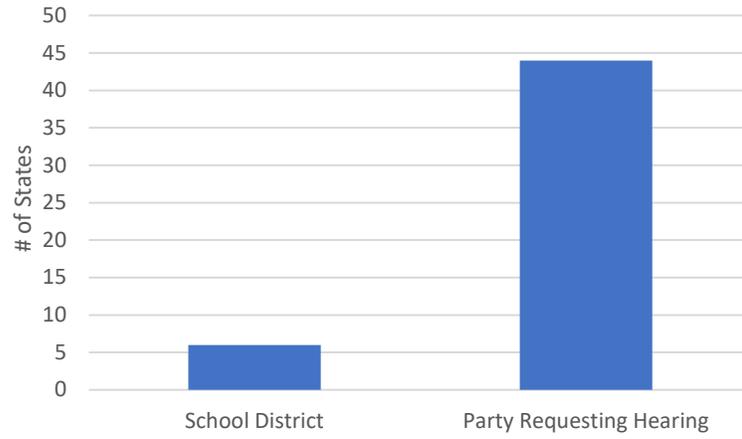



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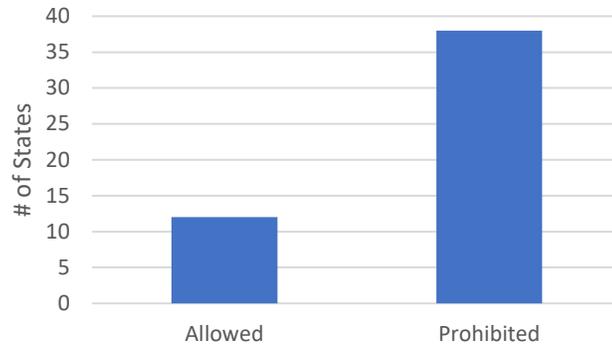
rules of civil procedure are used are: Alabama, Colorado, Florida, Indiana, North Carolina, South Dakota, Texas (19 TEX. ADMIN. CODE § 89.1185), Tennessee, and Wyoming.

<sup>47</sup> It is worth highlighting here the difficulty which the authors experienced when trying to establish whether a state uses discovery, the rules of procedure, and/or the rules of evidence. Some attorney respondents to our survey indicated that their state uses the formal rules of discovery and or the rules of civil procedure and evidence, even though the state codes were silent on this matter. This suggests that even when a state does not explicitly require the use of formal discovery or the rules of civil procedure and evidence, individual hearing officers may have discretion to allow discovery and to employ the formal rules on their own initiative.

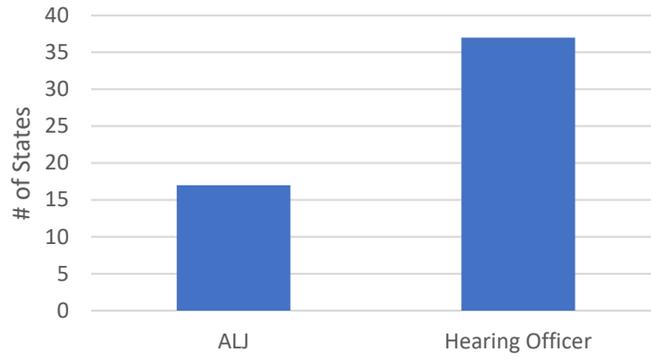
*Allocation of Burden of Proof*



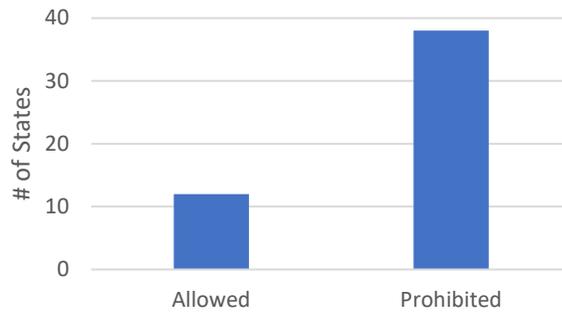
*Non-Attorney Representation*



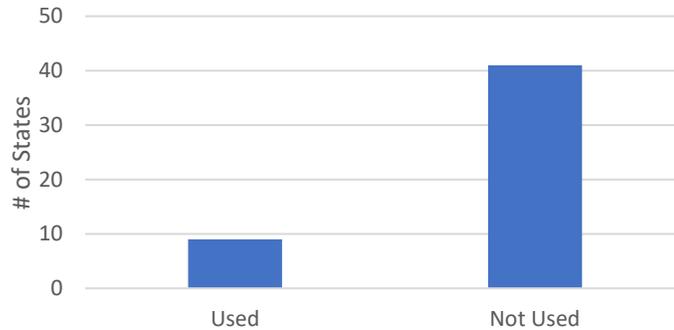
*ALJs v. Hearing Officers*



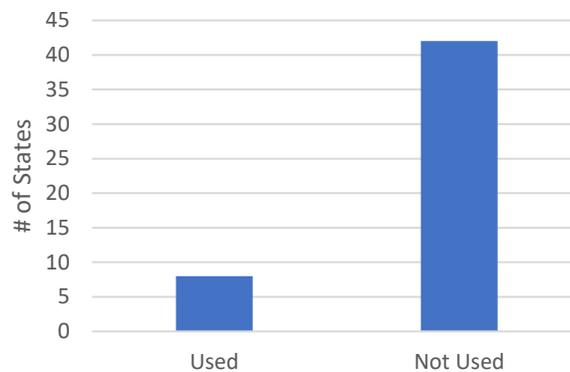
*Formal Discovery*



### *Rules of Civil Procedure*



### *Rules of Evidence*



## II. LISTENING TO SPECIAL EDUCATION ATTORNEYS

As the preceding section demonstrates, the flexibility accorded to states under the IDEA means that the experience of parties engaged in a due process hearing can vary significantly depending on the state in which they are located. Yet despite such differences, the literature on due process hearings speaks to a common theme that transcends state boundaries: the due process system is not living up to expectations. Indeed, over the past twenty-five years, there has been a steady stream of studies highlighting various flaws of the due process system.<sup>48</sup> The general take away is that the

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<sup>48</sup> See, e.g., Rosenfeld, *supra* note 6 (proposing that IDEA include a process for voluntary, binding arbitration); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403, 409–13 (1994) (proposing a five-step reform that would enhance the authority and revise the approach of the due process hearing).

system is inefficient, prohibitively expensive, and time-consuming.<sup>49</sup>

Despite what is now a sizable literature critiquing special education due process, there are still very few studies that explore the experiences and perceptions of the attorneys practicing special education “on the ground.” A review of the literature found only two such studies: one by Kevin Hoagland-Hanson and one by Elizabeth Shaver.<sup>50</sup> Hoagland-Hanson’s study focused on due process hearings in Pennsylvania and consisted of interviews with four members of the Pennsylvania special education bar, all of whom represented parents, as well as an empirical analysis of due process hearing outcomes in the state. In contrast, Shaver fielded a nationwide survey of special education attorneys that focused on practitioners’ views concerning the effectiveness of the resolution session prior to a due process hearing, the desirability of IEP facilitation, the possibility of amending the IDEA to allow for voluntary, binding arbitration for special education disputes, and the costs and benefits of a two-tier system versus a one-tier system.

Interestingly, the results of Shaver’s nationwide survey reflected the same phenomenon revealed in the survey reported here: attorney attitudes towards certain aspects of special education due process appear to depend heavily upon whether the attorney represents parents or school districts. For instance, Shaver found that school district attorneys were considerably more positive in evaluating the use of IEP facilitation as a means to resolve disputes and avoid the filing of a due process complaint than were parent attorneys. Sixty percent of school district attorneys felt that IEP facilitation was a “valuable vehicle to resolve disagreements quickly,” but only thirty-three percent of parent attorneys agreed.<sup>51</sup> School district attorneys were also more positive about the use of the resolution session as a means to resolve disputes; forty-one percent of school district attorneys reported that the resolution session was a “valuable vehicle” but only eighteen percent of parent attorneys felt the same.<sup>52</sup>

Notably, however, Shaver’s study suggested that areas of commonality do exist between attorneys on both sides. Both school district and parent attorneys agreed that IEP facilitation was a good idea in the abstract, but that its potential was often lost in the implementation. Attorneys on both sides

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<sup>49</sup> Hyman et al., *supra* note 3; Pasachoff, *supra* note 3; Pudelski, *supra* note 4.

<sup>50</sup> Hoagland-Hanson, *supra* note 7; Shaver, *supra* note 6. Other studies have interviewed or surveyed school parents, school administrators, and state special education directors. *See, e.g.*, J. Michael Havey, *School Psychologists’ Involvement in Special Education Due Process Hearings*, 36(2) PSYCHOL. IN THE SCHS. 117 (1999) (interviewing school psychologists involved in due process hearings); Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57(6) EXCEPTIONAL CHILD 546 (1991) (interviewing parents and school officials in Pennsylvania); Ann C. Candler & Eddie W. Henderson, *Procedural Due Process in Special Education: A Survey of Directors of Special Education*, 14 AM. SECONDARY EDUC. 20 (1984) (surveying special education directors).

<sup>51</sup> Shaver, *supra* note 6, at 181.

<sup>52</sup> *See id.* at 1845.

indicated that the success of IEP facilitation was highly dependent on the facilitator's skills and training; a good facilitator could make all the difference and possibly help the parties avoid the filing of a due process complaint. Based on her findings, Shaver recommended that Congress develop guidelines for training IEP facilitators so that they have conflict resolution skills as well as substantive understanding of special education teaching methodologies and best practices for writing IEPs.<sup>53</sup>

For those seeking improvements to the special education due process system, the experience and perceptions of attorneys represent an important resource. By tapping into practitioner's lived experiences of special education due process, we can gain a better sense of how the due process system plays out in practice and, importantly, how differing perceptions of the system's flaws may facilitate or impede attempts to build support for particular reforms. Parents and school districts face different challenges and concerns; these differences undoubtedly affect how they— and their attorneys— experience and evaluate due process. Finding commonly-held perceptions, values, and goals among the attorneys on both sides, however, could lead toward reforms that can be embraced more readily across the board.

### III. SURVEYING SPECIAL EDUCATION ATTORNEYS

The survey reported here builds on prior studies by examining attorney attitudes towards the overall complexity, accessibility, and effectiveness of due process. Conducted in late 2019 and early 2020, the survey questioned attorneys throughout the country in order to identify certain aspects of due process that might be important factors contributing toward the perception that due process is too complex.<sup>54</sup> Specifically, the survey asked lawyers about their experiences with formal discovery, the rules of procedure, the rules of evidence, and the use of expert witnesses. In addition, it sought their perceptions and attitudes towards the aspects of due process that could be affecting the accessibility of special education due process. It provided multiple opportunities for the participating attorneys to provide narrative comments and recommendations, potentially leading toward more targeted and effective reforms.

All respondents were contacted through email; several national organizations agreed to send the survey invitation to their respective email

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<sup>53</sup> *Id.* at 193–94.

<sup>54</sup> Complexity is used in this context to refer to a process that is difficult to navigate because of numerous legal rules and procedures, lengthy hearings, the need for sophisticated evidence, and the like. Excessive complexity can delay resolution of the issue, often leaving a child's educational needs unmet for an extended period of time.

lists.<sup>55</sup> Those lists were supplemented with Google searches to find email addresses of attorneys who practice special education law.<sup>56</sup> The survey specifically solicited responses from lawyers with experience in special education due process hearings; those without such experience would likely have declined to respond.<sup>57</sup>

The survey contained thirty-six questions,<sup>58</sup> four of which were open-ended questions inviting comments on particular aspects of due process hearings. The first section of the survey gathered basic information on each respondent, including where and for how long the attorney had been practicing, whether the attorney typically represented school districts or parents in special education matters, and how many due process cases the attorney had handled. Respondents were then asked about their use of discovery and expert witnesses, and about whether certain procedures were used in the state (i.e., rules of evidence, rules of civil procedure, representation by non-attorneys). Finally, a series of questions sought observations about the accessibility of due process to parents seeking to resolve special education disputes. At multiple points in the survey, respondents were invited to include narrative comments. In particular, respondents were given the option of providing comments on the use of expert witnesses, the use of discovery, the effectiveness of *pro se* representation for parents, and the effectiveness of attorney representation for parents.<sup>59</sup> At the end of the survey, respondents were given the opportunity to provide ideas for improving due process in special education.<sup>60</sup>

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<sup>55</sup> Three organizations graciously agreed to send the survey to members: 1) The National Disability Rights Network; 2) Council of Parent Attorneys and Advocates; and 3) National School Boards Association. Two additional lists in North Carolina were used, one of school board lawyers and one of parent lawyers.

<sup>56</sup> Recipients who did not respond within a week of receiving the survey were provided one reminder.

<sup>57</sup> Likely for this reason, our sample size is slightly less than half of Elizabeth Shaver's 2015 study. Indeed, while the number of lawyers practicing special education law in the U.S. is small, the number with experience in special education due process is likely even smaller. In North Carolina, for example, in 2018, just nine lawyers represented the parents in all of the due process hearings held in the state (except the *pro se* cases) and just fourteen lawyers represented the school districts. Analysis done by the authors based on state reports of the 16 due process cases that resulted in final hearing decisions. *See Due Process Hearings*, PUB. SCHS. OF N. CAROLINA: STATE BD. OF EDUC., DEP'T OF PUB. INSTRUCTION, <https://ec.ncpublicschools.gov/parent-resources/dispute-resolution/due-process-hearings> (last visited Feb. 25, 2021).

<sup>58</sup> The survey was designed to be completed within five to fifteen minutes depending upon how much time the attorney wished to spend answering the open-ended questions.

<sup>59</sup> These comments remain on file with the authors.

<sup>60</sup> Respondents were also given the option to provide their contact information if they were interested and available for a one-on-one interview. For confidentiality reasons, these names will not be shared.

### A. Respondent Demographics

A total of 175 attorneys from forty-three states and two additional jurisdictions completed the survey.<sup>61</sup> Table 1 provides the breakdown of respondents across states; slightly more than half of the states had one to three respondents, and only seven states had seven or more respondents.<sup>62</sup> Ninety-eight attorneys representing parents, seventy-four representing school districts, and three attorneys representing both parents and school districts participated in the survey.<sup>63</sup>

As Figure 1 demonstrates, the respondents came with varied levels of experience. Nearly half of the respondents had practiced special education law for more than fifteen years. Sixteen percent reported having practiced special education law for eleven to fifteen years; nearly twenty percent for six to ten years, and about twenty percent for zero to five years. When it came to experience specifically with due process cases (Figure 2), about half had handled more than twenty cases, while twelve percent reported having handled eleven to twenty cases, sixteen percent reported six to ten cases, and just over twenty percent reported zero to five cases. Those attorneys with the greatest experience in due process cases practiced in a wide range of states.<sup>64</sup> The states with the most attorneys who have handled more than twenty due process cases were Arizona (5), California (5), District of Columbia (4), Maryland (5), North Carolina (5), New Jersey (7), Ohio (4), and Texas (8). Not surprisingly, most of these attorneys practice in states with high numbers of due process cases (California, District of Columbia, Maryland, New Jersey, and Texas).<sup>65</sup>

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<sup>61</sup> Not every respondent answered every question; therefore, some questions record fewer than 177 responses.

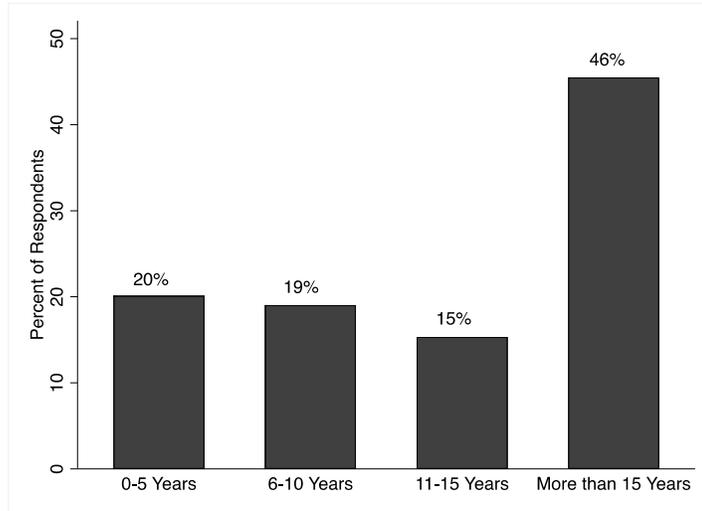
<sup>62</sup> Those attorneys who reported practicing in multiple states (n=19) were asked to indicate which state they would be referring to when completing the survey.

<sup>63</sup> Three attorneys indicated they represented both types of clients.

<sup>64</sup> AL, AR, AZ, CA, CO, CT, DC, FL, GA, HI, IL, IN, KY, LA, MA, MD, MI, MN, MO, MT, NC, NH, NJ, NM, NV, NY, OH, OR, PA, RI, TN, TX, VA, WA.

<sup>65</sup> *IDEA Data Brief: Due Process Complaints/Hearings*, CTR. FOR APPROPRIATE DISPUTE RESOL.. IN SPECIAL EDUC. (May 2017), [https://www.cadreworks.org/sites/default/files/resources/CADRE%20DPC%20Brief\\_WebFinal\\_6.2017.pdf](https://www.cadreworks.org/sites/default/files/resources/CADRE%20DPC%20Brief_WebFinal_6.2017.pdf)

*Figure 1: Years of Experience in Special Education Law*



*Figure 2: Number of Due Process Cases Handled*

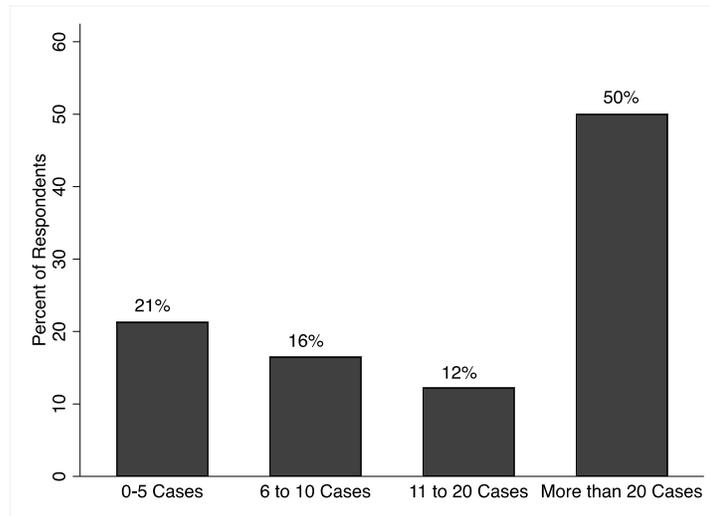


Table 1: Number of Respondents by State

0	1-3	4-6	7-9	10+
Delaware	Alaska	Alabama	District	North Carolina
Idaho	Connecticut	Arkansas	of Columbia	Texas
Kansas	Hawaii	Arizona	Florida	
North	Iowa	California	Georgia	
Dakota	Indiana	Colorado	Illinois	
South	Bureau of	Massachusetts	New	
Dakota	Indian Affairs	Maryland	Jersey	
Vermont	Kentucky	Michigan		
West	Louisiana	Minnesota		
Virginia	Missouri	New York		
	Mississippi	Ohio		
	Montana	Oregon		
	Nebraska	South Carolina		
	New	Tennessee		
	Hampshire	Virginia		
	New Mexico			
	Nevada			
	Oklahoma			
	Pennsylvania			
	Rhode Island			
	Utah			
	Washington			
	Wisconsin			
	Wyoming			

*B. Attorney Perceptions of Overall Complexity, Accessibility, & Effectiveness of Due Process Hearings*

The first substantive portion of the survey focused on attorneys' perceptions of the overall complexity, accessibility, and effectiveness of due process. Although due process was originally meant to provide parents with a prompt and informal tool for dispute resolution,<sup>66</sup> previous studies— as

<sup>66</sup> See 121 CONG. REC. 37,416 (1975) (The remarks of Senator Harrison Williams Jr. included the following statement, "I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the *urgent need for prompt resolution* of questions involving the education of handicapped children it is expected that *all hearings and reviews* conducted pursuant to these

well as vocal complaints by parents and their advocates— suggest that special education due process may not be meeting the mark.

*a. Complexity*

Respondents were asked to rate their state's due process hearing system on a scale of one to ten, with one being a simple administrative hearing and ten a complex civil trial. Figure 3 presents the results, aggregated across attorney type. Of the 149 respondents who answered this question, less than ten percent (28) reported a score of four or lower.<sup>67</sup> About half of the respondents (51% or 76) reported a score between five and seven. Nearly a third of the respondents (30% or 45) reported a score of eight or higher. The average score of all respondents was 6.33, with a median score of 6. These responses are consistent with previous research that has documented the increased “judicialization” of due process hearings.<sup>68</sup>

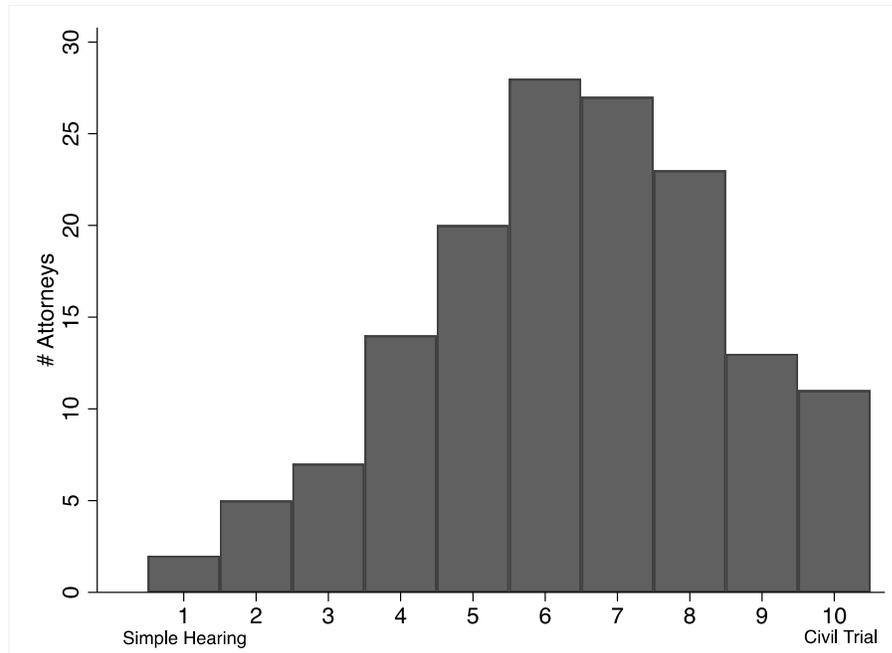
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provisions will be *commenced and disposed of as quickly as practicable* consistent with a fair consideration of the issues involved.”); C.M. ex rel. J.M. v. Bd. of Educ. of Henderson Cty., 241 F.3d 374, 381 (4th Cir. 2001) (“[T]hese rights [to a due process hearing and judicial review] were created to supply a simple and efficient method to encourage parental participation and facilitate parental enforcement of the IDEA.”).

<sup>67</sup> Again, not all respondents answered all questions. Thus, our percentages are based on the number of attorneys responding to a given question, not the overall number of attorneys who participated in the survey.

<sup>68</sup> Zirkel et. al, *supra* note 5, at 46, n. 60.

Figure 3: Attorneys Ratings of Their State's Due Process System

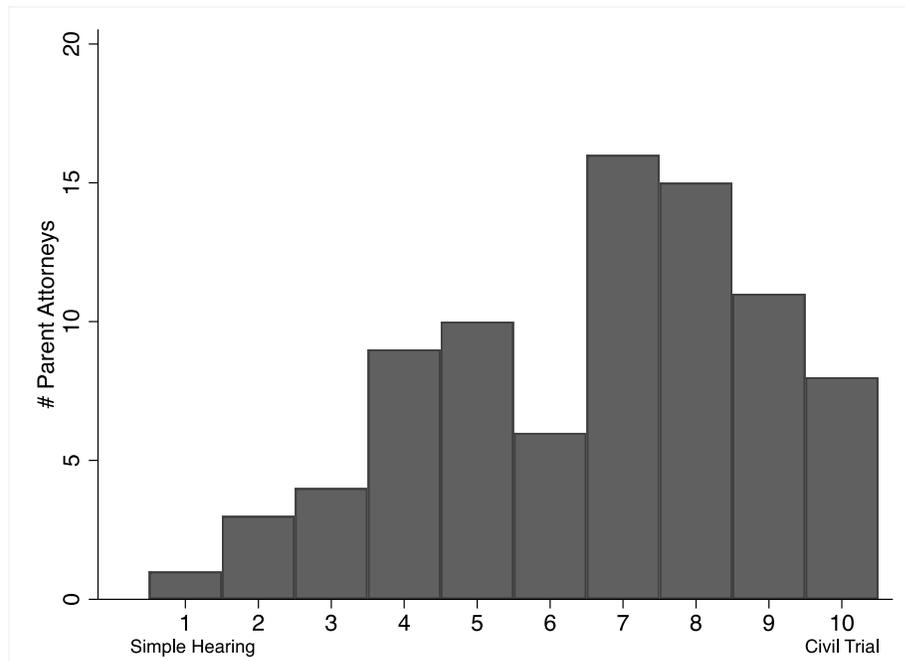


When broken down according to attorney type, the responses show that school district attorneys and parent attorneys have, on average, very different perceptions of the complexity of the due process system. Parent attorneys, as a group, perceived the system as more complex than school district attorneys. As shown in Figures 4 and 5, which report system ratings among parent attorneys and school district attorneys respectively, the distribution of responses among parent attorneys is clearly skewed towards the right (i.e., more perceived complexity) while the distribution among school district attorneys is much more normally distributed. The majority of parent attorneys (68%) rated the due process system in their state at a six or higher; the majority of school district attorneys (61%) rated the due process system in their state at a six or *lower*. A third of school district attorneys rated their state's due process framework at a five, right in the middle of an informal hearing and complex trial. The average score of parent attorneys was 6.57, with a median score of 7; the average score of school district attorneys was 6.20, with a median score of 6.

This survey question did not contain an option for comments, so the reasons for the perceptions about complexity were not provided by respondents. Judging from the comments on other parts of the survey, however, the difference in perception could be attributable to the requirement that, in most states, parents shoulder the burden of proof but are not in possession of the evidence. This makes it far more difficult for parents to put together their case. School districts (in most cases) are typically in a

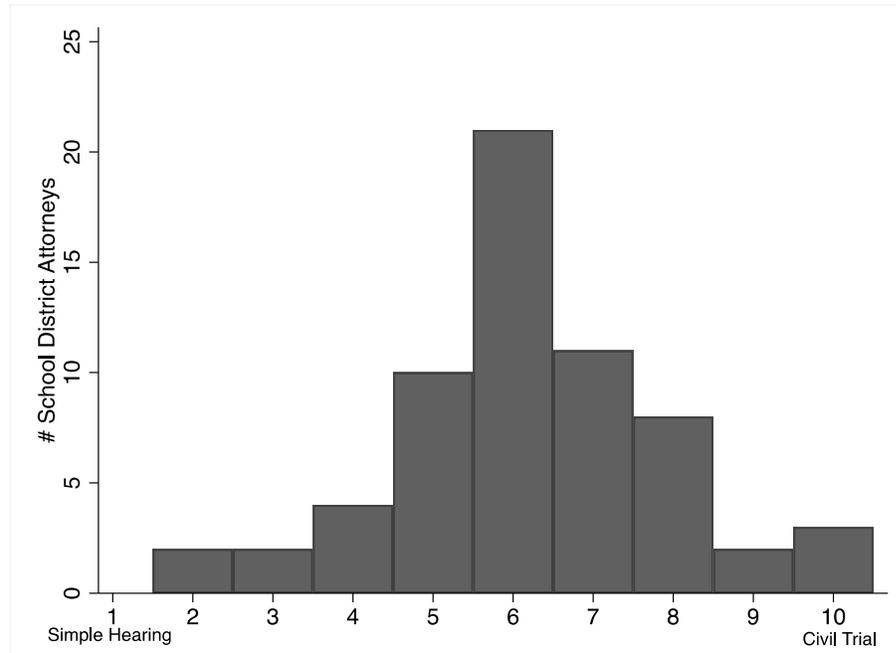
defensive position and have easy access to virtually all the evidence, such as teacher observations, student work samples, and a full range of professional opinions. The challenge for parent attorneys—of having to pull together enough evidence to meet a preponderance standard while being limited in access to evidence— could well make the case feel more complex for them than it does for school attorneys.<sup>69</sup>

*Figure 4: Parent Attorneys' Rating of Their State's Due Process System*



<sup>69</sup> In general, we might also expect that school district attorneys would view the system as less complex because, given they represent entire school districts and not individual families, they may see many more due process cases than parent attorneys. However, even among school and parent attorneys who have each handled more than twenty due process cases, we still see this difference in perception. The mean complexity rating among school attorneys who have handled more than twenty due process cases is a six; among parent attorneys it is a seven.

Figure 5: School District Attorneys' Rating of Their State's Due Process System



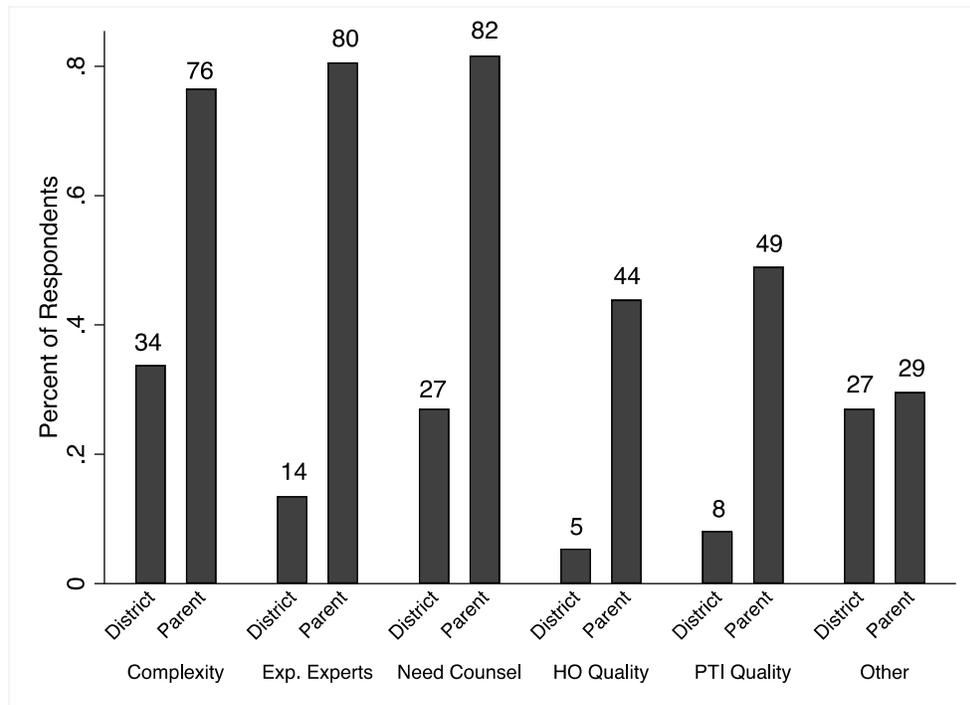
*b. Accessibility*

Respondents were also presented with a list of potential barriers that might make it difficult for parents to navigate the due process hearing system in their state and were asked to indicate which, if any, of those barriers characterized their state's system.<sup>70</sup> Figure 6 presents the results, broken down across attorney type. First, parent attorneys were much more likely to indicate that barriers were present in their state. While seventy-six percent of parent attorneys indicated that their state's due process hearing system was too complex for parents to navigate, only thirty-four percent of school district attorneys did so. While eighty percent of parent attorneys agreed that good results require expensive experts, which most of their parent clients cannot afford, only fourteen percent of school district attorneys endorsed that view. Similarly, while eighty-two percent of parent attorneys indicated

<sup>70</sup> The specific barriers listed were: "Overall hearing system is too complex for most parents to navigate; Good results require expensive experts, which most parents can't afford; Good results require representation by attorneys, which most parents can't afford; Hearing officers do not assist parents in the process; Support for parents, from our state's Parent Training and Information (PTI) Center or other organization, is not readily available." Note that this question is slightly different in format from others in the survey. Only those respondents who agreed that one of the listed barriers was in fact a barrier responded; those who did not agree were instructed not to respond at all. Thus, the results show the number of attorneys who responded, not the percentage.

that good results require representation by attorneys, which most parents can't afford, only twenty-seven percent of school district attorneys identified that as a barrier. Finally, when it comes to the assistance of hearing officers, forty-four percent of parent attorneys reported that hearing officers do not assist parents in the process; only five percent of district attorneys did so.<sup>71</sup>

Figure 6: Identifying Barriers to Special Education Due Process



### c. Effectiveness

Participants were next asked whether they thought the due process system was an effective way for parents to get special education disputes resolved, when represented by an attorney and when not represented by an attorney. As noted in Section II, some states allow parents to be represented by non-attorney advocates, while other states require that parents either proceed *pro se* or hire legal representation.

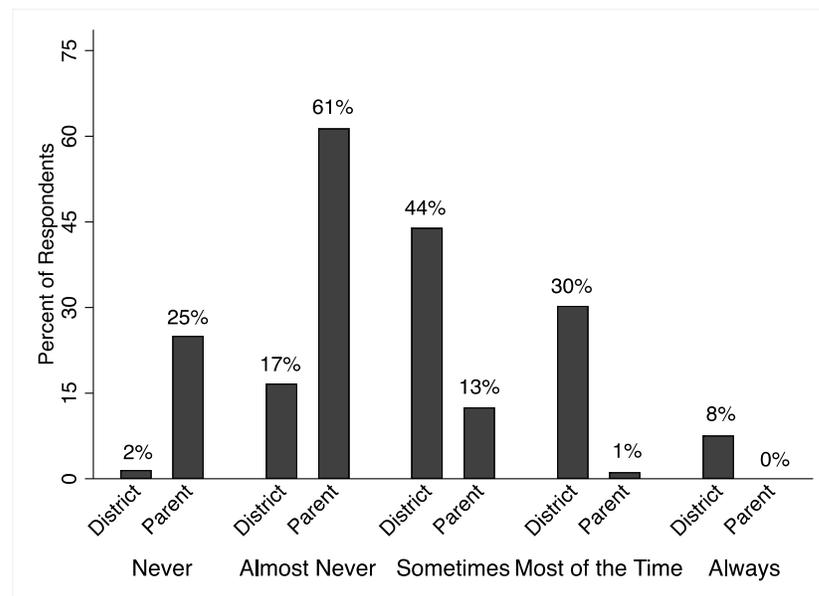
<sup>71</sup> The law does not specifically mandate that hearing officers assist parents; they have discretion over what level of assistance is provided. Surely, most inexperienced, *pro se* parents will have difficulty with an administrative hearing and will find the process more accessible with assistance from the hearing officer regarding adherence to rules, meaning of terminology, and even presentation of evidence. A hearing officer's obligation to neutrality will limit the extent of assistance that is appropriate, however.

### Pro Se Parents

With regard to *pro se* parents, the majority of respondents reported that due process is not an effective system to resolve special education disputes. More than half (57%) believe that due process is either never or almost never effective. Less than twenty percent think it is effective always (3%) or most of the time (13%). The remainder said it was sometimes effective (26%). However, as with the questions concerning complexity and accessibility, there are large differences between parent attorneys' evaluations of the effectiveness of due process and those of school district attorneys.

Attorneys who represent parents, on the whole, do not believe that due process can produce favorable results for unrepresented parents. As demonstrated in Figure 7, more than eighty-five percent said that due process was never or almost never effective (25% chose never effective; 61% chose almost never effective) while only twelve percent indicated that due process was sometimes effective and only one percent said it was effective most of the time. Indeed, one parent attorney commented, "A *pro se* parent has a better chance of winning the Power Ball than winning a due process hearing."

Figure 7: Effectiveness of the State's Due Process System for Pro Se Parents



Parent lawyers attributed that absence of success to the parents' general lack of understanding about what is needed to meet their burden of

proof, how to present evidence and witnesses, how to respond to motions, and how to craft a persuasive argument. Some parent attorneys suggested that, because school districts are always represented by lawyers, even when the parent is *pro se*, the playing field is far from even. Other parent lawyers reported that hearing officers are far more likely to defer to the school's witnesses when the parent does not have a lawyer to push against that deference and are more likely to push a parent toward a less favorable settlement. Others commented on the uphill battle parents face because the process is rarely concluded within the forty-five-day time limit prescribed in the IDEA and *pro se* parents cannot sustain their case month after month.

In contrast, school district attorneys were considerably more positive regarding *pro se* parents' chances of prevailing in due process. In the view of more than eighty percent of the school district lawyers in the sample, due process is at least sometimes effective for *pro se* parents (sometimes: 44%; most of the time: 30%; and always: 7%).<sup>72</sup> Several school district lawyers commented that they thought parents could sometimes do better unrepresented than represented. They suggested that the hearing officers "bend over backwards" to explain the process to the parents and that they themselves try to get to a resolution early in the process before a hearing occurs. Without the impact of attorney fee negotiations, they said, the discussions can focus more directly on the student's needs. In their view, a settlement is more often reached through mediation or at the resolution session when the parents are not represented. Nevertheless, a number of school district lawyers did note that unrepresented parents are typically ill-equipped to handle the complexities of a due process hearing or present effective arguments. One school district lawyer shared that over a long career, she had never lost a case to an unrepresented parent but had settled several.

One notable area of agreement between the two groups of lawyers is on alternatives to due process: attorneys on both sides suggested that *pro se* parents were more likely to be successful using the state complaint process or mediation. They noted that the state complaint process is much more accessible to parents and that parents are more likely to get the relief they seek.<sup>73</sup> At least one parent lawyer said, however, that even that process was not always accessible. This is because school districts had begun using due process to appeal state complaint decisions favorable to parents, thus

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<sup>72</sup> The comments suggested that a few lawyers read the question as comparing representation by attorneys with representation by non-attorney advocates, as opposed to asking about parents with no representation at all.

<sup>73</sup> This position is understandable, as the burden on the parents is considerably lower in the state complaint process. In that process, the parent need only present a complaint to the state educational agency; the state agency then gathers the evidence, investigates the complaint, and makes a decision. Once the parent has presented the complaint, there is no ongoing role for the parent, other than to answer questions of the state investigator should the investigator have any.

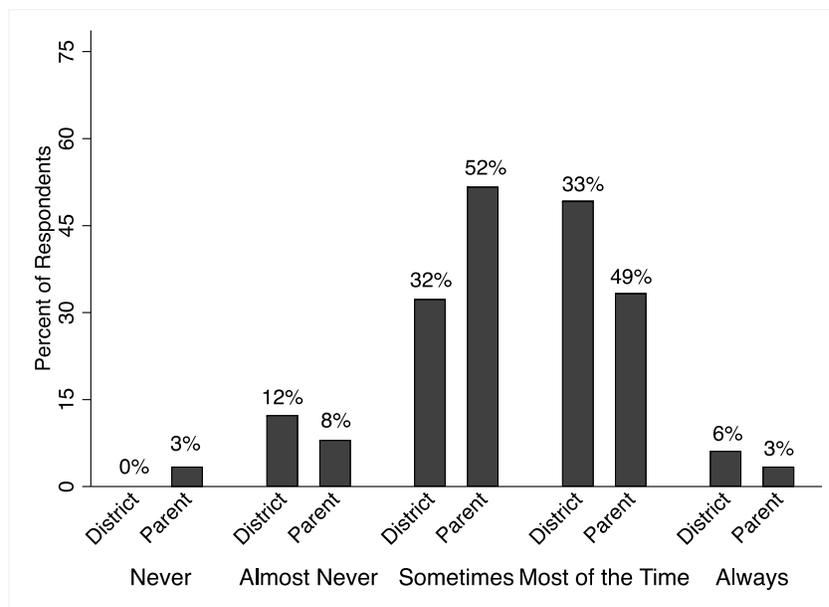
requiring parents to navigate due process anyway.

### Represented Parents

On the question of whether due process is effective at resolving special education disputes when the parent *is* represented by an attorney, the differences of opinion between school district lawyers and parent lawyers were not as pronounced as on other questions. School district lawyers were more likely to say that the process was effective “most of the time” than were parent lawyers (49% of school district lawyers vs. 33% of parent lawyers); parent lawyers were more likely to say that the process was just “sometimes” effective for parents (51% of parent lawyers vs. 32% of school district lawyers). While the differences in opinion were less marked than with respect to *pro se* parents, the differences are still quite significant. The specific breakdowns across attorney type are presented in Figure 8.

Parent attorneys generally reported that having an attorney improves the chances of a parent getting the dispute resolved. Some commented that representation helps level the playing field because school districts are always represented; it also helps families enter good settlements. Another said that in his experience, the majority of cases are settled before a hearing when there are attorneys on both sides.

*Figure 8: Effectiveness of the State’s Due Process System for Represented Parents*



A prevalent viewpoint of school district lawyers, however, is that the issue of parent attorney fees impairs the effectiveness of due process. “Attorneys’ fees drive the train,” commented one school board lawyer. Another said, “Some parent attorneys are VERY unreasonable when it comes to fees, which holds up the whole system of trying to resolve disputes in the best interest of the student and his/her FAPE.” Yet another shared this experience: “The [parent’s attorney’s] strategy seems to be to run up the time and bills for the school districts...Our small-sized districts are forced to settle and pay \$15,000 or more to the attorney in order to get the settlement because they would literally go broke paying for the due process hearing.” With somewhat more recognition of the need for parent attorneys to get paid for their work, another remarked, “Winning at due process is the only way that a parent’s attorney can access the IDEA’s fee-shifting provision, so parents who are represented by counsel almost always end up going through due process.”

Perhaps not surprisingly, parent attorneys also mention the issues of fees, but with a different emphasis. Many parent attorneys bemoan the expense of prosecuting a due process case for a parent, noting how few parents can afford counsel. One remarked, “The original purpose of a timely, cost-effective hearing has been turned on its ear. At present, getting a case through a hearing costs approximately \$50,000 to \$100,000 of qualified attorney time. This is due to the legal complexities districts’ counsel create and financially benefit from.” Another said, “It is too expensive to be useful for anything other than private placement cases.” Several parent lawyers see the school districts as the power players. One described it this way: “Special education attorneys come from small offices and represent clients that typically cannot afford attorneys. The school districts have big, big resources and teams of attorneys and paralegals, so it is a David and Goliath situation.”

Both school district attorneys and parent attorneys acknowledged that the effectiveness of due process is highly dependent on the lawyers. School district lawyers frequently noted that the process can be ineffective when the parent’s lawyer is not experienced or knowledgeable about special education law, while parent lawyers commented that the chance of resolution depended on whether or not school district’s law firm was overly litigious. Others noted that the skills that attorneys bring to the table facilitate resolution of the case. One school district attorney noted that attorneys tend to work toward resolving matters in most cases, regardless of which side they are representing. That attorney remarked, “Attorneys are trained to present evidence and make arguments in a concise and orderly manner that usually saves time and expenses. Attorneys rarely incite their clients’ emotions and can be useful in calming difficult personalities. That is true for both parent attorneys and school division attorneys.”

C. *Attorney Attitudes Towards Specific Aspects of Due Process*

In addition to asking respondents about their general perceptions of the complexity, accessibility, and effectiveness of due process, the survey also asked respondents to report more specifically on the use of formal discovery and expert witnesses. These topics were chosen on the theory that they were the most likely to add complexity to the process, especially for parents.

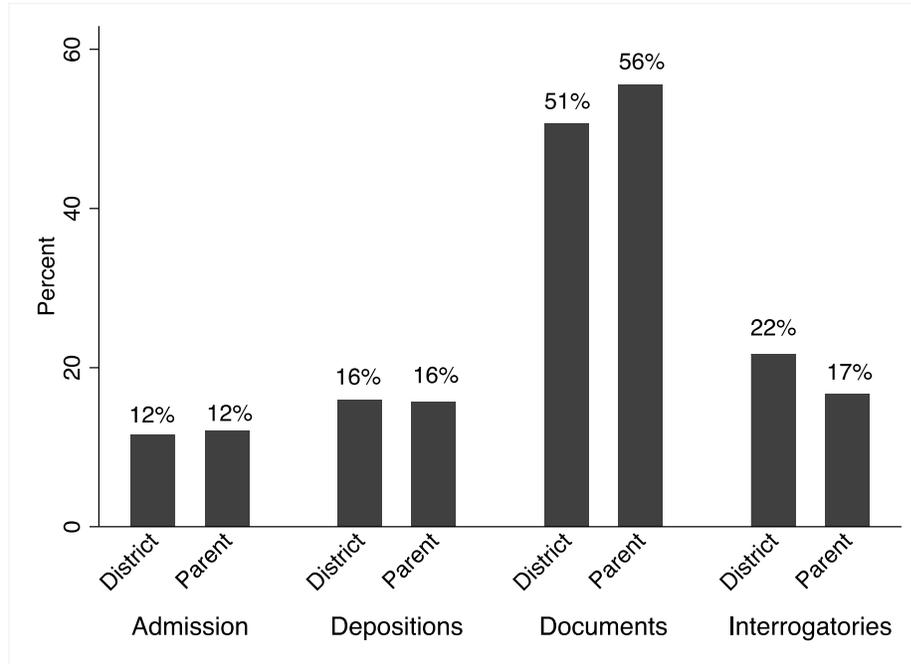
*Discovery*

States differ on whether formal discovery is allowed as part of due process procedures.<sup>74</sup> Respondents were asked to indicate the formal discovery tools, if any, that they usually use in due process cases. A little more than half the attorneys indicated they used discovery; the rest did not. Among the attorneys who use discovery, as shown in Figure 9, requests for the production of documents were the most common form of discovery, with requests for admissions, written interrogatories, and depositions used far less frequently. Slightly more than half reported using requests for production of documents when preparing for a due process case, while less than twenty percent reported using written interrogatories, depositions, or requests for admission. These patterns were repeated, with slight variation, when the data were grouped by parent attorneys and school district attorneys. Among school district attorneys, fifty percent use requests for documents, twenty-two percent use written interrogatories, sixteen percent use depositions, and twelve percent use requests for admission. Among parent attorneys, fifty-six percent use requests for production of documents, seventeen percent use written interrogatories, twelve percent use depositions, and sixteen percent use requests for admission.

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<sup>74</sup> The IDEA is silent on the use of discovery in due process. A 1996 letter from the federal Office of Special Education Programs within the U.S. Department of Education contained the following response to a question asking whether it was permissible under the IDEA for a school district to request that a parent answer interrogatories or produce documents prior to the hearing: "Part B does not contain discovery rules, and there is nothing in Part B that would prohibit or require use of discovery proceedings such as those described in your inquiry. Whether discovery is used in a Part B due process hearing and the nature and extent of discovery methods used are matters left to the discretion of the hearing officer and could be subject to any relevant State or local rules or procedures." Letter from OSEP, to Stadler (Jul. 5, 1996). On file with authors.

*Figure 9: Use of Discovery Tools*



Eighty-six attorneys provided comments on the use of formal discovery in due process hearings; both school district attorneys and parent attorneys had a considerable amount to say. Most of the comments fell into one of four major categories: pro-discovery comments, anti-discovery comments, comments focused on the costs of discovery, and comments focused on the improper use of discovery by the opposing side. Comments in favor or against formal discovery begin the following discussion, followed by those suggesting that discovery is either too costly or used improperly.

*Should Formal Discovery Be Allowed?*

Of the thirty-four school district attorneys who provided comments on the use of formal discovery, more were opposed to its use than were in favor of it. While eleven attorneys detailed why they felt formal discovery is an impediment to the due process system, only five attorneys advocated for greater discovery. Of those five, only two provided a detailed explanation as to why formal discovery would be useful. One attorney noted that “access to private medical/psychological/education providers is often critical to due process claims, but without the ability to get it, the school district doesn’t have what it needs to assess settlement options or prepare for a hearing.” An attorney who does not have access to discovery remarked, “discovery and motion practice would allow hearing officers to focus the issues that should be addressed during due process hearings. Often, hearings turn into multi-

day and multi-week free-for-alls. Adequate discovery and motion practice could assist in this regard.”

Those school district lawyers who opposed the use of formal discovery cited a number of reasons for their opposition. One repeated justification for restricting discovery was time, or the lack thereof. It was noted that the tight deadlines for each step of the due process framework “don’t lend themselves well to the timelines for written discovery.” Others said allowing formal discovery would “slow down the case” and take “time away” from more important aspects of the case. Numerous school district attorneys also suggested that allowing for formal discovery would lead to a more arduous due process system. Adding formal discovery would be “too broad [and] burdensome,” one said. Multiple attorneys noted that, due to the size of student files, document production could “end up being thousands of pages.”

Parent attorney views were more divided about whether formal discovery aids or impedes the due process system. Of those offering comments on discovery, eleven indicated opposition to allowing the use of formal discovery, while ten suggested that formal discovery should be allowed.<sup>75</sup> Those respondents who felt formal discovery should be allowed said that formal discovery is “essential...for the side that bears the burden of proof,” and that it “help[s] level the playing field for parents.” Parent attorneys who opposed the use of formal discovery, like their school district counterparts, frequently mentioned the time constraints of due process. These respondents said formal discovery would “complicate and slow down the otherwise fairly efficient process and shortened timeline,” and would “delay[] a decision beyond the applicable time frame.” Formal discovery was also viewed as making what should be an informal process too formal and complicated. One attorney noted that “[o]n the whole, I think it’s preferable for the hearing process to be more informal in order to level the playing field between parents and districts.” Another noted that “formal discovery is intimidating to *pro se* parents and makes the process more formal and more akin to typical litigation.”

#### *The Costs of Discovery & Improper Use*

Both school district lawyers (6) and parent lawyers (11) expressed concerns about the costs that formal discovery imposes. While school district attorneys’ comments were characterized by a simple recognition that discovery adds costs, however, the comments provided by parent attorneys also reflected a concern that increased costs would have particular impact on lower-income families. Formal discovery, it was feared, would “price parents out of getting their hearing,” and “have the effect of hindering, if not

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<sup>75</sup> The remaining comments by parent attorneys were best categorized as neutral, neither advocating for nor opposing the use of formal discovery in due process.

barring, parents (especially low-income parents) from utilizing the due process system.”

As might be expected in this adversarial setting, attorneys on both sides suggested that the *other* sides’ attorneys used discovery as a weapon. One school district attorney suggested that “[p]arents’ attorneys... will file formal discovery very early, even when it’s clear the case will settle quickly, in an effort to drive up costs and pressure the school.” Other school district lawyers suggested that discovery was used by parent attorneys for “nuisance/harassment purposes” and to “mire school districts down in responding to requests rather than preparing for a hearing.”

Parent attorneys showed a similar frustration and sense of discovery “weaponization.” One lawyer representing parents noted that the school districts “use discovery to significantly increase the legal expenses for families in the hope they will run out of money and give up.” Another parent attorney suggested that the school districts “throw[] in the kitchen sink, thus making it impossible to prepare.” Like the school district attorneys, parent attorneys indicated frustration with what were viewed as purposely burdensome discovery practices: “Here, school district attorneys employ the practice of sending multiple copies of the same documents in discovery such that you might end up with 35 copies of the same exact document. This results in productions that range from 5,000 to 15,000 pages of produced documents that must be slogged through which waste the family’s time and resources.”

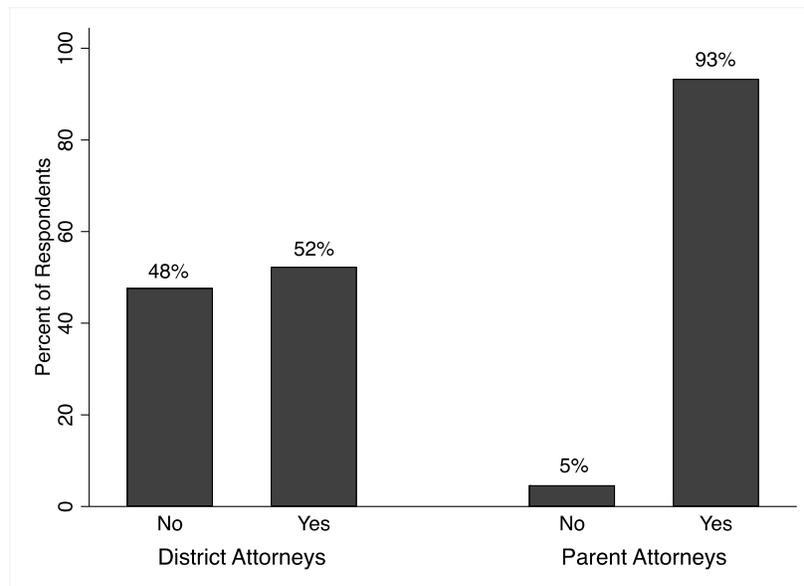
The considerable variation in attitudes toward discovery reveal that its usefulness in due process hearings continues to be a matter of significant debate. While discovery can enhance the parties’ opportunity to obtain information not contained in the student’s official records, it can also add cost and complexity to the proceeding. Not surprisingly, many attorneys view their own discovery practices as necessary and reasonable, but the opposing side’s use to be unnecessary and unreasonable. Consensus on the issue is illusive.

#### *Expert Witnesses*

Respondents were asked to indicate whether, in their experience, evidence from an expert witness is typically necessary to obtain a favorable ruling on a substantive issue in a due process case. One hundred and fifty-nine lawyers responded to this question, with three-quarters agreeing that evidence from an expert witness is necessary to secure a favorable ruling. When the data are broken down across attorney type, views diverge. As shown in Figure 9, parent attorneys are considerably more likely than school district attorneys to report that an expert witness is necessary to obtain a favorable ruling. While ninety-three percent of the parent attorneys indicated that an expert witness is necessary, school district attorneys were much more

divided on the issue: forty-eight percent reported that an expert witness was *not* necessary to obtain a favorable ruling, while fifty-two percent agreed it was.

*Figure 10: Need for Expert Witnesses*



Eighty-one attorneys offered comments on the use of expert witnesses in special education due process hearings, and both school district attorneys (30) and parent attorneys (51) had strong opinions on the subject. The comments were sorted into four groups: comments focused on parents' inability to meet their burden of proof without an expert witness, comments concerning the high cost of expert witnesses, comments highlighting school districts' ability to use staff as "built-in" experts, and comments regarding the use of unqualified experts. Comments of those who see expert witnesses as necessary but prohibitively costly for parents begin the discussion, followed by those suggesting that school districts gain advantage by having built-in experts or presenting unqualified experts.

#### *Expert Witnesses Necessary for Parents but also Costly*

Nearly half (24) of the parent attorneys who provided comments on the use of expert witnesses focused on the inability of parents to succeed without providing expert testimony. For parents to "have any chance in prevailing," these attorneys suggested, it is critical for parents to retain an expert witness. Indeed, one attorney reported that "[e]xpert witnesses are essential to winning even the simplest cases," while another noted that "one cannot even think of prevailing without an expert witness [and as such] I will not take a

case if the parents are unwilling to pay an expert to testify and appear.”

A number of parent attorneys pointed out that school districts come with “built-in” experts, i.e., their school staff, and so it is necessary for parents to bring their own experts to “combat” school officials. Others noted that expert witnesses are critical in “educating” the judge or hearing officer as to the child’s special education needs. Many parent attorneys suggested that school staff are often given deference by the judge or hearing officer, and thus it is “necessary [for parents] to have witnesses who can speak with authority and experience...about various aspects of students’ diagnoses and resulting needs.”

At the same time parent attorneys highlighted the necessity of retaining an expert witness, they also expressed considerable frustration regarding the high costs of doing so. The costs of retaining expert witnesses were consistently seen as a powerful barrier to indigent and low-income families. Because these costs cannot be shifted to the school district, parents must pay for their experts even when they ultimately prevail in the case. As one parent attorney commented, “The problem with experts is the cost. Not being able to recoup the cost of an expert— even when the prevailing party— is a huge impediment to parents’ ability to afford going to due process.”

Although school district attorneys also focused on the costs of expert witnesses in their comments, their focus centered less on the particular burdens of expert witnesses and more on the overall expense of the hearing. One school district attorney noted that “many cases become ‘battles of the experts’ and run up insane costs.” Another seemed to doubt the motivations of parents’ witnesses, suggesting that parents’ expert witnesses “often seem to be pushing an agenda, including advocating that the LEA should be paying for their services.”

#### *Built-In Experts & Unqualified Experts*

Both school district attorneys’ and parent attorneys’ comments reflected an awareness that school district staff can, and often do, serve as expert witnesses in due process hearings. Seven school district attorneys who mentioned this occurrence acknowledged it in a matter-of-fact way, exemplified by this remark: “I find that school the school district’s internal staff serve as expert witnesses very effectively for my clients; I usually don’t need an “outside” expert. My client’s employees are experts in their areas.” On the other hand, parent attorneys view school districts’ ability to put forth “built-in” experts as placing parents at a distinct disadvantage. One attorney noted that while parents have access to their child’s independent evaluations, they still “have to pay for experts to testify...or find ones that are willing to testify for free.” Indeed, one attorney asserted that “[t]he only party that is not harmed by the requirement of expert testimony is the school district, because it has educational experts on hand it can call on with ease.”

Additionally, several parent attorneys suggested that school “experts” are often given greater deference by hearing officers. It was noted that “[c]linician input is always vital to the presentation of our cases” because “[s]chool districts are given the benefit of the doubt most often by hearing officers— they are seen as the educational experts. It’s often necessary to have witnesses who can speak with authority and experience, often more so than the district’s witnesses...” Others suggested that hearing officers often give school district experts the “benefit of the doubt” or “deference over the parents’ retained expert” because the school’s witnesses “can pretty much observe the student at school whenever they want, while that takes more coordination and possibly expense on the parent/student side.”

A few school district attorneys’ comments, however, suggested that they felt that it was *parents’* experts that are given greater (and undue) deference. One suggested that “too much weight is often given to [outside experts] because they are in private practice and thought to be more skilled than public school experts.” Others suggested that “hearing officers often defer to [parents’] expert witnesses even when they know little about education” and that parents’ experts are “[g]iven too much deference when they have relatively limited exposure to the student and their areas of expertise are often tangential to educators.” Indeed, one school district attorney suggested that expert witnesses almost always help parents, “even when the expert has limited practical knowledge and is obviously biased due to relationships with the parent or student.”

Attorneys on both sides expressed doubt and suspicion as to the qualifications of the opposing sides’ experts, but in very distinct ways. Among school district lawyers, it was noted that parents’ experts often have “no direct knowledge of the particular student at issue,” and “are rarely experienced in education law or the requirements of special education” and come from areas of expertise that “are often tangential to education.” Parent attorneys, however, did not seem to view experience in an educational setting as necessarily dispositive of quality. In particular, parent attorneys expressed frustration with school districts routinely using their staff as experts, when under usual expert rules, they would not qualify. One attorney noted that even first-year teachers are often considered experts.

On the whole, the majority of those attorneys who chose to comment on the use of expert witness, both parent attorneys and school district attorneys, expressed frustration with the use of expert witnesses. The reasons for such frustration, however, differed depending on which side an attorney represented.

#### IV. ATTORNEY RECOMMENDATIONS FOR CHANGE

At the end of the survey, participants were asked an open-ended question: If you were to suggest changes to the due process hearing system in your state, what might those be? Nearly one-hundred respondents left comments, (thirty-nine school district lawyers and fifty-seven parent lawyers, which accounts for a bit more than half of each group of respondents) revealing the high interest in reforming due process. The range of the comments reflected not only many differing views, but also the variety of characteristics of the due process system throughout the country. For example, where there is no discovery allowed, some lawyers want it and others are glad it is not available; where discovery is allowed, some want to get rid of it and some prefer to keep it. Similarly, where the rules of evidence and civil procedure are used, a number of lawyers want to eliminate or loosen them, yet where they are not in place, lawyers wish for them.

Nevertheless, a few strong themes percolated throughout the comments. For example, both school district and parent lawyers expressed the need for better trained hearing officers. Indeed, there was more agreement on this point than any other. Quite a few comments referred to hearing officers' lack of understanding of special education law; others mentioned a lack of skill in applying the law to the facts or in basic procedures. One lawyer thought that hearing officers should have to pass a competency test before hearing due process cases; others preferred hearing officers who only handle special education cases, which would give them sufficient opportunity to develop expertise.

The lack of a sufficient number of hearing officers to handle the caseload was raised by lawyers from a number of different states (Illinois, New Jersey, Kentucky, New York). Mirroring the comments made about the effectiveness of due process in resolving parent disputes, parent attorneys frequently noted that hearing officers are not impartial and have a strong bias toward school districts. Some attributed this to the appointment process or the payment system.

Finding ways to reduce the complexity of hearings was another very common theme among the comments, and again one shared by attorneys representing both sides. Some comments were quite general, such as, "simplify the procedures" or "make any reasonable change that reduces the cost." Others were more specific, such as, "allow for subpoenas for records of third parties without need for hearing officer signature." One school board lawyer suggested that the process should be essentially on paper, with cases being resolved by a summary judgment type process in which both parties would submit documentary evidence, affidavits, and written arguments,

supplemented by an hour for each side to make an oral argument.<sup>76</sup>

Simplifying discovery would also be a welcome change according to several respondents. One respondent suggested that discovery be limited to requests for production of documents; another thought there should be rules for mandatory disclosures instead of discovery. Another proposal was for more clarity about the applicable rules. One attorney commented, “Too much is left to the discretion of hearing officers, even with regard to how they will accept communication and documents, . . . timing of prehearing calls, and how and when they will sign subpoenas.” The need for clarity and certainty of rules was also expressed this way: “Procedures need to be adopted and formalized so that each hearing isn’t like the wild, wild west.”

Quite a number of respondents focused on the length of hearings, with the majority suggesting that hearings be limited to either two, three, or five days. Several described hearings of ten to twenty days, remarking that hearing officers do not do enough to require the parties to streamline their evidence and engage in efficient time management. Allowing hearings to be scheduled over multiple months on non-consecutive days was viewed as problematic, as the judges cannot remember the testimony taken months before and the child’s needs change over the course of an extended hearing. More timely decisions are needed, according to several respondents; they noted that the forty-five-day requirement in IDEA is routinely ignored. Two respondents, however, one who represents schools and another parents, suggested that the timelines are too short, predicting that resolution would be easier to reach with more time.

A number of respondents mentioned preventing the need for due process hearings. Mandatory mediation was a frequent suggestion, particularly from school district lawyers, as a preferable way to reach an early resolution. A parent lawyer who approves of mediation thought it was preferable to due process because of the retaliation experienced by parents who choose to use the due process system. Another parent attorney thought mandatory mediation could be helpful as long as the mediator was not thereafter the hearing officer on the case.

Many parent attorneys, but no school board attorneys, said that to improve the whole process, parents must be able to recover the cost of expert witnesses. In line with their answers to the more specific question about expert witnesses, parent attorneys see a clear need for either reimbursement for the cost of experts or the development of a funding source to pay for experts. A few respondents thought the appointment of independent experts by the hearing officer would improve the fairness of the system. One school board lawyer proposed prohibiting the use of expert witnesses.

Related to the cost of experts is the cost of attorneys themselves. Many

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<sup>76</sup> This suggestion would require a change to the IDEA itself, which gives to parties the right in due process to present and cross-examine witnesses. *See* 20 U.S.C. § 1415(h) (2018).

participants suggested that reforms are needed to address the high cost of attorneys and the inability of most parents to meet that cost. Three school board lawyers and nearly twenty parent lawyers suggested that parents need more options for obtaining affordable representation. Recommendations included an increase in training for pro bono lawyers, an appointment system, more law school clinics specializing in education cases, greater priority for these cases at legal aid offices, and a state fund for payment of lawyers for parents. Three respondents, one school board lawyer and two parent lawyers, suggested that a certification process for non-attorney advocates could produce adequately trained people to represent parents at a lower fee.

Several school district attorneys, perhaps not unpredictably, favor a change that would alter the IDEA's fee-shifting provisions that require school districts to pay fees of prevailing parents. One school lawyer described the problem this way: "Some parent attorneys are VERY (emphasis in original) unreasonable when it comes to fees which holds up the whole system of trying to resolve disputes in the best interest of the student and his/her FAPE." Another view expressed was that the threat of paying exorbitant fees "is what drives 95% of settlements" causing school districts to "give in." Apparently because some districts will not pay attorney fees unless due process is pending, a school district lawyer lamented as follows: "It is not uncommon for parents to reach a practical resolution outside of a hearing, through an IEP meeting or other means, but then be forced to go to hearing so that the parent attorneys can seek fees from the district." A parent attorney proposed capping fees and costs for both parties, which would create an incentive to resolve cases "without all-out war."

A view expressed frequently by parent attorneys was that school districts should have the burden of proof. One elaborated on that idea, saying, "School districts should have the burden of proof until or unless 85% of the students with disabilities are graduating with a standard diploma with their original cohorts." A school district lawyer from New York, where the district has the burden of proof under state law, thought the burden should be on the parents instead. Having the burden on the school district, said the lawyer, "encourages frivolous litigation by parents and unnecessarily increases costs for school districts."

A broad suggestion made equally by parent and school board lawyers was to revamp the system entirely, though no one had a blueprint for doing so. "There has to be a way to accomplish the goals of IDEA that is more efficient and cost effective for the district and the parent," remarked one school board lawyer. Another questioned whether the current system reflects the true intent of the regulations. Similarly, a parent lawyer said, "A stronger and faster alternative to due process hearings would be the better solution." In a realistic vein, a parent lawyer observed, "There are no short-term or quick fixes for an adjudicative system that has been in place since 1977."

### A. *Analysis and Recommendations*

Finding the sweet spot for due process hearings is a Goldilocks problem: they should not be so complex and expensive that parents cannot access them but cannot be so stripped down that they do not give parents a realistic opportunity to challenge a school district's decision regarding their child's education.<sup>77</sup> At the same time, because school districts must serve many children, and with limited resources, the due process system should be structured so as to quickly weed out frivolous complaints and keep it manageable for the districts as well. Creating a due process hearing system that is "just right" has been a significant challenge.

Any reform proposals must confront the reality that much of the unwelcome complexity and expense comes with the territory. The subject matter of due process hearings is inherently complicated. Sophisticated expertise is needed to understand the nature of the child's disabilities, how those conditions impair learning, what rate and level of educational progress is reasonable, and what interventions are needed to address the impact of the child's challenges. Even very knowledgeable professionals struggle to precisely diagnose and understand the unique combination of impairments affecting any particular child and to accurately assess the impact of potential programming and placement choices.

At the same time, the legal standards are strikingly vague. Concepts such as an "appropriate education,"<sup>78</sup> "reasonably calculated,"<sup>79</sup> and "in light of the child's circumstances"<sup>80</sup> leave considerable room for disagreement. While the vagueness is perhaps necessary in light of the uniqueness of each individual child, it nevertheless opens the door to differing viewpoints. Even parents who accept the limitations on IEPs— i.e., that they need not be designed to maximize their child's potential<sup>81</sup>—may still perceive that their child's progress is insufficient while the child's teacher sees it as reasonable.

The procedures required by the IDEA likewise contribute to complexity. To assure meaningful procedural protections, the IDEA requires a detailed written complaint and an evidentiary hearing before a hearing officer with

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<sup>77</sup> For example, rules that prohibit experts, require evidence to be presented in a very limited amount of time, or limit the role of attorneys could make for an efficient hearing, but one in which the parents would be quite unlikely to be able to meet their burden of proof.

<sup>78</sup> The basic promise of the IDEA is that each child is entitled to a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A) (2016).

<sup>79</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203-04 (1982) (holding that the IEP must be reasonably calculated to enable the child to receive an education benefit).

<sup>80</sup> *Endrew v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (ruling that the appropriateness of a child's IEP should be judged in light of the child's circumstances).

<sup>81</sup> *See Rowley*, 458 U.S. at 176 (1982) (rejecting the argument that a child with a disability is entitled to an education that will maximize the child's potential).

cross-examination.<sup>82</sup> Such features alone require a high level of literacy and understanding of the law, which puts the process beyond the capacity of most parents and school district personnel. As a result, both sides need legal representation. So long as attorneys must be involved—especially attorneys with the requisite expertise, and for parent lawyers, the willingness to take on the risks of a contingency agreement—they must be appropriately compensated. At the same time, with the complexity of the subject matter of most special education disputes, the testimony of expert witnesses is nearly always needed. Experts, too, need to be compensated for their participation. Thus, significant expense is inevitable.

Finally, reform proposals have a higher likelihood of success if there is buy-in from both parents and schools. But as was borne out in the responses to this survey, the targets for reform are highly influenced by one's viewpoint. The special education lawyers who answered our nationwide survey clearly identified with their clients' positions; their perceptions of the flaws in the system seemingly followed directly from their allegiances.<sup>83</sup> For example, lawyers who represent school districts view the process as less complex than do parent lawyers, although both are participating in the very same process.<sup>84</sup> Likewise, lawyers who represent school districts are much more likely to view the current due process hearing as an effective tool for resolution of disputes than are parent lawyers, though they too find much fault with the system as it is. The comments made by the two groups not only revealed their differing opinions, but in some cases, very negative feelings about the opposing attorneys, calling them "very unreasonable," or accusing them of "weaponizing" discovery tools. While certainly not universal, this negativity toward the other side may be a factor in the lack of consensus on how to repair what many consider a broken system of dispute resolution.

Even within groups, there were many differing views. For example, on the question asking attorneys to rate the complexity of the hearings in their state on a scale of one to ten, with ten being the most complex, attorneys on the same side, in the same state, provided starkly divergent responses. For example, the ratings of complexity by the nine parent attorneys from New Jersey ranged from two through ten. It is difficult to know whether these contradictory ratings reveal true differences (perhaps related to different practices among hearing officers within the same state) or something else

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<sup>82</sup> 20 U.S.C. § 1415 (2018).

<sup>83</sup> Differing perceptions of the two groups of lawyers is not entirely unexpected. Parent and school district lawyers are, after all, adversaries in the process, with opposing positions in every case. Most cases that reach the stage of due process have already been through multiple efforts at dispute resolution: discussions at IEP meetings, mediation, a resolution session, and settlement talks. By the time the case is at due process, the parties have dug in their heels and may well view the opposing side as being unreasonably recalcitrant.

<sup>84</sup> See *supra* note 63.

affecting perceptions. In the New Jersey case, the two attorneys at the extremes were both highly experienced attorneys, so each had a good vantage point from which to judge. Again, with such conflicting observations about what is happening, agreement about how to address due process may continue to prove elusive.

Despite the variety of views, certain ideas surfaced frequently enough to suggest areas for potential reform in the due process system. Each of these appears to have some support from both groups of practicing lawyers, suggesting their clients would favor them as well. They are largely neutral, offering benefits to all involved. They are within the authority of the state educational agencies, thus not requiring Congressional action. The strongest themes are as discussed below.

### *1. Well-Trained, Objective Hearing Officers*

From the point of view of special education lawyers across the board, hearing officers with both case management skills and substantive knowledge of special education is vitally important. Everyone benefits when the hearing is well-run, and the hearing officer fairly and correctly applies the law to the facts, without an initial predisposition toward either side. States should examine their qualifications for hearing officers, their hiring processes, their initial and ongoing training requirements, and their payment system (together with the potential for unintended biases related to the payment system) to assure that they are employing hearing officers with the requisite skills and commitment to manage and decide the cases effectively.

The trend toward using administrative law judges (ALJs) in a state's administrative court<sup>85</sup> has the advantage of allowing the state education department to rely on the processes already in place for the resolution of administrative disputes. Administrative law judges tend to be lawyers<sup>86</sup> who are familiar with civil procedure and evidentiary standards and are likely to be better equipped than non-lawyers to manage the case in a professional manner. Administrative courts have a body of rules that can be adapted for use in due process, relieving the state educational agencies of having to develop their own rules. Judging from some of the comments regarding the process where the hearing officers are not ALJs, the lack of standard rules and enormous discretion given to the hearing officers is destabilizing to the entire process.<sup>87</sup> Nevertheless, to the extent that state administrative courts

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<sup>85</sup> Connolly, Zirkel & Mayes, *supra* note 29, at 158 (2019).

<sup>86</sup> *Id.* at 159.

<sup>87</sup> Consider these comments from respondents: "Hearing Officers in DC have a lot of discretion to allow/order something, however there is no right to formal discovery." "In Utah we do not have a formal set of rules which offer guidance to hearing officers on how to conduct their role. At times I have been

are themselves highly “judicialized,” using these courts for special education hearings may cut against the goal of increased procedural simplicity.

Another potential disadvantage of using the ALJs in the state administrative court is lack of specialized knowledge in special education. If the ALJs are randomly assigned and hear only a few special education cases, they have little opportunity to develop the expertise needed to understand the intricacies of the special education system as well as the nature of children’s disabilities and their impact on education. When ALJs are less well-versed in the subject matter, there is more need for experts and extended testimony, adding to the overall expense and length of hearings. This disadvantage can be mitigated by identifying certain ALJs who will be regularly assigned special education cases.

Regardless of whether states use ALJs or independent hearing officers, they need a system to monitor the hearing officers for quality control. One survey respondent commented that when a hearing officer’s decision is reversed by a reviewing court, there is no mechanism for the hearing officer to learn of the reversal so as to learn from the review. Hearing officers whose decisions are consistently reversed should likely lose their contract for the role. Mandatory training for all hearing officers should be in place in every state.

## *2. Clarity and Comprehensiveness of Rules*

All parties to due process welcome clarity regarding the rules that will govern the hearing, from the pre-hearing stage through the appeal stage. Currently, the level of detail in the rules regarding due process hearings varies considerably from state to state. When the rules are sparse, hearing officers have discretion to fill in the gaps. This leaves parties not knowing what to expect, which can be especially problematic for less experienced lawyers or advocates and unrepresented parents.

As broad support exists for clear and comprehensive rules, all states should review their rules and determine if they sufficiently give parties the information they need to know about procedures as they approach due process. States should make sure the rules are easily accessible on the state’s website and written in a straightforward way. Timelines, the right to discovery, evidentiary rules, expert qualification, subpoena procedures, and the like should not be left to the discretion of hearing officers. These matters should be explicitly covered in the rules, allowing for uniformity across the state.

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told that we would follow the federal rules of evidence and at others that we would use an undetermined “relaxed version of the rules of evidence.” “We have had a highly trained independent hearing officer for the past 15-20 years who does a fabulous job and knows the laws and rules very well. If he retires, I don’t know that we will maintain the same quality and fairness.”

### 3. Reduction of Costs

Lawyers on both sides of due process cases are concerned about the increasing cost of the cases. High costs prevent many parents with legitimate claims from pursuing them and put a burden on school districts that could be spending that money on educating children. The two largest contributors to high cost are attorney fees and expert witness fees. Potential approaches to reducing the high cost of due process are presented below.

#### a. Attorney Fees

Assuming the parent is represented, both sides in a case must cover attorney fees. The mechanisms by which the fees are paid differ, however. School districts will always have to cover the fees of their lawyers. This might be done through in-house counsel, which would typically be more cost effective, or with outside attorneys. Insurance may assist with outside counsel in some cases.<sup>88</sup>

Parents may or may not have to cover their attorney's fees, depending on the agreement with their attorney and the success of the case. IDEA contains a fee-shifting provision, requiring that the school district pay the parent's attorney fees if the parent is the prevailing party in the due process case.<sup>89</sup> Thus, many parent attorneys in private practice take cases on contingency, expecting to get their fees paid by the school district either in a favorable settlement or after a favorable hearing decision.<sup>90</sup> Parents typically pay a retainer fee, which is usually not returned if the case is unsuccessful. Some non-profit organizations and law school clinics provide free counsel to parents, either with or without income-eligibility guidelines.<sup>91</sup> Even when parents are not required to pay their lawyers

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<sup>88</sup> For a general discussion of school district insurance coverage, see Marcos Antonio Mendoza, *The Limits of Insurance as Governance: Professional Liability Coverage for Civil Rights Claims Against Public School Districts*, 38 QUIN. L. R. 375 (2020).

<sup>89</sup> 20 U.S.C. § 1415(i)(3)(B)(i) (2004).

<sup>90</sup> Parent attorneys must either obtain the fees through settlement, or by seeking them in federal district court following the due process hearing. 20 U.S.C. § 1415(i)(3)(B) (2004). The court has discretion to award reasonable fees as part of the costs when the prevailing party is the parent of a child with a disability, but is required to reduce the fees requested upon a finding that they are unreasonable or excessive, the parent or attorney unreasonably protracted the resolution of the controversy or failed to give the school district proper notice. 20 U.S.C. § 1415(i)(3)(F) (2004). The fee reduction does not apply, however, if the school district unreasonably protracted the final resolution. 20 U.S.C. § 1415(i)(3)(G) (2004). For an example of a fee reduction for the parent's attorney, see *J.L. v. Harrison Township Bd. of Educ.*, No. 14-2666, 2016 WL 4430929, at \*17-18 (D.N.J. Aug. 9, 2016).

<sup>91</sup> Legal aid organizations nationwide funded in part by the Legal Services Corporation limit eligibility to those families with an income of less than 125% of the federal poverty guidelines. 45 C.F.R. §1611.3(b) (1977). State protection and advocacy organizations, on the other hand, do not have income guidelines. 42 U.S.C. § 10805(a)(1)(C) (2006). Policies with regard to income eligibility at law school clinics vary according to local policy and state student practice acts. For example, in North Carolina, law

directly, they may be asked to allow the legal organization to pursue attorney fees as a way to support the organization. Thus, the school district may still be responsible for parent fees in a settlement or in cases in which the parent prevails even when the attorney is with a non-profit.

More availability of free counsel for parents would go a long way toward reducing the overall expense of due process. It is easier for non-profit attorneys to waive their fees, especially during settlement; this can bring down the total costs of due process and ease the burden on the districts of having to pay for both sides' fees.<sup>92</sup> Furthermore, non-profit attorneys representing parents often work to resolve disputes at the IEP level or through pre-due process settlement without the pressure of needing to recover fees, significantly reducing the overall expense of a dispute. Nevertheless, reducing the risk to districts of having to pay parents' attorney fees could simultaneously reduce the pressure that risk places on the districts to assiduously adhere to the IDEA's prescriptions. Thus, while more access to free or low-cost counsel to parents in need could improve accessibility and potentially bring overall costs down, the fee-shifting provision remains an important enforcement feature of the law that should remain.

If "free counsel" were implemented as a measure to address the high cost of due process, then sources of support for non-profit legal organizations would need to expand. More government funding, at either the federal or state level, would be the most reliable source, if policy makers were convinced of the value of appropriating it.<sup>93</sup> In today's climate however, with so many unmet needs in public education and limited legislative commitment to meet those needs through sufficient public funding, the idea of government support for additional special education lawyers is not likely on the immediate horizon. Philanthropic and law school funding are other potential sources of support.

Limiting the participation of attorneys in due process proceedings would reduce the cost of due process, but this is not an attractive option. As noted earlier, enforcement of the special education law is complicated and beyond the capacity of most parents. The design of the IDEA incorporates parental enforcement as a tool to ensure that schools are offering a free, appropriate public education to each child with a disability. Without attorneys to assist them, many parents would be unable to bring complaints that help enforce the law. Further, nearly all of the parent lawyers, and many of the school district lawyers, see the prospect of parents pursuing due process without an

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school clinics may only represent persons who are unable financially to pay for legal advice or services. 27 N.C. ADMIN. CODE § 1C.0201 (2020).

<sup>92</sup> For example, the Children's Law Clinic at Duke Law School, with which the authors are associated, often significantly reduces or waives its claim for fees if the case settles early.

<sup>93</sup> This would be similar to government funding for attorneys in other types of cases, such as juveniles, indigent criminal defendants, or parents facing termination of parental rights.

attorney as ineffective.<sup>94</sup> The widespread use of non-attorney advocates, especially without a credentialing system, or a full prohibition on any representation, would not seem to serve parents well either, given the skills needed to effectively present evidence to meet the burden of proof. Even if school districts were not permitted to be represented by attorneys in *pro se* due process cases, those districts would undoubtedly be consulting their attorneys behind the scenes, leaving unrepresented parents at a distinct disadvantage. Capping attorney fees or eliminating the fee-shifting provisions of the IDEA are likewise unappealing, as both approaches would discourage private lawyers from developing a special education practice and make due process even less accessible than it is already to lower-income parents.

*b. Expert Witness Fees*

The second contributor to high costs in due process is the cost of expert witnesses. Parent attorneys are nearly unanimous that parents cannot win cases without expert witnesses, and half the school board lawyers agree.<sup>95</sup> Experts are required to enable parents to meet their burden of proof (in the majority of states that have not shifted that burden to school districts), as parents must overcome school district evidence from its staff, whose testimony nearly always is given complete credence unless countered by that of someone with equivalent expertise. Without fee-shifting provisions for expert witness fees,<sup>96</sup> these costs must be borne by parents, making these fees a significant barrier for parents who wish to pursue due process.

Congress could address the problem by adding expert-witness fee-shifting provisions similar to the attorney provisions. This would require school districts to reimburse parents for the expert witness fees if the parents prevail. The IDEA Fairness Restoration Act,<sup>97</sup> which would amend Section 615(i)(3) of the IDEA to add expert witness fees to the attorney fee-shifting provision, has been introduced in Congress on multiple occasions, but never passed. Because such an approach is staunchly opposed by school districts,<sup>98</sup> a consensus on such a strategy is not on the horizon.

Another solution, which could occur at the state level, would be the creation of a funding source to pay experts. States could, for example,

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<sup>94</sup> See *supra* p. 26.

<sup>95</sup> See *supra* p. 36-37.

<sup>96</sup> See *Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

<sup>97</sup> S. 2790, 113th Cong. (2014); S. 613, 112th Cong. (2011); H.R. 4188, 110th Cong. (2007).

<sup>98</sup> The National School Boards Association and the American Association of School Administrators filed an *Amici Curiae* brief in the case of *Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), expressing strong disagreement with the idea of shifting expert witness fees to school districts when parents prevail in due process. Brief for National School Boards Association et al. as *Amici Curiae* Supporting Petitioner, *Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

establish a fund upon which hearing officers could draw to pay one or more independent experts to aid in the resolution of a due process case. Parents who wish to use this mechanism rather than privately hire an expert could be required to show why an expert is needed and propose the expert of their choice, with an opportunity by the school district to show that the proposed expert is biased or without the requisite expertise. The hearing officer would have the authority to vet the proposed expert for objectivity and authorize a reasonable fee. An alternative, but similar approach, could involve a pool of pre-certified experts from which either party could draw. These approaches might garner common support because they would address the concerns of school district lawyers that the parents' experts are insufficiently knowledgeable while still making experts available to the parents. Further, if all parties and the hearing officer agreed on the objectivity and expertise of the expert, the expert's opinion would hold great sway; were the expert to produce a report prior to the hearing, it could well expedite settlement of the case, obviating the need for an extensive, contentious hearing and multiple appeals. That result would reduce attorney fees and overall hearing costs as well.

While the creation of new funding streams to pay for lawyers and experts for families may be initially disfavored due to the perceived cost, policy makers would be well-advised to study how the upfront provision of such funds could ultimately decrease the overall cost of special education dispute resolution. If that could be shown, it would be money well-spent.

#### *4. Procedural Simplicity*

A large number of suggestions have been made, both by the attorneys responding to this survey and in other forums,<sup>99</sup> aimed at reducing the procedural complexity of due process. Some propose reforms that would alleviate the need to use the due process hearing at all; the most common among those proposals is mandatory mediation. Data from the Center for Appropriate Dispute Resolution in Special Education (CADRE) show that agreements are produced in about two thirds of the cases in which mediation is attempted.<sup>100</sup> CADRE likewise contends that mediation, along with other early dispute resolution mechanisms such as facilitated IEP meetings, are more cost-effective and efficient than due process hearings.<sup>101</sup> For parties who do not reach resolution through mediation, however, a mediation requirement would have added time, money, and complexity. In any event,

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<sup>99</sup> See Mueller, *supra* note 2.

<sup>100</sup> See *Trends in Dispute Resolution Under the Individuals with Disabilities Education Act (IDEA)*, CTR. FOR APPROPRIATE DISP. RESOL. IN SPECIAL EDUC. (Oct. 2019), <https://www.cadeworks.org/sites/default/files/resources/TrendsDisputeResolutionOCT2019FINAL.pdf>.

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

however, this change would require an amendment to the statute; the IDEA requires that participation in mediation must be voluntary.<sup>102</sup>

Another suggestion to reduce procedural complexity was made by a few respondents in states in which there is a two-tiered administrative review process: eliminate the state review process. As noted earlier, all but seven states use a one-tier review system. Given that most first-tier hearings are extensive evidentiary hearings, the value of the second tier is difficult to determine. It adds a time-consuming additional step before either party can appeal to court. States with two tiers should consider eliminating the second tier; they can do this within their current statutory authority.

Otherwise, despite a seemingly universal wish for more procedural simplicity, only limited consensus around workable strategies emerged from the survey. This is perhaps because for every procedure that is simplified, the parties lose a mechanism for potential advantage. If discovery is limited, for example, a route for gaining information is foreclosed. If evidentiary rules are relaxed, the possibility of the admission of unreliable testimony and the exclusion of necessary testimony increases. Two potential reforms to address procedural complexity are imposition of time limits on presentation of evidence and a limit to discovery.

#### *a. Time Limits*

In response to concerns that hearings can be upwards of twenty days, the idea of time limits has emerged. New Hampshire, for example, limits due process hearings to two days, except for good cause.<sup>103</sup> Time limits on the presentation of evidence force the parties to focus on the most important issues and use their time efficiently. Attorney fees are reduced by shorter hearings, so there is a cost reduction as well as increased simplicity. So long as the default period is reasonable and an escape valve exists for either party to move for additional time in extraordinary circumstances, time limits create a strong incentive to the attorneys to crystallize the evidence and avoid overly detailed presentations. A limit in the range of three to five days would likely be adequate for most due process cases.<sup>104</sup>

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<sup>102</sup> See 20 U.S.C. § 1415(e)(2)(A)(i) (2018).

<sup>103</sup> N.H. Code Admin. R. Educ. 1123.02(f) (2021).

<sup>104</sup> The U.S. Department of Education has acknowledged that states can set limits on the time a party may spend presenting evidence or questioning witnesses at due process hearings. See *B.S. v. Anoka Hennepin Pub. Sch.*, 799 F.3d 1217 (2015) (finding that the ALJ's limitation of nine hours for each side's evidentiary presentation was not an abuse of discretion and was consistent with Minnesota's statute); Letter from Melody Musgrove, Director, Office of Special Education Programs, to Margaret O'Sullivan Kane, Kane Education Law (Jan. 7, 2015) (on file with author) (finding that a three-day limit on hearings was permitted by the IDEA, which does not address the length of hearings).

*b. Discovery*

No consensus exists around formal discovery. Our survey results showed that in states allowing discovery, the attorneys perceived hearings to be more somewhat more complex than in states without discovery. The number of attorneys from each state was so small, however, that the results cannot be considered statistically valid.<sup>105</sup> Nevertheless, the perception that discovery adds complexity is intuitively true. The addition of interrogatories, depositions, and entry onto property for inspection make due process hearing essentially like civil trials. Those processes not only take time, but accomplishment of them takes training and skill as well. Each process must be planned and executed prior to the hearing; frequently the use by one party encourages use by the other party. Multiple survey respondents complained that discovery is frequently abused, with attorneys perceiving their opponents as intentionally using discovery for the sole purpose of dragging out the process and driving up the costs.

On the other hand, discovery provides a valuable tool, particularly to parents, to obtain vital information. In the typical case, for example, the parent is attempting to prove that the services provided are not appropriate or the child's setting is not the least restrictive environment. Neither the parent nor the parent's expert has had the daily vantage point that the teachers and other school district employees have had. Discovery tools give the parent the pre-hearing chance to question potential school witnesses, obtain documentary information that is not included in the child's official school records, and observe (or have an expert observe) the child in the classroom setting. Without these tools, the parent and the parent's attorney could find themselves heading into the hearing ill-prepared to respond to the school district's case. That lack of advanced knowledge can result in a longer hearing, as the parents scramble to react to the evidence presented by the school district.<sup>106</sup>

Another advantage of discovery is that it can encourage settlement. If used appropriately and not abused, discovery allows both sides to fully assess the expected evidence and predict the likely outcome of the hearing. That knowledge can lead to productive settlement talks, thus alleviating the need for a full hearing. Discovery can also lead to stipulations of facts, thereby streamlining the presentation of evidence when settlement does not occur.

The majority of states do not allow formal discovery, though some

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<sup>105</sup> Respondents from states allowing the use of formal discovery in due process hearings reported a mean complexity rating of 6.52 out of 10 and a median score of 7 out of 10. In states that do not use formal discovery, the mean complexity score was 6.27 and the median was 6.

<sup>106</sup> A rule against discovery can be slightly mitigated by the option to conduct discovery if the case is appealed to federal court following the hearing. Parties can request that the record be supplemented with information gained from discovery at the court level.

give hearing officers discretion to allow it when the need for it is shown.<sup>107</sup> The competing considerations make it difficult to find the right balance. While allowing discovery increases the complexity, the information void for parents without access to it can significantly limit their opportunity to show that their children with disabilities are not being appropriately served. State education agencies should at least reconsider their choices on discovery, with input from parents, school districts, and special education attorneys, to ensure that the hearing process is fair and provides parents an effective opportunity to resolve disagreements with the school district.

## V. CONCLUSION

It seems indisputable that the due process hearing system in place is a flawed mechanism for resolving disputes between parents and school districts. The many studies and analyses of due process show it to be viewed as frustratingly complex, expensive, and time-consuming. Its effectiveness at actually resolving the disputes presented is far from clear. Despite varying features in participating jurisdictions, the process appears unpopular throughout the country. Nevertheless, it has changed little since 1975 when it first became part of the system for providing special education to disabled students in the United States, despite many calls for amendments over the years.<sup>108</sup> Our study adds to the voices seeking change, but also adds an insight into why change has been so elusive: the opposing sides in the dispute, as represented by their lawyers, perceive the flaws very differently. Consensus around change is difficult to achieve when the participants disagree on the features to be amended, and, as reflected in our study, display limited mutual trust.

Continued push for change is merited regardless of its challenge. Here, we have focused on a few efforts that, based on the views expressed in the survey, could garner agreement on both sides. First, we encourage state education agencies to revisit their policies with regard to hiring, training, and paying hearing officers. Across the board, attorneys felt that better qualified and trained hearing officers would foster more efficient and effective hearings. Second, we encourage the agencies to review their procedural rules to make them clearer, more comprehensive, and more accessible. Complete and more explicit rules, leaving fewer procedures to the discretion of hearing officers, can make the hearing process more uniform and predictable for parents and school districts alike. Finally, we believe serious efforts should be pursued to find sources for the payment of necessary expert witnesses and to expand free or low-cost legal

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<sup>107</sup> See earlier discussion, *supra* note 49.

<sup>108</sup> See, e.g., Shaver, *supra* note 6; 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 So. Pol'y & L. 107 (2011).

representation for parents. Availability of both has the potential to bring down the overall cost of due process and increase parental accessibility to dispute resolution, which is one of the cornerstones of the IDEA. While more needs to be done to improve the due process experience for both parents and school districts, we believe these efforts could enhance IDEA dispute resolution for all.